

TONGAN JURY REFORM

*Research paper:
Comparative analysis and recommendations*

Balawyn Jones, Lachlan Campbell, Ravi Gosel

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RESEARCH OVERVIEW

This Research Paper aims to investigate the operation of civil and criminal jury trials in Tonga. The paper was prepared for and on behalf of the Supreme Court of Tonga by senior law students participating in the UQ Pro Bono Centre at the TC Beirne School of Law, University of Queensland. In November 2013, Reimen Hii, an Australian lawyer on assignment with the Supreme Court of Tonga (as a registrar on an AusAID-funded capacity building project) approached the UQ Pro Bono Centre to request a project that would undertake the research. The pro bono research project commenced in February 2014 and Reimen provided considerable input during the research phase. Four law students were originally selected to undertake this project, which involved considerable research and occasional Skype and email contact with Reimen Hii during his assignment. Law students Balawyn Jones, Lachlan Campbell and Ravi Gosel are the authors of this final Research Paper. Research support was provided by Alasdair McCallum. The paper was completed under the guidance and supervision of Professor Jennifer Corrin, a UQ law academic whose expertise and interest includes South Pacific law, court systems and the law of evidence. Monica Taylor, UQ Pro Bono Centre Director, also provided some project oversight.

The findings in this report are not sanctioned by the Tongan judiciary or the Tongan Ministry of Justice.

INTRODUCTION

The place of juries in the modern adversarial legal system is controversial. Trial by jury has been identified as a cornerstone of the democratic administration of justice, injecting community values and enhancing the acceptability of judicial decision-making. Yet faith in the jury as a democratic institution has been waning, as concerns rise over the inefficiency and impracticality of juries in modern trials. In many jurisdictions the sustainability of maintaining jury trials has been questioned.

The unique context of Tonga's legal system means that these tensions are particularly strong. Tonga's adoption in 1875 of an American style constitution, based on that of Hawaii, has ensured a strict civil right to a trial by jury.¹ The jury trial has been described as a 'central element' of the American conception of justice.²

The constitutional guarantee embodies the traditional understanding of the jury as a protection against oppressive political power. However, in practice the jury trial has presented a growing number of difficulties as the volume and complexity of trials continues to grow. The Tongan legal system faces exacerbated challenges as a result of its small population, and strong familial, cultural and religious ties in the community.

The content and challenges in civil and criminal jurisdictions are substantially different. Accordingly, these jurisdictions are assessed separately in Part I and Part II of this report respectively. Part I of this Research Paper considers civil juries. The principal concern for civil jury trials is whether they ought to be available at all. The objectives of Part I are therefore first, to examine the common law role that juries play in civil trials; second, to compare the availability of civil juries across common law jurisdictions; and third, to identify possible models of reform. Each model represents an alternative approach to resolving perceived difficulties in the operation of civil jury trials in Tonga.

Part II of this Research Paper examines the potential for reform in criminal juries. The objectives of Part II are first, to identify the Tongan position with respect to the role of the jury and procedures for eligibility of jurors, challenges against jurors, directions to and discharge of the jury, as well as a discussion of judge-alone trials; second, to elaborate the legal position in comparative jurisdictions; and third, to recommend reform based on the trends and successes outlined in these comparative legal systems.

¹ Rose Kautoke, 'The Jury System in Tonga' (2009) 13(1) *Journal of South Pacific Law* 8, 8.

² Reid Hastie, Steven Penrod and Nancy Pennington, *Inside the Jury* (1983), 1.

PART I

TONGAN CIVIL JURIES

Lachlan Campbell

1. Outline

Tonga remains an outlier among South Pacific nations and common law jurisdictions for its continued guarantee of the right to a jury in civil proceedings. Part I of this research paper aims to contrast the Tongan position on civil juries with a broad variety of comparative jurisdictions. Section 2 will provide an introduction to the role of the civil jury. Section 3 provides a detailed analysis of the availability of civil jury trials in selected jurisdictions. Section 4 identifies and summarises the possible models for reform.

2. The Role of Civil Jury Trials

The modern role of the jury in civil trials has been shaped by a complex history.³ Traditionally, the role of jury has been to decide issues of fact while the role of the judge has been to decide issues of law.⁴ The judge therefore has the responsibility of controlling the admissibility of evidence and directing the jury on the appropriate issues of law. The jury must resolve competing questions of fact and apply the law as directed by the judge. The judge controls the functions of the jury but is not entitled to supersede its powers.⁵

The verdict of a jury may be either general or special. A general verdict requires the jury to find for either the plaintiff or the defendant. If a finding is made for the plaintiff, the jury must also decide on the damages if they are sought as a remedy. By contrast, a special verdict allows a jury to make findings on specific questions of facts and leave the judge to conclude the outcome. A jury is entitled to give a special verdict whether or not it is asked to do so. Similarly, while a judge may put specific questions to a jury, the jury need not answer and may enter a general verdict instead.⁶

Although the civil jury in common law jurisdictions has developed from a similar historical origin, the modern role of civil juries can differ. In particular, the Australian position is now, in part, controlled by statute, which has placed limitations on the

³ *Naxakis v Western General Hospital* (1999) 197 CLR 269, [55]-[60].

⁴ Stephen Weiner, 'The Civil Jury Trial and the Law-Fact Distinction' (1966) 54(5) *California Law Review* 1867, 1867.

⁵ *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 228.

⁶ *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171, 200.

function of the jury at least in respect of defamation.⁷ A summary of the role of the civil jury by jurisdiction can be found in Appendix 1.

3. The Availability of Civil Jury Trials

An examination of Tonga's common law partners reveals a wide array of legislative positions on the availability of civil jury trials. This section will outline the relevant legislation in each selected jurisdiction and the extent to which civil jury trials have been limited. Detailed analysis of the legislative positions in Australia, England and New Zealand are included, as well as brief summaries on the positions in Canada, the USA and among Pacific Island nations. A summarised table of the respective positions is included in Appendix 2.

3.1 Tonga: the status quo

The constitution of Tonga provides for a right to elect a trial by jury in civil proceedings in the Supreme Court. Section 99 of the *Act of Constitution* (Tonga) provides:

Clause 99. Trial by jury

[W]henever any issue of fact is raised in any civil action triable in the Supreme Court any party to such action may claim the right of trial by jury; and the law of trial by jury shall never be repealed.

In the case of *Tupou v Saulala*,⁸ the unfettered right to request a trial by jury in civil matters was confirmed. An analysis of the legislation in force led Justice Ford to the conclusion that although a trial by judge alone was the presumption, if a party requested a trial by jury then they had a mandatory right to have the action tried by jury. The court did not have discretion to order a judge alone trial.

3.2 Australia

Civil procedure rules in Australia are governed by state and territory legislation. Individual states and territories have taken a diverse approach to the availability and form of civil jury trials. However, it is important to note that the federal constitution that binds all state and territories does not guarantee a right to trial by jury in the

⁷ Australia's uniform defamation law is put into effect through State legislation. In Queensland the relevant section relating to judicial officers and juries in defamation proceedings is s22, *Defamation Act (Qld)* 2005.

⁸ [2004] Tonga LR 158.

context of civil proceedings.⁹ Nor is there a common law right to a trial by jury in civil actions in Australia, rather it exists purely as a procedural right.¹⁰ An analysis of the approach taken by individual states is given below. The federal and Australian Capital Territory jurisdictions do not offer substantially different systems to those analysed in the states and have been excluded on this basis.

3.2.1 New South Wales

The right to trial by jury in civil trials has been abolished in New South Wales, except in defamation cases. However, a jury trial may still be available if the court is satisfied that this is in the interests of justice. Section 85(1) of the *Supreme Court Act 1970* states that:

Section 85. Trial without jury unless jury required in interests of justice

- (1) Proceedings in any Division are to be tried without a jury, unless the Court orders otherwise.
- (2) The Court may make an order under subsection (1) that proceedings are to be tried with a jury if:
 - (a) any party to the proceedings:
 - (i) files a requisition for trial with a jury, and
 - (ii) pays the fee prescribed by the regulations made under section 18 of the Civil Procedure Act 2005, and
 - (b) the Court is satisfied that the interests of justice require a trial by jury in the proceedings.

Thus while the parties to civil proceedings no longer have a right to a trial by jury, they are still, at least in theory, available in select circumstances. This legislative position was adopted in 2001 in order to address the perceived costliness and time-consuming nature of jury trials.¹¹ This represents a significant reversal in the availability of civil jury trials compared to the traditional position in the 1960s, when the majority of civil cases were heard before a jury.¹²

Although the unfettered right to a trial by jury has been abolished in New South Wales, a party may make an application to the court's discretion. Section 85(2)(b) requires that the circumstances of the case meet a threshold test such that 'the Court is satisfied that the interests of justice require a trial by jury in the proceedings.' The difficulty in meeting this test was highlighted in the case of *Maroubra Rugby League*

⁹ The same cannot be said of criminal proceedings. Section 80 of the Australian Constitution guarantees the right to a trial by jury for any indictable offence.

¹⁰ *Matthews v General Accident Fire and Life Insurance Corp Ltd* [1970] QWN 37, 95.

¹¹ Matthew Bracks, 'Case note -*Maroubra Rugby League Football Club Inc v Malo*' (2007) 4(2) *Australian Civil Liability* 21.

¹² Peter Young, 'Abolition of Civil Juries' (2002) 76 *Australian Law Journal* 83.

Football Club v Malo.¹³ At common law, it is assumed that each mode of trial, either by jury or by judge, is equally satisfactory and fair.¹⁴ Accordingly, Mason J considered that traditional arguments in favour of jury trials, for example perceived desirability for community involvement in questions of morality or credibility, would not be sufficient considerations alone. Instead the test was determined to act as a very high barrier to trial by jury, reserved for more exceptional circumstances, for example where a serving judge is called as a potential witness.¹⁵ The effect of this legislature has therefore been to effectively abolish civil jury trials in New South Wales.¹⁶

Whilst the right to trial by jury in defamation cases still exists, this is subject to the court's power to order a trial by judge alone where the trial would involve evidence of lengthy records, or technical or scientific issues that cannot be 'conveniently considered and resolved by a jury.'¹⁷

3.2.2 Northern Territory

No right to a civil jury trial exists in the Northern Territory. However, a party to proceedings may make an application to the court for a trial by jury. Section 7 of the *Juries Act 1963 (NT)* provides:

Section 7. Juries in other civil cases

(1A) This section does not apply in relation to civil proceedings for defamation.

(1) The trial of a civil issue or a question of fact in a civil issue shall be by the Court without a jury unless the Court orders otherwise in accordance with this section.

(2) A party to a civil issue may make application to the Court for an order that the issue or a question of fact in the issue be tried by the Court with a jury.

(3) Whether or not such an application has been made, the Court may, if it appears just, order that a civil issue or a question of fact in a civil issue be tried by the Court with a jury.

The presumption is therefore that civil proceedings be tried without a jury. The circumstances in which an application for a jury trial might be successful were discussed in *Nationwide News Pty Ltd v Bradshaw*.¹⁸ The court held that a trial by

¹³ (2007) 69 NSWLR 496 (2007) 4(2) CL 17.

¹⁴ *Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401, 410.

¹⁵ Matthew Bracks, above n 11, 21.

¹⁶ Jacqueline Horan has described the effect of this legislation as 'virtually to abolish the right to civil jury trial' in New South Wales. Jacqui Horan, 'The Law and Lore of the Australian Civil Jury and Civil Jury System' (2006) 9 *Flinders Journal of Law Reform* 29.

¹⁷ *Defamation Act 2005 (NSW)*, s 21(3). The wording is identical to the equivalent provisions in Queensland.

¹⁸ (1986) 41 NTR 1, 10.

jury should only be granted where there is a ‘special reason’ such that it appears ‘just’ that there is a departure from the normal mode of trial.¹⁹

However, in the context of the law of defamation, the right to a jury trial has been abolished altogether. Amendments to the *Juries Act* 1963 (NT) in 2006 inserted section 6A, which provides that:

Section 6A. No juries in civil cases for defamation

Civil proceedings for defamation must be tried by the Court without a jury. This position represents a departure from the largely uniform defamation laws in Australia, which typically maintain the right to a trial by jury.

The Northern Territory also has an accelerating system of fees for civil jury trials designed as an incentive to decrease their length. The applicant must pay a prescribed daily fee which doubles if the trial proceeds for 10 days or more.²⁰ These fees are four times higher than the respective fees for criminal trials.

3.2.3 Queensland

Civil jury trials remain available in Queensland as a procedural right subject to a number of limitations.²¹ Rule 472 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that:

Rule 472. Jury

Unless trial by jury is excluded by an Act, a plaintiff in the statement of claim or a defendant in the defence may elect a trial by jury.

The default mode of trial remains by judge alone. However, if either party chooses to elect trial by jury there is a presumption in favour of this choice. Additionally, if a party fails to elect for trial by jury in the statement of claim they may apply to the court to change the mode of trial at a later stage.²² The court also has the power to order a trial by jury where it believes that an issue of fact could more appropriately be tried by a jury.²³

Despite these rights, there are generally no more than one or two civil jury trials held in Queensland each year.²⁴ To some extent this reflects recent reforms by the state legislature to limit the role of civil juries. These efforts have taken three distinct

¹⁹ Ibid.

²⁰ *Juries Regulations* 1963 (NT), reg 6.

²¹ Civil procedure in Queensland is dealt with by subordinate legislation in the *Uniform Civil Procedure Rules* 1999 (Qld).

²² *Uniform Civil Procedure Rules* 1999 (Qld), r 475(2).

²³ *Uniform Civil Procedure Rules* 1999 (Qld), r 475.

²⁴ Queensland Law Reform Commission, *A Review of Jury Selection* (2010) Discussion Paper No. 69, 397.

forms: (1) piecemeal exclusion of certain areas of the law; (2) empowering judges to override an application for a jury trial in certain circumstances; and (3) additional court fees for the election of a jury trial.

First, the right to elect trial by jury is explicitly subject to exclusions contained in other legislative acts. The most important statutory exclusion is contained in section 73 of the *Civil Liability Act* 2001 (Qld) which provides that:

Section 73. Exclusion of jury trial

A proceeding in a court based on a claim for personal injury damages must be decided by the court sitting without a jury.

Personal injury claims have historically made up a large proportion of civil cases proceeding to trial by jury.²⁵ The blanket exclusion of personal injury claimants from the right to a trial by jury was introduced as part of reform aimed at reducing the value of damages awarded in civil liability cases.

The right to elect trial by jury in civil proceedings is also limited by the Court's power to order a trial by judge alone in certain circumstances. Section 65A of the *Jury Act* 1995 (Qld) provides:²⁶

Section 65A. Civil trial without a jury

A court may order a civil trial without a jury if the trial—

- (a) requires a prolonged examination of records; or
- (b) involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

The court's power to order a trial by judge alone was exercised in the case of *Smit v Chan*.²⁷ The Court found that the applicant must first establish the factual existence of the pre-conditions in section 65A. The Court will then weigh up these inconveniences with the significant consideration that a party has a right to elect a jury. Justice Mullins found in that case that the complexity of competing medical evidence was sufficient to deny the right to a jury trial. Other examples of the issues the court will consider are: if there is a physical inconvenience in handling large bundles of documents, if the documents are complex and voluminous, if the expense involved in the trial will be significantly increased, and if there is a risk a jury may not sufficiently understand the issues.²⁸

²⁵ New Zealand Law Commission, *Review of the Judicature Act 1908* (2012) Issues Paper no 29, [9.24].

²⁶ Interestingly, s 65A was introduced to the *Jury Act* 1995 (Qld) by amendment in 2012 after the simultaneous removal of identical wording in the *Uniform Civil Procedure Rules* 1999 (Qld), probably as a means of better entrenching this power in the legislation.

²⁷ [2003] 2 Qd R 431, [32].

²⁸ *Mizikovsky v Queensland Television Ltd & Ors* [2011] QSC 205.

An added disincentive for parties electing for trial by jury in Queensland is the additional court fees and costs associated with this mode of trial. Unlike a criminal trial by jury, a party who elects for a civil trial by jury must pay a prescribed fee of \$754 as well as the total amount of remuneration that is payable to jurors and reserve jurors for their attendance at the trial.²⁹

3.2.4 South Australia

The right to a civil jury trial was abolished in South Australia in 1927.³⁰ The *Juries Act 1927 (SA)*, which remains in force, was amended to provide in section 5 that:

Section 5. Civil proceedings not to be tried before a jury

No civil trial is to be held before a jury.

