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INTRODUCTION, EVOLUTION AND EQUALITY?
A LEGAL HISTORY OF THE NEW ZEALAND JURY SYSTEM

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I INTRODUCTION

One of the most fundamental institutions of Commonwealth legal structures is the jury system. The most noticeable aspect of the system in New Zealand is the lack of controversy that the development of this institution has created. Indeed the history of New Zealand juries has been almost entirely overlooked.[1]

This can be explained in part by the fact that although the jury system was of great constitutional importance, it was and still is seen in practice as a rather mundane task. Moreover, it is suggested that the lack of controversy in the New Zealand jury system stems from its clear correlation with New Zealand's social development. The theory of any parliamentary democracy is of course that legislation should follow social trends. However, the New Zealand jury system has done this with unusual consistency. Indeed it was only at the end of the nineteenth century that the New Zealand jury system became connected with any controversy.

This paper attempts to give a brief outline of the historical evolution of the jury system in New Zealand. The enormous amount of information has been divided into four chronological sections in an attempt to make this historical evolution more accessible. The paper therefore begins with the importation of the jury system into New Zealand in the pre-colonial period. Next, it looks at the systems original formulation and later adaptation in the early colonial period. Thirdly, the period of growth and expediency until approximately 1890 is examined.

In the later years of New Zealand's jury system the most controversial issues centre on the continuing struggle for legal equality between the defendant and

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[1] Jim Cameron makes a brief study of some aspects of the system in John Robson ed *The British Commonwealth: The Development of its Laws and Constitution. Volume 4* (2 ed, Stevens and Sons, London, 1967) 93-98. [*The British Commonwealth*] As does Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (Brookers Ltd, Wellington, 1995)

the accused, interracially, and between the sexes. These three cases are reflected in the debate and reforms in the jury system. They constitute a period of reform and make up the last section of jury development. However, because of their detail, defiance of chronological treatment, and importance, they have been treated as separate case studies.

II HISTORICAL OUTLINE

The early history of New Zealand is intertwined with all early legislation in this country. Therefore a short overview of this history is necessary for an understanding of the historical importance of the development of its jury system. After its discovery by James Cook in 1769, New Zealand developed rapidly into a country that Britain clearly coveted for colonisation.[2] But it was not until the 1830's that Britain seriously took up the annexation of New Zealand as actionable. New Zealand Maori signed the Treaty of Waitangi in 1840 and New Zealand became a settled[3] territory attached to New South Wales.[4]

Unlike New South Wales however, New Zealand was coveted for civilian colonisation.[5] As a Crown colony it was to be self-supporting and self-governing and to this extent a rush of legislation including a jury ordinance was quickly imported in 1841 for the regulation of British civilians, settlers and traders. Initial jury legislation therefore needed rapid change to adapt to New

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[2] J M Owens "New Zealand before Annexation" in Geoffrey W Rice (ed) *Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1981) 28, 28-29. [*Oxford History*]

[3] There is still debate over whether New Zealand is settled or ceded. It has been suggested however that New Zealand courts would have been bound to recognize and apply Maori law has New Zealand been a ceded territory. No court has yet applied Maori law (as opposed to custom) in New Zealand. The British government certainly treated New Zealand as a settled colony in legislation (including jury legislation). Philip A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company, Sydney, 1992) 32-34. [*Constitutional and Admin Law*]

[4] In fact letters patent of 1839 had altered the boundaries of New South Wales (NSW) to include New Zealand and make it an appendage of the Australian colony. But the Colonial Office did not express its sovereignty over New Zealand until after the signing of the Treaty of Waitangi in 1840. *Constitutional and Admin Law* above n 3, 30.

[5] W J Gardner "A Colonial Economy" in *Oxford History* above n 2, 57, 58.

Zealand's specific circumstances, not least of which were the presence of another race. Finally these specific circumstances made it easier for government and legislature to reside in New Zealand and New Zealand was granted its own constitution in 1852.[6] This led the way for self-governance and eventually party politics.

III PRE COLONIAL PERIOD 1830-1840

The origins of the New Zealand jury system stem from the long history of this institution in England. It created the distinction between fact and substantive law and even though the use of civil juries declined in later years,[7] "[i]t was to become a constitutional principle sacred to generations of Englishmen that men should be judged by their peers."[8]

Given the importance placed on the jury system in England, it is not surprising that it was one of the first pieces of legislation exported to both New South Wales and New Zealand.[9] Although British nationals from New Zealand could be tried extraterritorially by jury in New South Wales from 1828,[10] there was no provision for jury trial in New Zealand until legislation was imported directly from Britain in 1841. However, both the New South Wales and the later New Zealand legislation were clearly based on the English Act of 1825.[11]

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[6] Raewyn Dalziel "The Politics of Settlement" in *Oxford History* above n 2, 87, 91-92.

[7] J H Baker *Introduction to English Legal History* (2 ed, Butterworths, London, 1979) 81. [*Introduction to Legal History*] The use of civil juries other than in defamation cases also seems to have all but disappeared in New Zealand.

[8] *Introduction to English Legal History* above n 7, 66.

[9] Provision for juries in New South Wales (NSW) was actually granted by an English act in 1828. An Act to Provide for the Administration of Justice in New South Wales and Van Dieman's Land 1828 (UK) 9 Geo IV c 83, s 8. But it was first established by NSW legislation by the Juries Act 1829 (NSW) 10 Geo IV No VIII. In New Zealand the provision was made in the Juries Ordinance 1841.

[10] An Act to Provide for the Administration of Justice in New South Wales and Van Dieman's Land 1828 (UK) 9 Geo IV c 83, s4 and 8.

[11] However, the New Zealand copy was in a far less verbose form than either the English or NSW legislation.

The jury legislation of New South Wales was operative as early as 1829.[12] However, New South Wales was created as a penal colony[13] and therefore major variations from the English processes of trial were apparent.[14] Indeed the colony had far more problems in accepting the need for trial by one's peers than did New Zealand. The New South Wales jury system was based, for convicts and civilians alike, on military control.[15] Indeed many of the administrators in New South Wales had an intense distrust of anything non-military.[16] The absence of the civil jury was a source of bitter dispute and agitation continued against both the New South Wales authorities[17] and the British government.[18] By 1840 however civil juries were the norm and military juries for civilians were no longer in operation.[19]

IV COLONIAL PERIOD 1840-1852

In contrast to New South Wales the New Zealand jury system was brought in with both expediency and a lack of controversy in 1841. Like New South Wales however, New Zealand adapted this legislation to fit its situation. In New South Wales this had meant an emphasis on military control. But in New Zealand the legislation was merely simplified to fit with the status of the country as a colony in its infancy. Thus the New Zealand version of the English Act from 1825 maintained the same substantial provisions but reduced the text considerably.[20]

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[12] Juries Act 1829 (NSW) 10 Geo IV No VIII.
[13] New South Wales Act 1787 (UK) 27 Geo IV, c 2, B and C 18.
[14] Alex Castles *An Australian Legal History.* (The Law Book Company, Sydney, 1993) 47. [*An Australian Legal History*]
[15] *An Australian Legal History* above n 14, 47
[16] *An Australian Legal History* above n 14, 204. In 1836 for example, Burton J. of the Supreme Court showed his distaste for civilian juries, at least where these might not consist of the "gentlemen" he considered were the only ones suited for jury service. He affirmed there was a want of confidence in juries on the part of civil inhabitants.
[17] *An Australian Legal History* above n 14, 53.
[18] *An Australian Legal History* above n 14, 54. Indeed even with the introduction of civil juries, military ones continued and civil juries were subject to much pressure and scrutiny. *An Australian Legal History* above n 14, 272.
[19] *An Australian Legal History* above n 14, 203.
[20] From the 16 pages of the English act to a mere page of text in a similar format in the New Zealand Ordinance.

