

31 October 2024

**Courts System Policy**

Ministry of Justice

National Office

DX SX10088

Wellington

By Email: [courtspolicy@justice.govt.nz](mailto:courtspolicy@justice.govt.nz)

**To whom it may concern:**

**Re: Improving jury trials timeliness**

We write on behalf of New Zealand Asian Lawyers (NZAL) in response to the Ministry's proposal to improve jury trial timeliness. We respond below to the questions posed in the Ministry's discussion paper issued in September 2024.

**Part 1**

- 1. Do you think these are the right issues to be taken into account when considering changes to jury trials? Why/why not?**

We agree that the listed factors are the ones which should be taken into account.

- 2. Are any of them more important than others? Why / why not?**

We consider that the fair trial rights of defendants are the most important consideration, followed by the public trust and confidence in the integrity of the criminal justice system.

Court performance and timeliness can be seen as one aspect of defendants' fair trial rights (i.e., the right to be tried without undue delay).

It is not necessarily accepted that a jury trial (rather than a judge-alone trial) is inherently more stressful for complainants and witnesses. Most trials (judge-alone or jury) are held in open court and witnesses would often have to give evidence in front of strangers. Mechanisms already exist to mitigate the effect of this stress. The stress and bias (whether perceived or actual) by jurors can also be addressed by appropriate judicial directions to the jury. It is also our experience that judges frequently speak briefly to the complainant and witnesses to settle and reassure them.

The impact of prosecution agencies is a relevant consideration however it cannot be a primary consideration for the proposed changes. This is because it is ultimately a resource allocation issue as between the agencies.

- 3. Is there anything we may have missed?**

The increase of the jury trial threshold will have an impact on the ability for young lawyers to be trained by conducting jury trials with lower end offences so that they can be equipped with the skills to undertake more serious cases in due course.

In turn, this will have a longer-term impact on the availability and willingness of experienced counsel (both prosecution and defence) to work within the criminal justice system.

A related consideration is that the change in threshold will also likely have an impact on criminal legal aid resource allocations, as well as the training and qualification of younger lawyers through different PAL levels.

In respect of both issues raised above, the more significant the change to the jury trial threshold, the more significant negative effect the change is likely to have. A sharp increase the threshold will likely curtail the ability by young lawyers to conduct jury trials earlier in their career and training process.

**4. Do you think there are particular te Tiriti o Waitangi | Treaty of Waitangi implications to take into account when considering changes to jury trials? Why / why not?**

Te Tiriti is potentially relevant to every aspect of proposed law change in New Zealand. There are other organisations who are better equipped to address the Ministry on this specific issue.

## Part 2

**5. Do you agree there is a problem? Why / why not?**

It is not for this organisation to comment on whether more people electing jury trials is a 'problem' in and of itself. Thought should be given to why jury elections are more common, and efforts should be made at addressing the underlying issues.

For example, there is anecdotal evidence that defendants would elect jury trial so that the Crown would take over the prosecution. This is driven by a perception (rightly or wrongly) that the Crown is more willing than the Police Prosecution Service to engage in pragmatic resolution discussions and have greater regard to the Solicitor-General's Prosecution Guidelines. This reflects an under-investment in the resourcing, staffing and training of Police prosecutors.

The statistics around jury-trial delays often reflect the time it takes for a jury trial to proceed to trial due to lack of available courtrooms and trial judges. It is common for the parties to be given a trial date that is 12 months (or more) out from the case review hearing date. This does not mean that jury trials always give rise to more complex pre-trial issues or that they need a longer pre-trial period.

**6. Do you agree with how we have described the problem? Why / why not?**

See our answer to question 5.

**7. Do you think the threshold to elect a jury trial should be increased? Why / why not?**

We do not consider that an increase to the election threshold is necessarily warranted, as there may be other ways to address the underlying issue of why elections are increasing. If the threshold is to be raised, our view is that the three-year maximum is more appropriate so that it does not result in a significant impact on the rights of defendants to

a fair trial or to more severely curtail the ability of younger lawyers to be trained through conducting jury trials at a comparatively lower level of seriousness.

**8. If you do think it should be increased, at what level do you think it should be set: three years or more, five years or more, or seven years or more? Is there another way you think the right should be expressed?**

See our answer to question 7 above.

**9. Do you agree there is a problem? Why / why not?**

We agree based on anecdotal observations that the effect of an early election requirement is that counsel would have to sometimes advise their clients to make a jury election for the reasons outlined in the discussion paper.

We observe that the timing for the making of an election at the time of plea is too early. Often, counsel have not received or had the chance to either receive or review full disclosure (or at least a sufficient portion of the disclosure in order to give informed advice on this issue). Defendants may not have retained their choice of counsel at this stage yet. Changes in counsel leading up to the case review hearing stage is not uncommon. Counsel acting at an early stage (which can be a duty solicitor) will likely err on the side of caution.

For example, one reason to elect a judge-alone trial can be that the legal or evidential issue at trial is likely going to be novel, technical or complex, and/or that the defendant may wish for any decisions to be subject to a judgment setting out reasons (which will only be the case in a judge-alone trial). That assessment cannot be made readily in some cases without recourse to a substantial portion of the disclosure and careful consideration of the defence case theory which may involve the consultation of experts.

This is particularly the case for defendants who have a diverse cultural or linguistic background. They have a higher barrier in terms of communications with their counsel (whether private or assigned). They may not yet have had the benefit of a detailed meeting with their counsel in English yet due to the fact that a translator/interpreter speaking their first language is yet to be secured. Recent immigrants (or visitors) arriving in New Zealand from other countries may also lack a base level understanding of the New Zealand legal system and local connections. This also means it would take them longer to secure preferred representation and, when they do so, to be able to give instructions and receive legal advice in a language that they can fully comprehend.

**10. Do you agree with how we have described the problem? Why / why not?**

In addition to electing jury trial as a matter of default, electing trial by jury also has the effect of transferring the prosecution to the Crown solicitor's office. The case will remain with the Crown solicitor's office even if the election is changed to judge-alone at a later stage.

As we outlined above in answer to question 5, anecdotally defence counsel would also do so partially due to the perception that the Crown solicitor's office is more responsive and more reasonable to deal with than the Police prosecution services when it comes to either resolution or other evidential/legal decisions.

**11. Do you think the law should allow defendants to elect a jury trial later than they currently can? Why / why not?**

Yes, for the reasons we give above to question 9.

**12. Are there other considerations and factors you think are important that we may have missed, including any unintended consequences?**

Please refer to our answers above.

Dated this 31<sup>st</sup> of October 2024

A handwritten signature in blue ink, appearing to read 'Yvonne Mortimer-Wang'.

**Yvonne Mortimer-Wang**

Board member of NZAL, co-chair of the NZAL litigation committee