Commentators have since criticised the abolition of civil jury trials in South Australia on the grounds of failure to investigate the relevant costs and benefits before taking action.³¹

3.2.5 Tasmania

In Tasmania there is a right to a jury trial in civil proceedings subject to a number of limitations. Rule 557 in the *Supreme Court Rules 2000 (Tas)* provides that:

Rule 557. Trial with a jury

Subject to rule 558, a party is entitled to have tried by a judge with a jury any action, question or issue which, before the commencement of the Act, could have been instituted in the Court as an action at law.

The default mode of trial remains by judge alone.³² However, either party may elect trial by jury. Despite the existence of this right, jury trials are almost never used in Tasmania.³³

However, the right to a jury is not unqualified in Tasmania and is subject to two key limitations. First, rule 557 is subject to express exclusions in other legislation. For example the *Motor Accident (Liabilities and Compensation) Act 1973 (Tas)* provides in section 22 that:

Section 22. Actions for damages in respect of third party liabilities

²⁹ *Jury Act 1995 (Qld)*, s 65(1); *Jury Regulation 2007 (Qld)*, s 11.

³⁰ Herb Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal* 49, 72-76.

³¹ *Ibid.*

³² *Supreme Court Rules 2000 (Tas)*, r 556.

³³ Jacqui Horan, above n 16, 29.

(1) An action in which damages for personal injury are sought in respect of any motor accident shall be heard before a court without a jury.

The Act has the effect of expressly excluding this narrow area of the law from the general right to a trial by jury. Second, the right to a trial by jury is subject to the court's power to order a trial by judge alone. Rule 558 of the *Supreme Court Rules* 2000 (Tas) provides:

Rule 558. Issue requiring prolonged examination

Notwithstanding rule 557, on the application of any party, the Court or a judge may direct that any action or any question or issue in the action be tried without a jury if the action, question or issue requires prolonged examination of any document or account or any scientific or local investigation which it is not convenient for a jury to do.

The circumstances in which a court would make an order against a party electing for a trial by jury were discussed in *Gunston v Davies Bros Pty Ltd*.³⁴ The trial by jury must be uncondusive to the 'efficient administration of justice', such as where the trial would be (1) significantly more lengthy in time, (2) more expensive and (3) more prone to error.³⁵

3.2.6 Victoria

Civil jury trials remain in Victoria as a procedural right in proceedings for a common law remedy. Rule 47.02 of the *Supreme Court (General Civil Procedure Rules) 2005* (Vic) provides:

Rule 47.02 Mode of trial

(1) A proceeding commenced by writ and founded on contract (including contract implied by law) or on tort (including a proceeding for damages for breach of statutory duty) shall be tried with a jury if—

(a) the plaintiff in the writ or the defendant by notice in writing to the plaintiff and to the Prothonotary within 10 days after the last appearance signifies that the plaintiff or the defendant (as the case requires) desires to have the proceeding so tried; and

(b) the proper jury fees are paid.

(2) Any other proceeding shall be tried without a jury unless the Court otherwise orders.

The default mode of trial remains by judge alone. Should one party elect to exercise their right to a trial by jury the onus is on the resisting party to dissuade the court.³⁶

³⁴ [2010] TASSC 65.

³⁵ Ibid, [9]

³⁶ *Halligan v Curtin* [2013] VSC 124 (22 March 2013) [15].

The almost unfettered right to request a jury in Victoria means that the state undertakes the majority of civil jury trials in Australia.³⁷ Nonetheless, the overall number of civil jury trials in Victoria remains consistent with 584 such trials in 2012-2013.³⁸

However, neither party has an unqualified right to a jury.³⁹ Rule 47.02 (3) further provides that:

Rule 47.02 Mode of trial

(3) Notwithstanding any signification under paragraph (1), the Court may direct trial without a jury if in its opinion the proceeding should not in all the circumstances be tried before a jury.

If a party elects for a jury trial, that right will not be taken away without good reason.⁴⁰ The onus lies with the party resisting trial by jury to dissuade the court. The court is required to exercise its power of discretion ‘to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined.’⁴¹ The circumstances that might persuade the court to limit a party’s right to a jury were discussed in *Altmann v Dunning*.⁴² These circumstances might include where it would be desirable (1) to speed up the trial, (2) to save costs, (3) avoid the risk of inconsistent answers and (4) avoid the risk of incomplete answers in matters of complexity.⁴³

One further disincentive to parties electing for a jury trial in Victoria is the additional court fees. Unlike a criminal trial by jury, a party that elects for a civil trial by jury must pay a prescribed daily fee depending on the number of jurors and the length of the trial.⁴⁴ With six jurors typical costs are:⁴⁵

- Day 1: costs \$697.
- Days 2-6: \$500.
- Day 7 and onwards: \$993.

This tiered cost system acts as a particular disincentive for lengthy trials.

3.2.7 Western Australia

There is no right to a jury trial in Western Australia except in a number of limited

³⁷ Jacqueline Horan, ‘Perceptions of the Civil Jury System’ (2005) 31 *Monash University Law Review* 120, 121.

³⁸ Victorian Law Reform Commission, *Jury Empanelment* (2013) Consultation Paper no 18, [2.20].

³⁹ *Spiteri v Visyboard Pty Ltd* [2005] VSCA 132 [50].

⁴⁰ *Ibid* [53].

⁴¹ *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, r 1.14.

⁴² 1995 2 Vr 1, 17.

⁴³ *Ibid*.

⁴⁴ *Juries Act 2000 (Vic)*, s 24.

⁴⁵ *Juries (Fees) Regulations 2012 (Vic)*, reg 5.

areas of the law. The *Supreme Court Act 1935 (WA)* provides in section 42:

Section 42. Civil actions, trial with or without jury

(1) Subject as hereinafter provided, if, on the application of any party to an action made not later than such time before the trial as may be limited by the rules of court, the Court or a judge is satisfied that —

(a) a charge of fraud against that party; or

(b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage,

is in issue, the action shall, subject to the provisions of the *Juries Act 1957*, be tried by a jury.

The default position is therefore that civil jury trials are not available in Western Australia. A limited statutory right in narrowly prescribed areas of the law moderates the general absence of a right to trial by jury. These areas of the law are connected in that they involve issues of credibility and community values. However, despite this theoretical possibility, there has not been a jury trial in Western Australia since 1994.⁴⁶

However, even the minimal areas of the law that attract a statutory right to a trial by jury in Western Australia are subject to limitations. Where the court is satisfied that the ‘the trial thereof requires any prolonged examination of documents or accounts or any scientific or local examination which cannot conveniently be made with a jury’ the court has the discretion to order that the trial proceed with or without a jury.⁴⁷

3.3 New Zealand

Civil jury trials in New Zealand exist as a statutory right available in all cases that meet certain threshold tests. Section 19A of the *Judicature Act 1908 (NZ)* provides:

Section 19A. Certain civil proceedings may be tried by jury

(1) This section applies to civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels.

(2) If the debt or damages or the value of the chattels claimed in any civil proceedings to which this section applies exceeds \$3,000, either party may have the civil proceedings tried before a Judge and a jury on giving notice to the court and to the other party, within the time and in the manner prescribed by the High Court Rules, that he requires the civil proceedings to be tried before a jury.

⁴⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (2010) Discussion Paper, Project no 99, 11.

⁴⁷ *Supreme Court Act 1935 (WA)*, s 42(2).

The effect of this legislation is to grant a *prima facie* right to trial by jury in any civil proceeding where the relief claimed is at common law and exceeds \$3,000.⁴⁸ The wording of the threshold tests also has had the effect of excluding some claims for not meeting the definitions in subsection (1). For example compensation for a breach of the *Bill of Rights Act* 1990 (NZ) is not available.⁴⁹

Where the right to a civil jury in New Zealand exists it is qualified by the Court's power to order a judge only trial upon application by a party to the proceedings. Section 19A(5) of the *Judicature Act* 1908 (NZ) further provides that:

Section 19A(5) Certain civil proceedings may be tried by jury

(5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any civil proceedings to be tried before a jury, if it appears to a Judge before the trial—

(a) that the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or

(b) that the trial of the civil proceedings or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,—

the Judge may, on the application of either party, order that the civil proceedings or issue be tried before a Judge without a jury.

The presumption is that a party who elects for a jury trial will be allowed a jury as a right. A party resisting a trial by jury has the onus of applying to the Court to establish one of the factors set out in section 19A(5).⁵⁰ The factors, like those favoured in Australian jurisdictions, highlight the concern that juries are unfit to consider complex issues of law and large volumes of evidence, particularly where evidence is of a technical nature. There is some uncertainty in the case law concerning the interpretation of the factors empowering a Court to order a judge only trial.⁵¹ The weight of authority appears to support a narrow interpretation of section 19A(5) in favour of a stronger right to trial by jury.⁵²

⁴⁸ New Zealand Law Commission, *Review of the Judicature Act 1908* (2012) Issues Paper no 29, [9.9].

⁴⁹ *Ibid.*

⁵⁰ *M v L* [1998] 3 NZLR 104 (HC); *News Media (Auckland) Ltd v Young* [1989] 2 NZLR 173 (CA).

⁵¹ *Guardian Assurance Co v Lidgard* [1961] NZLR 860 (CA); *Shattock v Devlin* (1988) 1 PRNZ 271 (HC).

⁵² Above n 48, New Zealand Law Commission, [9.11]

Where the right to a civil jury trial does not exist for failure to meet the threshold tests in section 19A(1)-(2), the presumption is that the trial will proceed by judge alone.⁵³ However, even where no right to a civil jury exists, the Court is empowered to order a trial by jury where it is persuaded of its convenience.⁵⁴

Despite the presence of the right to a civil jury trial in New Zealand, the right is rarely exercised. Between 2003 and 2011 jury trials were only scheduled eight times in New Zealand, of which only three actually took place.⁵⁵ The majority of these cases involved an action for defamation.⁵⁶ Most applications for jury trials have been declined on the basis of section 19A(5). One possible reason for this is the absence of tort liability for accidents under the accident compensation legislation in New Zealand.⁵⁷

3.4 England and Wales

There is no right to a jury trial in England and Wales, except in very limited circumstances. The common law right to a jury trial was effectively abolished in 1933 by the *Administration of Justice Bill* 1933 (UK).⁵⁸ The issue is now dealt with by the *Senior Courts Act* 1981 (UK) which provides in section 69:

Section 69. Trial by jury

(1) Where on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—

- (a) a charge of fraud against that party; or
- (b) a claim in respect of malicious prosecution or false imprisonment; or
- (c) any question or issue of a kind prescribed for in the purposes of this paragraph,

the action shall be tried with a jury, unless the court is of the opinion that the trial requires the prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury or unless the court is of the opinion the trial will concern section 6 proceedings.

(2) An application under subsection (1) must be made no later than such time before the trial as may be prescribed

(3) An Action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

⁵³ *Judicature Act* 1908 (NZ), s 19B(1).

⁵⁴ *Judicature Act* 1908 (NZ), s 19B(2).

⁵⁵ Above n 48, New Zealand Law Commission, [9.12].

⁵⁶ *Ibid* [9.13].

⁵⁷ *Ibid* [9.18].

⁵⁸ Above n 30, Evatt, 72-76.

- (3A) An action in the Queen's Bench Division which by virtue of subsection (1) or (3) is being, or is to be, tried with a jury may, at any stage in the proceedings, be tried without a jury if the court concerned.
- (a) is of opinion that the action involves, or will involve, section 6 proceedings, and
 - (b) in its discretion orders the action to be tried without a jury.

The default position is therefore that civil jury trials are not available in England. However, there is a statutory exception to this rule in the prescribed areas of fraud, malicious prosecution, false imprisonment or where prescribed under the *Justice and Security Act 2013* (UK). In the past the availability of civil jury trials extended to cases of defamation; however, this possibility was extinguished by the *Defamation Act 2013* (UK).⁵⁹ There is also in theory the possibility of a civil jury trial under the Court's discretion in subsection (3), though this power is only exercised in exceptional circumstances.⁶⁰ In practice, there are now almost no civil cases decided by jury in England.⁶¹

3.5 Pacific Islands Nations

Tonga is unique among Pacific Island nations in allowing the use of juries in civil cases. Tonga and Cook Islands are the only two Pacific Island nations that allow the use of juries. However, Cook Islands limits the use of juries to criminal cases.⁶² In comparison, Nauru and Papua New Guinea make no allowance for community participation in trials at all. The majority of jurisdictions have instead opted for the use of assessors rather than juries in order to maintain community involvement in the trial process. In general though, the assessor model has been confined to use in criminal cases where they are often mandatory.⁶³

The fundamental difference between assessors and a jury is that assessors do not bind the Court.⁶⁴ In Fiji, Kiribati, Solomon Islands, Tuvalu and Vanuatu, community participation is limited to assessors acting in an advisory role only. The Court is required to listen to the advice of the assessor but holds an unqualified decision making power. In Fiji, the provision of trial by judge and assessors extends to civil

⁵⁹ Section 11(1).

⁶⁰ *Ward v James* [1966] 1 QB 273; *Sims v William Howard & Sons Ltd* [1964] 2 QB 409; *Hennell v Ranaboldo* [1963] 3 All ER 684.

⁶¹ Ministry of Justice (UK), *Diversity and Fairness in the Jury System* (2007) Ministry of Justice Research Series 2/07, 2.

⁶² *Juries Act 1968* (Cook Islands), s 6.

⁶³ Eric Colvin, 'Criminal Procedure in the South Pacific' (2004) 1 *Journal of South Pacific Law* 1. [part 4].

⁶⁴ Peter Duff, 'The Evolution of Trial by Judge and assessors in Fiji' (1997) 21 *Journal of Pacific Studies* 189, 190.

trials.⁶⁵ In Niue, Samoa and Tokelau, community participation is also limited to assessors; however, in these jurisdictions assessors have a more influential role. In order to convict an accused the assessors must come to the same conclusion as the judge.⁶⁶

3.6 Canada

Civil juries remain available, though restricted, in Canada, with the use of civil juries differing between provinces.⁶⁷ The province of Quebec⁶⁸ and the Federal Court of Canada⁶⁹ unequivocally prohibit the use of civil juries. In Alberta, jury trials for civil matters are limited to tort cases and cases involving the recovery of property with a value above \$10,000.⁷⁰ In Saskatchewan, a judge may order a civil jury where it will further 'the ends of justice'.⁷¹ In Manitoba and Nova Scotia, jury trials are required, unless the right is waived, in actions for defamation, malicious arrest, malicious prosecution, or false imprisonment. Civil jury trials are most readily available in British Columbia and Ontario. About three-quarters of civil jury trials held in Canada involve motor vehicle accidents.⁷²

3.7 United States of America (US)

The seventh amendment to the US Constitution guarantees a right to a jury trial in civil cases where the value of the property affected exceeds \$20.⁷³ However, this right is only applicable to proceedings in federal courts. Civil procedure in the United States is dealt with by individual state legislatures. A thorough analysis of individual states in the Union is beyond the scope of this paper. However in general, individual states have adopted the constitutional guarantee of civil jury trials present at the federal level with various idiosyncrasies. The situation in the United States is therefore one in which Tonga can mostly closely relate to.

4. Possible Reform Models For Tonga

The previous section of this paper outlined the continuing availability of civil jury trials in comparative jurisdictions. Unlike Tonga, none of these jurisdictions maintain

⁶⁵ *The High Court Rules* 1988 (Fiji) s 6.

⁶⁶ Colvin, above n 63.

⁶⁷ Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (1996), 13.

⁶⁸ *Juries Act* SQ 1976 c.9, s 56 (Quebec).

⁶⁹ *Federal Courts Act*, RSC 1985, c. F-7, s 49 (Canada).

⁷⁰ *Jury Act*, RSA 2000, c. J-3, s 16 (Alberta).

⁷¹ *Jury Act*, SS 1998, c. J-4.2, s 17(1) (Saskatchewan).

⁷² Ontario Law Reform Commission, above n 69, 1 .

⁷³ *United States Constitution* amendment VII.

a constitutional right to civil jury trials other than the US. However, the diverse legislation in force in those jurisdictions provides a number of models for reform, a summary of which can be found in Appendix 3. The approach to reform that the government of Tonga undertakes will depend upon how the competing objectives of Tonga are prioritised.

The legislation analysed in the preceding section of this paper has highlighted four broad approaches to reforming the status quo in Tonga:

1. A right to jury trials but disincentivising use
2. A qualified right to jury trials
3. A qualified extinguishment of jury trials
4. A total extinguishment of jury trials

Each of these approaches is summarised in more detail below.

4.1 Discouraging or disincentivising the use of the jury

This approach would require the introduction of legislation that has the effect of dissuading potential litigants from exercising their right to a jury trial. Reform based on this model would retain the unqualified right to jury trials currently allowed in Tonga. Given the wording of section 99 of the Constitution of Tonga, this approach is likely to be the only reform that will not require a constitutional amendment.