A *Formulation of the New Zealand System*

The New Zealand ordinance covered briefly and succinctly the basic precepts of the English system. Qualification was by sex (male) and the property franchise[21], but men in official occupations were exempt.[22] Men of unsound mind[23] or unsuitable character were also exempt from service.[24] The men were to be ordered alphabetically and would appear in such order throughout the year until superseded by a new order from the next year's list.[25] Ballot was used early in New Zealand and 12 men were selected from 36.[26] There was also provision to make up the numbers with "good and lawful men of the bystanders".[27]

The verbosity of the English provisions was not imported to New Zealand, but it is clear that the importance of this institution was. Jury legislation was amongst the rush of ordinances in 1841 that were intended to provide the legislative basis for the infant colony. Similarly, even at this early stage in New Zealand's development, failure to appear for jury service without 'reasonable excuse" incurred the substantial penalty of 10 pounds. [28]

The great importance placed on the jury mechanism may seem disproportionate to the primitive development of the New Zealand judicial system at this stage. However, if the purpose of the jury system in New Zealand is further explored, this importance appears justified. The jury system, as has been shown, held a

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[21] The property franchise at this stage consisted of having for "his own use a freehold Estate in lands and tenements within the colony" which he resided in. Jury Ordinance 1841, s 1.
[22] Jury Ordinance 1841, s 1. These were members of the Legislative Council, governor appointees, judges, ministerial officers of the courts coroners, gaolers, constables officers of the navy and army on full pay, clergymen, priests, and ministers of religion, barristers and solicitors actually practising, physicians, surgeons and apothecaries, revenue officers pilots, masters of vessels employed in the service of the government.
[23] Jury Ordinance 1841, s 2.
[24] Jury Ordinance 1841, s 1 disqualified those convicted of treason, felony or perjury.
[25] Jury Ordinance 1841, s 2 alphabetical order and s.6 general order.
[26] Jury Ordinance 1841, ss 10-12. This is in contrast to New South Wales who used military placement for juries for many years after their early legislation.
[27] Jury Ordinance 1841, s 12.
[28] Jury Ordinance 1841, s 9.

place of great historical importance for the British. A jury was, and still is to a certain extent, seen as a characteristic of traditional "British liberties".[29] It is suggested therefore that some of the importance attached to this system stemmed from an attempt to ensure the New Zealand institutional structure maintained a British civilised countenance. Also, initially at least, the Colonial Office wanted to maintain a high level of control in Crown Colony government in these far off colonies.[30] As part of the process of ensuring social control, the jury system was an integral part of this control system and therefore its early introduction is less surprising.

1 Special Juries

The Special Jury was introduced early to the colony in 1844.[31] The initial legislation did not state what purpose the special jury would serve. However, from English practices it was clear that this institution was to judge issues of a more technical nature. [32] Later legislation would spell out that this institution would involve men of the "best condition" to judge issues that were out of the contemplation of "ordinary" men.[33] However, this legislation recognised the infancy of the colony and did not purport to give guidelines on how to distinguish men for the purposes of special jury selection. Indeed the range of people in New Zealand's population was large, and therefore distinctions between the merits of various occupations would have been extremely difficult.

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[29] *Introduction to English Legal History* above n 7, 416.

[30] A H McLintock *Crown Colony Government in New Zealand* (R E Owen, Government Printer, Wellington, 1958) 77.

[31] It is also interesting to note that the initial Ordinance had provision for its own repeal by 1843. Jury Ordinance 1841, s 15. This could further the proposition that the Colonial office felt a strong need to continue control of their new colony. By positing the need for continued repeal within the legislation, the colonial office could ensure their check on the colony was maintained. However, the 1841 Ordinance was not repealed until the Amending Ordinance of 1844. Similarly, the title of the 1844 Ordinance declared that this was for the "temporary" provision for juries. That this was meant to raise uncertainty over the continuation of the provision for juries is unlikely and could simply have been intended to ensure the same check as the provision in the 1841 ordinance may have had in mind.

[31] Jury Amendment Ordinance 1844, s 6. See also Supreme Court Rules 1844, rule 74

[32] This was certainly the purpose it came to serve, Jury Act 1898, s 3. See the section on special juries later in this paper.

[33] Jury Act 1868, s 14.

This, and provisions on grand juries, would become the subject of vigorous debate in later years as it seemed to many that the section made provision for matters of higher financial concern to be dealt with in a different manner than every day issues.[34]

2 *Grand Juries*

Unlike the special jury, the grand jury was not specifically introduced into legislation until 1868.[35] However, it is clear that it was in operation well before that time.[36] Early legislation shows recognition of the functions of the grand jury but a reluctance to introduce it. For example, the Supreme Court Ordinance of 1841 had provision for indictments to be brought before the court on behalf of the Attorney General or Crown Prosecutor "as if [they] had been presented by a grand jury."[37] However, this reluctance was quickly overcome and although there was no specific provision for the grand jury, the section usurping its role was omitted in 1844.[38] Therefore, its use was clearly envisaged[39] and it was certainly utilised during this time.[40]

B Adaptation to New Zealand Circumstances

1 *Adaptation of the Property Qualification*

After the initial transfer of British legislation to New Zealand, it quickly

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[34] "Joint Statutes Revision Committee: Juries Act Amendment Bill" Legislative Council (No3) 1898, 1, 1-4. [L C No3] This will be discussed at greater length later in the paper.
[35] Juries Act 1868, s 17.
[36] Memorandum of the Judges Assembled in Conference at Auckland, Respecting the Jury System [1861] AJHR D-2A. [Judge Memo AJHR] The judges involved in this memorandum note the lack of provision for guidelines for grand juries. See also *The British Commonwealth* above n 1, 95.
[37] Supreme Court Ordinance 1841, s 20.
[38] Supreme Court Ordinance 1844.
[39] This is Jim Cameron's assertion. *The British Commonwealth* above n 2, 95. However, the evidence from the inclusion and omission on the section concerning indictments certainly indicates that his assertion is right. Similarly, the commentary from the judges of 1861 shows that the grand jury was being used at least by the early 1860's.
[40] Judge Memo AJHR above n 36.

became clear that any reform of the legislation needed to take New Zealand's specific circumstances into account. This included not only the financial make up of the colony but also the demographics. Thus the next Ordinance in 1844 eliminated the property qualification for jury membership in recognition that land titles were not sufficiently advanced to warrant their use as a defining characteristic in legislation. Instead a qualification of "good fame and character" was inserted.[41]

Recognition that the native Maori of New Zealand significantly outnumbered the colonisers was also integrated in this legislation. The qualification section was extended to allow Maori in mixed juries if their "capability may be certified" for the trial of cases where the property or person of any Maori was affected.[42] By incorporating Maori into the jury system in this way, a degree of legal separatism began to emerge.[43] However, the very fact that Maori as an indigenous people were incorporated at all shows the respect they were granted by the British Government.[44]

2 *Early Maori and the Jury System*

There was dispute over whether Maori rights should be governed by the same legal system as Europeans.[45] In theory English law prevailed, but in practice it was recognised as impotent, not only because of the limited resources of enforcers but also because few Maori could comprehend or understand the English language and laws.[46] Therefore, even with the provision for mixed juries, it seems fair to propose that most Maori had little or no contact with this institution in its early stage.[47]

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[41] Jury Amendment Ordinance 1844, s 1.
[42] Jury Amendment Ordinance 1844, s 1.
[43] Indeed, Maori were placed in the same category as aliens for the purposes of jury formation, Jury Act 1868.
[44] M P K Sorrenson in *Oxford History* above n 2, 141, 142.
[45] M P K Sorrenson in *Oxford History* above n 2, 141, 149.
[46] M P K Sorrenson in *Oxford History* above n 2, 141, 149.
[47] Jury Amendment Ordinance 1844, s 1.