One possible example of the disincentive approach emerging from an analysis of comparative jurisdictions is the introduction of additional prescribed court fees for parties electing to exercise their right to civil jury. However, given perceptions that a jury trial is already more time consuming and therefore expensive, the potential effect of this reform is unclear. At the very least, reform to court fees in Tonga may help to relieve the burden on government to provide for civil jury trials. It is important to note that this approach to reform need not be limited to the introduction of increased court fees, though no jurisdiction analysed provided alternative examples of a discouraging strategy.

Of the jurisdictions analysed the most closely resembling this reform approach is the Australian state of Victoria. Along with an almost unfettered right to elect trial by jury, state legislators have provided for a system of court fees for those who choose to exercise their right. The Victorian fee structure is escalating, in that the prescribed costs are calculated by the amount of days that a trial covers with an increasing daily fee after 6 days of trial. In comparison, the legislation in the state of Queensland prescribes a lump sum, in addition to the total cost to the state of remunerating and caring for jurors.

4.2 Qualifying the right to a trial by jury

This approach would require the introduction of legislation that limits the ability of a party to elect to exercise their right to a trial by jury in certain circumstances. This approach would not remove the general presumption that a party in a civil suit who elects for a jury trial will be granted one by way of right. However, given the way section 99 of the Tongan Constitution has been interpreted in the past, as an unfettered guarantee of the right to a civil jury,⁷⁴ this approach may require constitutional reform.

An analysis of comparative jurisdictions reveals two principal methods of qualifying the right to a jury trial. The first involves excluding certain areas of the law from the general right to a jury trial. The second involves granting the Court additional powers to reject a party electing for a jury trial where adverse circumstances are present.

The first method of qualifying the right to jury trials is exemplified by the approach taken in Queensland. By retaining a general right to jury trials while excluding specific statutory regimes, state legislators have avoided abolishing the jury trial altogether while simultaneously exercising control over the sorts of civil suits that can come before a jury. Most prominently, Queensland legislators have exempted all claims for personal injury, an area of the law historically attracting a large proportion of civil jury trials. This approach appears most suitable where the objective is to control the possibility of inconsistent damages in complex areas of law. However, as Tonga has avoided large-scale statutory codifications of the law, which has become common in other jurisdictions, this approach may be unsuitable. An alternative method of controlling the types of cases that can proceed with a jury has been taken in New Zealand, which limits the right to a civil jury to cases where damages will exceed \$3000. This approach is likely to have a similar effect to imposing court fees in that it will discourage plaintiffs in smaller cases from opting for a jury trial.

A second method of qualifying the right to jury trials is achieved by legislating for the power of the court to reject a request for a jury trial. This approach has proven the most popular across the jurisdictions analysed with comparable systems in place in Queensland, Tasmania, Victoria and New Zealand. This method of qualification is clearly aimed at dislodging the right to a jury where it would be prohibitively long, expensive or complex due to the nature of the evidence. These concerns are frequently raised as a criticism of civil jury trials. Enabling the judge to exercise discretion on the suitability of a jury trial is one method to strike a balance between maintaining the benefits of community involvement in the judiciary with the competing costs and inconvenience of civil juries. In Tonga, qualifying the right to a jury in inconvenient circumstances, for example where a dispassionate and unbiased

⁷⁴ *Tupou v Saulala* [2004] Tonga LR 158.

jury cannot be achieved, could be the most appropriate solution that avoids extinguishing such a right altogether.

4.3 A qualified extinguishment of jury trials

Extinguishing the general right to trial by jury in Tonga without abolishing it entirely would be a more radical reform approach. This approach would require an amendment to section 99 of the Constitution of Tonga and legislation outlining the circumstances in which a jury trial would be granted.

An analysis of comparative jurisdictions provides two principal methods of removing the right to a jury trial without abolishing the right altogether. The first method involves introducing a presumption against a jury trial while granting the Court powers to order a jury trial in particular circumstances. The second involves a general extinguishment of the right to a jury trial while identifying certain areas of the law as exceptions to the general exclusion.

The first method of the partial extinguishment approach is exemplified by the Australian state of New South Wales. By proceeding on the basis that jury trials are not available, but allowing the judiciary a discretion to grant one in special circumstances, this approach allows a jurisdiction to balance competing costs and benefits in allowing jury trials. In theory, a judicial discretion exception to general extinguishment could be an effective way to limit jury trials while maintaining flexibility for unforeseen circumstances. However, the situation in New South Wales has demonstrated that if the statutory discretion to grant a jury is too narrow it can have the practical effect of outright abolishment.

The second method of the partial extinguishment approach is exemplified by the state of Western Australia. This position is conceptually inverse to the approach taken in Queensland where a general right to request a jury trial is maintained but where specific causes of action are excluded by statute. The approach taken in Western Australia presumes a general extinguishment of the right to request a jury but identifies specific causes of action that retain a continuing right. This approach is better suited to jurisdictions where there has been less statutory codification because it allows parliament to abolish the use of the jury in all areas except specific causes of action that concern issues particularly suited to community involvement. A common example is the continued use of jury trials in actions for defamation due to the perceived desirability of assessing community values.

4.4 Abolish the right to a jury trial

A total extinguishment of the right to a jury trial will involve constitutional change in Tonga. Of the comparative law jurisdictions surveyed, this approach has only been

adopted in the state of South Australia and the Australian Capital Territory. Although a number of Pacific Island nations do not allow for civil jury trials, most – including Fiji – have maintained a role for community involvement in trials through the practice of non-binding assessors.

4.5 Summary of Trends

The general trend among common law jurisdictions has been to restrict or remove an unfettered right to jury trials while maintaining the possibility of a jury trial in varying ways. This trend highlights the competing interests at the heart of jury trial availability. A full survey of the benefits of jury trials is beyond this report. It can be said with confidence though that there are strong arguments in support of their continued availability. Yet, it is also argued that jury trials entail significant inconvenience, costs and uncertainty among other concerns. It is apparent that efforts in most jurisdictions to reform the availability of jury trials have avoided an outright abolishment in the interest of balancing these costs and benefits. At the same time almost all jurisdictions have recognised that an unfettered right to request jury trials is not in the interests of an efficient court system and have taken various steps to control their use.

PART II

TONGAN CRIMINAL JURIES

Ravi Gosel and Balawyn Jones

5. Outline

This report recommends law reform options for Tongan criminal juries based on analysis of the approaches in comparative jurisdictions. The overarching recommendation of this section of the report is that enactment or amendment of an Act outlining jury procedure, or the issuing of Practice Directions in this area be pursued to clarify the position in Tonga for judges and practitioners.

Tonga shares its common law traditions with Australia, New Zealand and the United Kingdom therefore these jurisdictions will be used for comparison. Scotland, although a part of the United Kingdom, has a unique legal system and will therefore be assessed separately. Tonga is unique in the South Pacific region as it more closely follows the Anglo-Australian traditions, primarily by retaining the jury system.⁷⁵ Contrastingly, most South Pacific jurisdictions use assessors or have no lay participation in trials.⁷⁶ Although Tonga's legal system has been influenced heavily by Fiji, comparative analysis with Fiji would not be suitable because an assessor system is used, instead of juries.⁷⁷

Cook Islands provides an interesting island nation comparison, as it is more demographically comparable and has returned from using an assessor system to a jury system. Now only these two island nations retain juries.⁷⁸ However, this usefulness is limited by the lack of available information from Cook Islands. 'While research carried out in overseas jurisdictions is instructive, its applicability to the [Tongan] context is likely to be limited by jurisdictional differences in legal culture and procedure'.⁷⁹ Particularly in light of Tonga's small population and distinct culture. These differences are taken into account when recommending reform based on the approaches adopted in comparative jurisdictions.

⁷⁵ Eric Colvin, 'Criminal Procedure in the South Pacific' (2004) 8(1) *Journal of South Pacific Law* 1, 20.

⁷⁶ *Ibid*, 18.

⁷⁷ Peter Duff, 'The Evolution of Trial by Judge and assessors in Fiji' (1997) 21 *Journal of Pacific Studies* 189.

⁷⁸ Colvin, above n 75, 18.

⁷⁹ Australian Law Reform Commission, Chapter 18: *Comments, Warnings and Directions to the Jury*, Report 102 Uniform Evidence Law (2006) [18.13].

6. Role of criminal juries

The critical and central role that juries play in the justice system is to ensure a fair trial. This right enables defendants, who are charged with serious offences, to be judged fairly and impartially by a jury, comprised of ordinary citizens, who then deliver their verdict in accordance with the law based on the evidence led at the trial.⁸⁰ The public participation of jurors in the administration of justice is part of the legal tradition.⁸¹ Significantly, the jury has been described as ‘the heart of the Anglo-Australian system of criminal justice’⁸² and ‘fundamental to the freedom that is so essential to our way of life’.⁸³ The jury systems allows for jurors, who are members of the public, to become part of the court itself by deciding on questions of fact, which enhances the legitimacy and public confidence in the criminal justice system,⁸⁴ and the acceptability of decisions and verdicts.⁸⁵ Therefore, the administration of justice is best understood as a shared community responsibility, as it should not always be left to the ‘professional cadre’.⁸⁶

In summary, the main functions of the jury in criminal trials⁸⁷ are to act as:

- A fact-finder;
- The conscience of the community;
- A safeguard against arbitrary or oppressive government;
- An institution which legitimises the criminal justice system; and
- An educative institution.

6.1 Tongan position

The right to trial by jury is enshrined in the *Tongan Constitution* in sections 11 and 99. The right is limited to charges heard before the Supreme Court and punishable by imprisonment for more than two years or a fine of five hundred pa’anga.⁸⁸ The role of the jury is similar to comparable jurisdictions, being to form a verdict of guilty or not guilty based on the facts admitted to the Court.⁸⁹ The *Supreme Court Act 1988* (Tonga) sections 9-14 provide further regulation of juries. In particular section 14

⁸⁰ Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 1.

⁸¹ Chief Justice M Gleeson, ‘Juries and public confidence in the courts’ (2007) 90 *Reform* 12.

⁸² Criminal Justice Commission, above n 80, 4.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Gleeson, above n 81, 4.

⁸⁶ *Ibid.*

⁸⁷ Law Reform Commission of Canada in *The Jury in Criminal Trials* (Working Paper 27, 1980). This working paper was noted in *R v Sherratt* (1991) 63 CCC (3d) 193, 203 by L’Heureux-Dube J.

⁸⁸ *Act of Constitution of Tonga 1988* (Tonga) s 99.

⁸⁹ *Ibid* s 100.

establishes that for criminal trials a jury of seven should be formed⁹⁰ and states that verdicts must be unanimous.⁹¹ Contrastingly, a majority of 5:2 may suffice in civil trials.⁹² In Tonga, defendants must elect to have a jury trial,⁹³ although, practically defendants rarely elect trial by jury.⁹⁴

6.2 Comparative jurisdictions

The number of jurors that serve and are required to form a verdict of guilty differs greatly between jurisdictions. In all Australian jurisdictions, the standard number of jurors in a criminal trial is 12.⁹⁵ In Victoria, up to fifteen can be sworn in for a long trial on the basis that a ballot must be held to reduce the number to 12 before the jury retires to consider its verdict.⁹⁶ If after a trial begins the judge discharges one or more jurors for reasons such as ill health, a verdict may still be rendered by those remaining, provided (generally speaking) that the number does not fall below ten.⁹⁷ England generally requires 12 persons to sit on a jury, however the trial can proceed with a minimum of nine (for instance if jurors are excused due to illness). Cook Islands also require a jury of 12, and a trial can proceed with a jury less than 11 if the prosecutor and accused both consent.⁹⁸ With such consent, a majority verdict can be formed with a minimum of nine.⁹⁹ Scotland on the other hand has fifteen person juries, with a minimum of 12.

In England, the verdict generally needs to be unanimous, as in Tonga. However, if the jury cannot reach unanimity after two hours a majority of 10:2 is acceptable. Cook Islands also has a default mechanism if unanimity cannot be reached. However, majority verdict cannot be considered unless there is no probability of the jury being unanimous after three hours, after which point a 'verdict of three-fourths shall be taken and accepted'.¹⁰⁰ Whereas, in Scotland a bare majority of 8:7 supports a verdict.

⁹⁰ *Supreme Court Act 1988* (Tonga) s 14(1).

⁹¹ *Ibid* s 14(8).

⁹² *Ibid* s 13(2).

⁹³ *Criminal Offences Act 1988* (Tonga) s 196(b); *Magistrates Court Act 1988* (Tonga) ss 12 and 35.

⁹⁴ Colvin, above n 75, 18; Commonwealth Governance, 'Judicial System of Tonga', *Commonwealth Governance*, <<http://www.commonwealthgovernance.org/countries/pacific/tonga/judicial-system/>> (at 21 May 2014).

⁹⁵ *Jury Act 1995* (Qld) s 33. But see ss 56, 57 which allow for the discharge of an individual juror and the continuation of the trial with less than 12 jurors (but not less than 10 jurors); *Jury Act 1977* (NSW) s 19; *Juries Act 2000* (Vic) s 22(2); *Juries Act 1957* (WA) s 18; *Juries Act 1963* (NT) s 6; *Juries Act 1967* (ACT) s 7; *Juries Act 2003* (Tas) s 25(2); *Juries Act 1927* (SA) s 6(2).

⁹⁶ *Juries Act 2000* (Vic) ss 22-23.

⁹⁷ Under the *Jury Act 1977* (NSW) s 22, the number can drop below ten if both sides agree, or can drop to no lower than eight if the trial has been in progress for at least two months.

⁹⁸ *Juries Act 1968* (The Cook Islands) s 28(5).

⁹⁹ *Juries Act 1968* (The Cook Islands) s 25.

¹⁰⁰ *Juries Act 1968* (Cook Islands) s 25. For example, Cook Islands News, 'Estall faces retrial after jury fails to reach verdict' <<http://www.cookislandsnews.com/item/45856-estall-faces-retrial->

Even in cases ‘where jurors have been excused, at least eight of the jurors must be satisfied that the guilt of the accused has been established beyond a reasonable doubt’.¹⁰¹

In Australia, majority verdicts are allowed in South Australia,¹⁰² Victoria,¹⁰³ Western Australia,¹⁰⁴ Tasmania,¹⁰⁵ the Northern Territory,¹⁰⁶ New South Wales¹⁰⁷ and Queensland.¹⁰⁸ The ACT still requires unanimous verdicts.¹⁰⁹ South Australia allows for majority verdicts of 11:1, and 10:1 or 9:1 where the jury has been reduced, in criminal trials (except for guilty verdicts where the defendant is on trial for murder or treason) if a unanimous verdict cannot be reached in four hours.¹¹⁰ Victoria follows a similar practice but jury deliberations must go on for six hours before a majority verdict can be made.¹¹¹ Western Australia accepts majority verdicts (10:2 verdict is accepted) for all trials after jury deliberations have continued for three hours except where the crime is murder or has a life sentence.¹¹² The Northern Territory has allowed for majority verdicts of 10:2, 10:1 and 9:1 for all criminal cases including murder,¹¹³ however, the deliberation must go for at least six hours before delivering a majority verdict.

6.3 Proposed reform

Although Scotland has an unusually high number of jurors compared to both civil and common law standards of between nine and 12, it is also true that a mere seven in Tonga is quite a small number. The Modern Scottish Jury Report highlighted:

The need to guard against juries which are too small, citing the abilities of larger juries to counterbalance better any prejudices harboured by individual jurors and an improved level of deliberation, possibly on account of larger

after-jury-fails-to-reach-verdict/45856-estall-faces-retrial-after-jury-fails-to-reach-verdict> (at 19 March 2014).

¹⁰¹ The Scottish Government Justice Ministry, Chapter 7: Jury Size, The Modern Scottish Jury in Criminal Trials (2008) [7.1].

¹⁰² *Juries Act 1927* (SA), s 57(1)(a) (but not for murder or treason).

¹⁰³ *Juries Act 2000* (Vic), s 46.

¹⁰⁴ *Criminal Procedure Act 2004* (WA), s 114 (but not for murder or an offence punishable with strict security life imprisonment).

¹⁰⁵ *Jury Act 2003* (Tas), s 43 (majority of 10:2 acceptable after 2 hours in cases other than murder and treason, where 10:2 may be accepted after 6 hours).

¹⁰⁶ *Criminal Code Act 1983* (NT) s 368.

¹⁰⁷ *Jury Act 1977* (NSW), s 55F.

¹⁰⁸ *Jury Act 1995* (Qld) s 59. But s 59A states that unanimous verdicts are required for trials relating to murder or any other crime punishable by imprisonment for life.