Indeed other legislation which was introduced in this period seems to lead to the conclusion that it was expected Maori would use the provision for a mixed jury very infrequently. In 1844 Governor FitzRoy introduced the Native Exemption Ordinance which stated that Maori were to be controlled by a combination of European and Maori law.[48] This worked well for Maori as it maintained their traditional hierarchy but many settlers were opposed to it as it seemed to be a token of appeasement to Maori.[49]

Further provision for cross-cultural offending was supplemented by the Resident Magistrates Courts Ordinance of 1846. This effectively gave the Resident Magistrate power over all criminal cases of a summary nature between two Maori.[50] The provisions also allowed for Resident Magistrates to deal with civil summary disputes between Maori and Pakeha.[51] In addition it recognised the intricacies of the British judicial system and to that end set up arbitration courts to settle civil disputes between Maori.[52] The Ordinance even allowed for Maori to arbitrate amongst themselves.[53] Given the contempt with which the British had treated other indigenous cultures, especially the aborigines of Australia, these inclusive provisions are remarkable in a colonial context.[54]

However, recognition of the complications of the European legal system seems to have been regarded as immaterial when there was a criminal dispute

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[48] The Native Exemption Ordinance 1844, s 3 required that Magistrates issue warrants through Maori chiefs, and allowed offenders to avoid sentence by paying compensation to the defendant; s 9. By using the chiefs as intermediaries, the magistrates could enforce law in a culturally acceptable manner. Similarly, using the process of compensation for retribution instead of incarceration or other deterrence practices was closer to Maori practices of utu and therefore also more acceptable to most Maori. See generally *Oxford History* above n 2 149.

[49] M P K Sorrenson in *Oxford History* above n 2, 141, 149.

[50] Resident Magistrates Court Ordinance 1846, ss 7-11.

[51] Resident Magistrates Court Ordinance 1846, ss 12-18.

[52] Resident Magistrates Court Ordinance 1846, s 19.

[53] Resident Magistrates Court Ordinance 1846, s 20. Only when the two Maori arbitrators failed to agree did the resident Magistrate intervene, s 22.

[54] M P K Sorrenson in *Oxford History* above n 2, 141, 142.

between Maori and European.[55] In these cases Maori were tried under European law using European mechanisms including the jury.[56] Therefore, while there was provision for Maori involvement as jurors at this early stage in New Zealand's legal history, it seems likely that Maori accused were intended to use the alternatives made available or to be tried by Europeans.

V GROWTH AND EXPEDIENCY 1852-1890

Even with its basis in England, New Zealand legislation had been successfully adapted to fit with the changing needs of a new colony. By the 1850's however, New Zealand had begun to develop increasingly rapidly. It became clear that continued control from England was impossible because of the delays and distance between the two countries. Therefore, with the 1852 Constitution Act, New Zealand became a self-governing colony. This had implications for all aspects of the New Zealand judicial system and the jury system was no exception.

With the birth of domestic government, local needs could be addressed more rapidly and precisely than previously. These needs included furthering the progression of colonisation quickly and efficiently. Moreover, the New Zealand population was rising rapidly and it clearly became necessary to increase the checks on New Zealand's new society. To this end, jury legislation attempted to incorporate both the need for more speed in trial proceedings and an increase in regulation.

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[55] There is no provision for this situation in the Resident Magistrates Court Ordinance 1846 and it must therefore be presumed that Maori were tried under the European system. This is certainly what the provision for Mixed juries in cases where Maori were involved would indicate, Jury Amendment Ordinance, s 1.

[56] However, the tone of these sections was entirely patriarchal. Therefore, it may have been that the Resident Magistrate could have utilised his powers over the natives and been given scope to intervene on their behalf.

A The Struggle for Increased Efficiency

The first action towards increasing efficiency in the jury system was reducing the numbers of jurors needed to try a case in less serious circumstances.[57] This came with the Supreme Court Amendment Act of 1862 which established Minor juries consisting of only six people.[58] The same procedure applied as for petty juries, the only difference being that the judge could decide whether to call twelve or six jurors.[59] A similar provision was established for special juries that reduced the number of jurors in civil cases to four.[60]

Similarly, the pressure on juries to deliver a verdict quickly began to increase. To this end an 1868 provision ensured that if the jury did not return a verdict within 12 hours they would be discharged, and a new trial ordered.[61] A potential mechanism to ensure jury efficiency was the discretionary provision of refreshment and heating. Castles notes that in Australia this was used as a tool to ensure a quick verdict from the jury or to turn around a dissenting vote.[62] However, there is no evidence that this provision was ever used for that purpose in New Zealand.

Any fears that judicial discretion controlled the verdicts of early juries are in fact probably unfounded because although a unanimous verdict was always

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[57] Supreme Court Amendment Act 1862, s 8. The classes of cases that could be tried by minor jury included mainly issues of fact and disputes of less than 100 pounds.

[58] Supreme Court Amendment Act 1862, s 7. This would and logically have been intended to reduce to amount of time the jury would spend in deliberations.

[59] Supreme Court Amendment Act 1862, s 13.

[60] Jury Amendment Act 1878, s 8. But unlike the provision for minor juries both the participants and the Supreme Court had to agree on the juries' reduction. An interesting but obviously essential provision within the four-member special jury was that this jury had to be unanimous. Jury Amendment Act 1878, s 12. This was in contrast with provisions since 1876 for other juries who could proceed with a three quarter majority. Juries Act 1876, s 7.

[61] Jury Act 1868, s 53. This provision for 12 hours was later replaced by "for such a period as the judge thinks reasonable not being less than four hours." Juries Act 1880, s 157. While the time taken to conduct a retrial would probably have been longer than simply waiting for the original verdict, the threat of discharge may have stirred some jurors to ensure a quick verdict. This seems to have been the intention of the legislation although how it worked is unclear. In fact it may have had a negative effect, as some jurors would have relished the idea of an early discharge.

[62] *An Australian Legal History* above n 14, 272.

preferred, the pressure to achieve unanimity was diminished in 1876 when provision for a three-quarter majority was introduced.[63] In itself the provision for a three quarter majority was another mechanism for speeding up the trial process as it ensured that verdicts could be passed with far less debate in chambers.

Lastly, a provision was introduced to allow juries to hear more than one issue at the same sitting. This had been standard practice in England for decades, at least in the eighteenth century, but was only introduced in New Zealand legislation in 1868.[64] In England this practice has been attributed to the lack of care and deliberation in the trial process.[65] However, a variety of factors point to the opposite reason for the introduction of the New Zealand provision. Unlike England, the practice in New Zealand was legislatively introduced along with a spate of provisions intended to speed up the trial process.[66] Indeed, the fact that it was in legislation at all seems to indicate that it was a deliberate attempt at efficiency rather than a practice merely stemming from any lack of care. Similarly, the New Zealand practice was subject to party approval[67] and was therefore more regulated than the English practice appears to have been.

B Increased Regulation

Another theme that characterised this period is the increased emphasis on regulation. Prior to the 1860's, jury legislation, as with New Zealand's legislation in general, was very simple and short. The judiciary noted this lack

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[63] Jury Amendment Act 1876, s 7. The three quarter majority was taken as a verdict if there had already been three hours of discussion, three quarters of the jury had intimated to the judge that they have agreed, and there seems no possibility of a unanimous verdict being reached.

[64] This began with the Juries Act 1868, s 38. As this practice had been around for some time in England it is feeble that it was in use in New Zealand earlier than 1868, however there are no records that indicate this.

[65] *Introduction to English Legal History* above n 7, 417.

[66] As has been previously noted.

[67] Juries Act 1868, s 38.

of detail as early as 1861.[68] However, a striking aspect of the jury legislation from the 1860's onwards is the increase in the number and length these of sections. Similarly, a great number of these sections were created specifically for the organisation of procedure.[69] Issues that would once have been left to the discretion of the sheriff were now the subjects of exacting regulations, including the shape and colour of the jury boxes![70]

The seriousness with which this legislation regarded the trial process is no doubt a reflection of the government's growing sophistication in this period. New Zealand was becoming less colonial and dependant on Britain. The existence of the parliamentary system meant that legislation was not only more relevant to the current New Zealand circumstances, but also that more attention could be paid to detail. The increased attention to detail made later statutes more lengthy and complex, but the overall format is clearer and consequently legislation became more accessible.[71]

Another characteristic of jury legislation in this period was the continual change in the criteria for exemption. Persons who were exempted initially were the same as those in the British legislation and were restricted to men in official occupations especially in government service.[72] During this period there was an increase in the importance given to these and other civil servants and the list of peoples exempt became very lengthy.[73] The increase in the legislative detail and

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[68] They complained of the lack of instruction over the forming of grand and special juries and also the apparent lack of consideration of the implications for jurors. This included concerns that the system of using alphabetical order in jury lists often meant that all the men of one household were called away for the same trial and therefore the effects on the household were increased. Judge Memo AJHR above n36. No doubt in response to these calls but also within its growing constitutional framework, the legislature noted for the first time the existence of the grand jury in legislation, Jury Amendment Act 1868, s 17.

[69] An interesting illustration of this is the consolidating legislation passed in 1868. Where previously legislation had noted the procedure by which juries could be selected, this act went as far as to note the exact procedure for setting up the selection process, Jury Act 1868, ss 9-16.

[70] Jury Act 1868, s 13.

[71] In the consolidating act of 1880 for example, there is a notable increase in structure and clarity within the statute and especially in the initial sections, Juries Act 1880.

[72] The Jury Ordinance 1841, s 1.

[73] Volunteer Act 1865, s 26 exempted volunteer firemen from jury service. While this was

enforcement of jury service with fines shows that the process was taken seriously. [74] However, this mass of exemptions illustrates that jury service was seen as a task and a duty rather than a right or privilege to preside over other citizens' fate.

C New Zealand - The Fastest Legislator in the West.

As New Zealand increased its sophistication, it also increased the volume of documents passed. Between 1840 and 1860 for example there were few recognisable statutes concerning juries. Yet between 1860 and 1880 there were at least thirteen.[75] This is of course due to the infancy of the colony in the early period. However, the new New Zealand government seemed to illustrate the tendency to pass generous amounts of legislation, which Sir Geoffrey Palmer attributes to the New Zealand government in general.[76]

This had specific implications for the jury system because it meant that many of the changes came in small parts rather than in a neatly consolidated statute. Indeed, many of the most far reaching reforms of this and other periods were passed into law through innocuous amendment and regulatory acts.[77] Notwithstanding any problems this creates for contemporary research, this piecemeal approach to the law of juries must have made it very difficult for citizens to gain access to the law.[78] Moreover, while it is clear that the concept of the jury was regarded as fundamental in theory, this practice raises questions

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partially repealed in 1866 in the Volunteer Amendment Act, s 3, the provision for exemption for active fire fighters remained and was affirmed in the Jury Amendment Act 1874, s 2. Similarly, all Railway workers earned an exemption in this period

[74] Fines were a part of the jury system from its conception, there being fines for non-appearance as early as the 1841 Ordinance, s 17.

[75] Refer Appendix 1

[76] Geoffrey Palmer *Unbridled Power* (2 ed, Oxford University Press, Auckland, 1987) 140.

[77] For example, the provision for reducing the number of jurors was passed in the Supreme Court Amendment Act 1862, s 7. Similarly, the devolution from a unanimous verdict to only a three quarter's majority was passed in an amending statute, Jury Amendment Act 1876, s 7, and the provision for Grand Juries was not passed until 1868 although they had clearly been operative for some time.

[78] This seems to have been a common thread throughout the legislative history of New Zealand. Indeed it could be argued to still exist today.

as to how much significance it was given in practice.[79]

VI THE STATUS QUO 1890-1940

In contrast to the exploration of new legislative avenues in previous periods, this next period was characterised by a noticeable lack of change.[80] Indeed, because of the technique of innocuous regulation and legislation on jury matters, the period between 1890 and the early 1900's could easily be overlooked. However, while there was little legislative change, the end of this period marks the beginnings of increasing debate over issues that would later become the subject of reform.

A Peremptory Challenge

One topic of debate that did result in legislative change in this period was the equal access to the challenge process. The right to challenge members of the jury to ensure that questionable persons are excluded from deciding the fate of the defendant has been and still is a principle at the heart of the New Zealand jury system. Similarly, the argument that this process is in fact used not to keep unqualified people off, but rather to ensure that people favourable to the challenger's case are selected has existed for many years.[81]

Prior to 1898, this judicial principle was extended only to defence counsel and the Crown had no right to challenge.[82] A bill proposing (amongst other things)

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[79] The fact that such a seemingly fundamental institution was amended by mere statute amendment acts for many years and with little or no debate certainly suggests its significance was more ideological than real. See Appendix 1.

[80] Change did occur of course, things were altered and added, but most of these were only minor aspects of the law such as increasing or decreasing the exemption qualifications and the issues of peremptory challenge.

[81] Note for example the quotations from judges in 1898 over the use of the peremptory challenge. LC No 3 above n 34, 1-4. Many Maori and women's commentators in later years also noted the efficiency of the challenge process in keeping these groups off juries. This is discussed at more length later in this paper.

[82] In fact, while many posited that the Crown had *no* right of challenge, counsel had a limited right to challenge for cause certain. Juries Act 1868, s.42 and Juries Act 1880, s 123.

that the numbers of challenges should be reduced and that the right itself should be extended to the Crown prompted debate both within parliamentary circles and in the judiciary.[83] Judicial debate virtually ignored this lack of equal access to the challenge process and centred instead on reducing numbers. [84] This judicial reaction suggests that the Crown's right to challenge was in fact never seriously threatened by legislation. The legislature noted that the provision for Crown counsel to ask jurors to stand aside equated to an equal if not better right to challenge than was held by defence counsel.[85] Therefore, while the bill did prompt the legislation of a right for the Crown to challenge, it is at least questionable whether this right was ever really inaccessible.[86]

VII THE EVOLUTION OF THE JURY SYSTEM - CONCLUSIONS

The jury system itself is a mechanism for social interaction and control within the judicial process. Thus the clearest explanation for the format of its development is its basis in social evolution. By following social patterns, the New Zealand jury legislation managed to keep abreast of current issues and this is perhaps the clearest explanation for the lack of controversy surrounding the institution.

However, jury system in the nineteenth century was particularly uncontroversial. This could have stemmed from the New Zealand government's practice of passing substantive issues through innocuous

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[83] LC No 3 above n 34, 1-4.

[84] LC No 3 above n 34, 1-4. Only one out of the five judges of the Supreme Court saw fit to mention the issue of Crown's challenge at all. Pennefather J notes that the dangers of politicisation within the jury system warrant the retention of the challenge process in its present form. He notes that the Crown should have the right to challenge for the same reason. It also unanimously concluded that the challenge mechanism was being abused as it was primarily used to get favourable people onto the jury. This debate proved to be fruitful and the numbers of challenges available was reduced from 12 to six, Juries Act Amendment Act 1898, s 11

[85] It was noted in the Parliamentary Debates that provision had already been made for the Crown to order jurors to stand aside in criminal cases. It was argued that provision to reduce the number of challenges available to defence council would therefore reduce the prisoner's rights even further, (19 October 1898) 105 NZPD 180.