¹⁰⁹ *Juries Act 1967* (ACT) s 38.

¹¹⁰ *Juries Act 1927* (SA) s 57.

¹¹¹ *Juries Act 2000* (Vic), s 46.

¹¹² *Criminal Procedure Act 2004* (WA), s 114.

¹¹³ *Criminal Code Act 1983* (NT) s 368.

*groups tending to have a better collective memory when it comes to recalling evidence.*¹¹⁴

These comments were made in reference to America in the context of reducing juries to around eight or six members. Tonga follows the common law tradition. Generally ‘common law jurisdictions have juries of 12, though some states in the USA have juries with as few as six members’.¹¹⁵ It is understandable that a country with a small population such as Tonga has a lower number of jurors per trial, even though Cook Islands, which has a comparatively small population,¹¹⁶ follows the common law tradition of 12 jurors. It is not suggested that Tonga necessarily change the number of jurors required to sit. The number of jurors is variable across comparable jurisdictions and is largely determined by custom.

A small jury size and requirement of unanimity as in Tonga could potentially lead to the frequent occurrence of hung juries or abandonment of a trial due to juror illness and excusal.¹¹⁷ Retrial in these circumstances can be expensive. On the other hand, having fewer jurors reduces the cost of running a jury trial and lessens the burden on the community. Importantly, ‘the smaller the jury, the greater the risks of any one juror’s views prevailing...leading to a greater need for weighted verdicts, if not unanimity’.¹¹⁸ Therefore, even though there is substantial risk of retrial, the requirement of unanimous verdict by Tongan juries may be considered a principled approach.

On the other hand the Tongan cultural context is highly relevant and includes issues such as the close ties in the community, influence of the church and social expectations, all of which limit dissent on controversial cases and which may point towards the need for greater flexibility in decision-making. Tonga could consider adopting a strict majority verdict procedure, in default to the current requirement of unanimity. As discussed above, a majority verdict is defined as a verdict where the decision of a large proportion of the jury is accepted, instead of a unanimous decision. Usually after a prescribed number of hours or when it becomes clear that the jury will not be able to reach a unanimous decision. Majority decisions are possible even on smaller juries, such as in Hong Kong, where at least five out of seven jurors are required to agree to form a verdict.¹¹⁹

¹¹⁴ The Scottish Government Justice Ministry, above n 101, [7.5].

¹¹⁵ Ibid [7.8].

¹¹⁶ The CIA World Factbook estimates Tonga’s population to be 106,440 and The Cook Islands 13,700 (July 2014).

¹¹⁷ The Scottish Government Justice Ministry, above n 103, [7.8], [7.19].

¹¹⁸ Ibid, [7.12].

¹¹⁹ *Ordinance for the Regulation of Jurors and Juries* 1845 (Hong Kong), s 24(3).

It is recommended that if a majority verdict procedure were adopted, it should include a judicial direction or warning equivalent to the ‘Black Direction’ used in Australia and the United Kingdom.¹²⁰ As well as preconditions, including the requirement of a prescribed period elapsing before default to majority becomes available and encouragement towards unanimity if possible and/or an indication from the jury that unanimity is not possible. Also, as in most other jurisdictions, the majority verdict procedures may not be appropriate for offences that carry life imprisonment such as murder.

7. Juror eligibility

The essential characteristics of a jury are competence, impartiality, representativeness, independence and also practically, efficiency. These principles are common to all jurisdictions and should guide eligibility to serve as a juror. The principle of competence requires that jurors must be able to comprehend the proceedings.¹²¹ Therefore, persons who do not have the relevant language ability or are mentally disabled or impaired should be excluded from serving. Impartiality requires that jurors must not have a personal interest or bias against the case or parties.¹²² There is a tension between impartiality and representativeness. Some argue that a representative jury is a ‘random selection of...ordinary persons from the community’¹²³ and therefore will inherently contain ‘a cross-section of society’s biases’.¹²⁴

Due to the current limits on eligibility in Tonga the representativeness of juries may be diminished. There is a trend in the comparative jurisdictions moving towards a relaxing of exclusions and limitations on who can serve, with the aim of broadening the jury pool and increasing representativeness of juries. However, any alterations need to be balanced against independence, competence and impartiality. The core defence of independence of juries is separation from the influence of the executive, legislature and judiciary.¹²⁵ This means that individuals involved in any of the arms of government should be excluded in principle from serving on juries to ensure independence. Independence of jurors as lay participants requires exclusion of actors such as members of the legislature, judges, prosecutors and police.

¹²⁰ *Black v The Queen* (1993) 179 CLR 44, 51.

¹²¹ Queensland Law Reform Commission, Chapter 5: Jury Selection A Strategy for Reform, A Review of Jury Selection (2010) Discussion Paper WP No. 69, [5.6].

¹²² *Ibid* [5.9].

¹²³ *Ibid* [5.9].

¹²⁴ Ian Kawaley, ‘The fair cross-section principle: Trial by special jury and the right to criminal jury trial under the Bermuda Constitution’ (1989) 38 *International and Comparative Law Quarterly* 522, 527.

¹²⁵ Queensland Law Reform Commission, above n 121,[5.7].

Reforms to increase representativeness must also be balanced against the practical considerations of susceptibility to challenge and social value of jurors. If ‘inclusion is controversial and [potential jurors] are likely to be routinely challenged or excused, there might be no value in making them liable to serve.’¹²⁶ Additionally, the rationale for exclusion based on social value:

*[L]ies in the need for the jury system to avoid undue interference in the provision of public services...Two public goods have to be balanced: the desirability of fully representative juries and the importance of continuity in provision of defence, health and other important services to the public at large.*¹²⁷

The New South Wales Law Reform Commission recently found that ‘[t]here has been a general trend in reforms and reform proposals...towards increasing the pool of prospective jurors, eliminating unnecessary or unsupportable automatic exclusions’.¹²⁸ Importantly, the presumptions behind excusal and exemption are reversing. It is now assumed that individuals are unbiased and competent and applications for discretionary excusal can be made to prove the contrary.

In most jurisdictions the starting point is whether a person is ‘qualified’ to serve.¹²⁹ Although the terminology differs between jurisdictions, qualification simply involves being a registered elector in the jury district and being eligible. A person is ‘eligible’ unless he or she falls into one of the categories of ‘ineligible’ people.¹³⁰ Generally, ineligibility is determined by a person’s standing or occupation (or, in some cases, previous occupation), criminal record, age or disability.¹³¹ Unless excused or exempt,¹³² a qualified person is ‘liable’ to perform jury service.¹³³

7.1 Tongan position

The current procedure for selection in Tonga relies on the registrar to collate a list of 15 men and 15 women from the electoral roll. There are two major issues at the selection stage of the jury process in Tonga. First, due to Tonga’s small population and strong culture and traditions, it is difficult to remove bias from the jury. Second, a sizeable proportion of the population is exempted, at least traditionally, from jury participation.

¹²⁶ Ibid [5.32].

¹²⁷ The Scottish Government Justice Ministry, above n 101,[4.3].

¹²⁸ Queensland Law Reform Commission, above n 121,[5.37].

¹²⁹ *Jury Act 1995* (Qld) s 4(1).

¹³⁰ Ibid s 4(3); *Jury Act 1977* (NSW) ss 5, 6.; *Juries Act 1927* (SA) ss 11, 14; *Juries Act 2000* (Vic) s 5; *Juries Act 1957* (WA) s 4.

¹³¹ *Jury Act 1995* (Qld) s 4(3).

¹³² Ibid ss 19-23 (power to excuse from jury service).

¹³³ Ibid s 5.

There are both statutory and customary limitations on who can serve on the jury. Under the current system in Tonga, the registrar excludes potential jurors, who are: related, from the same village or share a common religion, to screen against jurors who are or would be perceived by a reasonable person to be biased. There are also the standard age, literacy and disability exclusions. Anyone convicted of a criminal offence or sentenced to a period of imprisonment for more than two years is also excluded. Further, members of the legislature, public servants and government officials, guardsmen and artillery-men, ministers of religion and assistant ministers, school-masters and collegians are exempt from jury service.

7.2 Comparative jurisdictions

7.2.1 United Kingdom – England and Wales

England has recently undertaken radical reform and ‘remov[ed] virtually all of the categories of automatic exclusions, including those for judges, lawyers and police officers’.¹³⁴ The rationale being that ‘no one should be automatically ineligible or excused from jury duty simply because he or she is a member of a certain profession or holds a particular office or job’.¹³⁵ In *R v Abdroikof*,¹³⁶ which assessed the fairness of police jurors serving on juries, it was noted that because a 10:2 majority could reach a verdict, there was ‘real protection against the prejudices of an individual juror’.¹³⁷ On the other hand, justice must not only be done but must be seen to be done.¹³⁸ Police officers remain excluded persons in Scotland, Australia, New Zealand, Cook Islands and Tonga. It is the better accepted position that, following the principled approach set out above, police officers, as part of the government, should or may be excluded from serving as jurors.

7.2.2 United Kingdom - Scotland

In contrast, the Scottish government has retained the categories of exemption previously common in the United Kingdom, particularly for people who work within the justice system, including court staff, police and legal practitioners.¹³⁹ Categories of excusal also exist for professions with high social value, for example doctors, dentists and nurses. As well as those who have attended jury service in the last five

¹³⁴ Queensland Law Reform Commission, above n 121, [5.43].

¹³⁵, The Scottish Government Justice Ministry, above n 101 [4.5].

¹³⁶ [2007] UKHL 37.

¹³⁷ *R v Abdroikof* [2007] UKHL 37 [18].

¹³⁸ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.

¹³⁹ Peter Duff, ‘The Scottish Criminal Jury: A Very Peculiar Institution’ 62(2) *Law and Contemporary Problems* 173, 178.

years and individuals with ‘good reason’, such as serious long-term illness.¹⁴⁰ However, in 2011 Scotland undertook reform aimed to expand the pool of potential jurors, namely by abolishing the upper age limit for persons undertaking jury service in a criminal trial. Although persons aged over 71 retain the right to be excused.¹⁴¹

7.2.3 Australia

In Queensland, additional to the commonplace exclusions based on age, literacy, mental or physical disability and criminality, categories of eligibility reflect the need for independence from legislative, executive and judicial branches of government, extending to exclusion of detention centre employees and corrective services officers.¹⁴²

In New South Wales, the Law Reform Commission (NSWLRC) in 2007 recommended reform with the goal of enhancing representativeness of juries to improve jury service participation.¹⁴³ It recommended that the distinction between disqualification and ineligibility should be removed and replaced with a single category of ‘exclusion’, and that the number of exclusions should be reduced.¹⁴⁴ It also recommended the removal of excusal as of right and clarification of the circumstances in which a person may be excused for good cause.¹⁴⁵ It has also retained some categories of excusal as of right, for example, for clergy and emergency services workers, but many other categories have been removed.¹⁴⁶ Furthermore, it includes provisions for persons who wish to seek excusal from, or deferral of, jury service in particular circumstances, such as illness.¹⁴⁷

It is important to note that the *Jury Act 1977* (NSW) still retains certain exclusions in relation to criminal history and occupations; however, they no longer apply for life and are confined to persons connected with the administration of criminal justice.¹⁴⁸ Exclusions on the basis of criminal history are appropriate as safeguards of impartiality and public confidence. However, the NSWLRC recommended that ‘people who have served their time, undertaken rehabilitation, and become eligible

¹⁴⁰ *Law Reform (Miscellaneous Provisions) Act 1980* (Scotland) sch 1(5).

¹⁴¹ The Scottish Government, ‘Jury System’ <<http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/juryreform>> (at 23 April 2014).

¹⁴² *Jury Act 1995* (Qld) s 4(3).

¹⁴³ New South Wales Law Reform Commission, *Jury Selection*, Report 117 (2007) [1.5]–[1.7].

¹⁴⁴ *Ibid* [2.32]–[2.35], [2.36]–[2.42], Rec 2.

¹⁴⁵ *Ibid* ch 6–7, Rec 26–28, 31, 32.

¹⁴⁶ *Jury Act 1977* (NSW) ss 6, 7; sch 1, 2.

¹⁴⁷ *Ibid* ss 14(2)–(3), 14A, 14B, 38.

¹⁴⁸ *Ibid* s 6, sch 1 cl 5–7.

voters once again' should be allowed 'to become fully functioning members of society'.¹⁴⁹

In South Australia, amendments in 1984 removed the categories of people excluded from jury service, including army and navy officers, bank managers, mayors, dentists, medical practitioners, fire brigade officers, teachers, chemists, pilots, and persons in the paid and active service of government.¹⁵⁰ At present, restrictions are only placed upon those who have particular criminal histories, mental or physical disabilities and certain persons, including the Governor, members of Parliament and the judiciary and legal practitioners, who are involved in the administration of justice.¹⁵¹ Provision is also made, in special circumstances, for discretionary excusal and deferral of jury service.¹⁵²

At present, in Victoria disqualifications relate to age, disability, criminal history, and almost all of the categories of ineligibility relate to occupation.¹⁵³ It is also worth noting that before the introduction of the *Juries Act 2000* (Vic), several categories were entitled to be excused as of right if they did not wish to serve, including women, doctors, dentists, pharmacists, teachers, mayors and town clerks.¹⁵⁴ However, these categories were removed following the recommendation of the Victorian Law Reform Committee to remove the excusals as of right.¹⁵⁵ The *Juries Act 2000* (Vic) also allows a person to apply for excusal from service 'for good reason', for example, if attendance would cause substantial hardship to the person or substantial inconvenience to the public.¹⁵⁶

Under the *Juries Act 1957* (WA), similar to other jurisdictions, criminal history, disability and illiteracy are grounds for exclusion from jury duty in Western Australia.¹⁵⁷ Most of the other bases for exclusion relate to occupation or profession, although some relate to age, family circumstances, and religion.¹⁵⁸ In addition, the

¹⁴⁹ Queensland Law Reform Commission, above n 121, [5.54].

¹⁵⁰ See *Juries Act 1927–1974* (SA) s 13, sch 3 which was later repealed and replaced by *Juries Act Amendment Act 1984* (SA).

¹⁵¹ *Juries Act 1927* (SA) ss 12, 13, sch 3. The South Australian jury system was reviewed in 2002. It was proposed that the existing categories of ineligibility should remain unchanged: see South Australia, Courts Administration Authority, Sheriff's Office, South Australian Jury Review (May 2002) [2.2] <<http://www.courts.sa.gov.au/sheriff/index.html>> at 21 January 2011.

¹⁵² *Juries Act 1927* (SA) s 16.

¹⁵³ *Juries Act 2000* (Vic) s 5(2)–(3), sch 1, 2.

¹⁵⁴ See *Juries Act 1967* (Vic) s 4(3), sch 4 later repealed and replaced by *Juries Act 2000* (Vic).

¹⁵⁵ Parliament of Victoria, Law Reform Committee, Jury Service in Victoria, Final Report (1996) vol 1, (1997) vol 2, (1997) vol 3.

¹⁵⁶ See *Juries Act 1967* (Vic) s 4(3), sch 4 later repealed and replaced by *Juries Act 2000* (Vic).

¹⁵⁷ *Juries Act 1957* (WA) s 5.

¹⁵⁸ *Ibid* s 5(a)–(c)(i), sch 2 pts I, II.

Juries Act 1957 (WA) includes a limited number of grounds on which a person may be excused on an individual basis.¹⁵⁹

The Law Reform Commission of Western Australia (LRCWA) recently recommended limiting the categories of occupational ineligibility, abolishing excusal as of right and tightening the grounds for discretionary excusal.¹⁶⁰ The LRCWA nevertheless considered that some exclusions, for persons connected with the administration of criminal justice, should be retained.¹⁶¹ The *Juries Legislation Amendment Bill 2010* (WA), which was later introduced, has given effect to a number of the LRCWA's recommendations to 'increase community representation on juries'.¹⁶²

7.3 Proposed Reform

There are sound rationales for broadening the jury pool by removing or relaxing exclusions and exemptions. Reforms in this area need to balance the increase in representativeness with independence. It is accepted that any actors in the executive, legislature or judiciary, including the police (this can also extend but does not necessarily to public servants) may be excluded on grounds of independence. Further, in Tonga, exemptions for members of religious organisations, defence force and school masters may be justified in terms of social value. For example, as there is a low doctor to patient ratio in Tonga,¹⁶³ the social utility of a doctor would be higher in the community than serving on a jury. However, the restriction on 'collegians', understood in this context as university graduates, in Tonga may in effect unnecessarily exclude the majority of the middle to upper class educated with no apparent rationale as to independence or social value.

Previously, people who had been convicted and sentenced to any period of incarceration were ineligible to be enrolled on the roster of electors (from which the jury members are drawn). However, earlier this year, spent sentencing legislation was introduced by the *Rehabilitation of Offenders Act 2013* (Tonga). This Act applies with respect to convictions with a non-custodial sentence, or no more than two years imprisonment, after a rehabilitation period (uninterrupted by subsequent

¹⁵⁹ Ibid ss 5(c)(ii), 27, 32.

¹⁶⁰ Law Reform Commission of Western Australia, Selection, Eligibility and Exemption of Jurors, Final Report (2010) vii.

¹⁶¹ Ibid vii, 49.

¹⁶² Western Australia, Parliamentary Debates, Legislative Assembly, 25 November 2010, 9709 (Charles Porter, Attorney General).

¹⁶³ The CIA World Factbook states that the physician density in Tonga was 0.56 physicians per 1,000 population in 2010.

convictions).¹⁶⁴ Section 4 outlines the effects of a spent conviction, primarily that the person is deemed to have no criminal record, including for the purposes of juror eligibility. The enactment of spent conviction legislation has brought Tonga in line with comparative jurisdictions, and in some respects is even more liberal.

With respect to eligibility for the conviction to be spent, the maximum period of incarceration differs between jurisdictions: New South Wales (6 months custodial-sentence or less),¹⁶⁵ Queensland (30 months),¹⁶⁶ South Australia (12 months),¹⁶⁷ Australia Capital Territory (6 months),¹⁶⁸ Northern Territory (6 months),¹⁶⁹ Western Australia (12 months),¹⁷⁰ and Tasmania (6 months).¹⁷¹ Victoria is the only state in Australia that has not yet implemented spent conviction legislation, the release or withholding of information is currently dictated by police policy. In Scotland, the prescribed period is two and a half years and convictions with sentences that exceed this period can never be spent.¹⁷² Recently the United Kingdom undertook reform increasing the maximum sentences capable of becoming spent to four years and reducing the rehabilitation period required.¹⁷³

The introduction of spent conviction legislation is a welcome measure to ensure that people who are convicted of relatively minor offences, who have undertaken rehabilitation and rejoined civil society gain the right, or responsibility of participation on juries.

8. Challenges

In all jurisdictions, the random selection of jurors is important to ensure that jurors are independent and impartial.¹⁷⁴ However, a randomly selected jury may not necessarily be broadly representative of the community. As such, the right to challenge jurors is fundamental to the jury selection process because it allows both parties (that is, the prosecution and defence) to reject jurors who may or are perceived to be biased against one party and are therefore not deemed capable to discharge their duties.¹⁷⁵

¹⁶⁴ *Rehabilitation of Offenders Act 2013* (Tonga), s 2.

¹⁶⁵ *Criminal Records Act 1991* (NSW).

¹⁶⁶ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

¹⁶⁷ *Spent Convictions Act 2009* (SA).

¹⁶⁸ *Spent Convictions Act 2000* (ACT).

¹⁶⁹ *Criminal Records (Spent Convictions) Act 1992* (NT).

¹⁷⁰ *Spent Convictions Act 1988* (WA).

¹⁷¹ *Annulled Convictions Act 2003* (Tas).

¹⁷² *Rehabilitation of Offenders Act 1974* (Scotland).

¹⁷³ *Rehabilitation of Offenders Act 1974* (UK).

¹⁷⁴ Queensland Law Reform Commission, *A Review of Jury Selection*, Report 68 (2011) 300.

¹⁷⁵ *Ibid.*

Generally, challenges must be made when the person's name is called. Before the selection process begins, the defendant is to be informed of the right to challenge.¹⁷⁶ There are different forms in which the prosecution and each defendant may challenge the empanelment of prospective jurors, which are as follows:¹⁷⁷

1. Peremptory challenges, for which no cause need be shown;
2. Challenges for cause; and
3. Challenges to the array (that is, to the jury panel as a whole).

8.1 Peremptory challenges

Using a peremptory challenge (also called a challenge without cause), the prosecution or defence may challenge a potential juror without giving any reason for doing so.¹⁷⁸ The following rationales are commonly given for the existence of the peremptory challenge:

- removing biased jurors;¹⁷⁹
- allowing the parties, in particular the defendant, to have some control over the composition of the jury, enabling greater acceptance of the jury's verdict as fair;¹⁸⁰ and
- influencing the representation of different community groups in a positive manner to include minorities.¹⁸¹

However, the New Zealand Law Reform Commission (NZLRC) has argued for the abolition of the peremptory challenge because it would:

- eliminate the unreviewable ability of counsel to make decisions according to racial, social and gender stereotypes in excluding potential jurors;¹⁸²
- compel counsel to articulate proper reasons under a modified challenge for

¹⁷⁶ *Jury Act 1995* (Qld) s 39; *Criminal Practice Rules 1999* (Qld) r 47. See also Queensland Courts, Supreme and District Courts Benchbook, 'Trial Procedure' [5B.2] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

¹⁷⁷ Queensland Law Reform Commission, above n 174, 301.

¹⁷⁸ *Juries Act 1981* (New Z) s 24.

¹⁷⁹ Pomerant, Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases (Working Document for the Department of Justice, Canada, 1994), 62–63; Findlay, Jury Management in New South Wales (Australian Institute of Judicial Administration, 1994), 50; Kawaley, "Abolishing the peremptory challenge" (1988) 85 No 2 Law Society's Gazette 22.

¹⁸⁰ Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper 27, 1980), 54; see also Parliament of Victoria Law Reform Committee, *Jury Service in Victoria* (Issues Paper 2, 1995), 46; and Blake, "The Case for the Jury" in Findlay and Duff (eds), *The Jury Under Attack* (Butterworths, London, 1988), 147.

¹⁸¹ Blake, "The Case for the Jury" in Findlay and Duff (eds), *The Jury Under Attack* (Butterworths, London, 1988), 147, 157.

¹⁸² New Zealand Law Reform Commission, *Juries in Criminal Trials Part One*, Preliminary Paper 32 (1998) 98.

- cause procedure;¹⁸³ and
- eliminate the advantage of counsel who seek to exclude members of minorities over counsel who seek to include them, thereby better protecting the interests of minority groups by improving their representation on juries.¹⁸⁴

The NZLRC further contends that a jury selected purely at random from the jury pool is likely to be more representative than one produced from the exercise of 12 peremptory challenges.¹⁸⁵ The abolition of peremptory challenges would mean that there would be no mechanism for counsel to exclude potential jurors who have a non-specific bias, which may affect their judgment.¹⁸⁶ Other law reform agencies have been reluctant to recommend abolition and have usually recommended a reduction in the number of peremptory challenges, the use of guidelines, or no change at all.¹⁸⁷

It has been argued that the mechanism of peremptory challenges interferes with the random nature of jury selection,¹⁸⁸ and accordingly, introduces bias into a system, which strives to be impartial, because it allows for litigating parties to implement challenges based on their subjective biases.¹⁸⁹ Parties to the dispute may choose to exclude an eligible juror from the jury panel based on personal characteristics such as gender, race, attire, grooming and age. Since the parties are not required to explain their reasons for challenging a potential juror, the challenge may be based solely on a discriminatory factor, which may serve as a tactical strategy for the parties and undermine jury representativeness.

The majority of jurisdictions allow for peremptory challenges in jury selection. All Australian states allow peremptory challenges,¹⁹⁰ however, the number of challenges granted to the counsels in each state is not the same. In New South Wales¹⁹¹ and South Australia,¹⁹² the number of peremptory challenges is three for each side for all offences. Eight peremptory challenges are allowed for both counsels for all offences in Queensland and Victoria. Western Australia allows five peremptory challenges per side.¹⁹³ Whilst in New Zealand and Cook Islands each side is allowed six challenges.

¹⁸³ Ibid.

¹⁸⁴ Ibid, 99.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid, 100.

¹⁸⁷ For example, Law Reform Commission of Canada, Report 16: codification of common law practice; New South Wales Law Reform Commission: reduction in number; Findlay, above n 181: no change.

¹⁸⁸ Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Criminal Law Journal*, 178.

¹⁸⁹ Ibid.

¹⁹⁰ Horan and Goodman-Delahunty, above n 188, 167.

¹⁹¹ Ibid.

¹⁹² Ibid, 177.

¹⁹³ *Criminal Procedure Act 2004 (WA)*, s 104.

In New Zealand, in a case involving more than one defendant, the Crown has a maximum of 12 challenges, while defence counsel may challenge six potential jurors for each defendant.

An exception to the general trend of retaining peremptory challenges is the position in the United Kingdom. ‘Peremptory challenges were abolished in England and Wales in 1988 and in Scotland in 1995’.¹⁹⁴ In abolishing peremptory challenges, Scottish courts decided that it should not be assumed that ‘jurors will pursue their prejudices in defiance of their oath and the directions of the judge’.¹⁹⁵ This is consistent with the reasoning that juries are intended to be composed of randomly selected people so there is ‘no justification for either side to attempt to alter its composition except where there are grounds for challenge for cause’.¹⁹⁶ For example, if a juror has personal knowledge of the case or parties, this would be a sufficient ground for a *challenge for cause*. Another reason given for this approach in the United Kingdom is to stop advocates attempting to ‘stack the jury in its favour’,¹⁹⁷ however there is little to no empirical data that supports this rationale.

8.2 Challenges for cause

A challenge for cause is made on the basis that the person challenged is not qualified for jury service or is not impartial.¹⁹⁸ In all comparative jurisdictions, each party may make a number of challenges for cause. The number of challenges for cause is not limited in any of the Australian jurisdictions or New Zealand, although this is not always stated expressly but may be presumed from the lack of express restriction in the legislation.¹⁹⁹ In New Zealand, there are both challenges for want of qualification and for cause. Under the former, both parties are entitled to challenge any balloted potential juror if that person is not permitted to serve.²⁰⁰ However, this kind of challenge occurs rarely, if at all.²⁰¹ Under the latter, the prosecution and defence may

¹⁹⁴ Victorian Law Reform Commission, Chapter 3: Peremptory challenges, Jury empanelment – consultation paper (2013) [3.9].

¹⁹⁵ Duff, above n 139, 180-1.

¹⁹⁶ Duff, above n 139, 184.

¹⁹⁷ *Ibid*, 182.

¹⁹⁸ *Jury Act 1995* (Qld) s 43(2). Lack of impartiality is not an express cause for challenge in South Australia: *Juries Act 1927* (SA) s 66. See also *Criminal Procedure Act 2004* (WA) s 104(5).

¹⁹⁹ *Juries Act 1967* (ACT) s 34; *Jury Act 1977* (NSW) ss 43, 44; *Juries Act 1963* (NT) ss 42, 44; *Juries Act 1927* (SA) ss 66, 67; *Juries Act 2003* (Tas) s 33; *Juries Act 2000* (Vic) s 37; *Criminal Procedure Act 2004* (WA) s 104(5).

²⁰⁰ *Juries Act 1981* (NZ), s 23.

²⁰¹ See also O’Donovan, *Courtroom Procedure – A Practitioner’s Survival Kit* (CCH, Auckland, 1989) para 714; *R v Sanders* [1995] 3 NZLR 545, 548–549 (CA): challenges for cause have been rare in New Zealand because of the existence of peremptory challenges and the former right of the Crown to require jurors to stand by (now there is a consensual procedure or dependent on the judge’s own motion under s 27 of the *Juries Act 1981* (NZ)).

challenge potential jurors on the ground that they are not ‘indifferent between the parties’: that is, they are biased towards one party.²⁰² However, there is no clear New Zealand authority on whether a challenge for cause is available in such cases.²⁰³

In the United Kingdom, the prosecution can request jurors to ‘stand by’ and both parties can challenge for cause. Stand by can be used to remove an unsuitable juror, but only with the defence’s consent, or to remove a juror with authority of the Attorney General in security or terrorism cases.²⁰⁴ The equally rare challenge of the array is based on the bias of the official that selected the jury. The more common challenge for cause can be exercised by either party if a potential juror is ineligible or disqualified or it is suspected that they are biased,²⁰⁵ for example if they are related or hold an opinion, amicable or hostile, of one of the parties or case. In Scotland, ‘because such challenges are very rare, no clear procedure has evolved for dealing with them’.²⁰⁶ It is however established that although occupation, race, political belief or religion are not sufficient grounds for challenge for cause, personal connection with the parties or knowledge of the case, as well as disability are sufficient.²⁰⁷ It should be noted that in the Scottish context, each individual in the jury (and the biases they may have) carry lesser significance in deciding the verdict, as bare majority suffices.

A number of common law grounds on which a juror could be challenged for cause are not available under section 25 of the *Juries Act* 1981 (NZ):²⁰⁸ for example, intoxication,²⁰⁹ the impersonation of a juror,²¹⁰ or the inability to understand the language in which the trial is being conducted.²¹¹ In such cases counsel must rely on a

²⁰² *Juries Act* 1981 (NZ), s 25.

²⁰³ *R v Pyke and McGill* (1909) 29 NZLR 376 is the authority that a challenge for cause for prejudice does not lie where a juror has sat on an earlier trial of a person associated with the accused in the same events. In *R v Greening* [1957] NZLR 906, Gresson J stated that “it is difficult to see why that cannot be fairly regarded as likely to engender a predisposition in respect of the matters to be tried” (913). However, an earlier judgment of Gresson J, *R v Pratt* [1949] NZLR 425 (not cited in Greening), citing Pyke and McGill as an authority, states that although it was “preferable” for such a person not to sit on the jury such a situation was not enough to sustain a challenge for cause. According to *Gash* [1967] 1 All ER 811, a challenge for cause will lie if the accused’s companion (previously convicted by the same jurors) will appear as a witness for the defence.

²⁰⁴ See 88 Cr App R 123 (Archbold [2013] 4-304 and 4-306, Appendix A -282).

²⁰⁵ *Criminal Justice Act* 2003 (UK), s 12.

²⁰⁶ Duff, above n 139,181.

²⁰⁷ *Ibid* 181-2.

²⁰⁸ Finn, “Aspects of the Law Relating to Jury Trials” (1984) 2 *Canterbury Law Review* 206, 206–207.

²⁰⁹ *Ex parte Morris* (1907) 72 JP 5.

²¹⁰ *R v Wakefield* [1918] 1 KB 216.

²¹¹ *RasBehariLal v King-Emperor* (1933) 50 TLR 1.

peremptory challenge or the stand by procedure.²¹² However, it is worth noting that in 1957 the Court of Appeal described them as obsolete.²¹³

In Cook Islands a juror can be challenged for one of three reasons:

- (a) That any juror's name does not appear in the jury list;
- (b) That any juror is not indifferent between the Crown and the accused and;
- (c) That any juror is disqualified under the law in force for the time being.²¹⁴

8.3 Challenges to the array

A party may challenge the array from which a jury is to be selected before any juror is sworn.²¹⁵ Challenges to the array were originally the remedy available to a party when the composition of the jury pool had been improperly manipulated or the jury pool was not impartial.²¹⁶ In practice, these issues may now more often give rise to an application to transfer the trial to a different location or, more recently, for a judge-only trial. Express provision is made for a party to challenge the whole jury panel before empanelment commences in Tasmania²¹⁷ and the common law right of challenge to the array is preserved in New South Wales, the Northern Territory and South Australia.²¹⁸ Challenge to the array is not, however, available to a defendant in Western Australia.²¹⁹ Section 17 of the *Juries Act* 1968 (Cook Islands) establishes the right to challenge the array.

8.4 Tongan position and proposed reform

Tonga retains the right to peremptory challenge and during empanelment each party has a right to six challenges and 'where several accused persons are tried together for an indictable offence, each has a right to the full number of his challenge'.²²⁰ Challenge for cause seem to be available in Tonga, however it is not clear on what grounds or where the right comes from. It is also unclear whether challenge of the

²¹² Finn, above n 208, 207.

²¹³ *R v Greening* [1957] NZLR 906, 914.

²¹⁴ *Juries Act* 1968 (Cook Islands) s 18.

²¹⁵ *Jury Act* 1995 (Qld) s 40(1).

²¹⁶ Lord P Devlin, *Trial by Jury* (1956) 26.

²¹⁷ *Juries Act* 2003 (Tas) s 32.

²¹⁸ *Jury Act* 1977 (NSW) s 41; *Juries Act* 1963 (NT) s 42; *Juries Act* 1927 (SA) s 67. See, for example, *R v Grant* [1972] VR 423; *R v Diak* (1983) 69 FLR 268. In the Northern Territory, however, an omission, error or irregularity by the Sheriff in the time or mode of service of a summons or the summoning, or return of a juror by a wrong name (if there is no question as to identity) is not a cause of challenge to the array: *Juries Act* 1963 (NT) s 47(1).