[86] Juries Act Amendment Act 1898, s 10.

legislation. The lack of debate over juries could therefore have stemmed at least in part from a lack of accessibility to potential reforms. Conversely, it could be that there was little desire to reform jury law in this period as it was seen to be functioning well and those who were excluded from it were happy or ambivalent about this exclusion.

VIII SPECIAL TOPICS - THE STRUGGLE FOR EQUALITY

The reaction to jury legislation after the 1900's is neatly in opposition to the apparent apathy of the earlier period. This period was the basis for the reform of the system in a variety of areas. It is suggested that this period was brought about because the jury system no longer followed the development of society generally.

Educational qualifications were now the norm and no longer dictated occupational hierarchies to the extent of the nineteenth century. Therefore provision for grand and special juries had become outdated in the eyes of many. Similarly, Maori were becoming increasingly urbanised and assimilated into European institutions. Thus the provision for all-Maori juries was also seen by many as unnecessary. Lastly, women had held the right to vote since 1893 and yet were still excluded from jury service.

Therefore the 1900's brought a level of controversy to the development of the jury system that had never before been seen in New Zealand. It was based around three key topics but centred in the struggle for equality within the jury system.

A Grand Juries

There was continual debate over the use and particularly the membership of the grand and special juries. This indicates that there was dissatisfaction with the jury system's consistency with social development. However, any

dissatisfaction seems to have been forgotten or resolved over some periods as the institution remained for many decades. It is suggested that there remained a disparity between the system and social development. But that this was allowed to continue because of the desires and status of the "majority" upon which the judiciary held much sway, and later in the 1930's because the government took active steps to mould the institutions to the social conditions.

The same Bill that was concerned with peremptory challenge prompted debate about the desirability or otherwise of the grand and special juries. However, unlike the issue of peremptory challenge, this debate had arisen with just as much vigour in previous years.[87] Indeed one politician noted in 1883 that the issue of grand juries had been "raised over and over again as long as he could remember."[88]

The original purpose of the grand jury both in England and in New Zealand was to "search out local crime and to bring offenders before the court."[89] However, this purpose never had the same emphasis in New Zealand and was abandoned in 1893.[90] Instead, the purpose of the grand jury both in New Zealand and England became similar to the preliminary hearing process of today which decides whether there is a *prima facie* case to proceed with.[91]

It appears that a Supreme Court judge would describe a list of cases to the grand jury for their consideration.[92] If the grand jury returned a verdict of a true bill for a particular case it would then go immediately to the waiting petty

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[87] There is even note of the need to abolish it as early as 1870. (9 August 1870) 8 NZPD 376-378.

[88] (1 August 1883) 45 NZPD 245. Although there is little record apart from the brief mention in the 1870 Debates, of debate on the grand jury before 1883.

[89] *The British Commonwealth* above n 1, 95.

[90] Criminal Code Act 1893, s 385.

[91] (9 August 1870) 8 NZPD 377-378.

[92] There is no written record of how this institution functioned in practice, therefore anecdotal evidence from George Barton has formed the basis of this section. This was gathered in a personal conversation on the 19 August 1998. [Anecdotal evidence]

jury.[93] Each case would be considered and referred to the petty jury individually.[94] But by about the 1920's this referral was virtually automatic.[95] An interesting practice in the South Island was for the grand jury to present the judge with a pair of white gloves if there were no criminal cases to be considered.[96] Judges often used this opportunity to speak in general terms on law, order and morality or even the state of the nation.[97]

In 1883, a Private Member Bill was introduced by J A Tole. This included a measure to abolish the grand jury. The Bill generated an immense amount of support in the House of Representatives.[98]. However, it seems that the Legislative Council must have opposed this Bill because the grand jury remained until 1961.[99]

1 Parliamentary Debate

Mr Tole took particular note of the discrepancies in the selection process of the grand jury.[100] He claimed that the occupation distinctions on which it was based in England were not founded and almost farcical in New Zealand.[101] He also argued that the grand jury was merely checking the information of a Magistrate or Justice of the peace.[102] The very nature of the grand jury was that it was composed of people subject to the opinions and pressure of topical

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[93] Anecdotal evidence above n 92.
[94] Anecdotal evidence above n 92.
[95] Anecdotal evidence above n 92. Indeed, the function of the Grand Jury as a rubber stamp was recognized by enacting legislation that allowed judges to review depositions and judicial discretion to dismiss the indictment. Crimes Act 1954, s 42 (3), (4), (6).
[96] Anecdotal evidence above n 92.
[97] Anecdotal evidence above n 92.
[98] The Minister of Justice was opposed to the Bill but the other seven commentators approved and there is no record of any persuasive arguments for the retention of the grand jury in this year, (1 August 1870) 45 NZPD 242. Indeed, there is a reference to a first reading in the Legislative Council but no other record of debate on the Bill or the topic of Juries exists in this year. (1 August 1870) 45 NZPD 343.
[99] It was perhaps through luck rather than a loyal following that this institution remained at all because as the debates show there was little support for the Grand jury at least in 1883.
[100] Jury Act 1868, s 14 provided that men for the special and grand juries should be in general "men of the best character".
[101] (1 August 1870) 45 NZPD 242-243.
[102] (1 August 1870) 45 NZPD 243.

news. Therefore he argued this check was open to politicisation by protecting criminals of current political favour or condemning innocent men who had none.[103] He proposed New Zealand revert back to the system established in 1841 of a single signatory for indictments, and cited the successful use of this practice in Scotland and parts of Australia.[104] Importantly, it was noted that the District Court had been operating without grand juries for years and had instead been successfully using a Crown Solicitor.[105]

When the issue arose again in 1898, the parliamentary arguments against the grand jury were very similar.[106] However this time the division of opinion and the arguments for its retention were recorded. They noted that the function of the grand jury was to save innocent men from the indignity of a formal trial.[107] Similarly, it was argued that replacement of the grand jury with a single representative was far more open to corruption and politicisation.[108] It was also seen by some as a mechanism to allow citizens to express their own views of justice.[109]

2 Judicial Debate

In judicial debate opinions were also clearly divided. Arguments for the retention of grand juries were based in the fact that they did not cost a great deal, were serving their purpose with accuracy and reliability and that they performed a necessary function.[110] The possible politicisation of the indictment

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[103] (1 August 1870) 45 NZPD 243.
[104] (1 August 1870) 45 NZPD 243.
[105] (1 August 1870) 45 NZPD 244.
[106] (19 October 1898) 105 NZPD 179-188. Particularly arguments such as the redundancy of this institution in present conditions, the cost of maintaining it, overseas precedent and the fact that the District Court had been operating successfully without a grand jury system for many years.
[107] (19 October 1898) 105 NZPD 186. Some members saw this alone as so important that they thought it justified the retention of the institution by itself
[108] (19 October 1898) 105 NZPD 181 and 185; (8 July 1898) 101 NZPD 322.
[109] *The British Commonwealth* above n1, 96.
[110] LC No 3 above n 34, 1-4 per Prendergast CJ, Edwards J and Pennefather J.

procedure was again raised but this time with a comparison of overseas experiences.[111]

The arguments for abolition were again very similar to those already proposed and included concepts of increased cost and a lack of efficiency. However none of these arguments managed to sway the legislature. Even though the English grand jury was abolished in 1933, New Zealand maintained this institution until 1961.[112]

B Special Juries

After their introduction in 1844, special jury trials seem to have become widely accepted as a vital part of judicial practice.[113] They were largely unregulated, as there were no legislative guidelines on either personnel or the constitution of this institution, these being left to the discretion of the Supreme Court.[114] The judges of this court made note of the lack of precise provision for both grand and special juries in 1861.[115] But although both the special and grand jury personnel became regulated soon after by legislation in 1868,[116] there was not a limitation of the classes of cases to be considered by special juries until 1898.[117] Even after this provision there still remained a significant discretionary

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[111] LC No 3 above n 34, 4. Pennefather J notes that although it inevitable that innocent men will sometimes be "exposed to the indignity of a public trial" the institution of the grand jury reduces this evil by ensuring that there must be at least a *prima facie* case against the accused. He bases his arguments on his experiences in South Australia were there was no provision for grand juries.

[112] Administration of Justice (Miscellaneous Provisions) Act (UK) 1933, ss 1-3. However, while s 1 abolished grand juries outright, s 4 provided for their continuation in London and Middlesex certain circumstances. (See the first schedule to this Act.) Castles posits that the grand jury was abolished in South Australia as early as 1852 *An Australian Legal History* above n 14, 322. However, in NSW, the legislation is somewhat ambiguous as to whether grand juries were replaced by a commissioner or in fact continued. Jury Laws Consolidation Act 1851 (NSW) 15 Vic No3, ss 9-11. The New Zealand grand jury was abolished by the Crimes Act 1961, s 345.

[113] This conclusion can be derived from the wide amount of support for this institution in Parliamentary debates in later years.

[114] Jury Amendment Ordinance 1844, s 6.

[115] Judge Memo AJHR above n 3.

[116] Jury Act 1868, grand juries, s 17, special juries, s 14.

[117] Juries Act 1898, s 3.

judicial power as the section required either consent from all the parties or the opinion of the judge.[118]

As there was little legislative stipulation of the purpose of this institution and little record of its use, it is difficult to assess how it actually worked in practice. However, some assumptions can be made. It seems clear that it was based on the principle that like persons should be treated alike.[119] However this was prefaced by the condition that a "like" person should be restricted to one of the "best condition".[120] This prerequisite ensured that the cases dealt with by special juries contained matters (or at least people) which were of some financial importance.

The function of the special jury was to establish which material facts had been proved. While this appeared to be the same function as the petty jury, the premise of the distinction seems to be that mercantile and business facts needed to be considered in a different manner to those of common disputes.[121] Indeed, the rarity of special juries in criminal cases seems to reinforce the presumption that it was the mercantile nature of proceedings that warranted special treatment.[122]

1 Parliamentary Debate

Before the legislation in 1898, the same debate that was raised for grand juries was raised over whether the special jury should even continue to exist. One of the biggest criticisms of the special jury as of the grand jury was that it was based on the false premise that its members were of a higher class and

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[118] Juries Act 1898, s 3.
[119] (8 July 1898) 101 NZPD 317.
[120] Jury Act 1868, s 14.
[121] Because the issues involved were "complicated and technical questions..." JE Denniston, L C No3 above n 34, 3.

intelligence.[123] It seems clear that in New Zealand however, members of the special jury list did not have any significantly greater intelligence than members of the common jury.[124] Moreover, it was argued that unlike Britain, where this system originated, New Zealand did not have an existing class system that included an educated leisure class.[125] Indeed it was argued that there was no class system on which to make a true distinction.[126]

It was accepted that the special jury could provide a panel of experts well equipped to deal with the intricacies of mercantile cases.[127] However, the fact remained that jurors were selected not because of any expertise on the issue to be tried, but firstly by their standing in the community and then secondly by lot. This form of selection ensured that in fact, the jury was not certain to contain any person with expertise in the required area.[128]

2 Judicial Debate

Members of the judiciary were perhaps the strongest advocates for the continuation of the special jury.[129] This is not surprising because they were of the "class" which was defined as essential for special and grand jury membership. It may be that part of the reason for this support derived from an effort to maintain this social standing.[130]

Within the judiciary however, there was a distinction made between the use of the special jury in civil and criminal cases. In the latter, there was a general consensus that the abolition of the special jury would be of no significant

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[122] L C No3 above n 34, 2 per Edward Connoly CJ.
[123] (8 July 1898) 101 NZPD 317.
[124] (1 August 1883) 45 NZPD 242. Indeed it was noted that eighty percent of the New Zealand population could read or write which certainly needed a "considerable amount of intelligence..." (7 July 1898) 101 NZPD 317.
[125] (1 August 1883) 45 NZPD 242.
[126] (1 August 1883) 45 NZPD 242.
[127] (8 July 1898) 101 NZPD 320.
[128] (8 July 1898) 101 NZPD 317.
[129] LC No 3 above n34, 1-4.

matter because it was used so rarely.[131] In the former however, the need to maintain the special jury was unanimously accepted.[132] It was posited that this "class" of jury was well informed, well educated and therefore in a "better position to understand complicated and technical questions and to appreciate the legal principles to be applied to them."[133] Judges regarded arguments that wealthy suitors gained an advantage from the special jury as unfounded because both parties would get the benefit of the better tribunal.[134] These arguments seem to have won out at this time because the 1898 bill was altered to provide for regulation of the special jury rather than its abolition.[135]

Recognition of New Zealand's social conditions was eventually made in the 1930's and the membership requirements were changed to take account of the lack of occupational hierarchy in New Zealand.[136] Once these were gone, debate stopped and both the special and grand juries declined into disuse fairly rapidly. They were eventually abolished in 1961 and 1981 respectively, with little debate.[137]

C Maori Juries

Provision for Maori involvement in the jury trial process was made very early on in New Zealand's history.[138] However it was soon realised that differences in language and culture warranted a separate provision and all-Maori juries

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[130] However this is merely speculation.
[131] LC No3 above n 34, 1-4. Although Prendergast CJ is an exception in this regard. He is of the opinion that the law could not be adequately altered in the case of criminal trials to warrant the abolition of the special jury. While the other four judges do not comment on the effectiveness or otherwise of the special jury in criminal cases they do not oppose its abolition because, as stated, it was used very rarely.
[132] LC No3 above n 34, 1-4.
[133] LC No3 above n 34, 2 per Denniston J.
[134] LC No 3 above n 34, 2 per Denniston J.
[135] Juries Act 1898, s 3.
[136] The Qualification Provisions were changed a number of times but the most significant changes were in 1936 and 1939. Statutes Amendment Act 1936, s 40(4); Statutes Amendment Act 1939, s 37.
[137] Crimes Act 1961, s 345 (grand juries) Juries Act 1981, s 4 (special juries) This section repealed special juries by the lack of their inclusion in this consolidating legislation.
[138] Jury Amendment Ordinance 1844, s 1.

were introduced. The provision for all-Maori juries remained uncontroversial from its conception in 1862 until the beginning of its demise in 1961. It is arguable that the provision had been inconsistent with social development and public opinion for many years and once it became a topic of debate its eradication was virtually guaranteed.[139]

The Juries Amendment Ordinance of 1844 made provision for Maori to serve on mixed juries for trials in which the property or person of another Maori was involved.[140] This provision was formed in the same way as provisions for Europeans, and Maori still had to fulfil the good character qualifications to be eligible to sit on the jury.[141] There is little record of this period and therefore it is unknown if this section was utilised in practice. Moreover, because of the language barrier it is more likely that Maori made use of the arbitration process set up under the Resident Magistrates Ordinance as this had provision for Maori to adjudicate over Maori.[142]

There is likewise no record of Maori opinions on the operation of this provision but it was to be short lived in any case. In 1862 the law was changed again to include a provision for an all-Maori jury and the limitation of the mixed jury.[143] This was against the wishes of the judiciary who advocated mixed juries only.[144] In civil cases this section maintained the provision for mixed juries upon the inclusion and request of a Maori party.[145] It also added a provision in both civil and criminal cases for an all-Maori jury where both parties were Maori.[146]

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[139] (28 September 1961) 328 NZPD 2573.
[140] Jury Amendment Ordinance 1844, s 1.
[141] Jury Amendment Ordinance 1844, s 1.
[142] Resident Magistrates Court Ordinance 1846. See the section on *Early Maori* in this paper for further discussion on this provision.
[143] Jury Law Amendment Act 1862, ss 8-12.
[144] Judge Memo AJHR above n 36, The judges of the Supreme Court proposed that "natives" should have the option to elect trial by mixed jury which they recommended be made up of six Europeans and six Maori with a right of challenge of three peoples from each race.
[145] Jury Law Amendment Act 1862, s 11.