²¹⁹ See *Juries Act* 1957 (WA) s 40; *Criminal Procedure Act* 2004 (WA) s 104(1).

²²⁰ *Supreme Court Act* 1988 (Tonga) s 14(2).

array is available in Tonga and if so, what its source is. It is not mentioned in section 14(2) of the *Supreme Court Act 1988* (Tonga). However, it may exist implicitly in clause 15 of the *Constitution* (Tonga): ‘Court to be unbiased’, which requires that both the judge and jurors are to be free from all bias or interest in the case. Therefore any bias in the selection of the jury may be challengeable on this basis.

As seen above, the existence and use of challenges to the jury is largely determined by custom and competing rationales, which aim to balance representativeness against impartiality. This being so, there seems to be a need to clarify, but not necessarily amend, the current position in Tonga. The availability, grounds and source of challenge for cause and challenge to the array are currently unclear and could be clarified through enactment of an act or issuing of a practice direction.

9. Juror Education

An issue raised by Kautoke in her paper ‘the Jury System of Tonga’ was the lack of jury service information,²²¹ compounded by language and cultural barriers. However, this could be addressed through juror education booklets in both languages to clarify the role of the jury. All of the comparative jurisdictions provide some form of juror handbook to jurors to explain their role and responsibilities. See Appendix 4 for a draft Tongan Juror’s Handbook.

10. Directions

10.1 Comparative jurisdictions

Juries are able to receive directions in the following ways:

- i. Directions relating to the decision-making process
- ii. Directions relating to the principles of criminal liability
- iii. Directions relating to the evidence
- iv. Directions relating to the accused’s silence, conduct or character

The following summary of direction taxonomy is based primarily on Australian jurisprudence and procedure but is similar in the United Kingdom, Scotland and New Zealand. Most differences in directions between jurisdictions are because of differences in the law. All directions are necessarily flexible to adapt to the individual case, however for consistency and clarity authoritative guidance for judges is provided. There is very little available information from Cook Islands.

²²¹ Kautoke, above n 1, 14.

i. Directions relating to the decision-making process

Directions that fall within this category include those that instruct the jury on:²²²

- the jury's exclusive role and right to determine the guilt of the accused, and in that respect, to decide the facts on the evidence, as distinct from the judge's role to decide any issue of law that might be relevant to the trial;
- the jury's duty to apply the law as explained by the judge;
- the jury's duty to act impartially without any form of prejudice, and keep an open mind until all the evidence has been presented;
- the jury's duty to reach a decision based only on the evidence presented in court and to resist "sleuthing" or any form of independent legal research;
- the jury's duty in dealing with any alternative verdicts that may be available; and
- the jury's duty to persevere in reaching a unanimous decision ("the Black direction") or where appropriate, its right to return a majority verdict.²²³

ii. Directions relating to the principles of criminal liability

Directions that fall within this category include those that instruct the jury on:²²⁴

- the presumption of innocence that applies to the accused;
- the elements of the offence that must be proven;
- the burden and standard of proof to be applied;
- issues that, where relevant to the individual case, might negate the criminal liability of the accused, either wholly or partially, such as mental illness, self-defence, duress, intoxication, provocation, or substantial impairment by reason of abnormality of mind;
- issues arising where the offence alleged involved more than one person requiring, for example, an assessment of responsibility according to the principles of complicity, or of whether the accused was acting in company; and
- defences or alternative offences which appear to be available on the evidence even though the accused has not raised them ("the Pemble direction").²²⁵

iii. Directions relating to the evidence

Directions that fall within this category include those that:²²⁶

- warn the jury against relying on potentially unreliable evidence, for example, evidence of a person concerned in the offence (accomplice) or of a prison informer, eyewitness identification evidence, or where delay in making a complaint has led to the accused suffering a significant forensic disadvantage;

²²² New South Wales Law Reform Commission, *Jury Directions*, Report 136 (2012) 10-1.

²²³ *Black v The Queen* (1993) 179 CLR 44.

²²⁴ NSWLRC, above n 222, 11.

²²⁵ *Pemble v The Queen* (1971) 124 CLR 107.

²²⁶ NSWLRC, above n 222, 11.

- instruct the jury on the interpretation of evidence, including in relation to the inferences that may be drawn from tendency or coincidence evidence, circumstantial evidence, or DNA evidence;
- warn the jury about how it may or may not use evidence, including its use for limited purposes; and
- warn against drawing adverse inferences about the way in which certain evidence is presented, for example, where special measures have been taken allowing child witnesses or sexual offence complainants to give evidence via CCTV or in the form of a pre-recorded interview.

iv. Directions relating to the accused's silence, conduct or character

Directions that fall within this category include those that instruct the jury about:²²⁷

- the exercise by the accused either before or during the trial of the right to silence;
- the use of evidence of post-offence conduct where the accused lied to investigating police or had taken flight;
- alibi evidence including the use that can be made of a false alibi;
- the use that can be made of evidence of the accused's good or bad character; and
- the use that the jury can make of relationship or background evidence.

10.2 Tongan position and proposed reform

Section 4 of the *Supreme Court Act* 1988 (Tonga) states that when 'evidence has been heard the judge shall sum up the evidence and explain to the jury the law that bears upon the case'. The *Magistrates Court Act* 1988 (Tonga) s 14(4) reiterates this direction. Apart from this, the judicial directions are not written down. Judicial directions could be written down to provide uniformity and reduce the likelihood of an appeal instead of orally transferred directions or inconsistent reference to Archbold or Halsbury's Laws.

11. Discharging juries

11.1 Comparative jurisdictions

Australia

i. Before trial

At any time prior to the empanelment of the jury, the judge has the power to excuse a prospective juror or member of a jury panel from service, either for the whole or part

²²⁷ NSWLRC, above n 222, 12.

of a particular jury service period or permanently.²²⁸ The judge has express power to discharge a juror, or jury, at the final stage of the jury selection process (including after the requisite number of jurors have been selected and sworn in). In particular, section 46 of the *Jury Act* 1995 (Qld) provides discretion to a judge to discharge an individual juror in the final stage of the selection process on the grounds that there is reason to doubt the impartiality of that juror regardless of whether or not a challenge has been made. If this happens, another person must be selected from the jury panel to replace the discharged juror. The Queensland Supreme Court and District Court Benchbooks set out procedures for judges to follow in avoiding juror bias and one of the mechanisms employed by judges is asking the jurors whether they know of any reason why they cannot or should not sit on the jury for that trial.²²⁹ In Victoria, the court may excuse a juror for the trial if satisfied the person is ‘unable to consider the case impartially’ or ‘is unable to perform jury service for any other reason’.²³⁰

Moreover, in Queensland and New South Wales, a judge may at the same point discharge the whole of a jury if the judge considers that ‘the challenges made to persons selected to serve on the jury or as reserve jurors have resulted in a jury of a composition that may cause the trial to be, or appear to be, unfair’.²³¹ In that event, a new jury must be selected from the remainder of the jury panel. This is rarely exercised but occurred in a New South Wales District Court trial in 1981 when a judge discharged a wholly non-Indigenous jury in a trial of an Indigenous man; the three Indigenous members of the jury panel had been peremptorily challenged by the prosecutor.²³²

ii. During trial

The judge also has power to discharge individual jurors, or the whole jury, if particular problems arise or come to light after the jury is empanelled and during the trial. Without discharging the whole jury, the judge has a wide discretion to discharge an individual juror, who has been sworn, if:²³³

- a) it appears to the judge (from the juror’s own statements or from evidence before the judge) that the juror is not impartial or ought not, for other reasons, be allowed or required to act as a juror at the trial; or
- b) the juror becomes incapable, in the judge’s opinion, of continuing to act as a juror; or
- c) the juror becomes unavailable, for reasons the judge considers adequate, to

²²⁸ *Jury Act* 1995 (Qld) ss 20, 22, 23.

²²⁹ Queensland Courts, Supreme and District Courts Benchbook, ‘Trial Procedure’ [5B.3] <<http://www.courts.qld.gov.au/2265.htm>> at 1 February 2011.

²³⁰ *Juries Act* 2003 (Tas) s 39(1)–(4); *Juries Act* 2000 (Vic) s 32.

²³¹ *Jury Act* 1995 (Qld) s 48; *Jury Act* 1977 (NSW) s 47A.

²³² *R v Smith* (Unreported, District Court of New South Wales, Martin J, 19 October 1981).

²³³ *Jury Act* 1995 (Qld) s 56(1).

continue as a juror.

Nevertheless, the exercise of this power has to be balanced against the fundamental right of an accused person to a trial by a jury of 12 persons,²³⁴ and must be exercised in unmistakable terms, particularly with a jury of less than 12 members.²³⁵ In exercising this discretion, the judge must take into account the fair and lawful trial of the defendant with relevant considerations including the primary right to be tried by a jury of 12, the burden on the defendant of delay in the trial, the consequences of delay to others, including witnesses, the expense to the community and the nature of the charge.²³⁶

Similar provisions have been made in some of the other jurisdictions, although the expression of the grounds differs. In Victoria, a juror may be discharged if it appears that the juror is not impartial, the juror becomes incapable of continuing to act as a juror, the juror becomes ill, or it appears for any other reason that the juror should not continue to act as a juror.²³⁷ In Western Australia, the judge must be satisfied that the juror should not be required or allowed to continue in the jury and that if the juror is discharged, it will leave at least 10 jurors remaining.²³⁸

In New South Wales, sections 53A and 53B of the *Jury Act 1977* (NSW) provides for mandatory and discretionary discharge of jurors. An individual juror must be discharged if:

- a) it is found that the juror was mistakenly or irregularly empanelled, whether because the juror was excluded from jury service or was otherwise not selected in accordance with this Act; or
- b) the juror has become excluded from jury service; or
- c) the juror has engaged in misconduct in relation to the trial or coronial inquest.

An individual juror may be discharged if:

- a) the juror (though able to discharge the duties of a juror) has, in the judge's or coroner's opinion, become so ill or infirm as to be likely to become unable to serve as a juror before the jury delivers their verdict or has become so ill as to be a health risk to other jurors or persons present at the trial or coronial inquest; or
- b) it appears to the court or coroner (from the juror's own statements or from evidence before the court or coroner) that the juror may not be able to give impartial consideration to the case because of the juror's familiarity with the

²³⁴ Above n 229, Queensland Courts, [5B.10]. See also *R v Metius* [2009] QCA 003.

²³⁵ *Wu v The Queen* (1999) 199 CLR 99 (at 103).

²³⁶ See also *R v Hutchings* [2006] QCA 219; *R v Shaw* [2007] QCA 231 and *R v Walters* [2007] QCA 140.

²³⁷ *Juries Act 2003* (Tas) s 40; *Juries Act 2000* (Vic) s 43.

²³⁸ *Criminal Procedure Act 2004* (WA) s 115.

witnesses, parties or legal representatives in the trial or coronial inquest, any reasonable apprehension of bias or conflict of interest on the part of the juror or any similar reason; or

- c) a juror refuses to take part in the jury's deliberations; or
- d) it appears to the court or coroner that, for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror.

In Queensland, the whole jury may also be discharged without giving a verdict in particular circumstances, namely:

- if the jury cannot agree on a verdict;²³⁹
- if the judge considers there are 'other proper reasons' for discharging the jury without giving a verdict;²⁴⁰
- if proceedings are to be discontinued because the trial is adjourned;²⁴¹ or
- if the judge dies, or becomes 'incapable of proceeding with the trial'.²⁴²

If the jury is discharged, the judge may either adjourn the trial or proceed immediately with the selection of a new jury.²⁴³ Provision is also made in some of the other jurisdictions for the jury to be discharged without giving a verdict, for example, if the number of jurors is reduced below 10, or if it is in the interests of justice to do so.²⁴⁴

New Zealand

Individual jurors or the whole jury may be discharged by the judge under section 22 of the *Juries Act* 1981 (NZ) or section 374 of the *Crimes Act* 1961 (NZ). Apart from discharge arising out of inability to agree, the grounds are that:

- the juror is, or may appear to be, biased because of an association with someone involved in the case or the events giving rise to the charge;²⁴⁵
- an emergency or casualty renders discharge of the jury highly expedient for the ends of justice;²⁴⁶
- a juror is incapable of continuing to serve, for example, because of some mental or physical incapacity, or because the juror refuses to perform his or her duty;²⁴⁷

²³⁹ *Jury Act* 1995 (Qld) s 60(1).

²⁴⁰ *Ibid.*

²⁴¹ *Ibid* s 60(2).

²⁴² *Ibid* s 61.

²⁴³ *Ibid* s 62(1).

²⁴⁴ See *Juries Act* 1967 (ACT) s 8(3); *Jury Act* 1977 (NSW) ss 22, 53C(1); *Juries Act* 1927 (SA) s 56(2); *Juries Act* 2003 (Tas) s 41; *Criminal Procedure Act* 2004 (WA) s 116; *Juries Act* 1981 (NZ) s 22.

²⁴⁵ *Juries Act* 1981 (NZ) s 22.

²⁴⁶ *Crimes Act* 1961 (NZ) s 374(1).

²⁴⁷ *Crimes Act* 1961 (NZ) s 374(3)(a).

- the juror is disqualified under one of the provisions of the *Juries Act*;²⁴⁸
- the juror is unable to continue to serve by reason of the illness or death of a member of the juror's family;²⁴⁹
- a juror is personally concerned with the facts of the case;²⁵⁰ or
- a juror is closely connected with one of the parties or with one of the witnesses or prospective witnesses.²⁵¹

The power to discharge a juror in section 22(1) of the *Juries Act* 1981 (NZ) is restricted to the period between when the jury is constituted and when the defendant is given in charge to the jury, or the case is opened. During this time the jury has retired only to select a jury representative (foreman), and the opportunity for discussion among jurors is limited.²⁵² The grounds for discharge are that it has been brought to the attention of the trial judge that a juror either is personally concerned with the facts of the case, or is closely connected with one of the parties or prospective witnesses.²⁵³

In addition, this power applies to individual jurors rather than the whole jury. Following the discharge of the juror another person is selected from the panel. Through this power, the judge is able to exclude jurors whose presence on the jury may create a risk of the trial being aborted or the judgment appealed.²⁵⁴

Section 374(1) of the *Crimes Act* 1961 (NZ) allows the judge to discharge individual jurors or the whole jury. In the event of discharge of the whole jury, provision is made for the empanelling of a new jury. If, however, a juror is discharged, no provision is made for a replacement juror. In this respect the provision differs from s 22 of the *Juries Act* 1981 (NZ), which allows the selection of a replacement juror. These provisions apply differently because the *Juries Act* provision covers a very limited period at the beginning of the trial during which no evidence is heard and so a replacement juror will not have missed any evidence or significant jury discussion. The *Crimes Act* provision on the other hand provides that the jury may be discharged before a verdict is made if any emergency or casualty renders it highly expedient for the ends of justice to do so. Following discharge, the court may immediately order the

²⁴⁸ Ibid s 374(3)(b).

²⁴⁹ Ibid s 374(3)(c).

²⁵⁰ Ibid s 374(3)(d).

²⁵¹ Ibid s 374(3)(e).

²⁵² New Zealand Law Reform Commission, *Juries in Criminal Trials Part One*, Preliminary Paper 32 (1998) 110.

²⁵³ Ibid.

²⁵⁴ See Adams on Criminal Law (Robertson (ed) Brooker & Friend, Wellington, 1992), ch 5.1.02, citing *R v TePou* [1992] 1 NZLR 522, CA 340. In that case the Court of Appeal held that discharge under s 22 would have been justified where a juror was acquainted with the police officer in charge of the case, although they were not close friends and apparently had not discussed the case.

empanelling of a new jury or alternatively postpone the trial.²⁵⁵

United Kingdom – England and Wales, and Scotland

In England and Wales the whole jury can be discharged if the jury cannot reach verdict, there has been jury tampering²⁵⁶ or it is ‘necessary’²⁵⁷ to overcome a ‘real danger’²⁵⁸ of bias, for example if prejudicial evidence has been lead and fairness cannot be ensured through judicial direction.

Cook Islands

Section 26 *Juries Act* 1968 (Cook Islands) allows for discharge of juries unable to agree, if having deliberated for an excess of four hours and no agreement can be reached. Section 28 covers the Court’s discretion in the interests of justice to discharge the jury before verdict. Secondly, there is the option to excuse individual jurors, for example because of disqualification or illness, and continue with the remaining jurors. Also if the presiding Judge becomes incapable, the Registrar has power to discharge the jury.

11.2 Tongan position and proposed reform

The state of the law with respect to discharging juries in Tonga is unclear. Recently, the whole jury in the ‘Princess Ashika’ trial was dismissed because one of the jurors was found to be ineligible.²⁵⁹ Therefore, it can be concluded that a power to discharge juries exists. However, the source, content and scope are unknown. Similarly to judicial directions, the law regarding discharging juries ought to be clarified by an enactment or practice direction. Writing down the procedure for discharging juries would increase consistency and accountability.

12. Judge-alone trials

12.1 Tongan position

In Tonga because trial by jury is not mandatory but electable it is possible to have a judge-alone trial. For example in the recent Fungavaka case, the police officers accused of manslaughter elected a judge-alone trial, whereas the trial of the civilian

²⁵⁵ *Crimes Act* 1961 (NZ) s 374(6).

²⁵⁶ *Criminal Justice Act* 2003 (UK) s 46.

²⁵⁷ *R v Hambery* [1977] QB 924.

²⁵⁸ *Porter v Magill* [2002] 2 AC 357.

²⁵⁹ See for example, Liam Cochrane, ‘Tongan ferry disaster jury dismissed’, *Australian Broadcasting Corporation*, <<http://www.radioaustralia.net.au/international/2011-02-08/tongan-ferry-disaster-jury-dismissed/225420>> (at 17 September 2014): ‘Justice Robert Shuster dismissed the jury after it emerged one juror had been convicted over riots in 2006.’

accused facing manslaughter, which commenced May 2014, was a trial by jury. However, Tonga has faced issues retaining juror integrity when the accused elect trial by jury in highly political cases such as the Pohiva and others, pro-democracy riot in 2006. When the accused were acquitted in this case it led to calls from Tonga's Law Society President to abolish all jury trials.²⁶⁰

The question of if, or in which circumstances, the right to jury should be curtailed is a difficult one and the approach to the issue in the study jurisdictions is greatly divergent. However, there is a model, mainly adopted in the Australian jurisdictions, that limits the right to jury in circumstances where fairness cannot otherwise be ensured.

12.2 Comparative jurisdictions

United Kingdom – England and Wales

England has been reluctant to impede the use of juries even in highly contentious circumstances and the very limited exception has only been used *once* in its existence to effect a trial without jury. A non-jury trial may only occur when:

*there is evidence of a real and present danger that jury tampering would take place and notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.*²⁶¹

The other proposed non-jury trial for complex fraud cases was not brought into force. When rejecting an application for a non-jury trial the Chief Justice stated that 'trial of a serious criminal offence without a jury...must remain the decision of last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled'.²⁶² Note that 'Diplock' courts

²⁶⁰ Matangi Tonga, 'Tonga: Police on trial for death in custody' *Cook Islands News* <<http://www.cookislandsnews.com/item/46411-tonga-police-on-trial-for-death-in-custody>> (at 23 April 2014); Matangi Tonga, 'Tonga Judge Imposes Media Gag on Murder Trial' *Pacific Island Report* <<http://pidp.eastwestcenter.org/pireport/2014/May/05-13-01.htm>> (at 12 May 2014); Radio Australia, 'Calls for Tonga's jury system to be abolished' *ABC*, <<http://www.radioaustralia.net.au/international/2007-10-31/calls-for-tongas-jury-system-to-be-abolished/14752>> (at 31 October 2007).

²⁶¹ *Criminal Justice Act 2003* (UK), s 44.

²⁶² *J, S, M v R* [2010] EWCA Crim 1755, [8].

have been used in the United Kingdom in relation to terrorism in Northern Ireland based on similar concerns of jury tampering.²⁶³

United Kingdom - Scotland

Chapter eight of the Modern Scottish Jury Report generated discussion on trial without a jury. The focus is strongly on the burden that excessively long or complex trials place on jurors and on the other hand, protection of proceedings and fairness to the accused. It was made clear in the report that the Government did 'not wish to advance...any firm proposals for dispensing with jury trials'.²⁶⁴

Cook Islands

Recently a judge in The Cook Islands discharged a jury due to delay causing the trial to exceed the estimated timeframe and over-burdening the jurors. It was noted that if the trial was able to be conducted by judge alone it could better scheduled.²⁶⁵ Although there is only very minor discourse on topic, it is in a similar vein to the Scottish reasoning. There was no precedent found for curtailing the right to juries for reasons of politics or media prejudices as in Australia.

Australia

Australian judges have proffered their views in support of, or against, judge-alone trials.²⁶⁶ Law Reform Commissions throughout Australia have also considered the role of the jury and some have specifically considered judge alone trials.²⁶⁷ Those

²⁶³ Sections 44-50 of Part 7 of the *Criminal Justice Act* ('CJA') 2003, came into force on 24 July 2006. To date the trial of Twomey and others (the defendants T, R, C and B referred to above) remains unique, being the only case to be heard by a judge without a jury under the non-jury trial provisions. The provisions set out in Section 44 were considered by the Lord Chief Justice in the following two cases: *J, S, M v R* [2010] EWCA Crim 1755, see:

<http://www.bailii.org/ew/cases/EWCA/Crim/2010/1755.html> and *KS v R* [2010] EWCA Crim 1756, see: <http://www.bailii.org/ew/cases/EWCA/Crim/2010/1756.html>. In both cases the Court of Appeal overturned High Court decisions that trials were to be conducted by a judge alone, emphasising the importance of trial by jury, see:

http://www.cps.gov.uk/legal/l_to_o/non_jury_trials/index.html

²⁶⁴ The Scottish Government Justice Ministry, Chapter 8: Trial without a jury, *The Modern Scottish Jury in Criminal Trials* (2008) [8.2].

²⁶⁵ Calida Smylie, 'Jury trial aborted' *Cook Islands News*

<<http://www.cookislandsnews.com/item/40451-jury-trial-aborted/40451-jury-trial-aborted>> (at 4 September 2012).

²⁶⁶ In support see French DCJ, 'Juries - a Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System' (2007) 90 *Reform* 40, against see Heenan DC SCJ, 'Trial by Judge Alone' (1995) 4 *Journal of Judicial Administration* 240 and White SCJ in *R v Marshall* (1986) 43 SASR 448.

²⁶⁷ Law Reform Commission of Western Australia (LRCWA), *Review of the Criminal and Civil Justice System in Western Australia (Consultation Papers)* Project No 92 (June 1999) Vol 2, s 4.8 and LRCWA, *Review of the Criminal and Civil Justice System in Western Australia (Final Report)* Project No 92 (September 1999) Ch 30. See also the New South Wales Law Reform Commission (NSWLRC) Report No 48 (1986) Chs 7 and 10.

who support judge alone trials suggest jurors are impacted by prejudices, at times convicting upon weak evidence, or acquitting when the evidence is overwhelming.²⁶⁸ This is exacerbated by lack of transparency and accountability in jury deliberations.²⁶⁹

South Australia embraced the use of judge-alone trials in 1984, New South Wales in 1991 and the Australian Capital Territory in 1993.²⁷⁰ Both South Australia and the Australian Capital Territory allow an accused to elect to proceed without a jury, not vesting any discretion in either the prosecutor or the court to refuse such an election.²⁷¹ The legislation in these States currently pays heed to the protection theory, giving priority to the accused's choice to waive their right to a jury trial.

Originally in New South Wales the prosecutor had to consent to an accused's election for a judge-alone trial.²⁷² The Director of Public Prosecution (DPP) in New South Wales has now developed guidelines informing the exercise of this discretion²⁷³ stating that judge alone trials may be pertinent in cases:

- of a technical or trivial nature; or
- where the issue to be determined is one of law; or
- where judicial directions or other measures will prove inadequate to address prejudice from pre-trial publicity or another cause; or
- where evidence is technical or likely to raise lengthy arguments as to its admissibility.

However, in New South Wales, it remains the case that where the accused elects a judge-alone trial, and the prosecutor agrees, the matter is to proceed in that mode.²⁷⁴ The difference arises now where a prosecutor does not agree to such a disposition. In those instances, the Court can still order a judge alone trial where it is 'in the interests

²⁶⁸ Willis J, 'Trial by Judge Alone' (1998) 7 *Journal of Judicial Administration* 144, 152.

²⁶⁹ Samuels A, 'Trials on Indictment without a Jury' (2004) 68 *Journal of Criminal Law* 125, 126; French DCJ, 'Juries - a Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System' (2007) 90 *Reform* 40.

²⁷⁰ *Juries Act 1927 (SA)* s 7; *Criminal Procedure Act 1986 (NSW)* s 132; *Supreme Court Act 1933 (ACT)* s 68B.

²⁷¹ The court can only refuse the exercise of this election if the accused has not complied with statutory provisions – eg the accused must have sought and received advice from a legal practitioner about their choice: *Juries Act 1927 (SA)* ss 7(1)(b), 7(2) and 7(3); *Supreme Court Act 1933 (ACT)* s 68B.

²⁷² *Criminal Procedure Act 1986 (NSW)* s 132(3).

²⁷³ Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <<http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>> viewed 4 September 2010.

²⁷⁴ *Criminal Procedure Act 1986 (NSW)* s 132(2). The section is broader in application when combined with s 132(1) requiring such a trial if either party applies to the Court and both parties agree to this format. Note also the overriding requirement for a jury trial where the accused does not consent to a judge alone trial in s 132(3), subject only to s 132(7) where there is a substantial risk of jury tampering which cannot be mitigated in another way.

of justice to do so',²⁷⁵ and may refuse if objective community standards are to be applied during the trial.²⁷⁶

Western Australia implemented judge alone provisions in 1994.²⁷⁷ That legislation largely mirrored the first formulation in New South Wales, particularly the requirement for Crown consent.²⁷⁸ The legislation provides examples of when such an order may be appropriate; focusing on complex or lengthy trials and instances where it is likely that jury members may be subjected to threats or bribes.²⁷⁹ In addition, the Act describes when a 'no jury' order may not be appropriate, that is, where the trial would require the application of objective community standards, specifically reasonableness, negligence, indecency, obscenity or dangerousness.²⁸⁰

In 2008, Queensland introduced provisions into the *Criminal Code 1899 (Qld)* allowing for a pre-trial application for a 'no jury' order.²⁸¹ Like New South Wales and Western Australia, the prosecution or defence can make an application and the court can make these orders if it is in the interests of justice, with the consent of the accused.²⁸² Section 615(4) of the *Criminal Code 1899 (Qld)* provides examples of when these orders may be made, including if:

- a) The trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
- b) There has been significant pre-trial publicity that may affect jury deliberations.

The courts are guided by section 615(5) in the *Criminal Code 1899 (Qld)*, which allows refusal of such an order if the trial would necessitate contemplation of objective community standards.

New Zealand

In New Zealand, whether a particular defendant is tried by a jury or by judge alone depends on a variety of factors, including the defendant's preference, the maximum penalty for the offence charged and the type of offence, and the way proceedings are commenced. Not all defendants are able to elect trial by jury and not everyone is able to choose trial by judge-alone.

²⁷⁵ Ibid s 132(4).

²⁷⁶ Ibid s 132(5) specifically outlines issues of reasonableness, negligence, indecency, obscenity or dangerousness (but notes this is not an exhaustive list).

²⁷⁷ *Criminal Code 1913 (WA)* ss 651A – 651C.

²⁷⁸ Ibid s 651A(5).

²⁷⁹ *Criminal Procedure Act 2004 (WA)* s 118(5).

²⁸⁰ Ibid s 118(6).

²⁸¹ Introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008 (Qld)*.

Queensland previously had provision to allow judge alone trials in the Children's Court of Queensland: *Juvenile Justice Act 1992 (Qld)* s 102.

²⁸² *Criminal Code 1899 (Qld)* s 615.

The right to elect trial by jury is set out in section 66(1) of the *Summary Proceedings Act 1957* (NZ) and confirmed in s 24(e) of the *New Zealand Bill of Rights Act 1990* (NZ). Section 66(1) *Summary Proceedings Act 1957* (NZ) gives defendants prosecuted summarily, and charged with an offence punishable by a maximum penalty exceeding 3 months' imprisonment, a right to elect trial by jury. Section 24(e) of the *New Zealand Bill of Rights Act 1990* (NZ) provides that everyone who is charged with an offence:

shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months.

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

Summary offences carry a right to elect trial by jury except when:

- they are punishable by a sentence of 3 months' imprisonment or less (offences in this category will be tried by a judge alone); or
- they are subject to legislation which expressly precludes trial by jury (for example, section 43 of the *Summary Offences Act 1981* (NZ)).

Indictable offences will be tried by a jury except when:

- they are punishable by a sentence of 3 months' imprisonment or less – see, for example, certain theft offences in section 227(d) of the *Crimes Act 1961* (NZ) in which case they are tried by a judge alone; or
- they are indictable offences triable summarily, in which case:
 - if prosecuted summarily, they are treated as summary offences unless the defendant elects trial by jury under section 66(1) of the *Summary Proceedings Act 1957* (NZ), or
 - if prosecuted indictably, the defendant loses the right to trial by judge alone other than by application under sections 361A–361C of the *Crimes Act 1961* (NZ); or
- the defendant applies for trial by judge alone under sections 361A–361C of the *Crimes Act 1961* (NZ).

12.3 Proposed reform

From the perspective of the defendant, judge-alone trials are not necessary as this can be freely elected. However, there may be circumstances when the prosecution wants to enforce a judge-alone trial. Whether this is an appropriate area of reform depends of the prioritization of different rationales. There are two primary rationales, firstly, unfairness due to media or political exposure, and on the other hand, the burden on jurors of long and technical trials. If a similar approach to Australia were taken in

Tonga, it is important to note that reform must only be undertaken for a limited amount of cases and must not undermine the general right to trial by jury. However, this is unlikely to be a pertinent reform at this time, and the issuing of practice directions to clarify other areas of law in this area are likely to take priority over any reform in the area of judge-alone trials.

Appendix 1: The Role of the Jury in Civil Trials

Jurisdiction	The Role of the Jury in a Civil Trial
Australia	
<i>NSW, QLD, VIC, TAS, NT</i>	<ul style="list-style-type: none"> • Jury makes finding of facts, decides case in favour of one party and awards damages. • Special verdict: Jury may answer specific findings of fact in special verdict. • Exceptions: Jury not entitled to make award of damages in defamation cases.
<i>SA, ACT</i>	N/A – No jury trials.
England	<ul style="list-style-type: none"> • Jury makes finding of facts, decides case in favour of one party and awards damages. <ul style="list-style-type: none"> ◦ Before the removal of the potential for jury trials in actions in defamation, the power to award damages was somewhat curtailed by the discretion of the judge. • Special verdict: Jury may answer specific findings of fact in special verdict and leave judge to make conclusion.
New Zealand	<ul style="list-style-type: none"> • Jury makes finding of facts, decides case in favour of one party and awards damages. • Special verdict: Jury may answer specific findings of fact in special verdict.
Pacific Island Nations (ex Tonga)	N/A – No jury trials
USA	<ul style="list-style-type: none"> • Jury makes finding of facts, decides case in favour of one party and awards damages. • A jury may also be asked supplemental questions or “interrogatories” which enable the courts to review the consistency of a jury’s verdict. • Special Verdict: Jury may answer specific findings of fact in special verdict and leave judge to make conclusion.