However if there was a criminal offence between a Maori and a European (notwithstanding who was the victim and who was the offender,) there was no Maori provision and the case would be tried before a European jury. Similarly, where there was a European involved, the Maori party had to *request* a mixed jury in civil cases.[147] Contrary to the 1844 provision therefore, there was little provision for any Maori to appear in the jury where there was a European involved.

Although the implications of this piece of legislation were far reaching, there was no debate on the matter and the Act passed into law quietly.[148] This new "right" to an all-Maori jury was undoubtedly an important one and was of great concern to Maori as later opposition to its repeal would show. However, Jim Cameron proposes that the removal of the right to a mixed jury was more of a disadvantage than the addition of access to an all-Maori jury.[149]

This stems from the fact that in practice the all-Maori jury was hardly ever used. Initially, this may have been because of the geographically isolated position of many Maori.[150] However, the rapid urbanisation and integration of later years did little to increase the use of this institution.[151] Moreover, in cases where it would seem logical to grant the use of the all-Maori jury it was deemed to be unavailable.[152] The availability of the all-Maori jury was therefore precarious at best and was very infrequently used during its time in statute.[153]

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[146] Jury Law Amendment Act 1862, s 9.
[147] Jury Law Amendment Act 1862, s 11.
[148] At least there is no recoverable evidence of any controversy and there are certainly no Parliamentary Debates on the subject.
[149] *The British Commonwealth* above n 1, 94.
[150] Michael King "Between Two Worlds" in *Oxford History* above n 2, 285, 290.
[151] This could in fact have stemmed form the ideology of integration itself as Maori avoided Maori institutions in favour of Pakeha alternatives. See generally, Michael King "Between Two Worlds" in *Oxford History* above n 2, 285, 294-298.
[152] *R v Paku* [1910] 12 GLR 548. The judge in this case states that the dispute was not one between two Maori as within the definition of the section. However, as this case concerned an action under the Tohunga Suppression Act 1908, the very nature of the offence included two Maori parties.
[153] A reference is made in the Parliamentary Debates that "for some years way back it [the all Maori jury] had been used about once a year." (13 July 1961) 326 NZPD 500. While this is still an almost insignificant usage, it is in fact more than I had expected. Unfortunately there

The possibility of a sympathetic Maori vote in the jury may therefore have been more advantageous to many Maori in the long run, but the legislation took away that possibility in criminal cases.[154] Jim Cameron notes that while this may have been a disadvantage for Maori there is no proof that it caused any injustice as there was no protest on the part of Maori for the century that this provision was active.[155] The lack of recorded protest by Maori, certainly in later times, may well justify this assertion.[156]

1 Initial Debate - 1961

Unlike the debate surrounding special, grand, and women's juries, a gradual build up of dissatisfaction did not surround the provision for Maori juries. It would seem fair to propose therefore that in the 1960's the majority of society did not yet support its repeal or at least were apathetic towards the issue. However, when the debate did surface it was continuously noted that this provision had been out of date for some time. The debate was therefore clearly prompted by something other than a growing disparity between legislative and social norms although it is clear that its eventual repeal was due to the latter.

Peter Williams claims that what prompted this debate was the controversial case of *R v Rau*.[157] The fact that the timing of this case and the beginning of debate over the Maori provision coincide so closely probably justifies his

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are no records as to the correct usage statistics for the all Maori jury and it is perhaps better to just leave it at the commonly accepted fact that, certainly in later years, it was used very infrequently at best.

[154] Peter Williams has commented that his gut reaction is that Maori were more objective in considering Maori cases. Personal Correspondence 22 July 1998.

[155] *The British Commonwealth* above n 1, 94. Indeed, there is current concern that Maori are underrepresented in the jury system. New Zealand Law Commission *Juries in Criminal Trials: NZLC PP 32* (Part 1, Wellington, 1998) 62-79. [*Juries in Criminal Trials*]

[156] However it is doubtful whether Maori complaints from the general public would have been recorded in official records which are primary source for this period. Moreover, it should be noted that any lack of protest might have stemmed from a general feeling of disenfranchisement within Maori society.

position. [158] Indeed, the case was specifically mentioned in the Parliamentary debates at this time.[159] However, it is likely that it was not the *Rau* case itself that prompted debate but rather that *a* case involving a Maori jury occurred. Because once the debate was triggered, it became clear that many people saw the repeal of this provision as long overdue.[160]

The first Parliamentary proposal for the alteration of the Maori jury provision came in July of 1961.[161] This was initiated by the then Attorney General J R Hanan and sparked a series of debates during 1961 and 1962. At this early stage Hanan compared the section to practices in South Africa and Alabama at the time and concluded that the continuation of a separate section for Maori was "racial discrimination in its vilest form."[162]

Later in 1961 the issue was raised again when the Juries Amendment Bill was brought before the house. The importance of this Bill was shown by the fact that the members held a full debate although the Bill was only in its first reading.[163] It was proposed that the section allowing for an all Maori jury be completely abolished. Instead jury membership would be decided regardless of ethnicity, the only new qualification being that members were "New Zealanders".[164]

It seemed to be generally presumed that this legislation would be passed as dates were already proposed for the beginning of this "equal" provision.[165]

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[157] Peter Williams *A Passion for Justice* (Sheal Bay Press, Christchurch, 1997) 91.
[158] Debates began in July of 1961 and the case was heard on 27 June 1961. The court at first instance found Roy Rau guilty of murder. On appeal, the court quashed the conviction and ordered a retrial. *R v Rau* (16 August 1961) unreported, Court of Appeal, CA 46/61. The controversy centred on the verdict of not guilty which the all-Maori jury returned in this second trial. (No citation is available for the two trial hearings of this case.)
[159] (20 November 1962) 332 NZPD 2763-2764.
[160] (28 September 1961) 328 NZPD 2573.
[161] (13 July 1961) 326 NZPD 500.
[162] (13 July 1961) 326 NZPD 501. These comments clearly stem from the focus on integration policy at this time.
[163] (28 September 1961) 328 NZPD 2570.
[164] (28 September 1961) 328 NZPD 2572.
[165] (28 September 1961) 328 NZPD 2572. It was noted that all (male) New Zealanders would

However, some members did question whether there had been adequate consultation with Maori in this matter.[166] In response to these queries both the Attorney General and the member for Southern Maori assured the house that most Maori were supportive of the move to remove this "discriminatory" provision and replace it with full integration.[167] Indeed when questioned as to whether any section of the Maori people opposed the proposal, the Honourable Sir Eruera Tirikatene implied that there were none.[168] The House generally accepted this assurance.[169]

2 *Arguments against Integration*

Maori opinion would however become a dividing issue on this topic. Later in 1961 and certainly in 1962 it became clear that this consultation had not been as thorough and universal as the ministers had made out.[170] Advocates of the Bill cited the approval of the Maori Council as indicative of Maori approval generally.[171] But opponents, chiefly the Maori MPs, [172] noted that the Maori Council was not wholly representative of Maori opinion.[173]

An argument, which has implications for New Zealand's current system, is that the provision for an all-Maori jury may help to even out the disproportionate numbers of Maori inmates in prison.[174] It was argued that the statistics showed

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be equally liable to serve on juries from the first of December 1962. Until that time that provision was made for Maori to volunteer their names onto the jury lists, as was the case for women. The problems with this provision are considered further in the discussion on Women jurors.