Appendix 2: Summary of Availability of Civil Jury Trials by Jurisdiction

Jurisdiction	Availability of Civil Jury Trial
Australia	
<i>New South Wales</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of availability of jury trial: No <ol style="list-style-type: none"> a. Judicial discretion to allow if in ‘interest of justice’ b. Defamation cases allowed jury trials 3. Judicial discretion to deny entitlement to jury trial: Yes <ol style="list-style-type: none"> a. Discretion to deny if prolonged examination of records or inconvenient scientific evidence 4. Civil jury Court fees: Yes
<i>Northern Territory</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of availability of jury trial: No <ul style="list-style-type: none"> • Judicial discretion to allow if ‘just’ • Defamation cases never allowed a jury trial 3. Judicial discretion to deny entitlement to jury trial: N/A 4. Civil jury Court fees: Yes
<i>Queensland</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: Yes 2. Partial extinguishment of right to jury trial: Yes <ul style="list-style-type: none"> • Statutorily excluded actions: e.g. personal injury 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Discretion to deny if prolonged examination of records or inconvenient scientific evidence 4. Civil jury Court fees: Yes
<i>South Australia</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of availability of jury trial: Yes 3. Judicial discretion to deny entitlement to jury trial: N/A 4. Civil jury Court fees: N/A

<i>Tasmania</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: Yes 2. Partial extinguishment of right to jury trial: Yes <ul style="list-style-type: none"> • Statutorily excluded actions: Motor Vehicle Accidents 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Discretion to deny if the prolonged examination of records or scientific evidence is inconvenient 4. Civil jury Court fees: No
<i>Victoria</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: Yes 2. Partial extinguishment of right to jury trial: No 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Discretion to deny but no statutory guidance 4. Civil jury Court fees: Yes
<i>Western Australia</i>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of availability of jury trial: No <ul style="list-style-type: none"> • Cases of fraud, libel, slander, malicious prosecution, false imprisonment and seduction retain right to jury 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Judicial discretion to deny right if the prolonged examination of records or scientific evidence is inconvenient 4. Civil jury Court fees: Yes
England	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of availability of jury trial: No <ul style="list-style-type: none"> • Cases of fraud, libel, slander, malicious prosecution and false imprisonment allowed right to jury • Broad judicial discretion to allow a jury trial. 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Judicial discretion to deny right if the prolonged examination of records or scientific evidence is inconvenient 4. Civil jury Court fees: Yes

<p>New Zealand</p>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: Yes 2. Partial extinguishment of right to jury trial: Yes <ul style="list-style-type: none"> • No right to jury trial where damages less than \$3000 • Jury trials only available for pecuniary damages • Judicial discretion to allow if convenient 3. Judicial discretion to deny entitlement to jury trial: Yes <ul style="list-style-type: none"> • Discretion to deny if either mainly difficult considerations of law, or prolonged examination of records or scientific evidence is inconvenient 4. Civil jury Court fees: Yes
<p>Pacific Islands (excluding Tonga)</p>	<ol style="list-style-type: none"> 1. General right to elect trial by jury: No 2. Total extinguishment of right to jury trial: Yes <ul style="list-style-type: none"> • Use of assessors (except in Papua New Guinea and Nauru) 3. Judicial discretion to deny entitlement to jury trial: N/A 4. Civil jury Court fees: N/A

Appendix 3: Summary of Civil Jury Reform Strategies by Jurisdiction

	Australia								England and Wales	New Zealand	Pacific	USA
	Tonga	ACT	NSW	NT	QLD	SA	TAS	VIC				
Absolute right to jury trial												
Qualified right to jury trial												
<i>Judicial discretion to deny right to jury</i>												
<i>Statutorily excluded causes of action (e.g. personal injury claims)</i>												
Qualified extinguishment of jury trial												
<i>Judicial discretion to allow a jury</i>												
<i>Prescribed causes of action retain right (e.g. Defamation or Fraud)</i>												
Absolute extinguishment of jury trial												

Appendix 4: Tongan Juror's Handbook

1. What does a jury do?

Juries are used in criminal and civil trials in the Supreme Court of Tonga.

In a criminal trial the jury decides whether or not the accused person is guilty. In a civil trial the task of a jury is to resolve a dispute.

The jury makes its decision (called the 'verdict') on the basis of the evidence they hear or see in court. The jury does not give reasons for its verdict.

2. Summoned for jury service

[insert details in relation to the procedure for summoning potential jurors in Tonga]

a) How long will I be needed?

The number of days you will be needed depends on whether you are 'empanelled' as a juror on a trial.

The trial will usually begin on the same day you are empanelled. Trials usually go for [insert] to [insert] days, but sometimes they can take longer. You will be told at the start of the trial how long it is expected to take.

If serving on a long trial is a problem, you can ask the judge to be excused. However, the judge must be satisfied that it is proper for you to be excused.

b) When do I need to arrive?

You should arrive at the jury pool room by [insert] am on your first day, unless you have been given different instructions. You will usually have to stay until about [insert] pm.

If you are empanelled on a jury for a trial you will usually have to attend court each weekday between [insert] am and [insert] pm. The judge will tell you exactly when you are needed. It is important not to be late.

c) What happens if I don't go?

If you are summoned for jury service but do not attend, you may need to appear before a judge to explain your absence. Being too busy or forgetting the date are not acceptable excuses. You will be summoned again for jury service at a later date and may be fined.

d) Where do I go?

In Tonga, the jury pool room is located at the [insert]:

[insert address details]

e) What do I need to bring with me?

Your summons will have told you what to do before jury service, where to go and what to bring with you. You must bring with you to jury service:

- your summons
- photo identification.

3. About being a juror

You do not need to have any special skills, expertise or level of education to be a juror. One of the values of the jury system is that a verdict is reached by people from different backgrounds with a variety of attitudes, values and experience. It is important that each juror contributes to the discussion before reaching a verdict.

As a juror, it may be helpful to keep the following in mind:

- Listen carefully to the evidence
- Keep an open mind, without prejudice or bias
- Be fair and impartial
- Be objective
- Listen to all the evidence before you make up your mind
- Don't talk about the case except to other jury members in the privacy of the jury room

a) How to assess the evidence

As a juror, you are required to decide all questions of fact arising in the case. So it is important that you do not form or express an opinion until you have heard all the evidence.

Trials can take place months or sometimes years after the events in question, so some witnesses will remember more than others. Some witnesses may appear calm, while others may appear difficult or nervous.

Try to be fair and objective when thinking about the evidence given by a witness.

It is important to listen carefully to all evidence. Let the judge know if you have not heard or understood something, or if you need a break.

b) Can I talk to other people?

You must not talk about the case with anyone except the other jurors. You should only speak to the other jurors in the privacy of the jury room. There are strict limits on what you can talk about even after the trial is over.

You must not talk to court staff about the case, either during the trial or after it is finished. It is preferable not to bring friends or relatives to court to watch as you may be drawn into a conversation about the case when you leave court.

c) Do I have to attend the whole trial?

Yes, attendance is compulsory. You must arrive on time every day during the trial. If you become sick or something happens that delays you or prevents you from attending, then contact [insert] as soon as possible so that the judge can be told.

4. Choosing the jury

[insert details in relation to the procedure for selecting jurors in Tonga]

a) When you are in the courtroom

In the courtroom, have a look around to see if you recognise anyone—the accused, the lawyers, the judge, or anyone connected with the trial. The judge will ask if anyone knows any of the participants. If you do, tell the judge because this may be a reason for you to be excused from the jury.

The judge will explain what the trial is about and will give its estimated length. The names or numbers of the jury are then read out—answer ‘present’ when your name is called.

b) Challenges

The parties involved in the trial have the right to challenge jurors. There is no need to feel embarrassed or offended if you are challenged. Sometimes challenges are made simply on the basis of the person’s age, gender or occupation.

c) Taking an oath or affirmation

The selected jurors must take an oath (to swear or promise in accordance with religious beliefs or customs) or make an affirmation to carry out their task faithfully and impartially, and decide on a verdict according to the evidence. An oath or affirmation must be taken seriously. Tell the tipstaff if you want to make an affirmation instead of taking an oath.

d) Choosing a foreman/forewoman

Before the trial begins the jurors choose someone to be the jury foreman/forewoman. Any juror can be chosen. The opinion of the foreman/forewoman has no greater weight than that of any other juror.

If a foreman/forewoman is not able or willing to continue in the role, the jury can choose someone else to take his or her place after telling the judge about the situation.

The role of a foreman/forewoman is to:

- speak or ask questions on behalf of the jury during the trial
- chair jury discussions and make sure that each juror has an opportunity to express his or her point of view
- keep the deliberations focused on the evidence and the law
- arrange with the tipstaff to take a break if any juror requests one

- ask the court to deal with any question raised by any juror
- ask the court to adjourn if the jury wishes to finish for the day
- give the jury's verdict at the end of the trial.

e) Follow the judge's instructions

The judge will give the jury full instructions about what it needs to do before and during the trial. You must follow the judge's instructions.

f) What happens if I am not selected

If you are not selected for a jury or if you are excused from a particular trial, you will be taken back to the jury pool room to wait. Your name may be drawn out again for another panel of jurors required that day, or sometimes the next day

5. Who's who in the courtroom?

a) The judge

The judge presides over the court and deals with any legal issues that arise during the trial. The judge informs the jurors about their role and instructs them about what the law is, so they can apply the law to the facts of the case.

The jury should not assume anything about the judge's own view of the evidence from the judge's comments or attitude to the parties during the trial. The judge is addressed as 'Your Honour.'

b) Judge's associate

The associate is the judge's personal assistant. He or she:

- draws out the names for the jury empanelment
- swears in the jury and keeps a list of trial exhibits and documents
- records the verdict of the jury at the end of the trial
- provides administrative assistance to the judge.

c) Judge's tipstaff

The judge's tipstaff is a court officer who announces that the court is in session and swears in witnesses. An important duty of the tipstaff is to look after the jury. He or she escorts jury members into the courtroom and into the jury room, and deals with any practical matters for the jury.

d) Lawyers

The parties are usually represented by lawyers. There are two types of lawyers involved in a trial: barristers (also called 'counsel') and solicitors. The lawyer conducting the case for each side, usually a barrister, wears robes and sits at the bar table facing the judge. The other lawyers, usually solicitors, and law clerks sit on the other side of the bar table, to assist during the trial.

e) Parties in a criminal trial

In a criminal trial the parties are the prosecution and the defence.

i. Prosecution

In Tonga prosecution cases are brought by the [insert].

ii. Defence

The person who has been charged with an offence is called the 'accused.' There may be more than one accused. Generally the accused persons will be represented by defence counsel but may also represent themselves.

f) Parties in a civil trial

In a civil trial, the parties are called the plaintiff and the defendant.

i. Plaintiff

The plaintiff is the person bringing the action or 'suing' the other party. Sometimes there is more than one plaintiff.

ii. Defendant

The defendant is the person defending the action or being 'sued.' There may be more than one defendant.

g) Other people in the courtroom

In a criminal trial there will often be police, journalists or security officers in the courtroom. Courts are normally open to the public, and so there will often be other people observing at the back of the courtroom.

6. The trial

In a criminal trial, an accused person is innocent until proven guilty. A criminal charge is only a formal accusation. A civil trial is different from a criminal trial because it involves a dispute between two or more people, which they have been unable to sort out themselves.

a) Judge's directions

A fair trial depends on the combined efforts of jurors as the deciders of the facts and the judge as the final authority on the law. The jury must apply the law (as stated by the judge) to the facts as it finds them to be.

b) Criminal trial procedure

i. Opening statements

At the start of a criminal trial the prosecution will make an opening statement telling the jury what the alleged offence is and what the evidence is expected to show. The accused person's lawyer may also make an opening statement.

These statements are not part of the evidence. Their purpose is to give you the framework of the case, the points of conflict and the issues to be decided.

ii. Prosecution case

The presentation of evidence to the jury begins after the opening statements. When a witness is called to the witness box by the prosecution and swears to tell the truth, he or she is questioned or 'examined' by the prosecution.

Then he or she may be questioned or 'cross-examined' by the defence barrister. The aim of cross-examination is to test the accuracy of the evidence or emphasise certain parts of it.

Sometimes the prosecutor 're-examines' the witness to clarify something that has come up in cross-examination.

It is important to listen to all of the evidence and to examine anything you are shown, such as documents or photographs.

iii. Defence case

When the prosecution has finished, the defence can call witnesses or present other evidence. In a criminal trial the accused is presumed innocent. It is up to the prosecution to prove guilt.

The same process of examination, cross-examination and re-examination will occur with any witnesses called by the defence.

iv. Final addresses

After all the evidence has been given, both sides will have the opportunity to present their final submission to the jury. As with the opening statement, this is not part of the evidence. You should listen to these submissions and consider them thoughtfully, but you must form your own opinion of the facts.

v. Judge's charge to the jury

After the final address from each side, the judge summarises the case and gives instructions to the jury. It is very important that each juror listens to all these instructions and understands them, because the judge will define the issues to be decided, and the law the facts need to be applied to.

c) Civil trial procedure

The order of events in a civil trial is similar to that in a criminal trial. The plaintiff goes first and starts by explaining what the case is about and how it will be presented.

Witnesses for the plaintiff are questioned and cross-examined. Then the defendant's witnesses are questioned and cross-examined.

At the end of the evidence, each side gives a summary of their case to the jury and the judge will give the jury instructions.

d) What is evidence?

Evidence is offered to the court and jury, and may include:

- oral evidence given by witnesses
- physical objects such as photographs, documents, firearms, exhibits, etc.

The jury's verdict must be based only on the evidence presented during the trial. Evidence is important, and there are strict rules about what evidence can be given in court and the sorts of questions that can be asked. The lawyers on either side may object to the questions asked of witnesses or to other evidence.

The judge then makes a ruling on whether the evidence is admissible, based on the law. Sometimes jurors are asked to leave the court while these legal points are discussed by the judge and the lawyers. This may seem time-consuming, but it is important that the rights of all parties are protected, and that questions of law are properly decided by the judge as they come up. The jury should not feel resentful at being excluded. The judge will make sure that the jury is told everything it needs to know about the law or facts so it can reach a verdict.

e) What does a jury have to decide?

i. In a criminal trial

The accused does not have to prove his or her innocence. It is up to the prosecution to prove that the accused is guilty 'beyond reasonable doubt.' This means that if the jury has a reasonable doubt about whether the person is guilty, then the verdict must be 'not guilty.'

ii. In a civil trial

In a civil trial the standard of proof is 'on the balance of probabilities'—this is a lesser standard than in criminal trials.

7. Considering the verdict

a) In the jury room

After all the evidence has been given and summed up in court, the judge will ask the jury to retire to the jury room to consider their verdict. During this time you should only talk to the other jury members about the case.

All discussions must take place in the privacy of the jury room and when all jurors are present. The deliberations of the jury are secret and there is no set way for how jurors should reach their decision.

b) What happens during the deliberation period?

Once a jury retires to consider their verdict, jurors will have to stay together.

The judge will give you more details about arrangements during the jury deliberation period toward the end of the trial.

In most cases the judge will allow the jurors to go home each night. If allowed to go home, each juror will have to swear (or affirm) that he or she will not discuss the trial or the deliberations of the jury with any non-juror.

If the jury wants to finish its deliberations early on any day they must ask the judge. Sometimes you may be required to stay later than [insert] pm or even stay overnight until a decision is reached. You will normally be told the day before if you need to stay overnight, so that you can bring an overnight bag the next day. You will be provided with meals and accommodation. Messages can be passed on to family and friends. If the verdict is given late at night, the court will arrange transport home (if necessary).

c) How long will it take?

The jury must reach a unanimous verdict unless the judge tells them otherwise. Do not rush your decision. The court will give you as much time as you need.

It is important to think about all the evidence carefully. All jurors should feel comfortable with the verdict. No juror should feel pressured to change their mind, just because everyone else has reached a different conclusion or because it is taking a long time to decide.

Remember, your decision will have a significant effect on the lives of other people.

d) Jury decision-making

Provided you always follow the judge's instructions about the law, you are free to deliberate in any way you wish.

Jurors should keep an open mind, listen carefully to everyone and be prepared to tell others on the jury what they think and why.

Be prepared to change your mind when there is good reason to. At the same time, try not to be overly influenced by other people's ideas.

Even if someone has taken notes, this does not always mean that his or her notes are more accurate than what you remember of the evidence.

The judge can provide help to the jury about the evidence. Do not hesitate to ask for help. Every juror's opinion counts when the jury is deciding a verdict.

It is important to respect the opinions of other jurors and value the different viewpoints that each juror brings to the case. This will help the jury to reach a fair verdict. Let your fellow jurors have a chance to say what they think and why. Do not intimidate anyone else. Equally, do not be afraid to speak up and express your views.

e) Decide on general guidelines

There are no set rules about how to conduct your deliberations. However, it may be useful at the beginning to decide how you want to proceed and to decide on general guidelines.

You may like to consider the following:

- Decide on some general guidelines at the beginning
- Have each person discuss their initial thoughts about the case
- Go around the table, one by one, and talk about the case
- Try to get everyone to talk by saying something like: ‘Does anyone else have anything to add?’
- Ask someone to take notes during your deliberations
- Write down key points so everyone can see them

f) The verdict

You should spend a reasonable amount of time considering the evidence and the law and listening to each other’s opinions, so that you feel more confident and satisfied with your verdict. You might vote by:

- raising your hands
- a written ballot
- or by a spoken ballot

Eventually, a final vote in the jury room will have to be taken, with each juror expressing their verdict openly. The jury foreman/forewoman should let the tipstaff know that the jury has reached a verdict (but not what the verdict is). The judge will then call everyone—including the jury—back into the courtroom. Upon delivery of the verdict, the judge will then discharge the jury.

g) Confidentiality

After the trial has finished it is still important that you do not discuss your jury service in such a way that you disclose the identity of another juror or details of the jury discussions, or the particular case.

You cannot be asked to explain how you reached your verdict. You cannot reveal anything that was discussed during your deliberations.

Sometimes there will be an appeal, or there may be other matters to be dealt with related to the trial you have been involved in, and it is important that justice is not compromised by a juror discussing the trial.