[166] (28 September 1961) 328 NZPD 2571-2572.

[167] (28 September 1961) 328 NZPD 2571.

[168] (28 September 1961) 328 NZPD 2572. In fact the member for Southern Maori stated that he had "never met any" Maori who were opposed to the proposal to abolish Maori juries.

[169] (28 September 1961) 328 NZPD 2574.

[170] (20 November 1962) 332 NZPD 2753 and 2760.

[171] See for example, (11 October 1962) 332 NZPD 2009 and 2012; (20 November 1962) 332 NZPD 2756.

[172] Indeed, contrary to his earlier position, Eruera Tirikatene was one of the leading advocates against the imminent introduction of the Bill, (20 November 1962) 332 NZPD 2762-2765. Mrs Ranata also advocated that not all Maori agreed to the Bill, (20 November 1962) 332 NZPD 2760.

[173] (11 October 1962) 332 NZPD 2010.

[174] There is continuing concern about the number of Maori offenders in New Zealand. Many

that Maori were imprisoned at a far higher rate than non-Maori and that the provision for all Maori juries should be used to reverse this trend.[175] This is a feasible argument given the success of current bi-cultural justice initiatives, but the fact remains that the provision had failed to have any impact on numbers of Maori offenders during its long existence.[176]

Lastly, a final argument against the abolition of all Maori juries and integration of Maori generally in the jury system revolved around the challenge mechanism. It was noted that it was very unlikely for any Maori to get onto a jury considering matters between Maori and European.[177] This was certainly a concern for Maori especially in criminal cases where personal liberty was at stake. It was feared that Maori would be inadequately represented within the jury system through this process of challenge and the lack of any separate Maori provision. These assertions were quite probably correct at the time and there is concern that they remain today.[178]

3 Arguments for Integration

While the key division was between Maori MPs and the government, there were still many arguments over the general implications of the Bill. Not least of these was the continued assertion that having any kind of separate provision based on race was discriminatory.[179] It was argued that the legislation implied

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commentators have noted the possibility of utilising tribal hierarchies to try and alleviate this problem. New Zealand Courts Consultative Committee *Report of the Courts Consultative Committee on He Whaipaanga Hou* (Wellington, 1991) 13-18 and 49-51 Indeed, forms of Marae based justice are in operation currently. Using an all Maori jury in certain cases may still be a viable option in reducing the numbers of Maori offenders as its emphasis on Tangatawhenua and Maoritanga may prove to be more respected and therefore more suitable.

[175] (11 October 1962) 332 NZPD 2013.

[176] It should be remembered however that the Maori provisions were used very infrequently. With the increased awareness that Maori are underrepresented within the jury, the introduction of similar provisions today may have a more positive effect.

[177] (20 November 1962) 332 NZPD 2754.

[178] "Call for more Maori jurors when Maoris are on trial" *The Dominion,* 18 July 1998, 2.

[179] There was discussion at this point about New Zealand's obligations to the United Nations, which at this point advocated that there should be no differentiation based on race notwithstanding its objectives. (20 November 1962) 332 NZPD 2757.

the incompetence of Maori to try cases.[180] Similarly, it created arguments that Maori did not trust the competence of European juries.[181] The presence of Maori on local councils and in Parliament was advocated as proof of Maori competency[182] and education statistics clearly showed equal achievement. [183] It was therefore argued there was no reason for the discrimination.

Members of the Opposition quite rightly took issue with this last justification because while the government was advocating equality at all costs in this debate, it had not followed a similar line in regards to women and special juries.[184] Indeed, the government did not pass legislation that placed women on a completely equal footing with men until 1976.[185]

While it was probably not instrumental to decisions in either opposition or affirmation of the Bill, interesting commentary was made about the implications of the definition of Maori in the principle act.[186] This noted that the actual formulation of the section meant that it only applied to Maori between half and full blood.[187] Due to the evolution of the Maori race, that definition of Maori applied to very few. Therefore, while the arguments raged about the injustice and discrimination that the section had created in reality most Maori were liable to serve on common juries and had been for many years.[188] The real problem was that the Police had assumed that Maori were disqualified by the legislation and had never included Maori when compiling

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[180] (20 November 1962) 332 NZPD 2749.
[181] (20 November 1962) 332 NZPD 2757.
[182] (20 November 1962) 332 NZPD 2757.
[183] (20 November 1962) 332 NZPD 2759-2760.
[184] (20 November 1962) 332 NZPD 2754-2755.
[185] Juries Amendment Act 1976, s 2(3)
[186] This was probably not instrumental in the debate because it did not really serve to advocate or oppose the abolition of the all-Maori jury provision. Advocates of the Bill could hardly point to the existing legislation as entirely discriminatory as this section showed that it was not (although they continued to do so). But opponents of the Bill would also have been reluctant to use this definition, as it would have meant that very few Maori would be entitled to use the all Maori jury. Rather, this point just seems to have been raised to show that the legislation had become outdated.
[187] Jury Act 1908, s 2. See also, (20 November 1962) 332 NZPD 2751.

jury lists.[189] This undoubtedly served to show that the legislation had become out-dated, as the original intention was to keep Maori and European jury membership separate.

However, division was not over the general intention of the Bill but rather the timing. Most opponents felt that Maori were not yet ready for complete integration within the legal system.[190] In recognition of this, it was proposed that if the Bill was passed at that session, the section abolishing all Maori juries would not come into force until December 1964.[191] This would give Maori time to show their opinion in the next election. This must have eventually been accepted as the best option as the Bill was finally passed in this form.[192]

D The Woman's Question

Agitation over including women in the jury system had begun as far back as 1896.[193] But the first movement towards sexual equality in the New Zealand Jury system was not until 1942 with the Women Jurors Act. This provision made little impact on numbers of women in the jury system as most women did not volunteer to join. However, the response to the 1942 legislation was not entirely due to apathy and many people were still concerned that the jury system was inconsistent with the social development of women generally.

The length of the agitation for the inclusion of women in juries seems to indicate that while the issue was topical for a large group of New Zealanders, it was not inconsistent with the ideals of the social majority until the 1960's. However, it must be remembered that at this time the "social majority" in New Zealand was male. Notwithstanding these concerns, pressure for sexual

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[188] (20 November 1962) 332 NZPD 2751.
[189] (20 November 1962) 332 NZPD 2751.
[190] (20 November 1962) 332 NZPD 2760 and 2762-2765.
[191] (11 October 1962) 332 NZPD 2013.
[192] Juries Amendment Act 1962, ss 1-2.

equality became more acceptable and women were increasingly included in the jury system after the 1960's.

1 1942 Legislation

This first act purported to grant any woman between the ages of 25 and 60 years the same rights and duties of jury service "as if she were a man".[194] However, there was a proviso that held that a woman was only placed on the jury list if she "notifies the Sheriff in writing that she desires to serve as a juror".[195] That difference was substantial enough to incur condemnation from the National Council of Women of New Zealand as discriminatory[196] and to be at least partly to blame for the exponentially unequal numbers of women and men on the jury.[197]

Even with this large restriction on female entry into the jury system, there was little support for the Bill in its early stages.[198] Perceptions of women as emotional, domesticated and therefore clearly unsuitable for the constitutional role of juror were evident in early parliamentary debates[199] and public opinion around this period.[200]

However, even advocates of the Bill were influenced by these concepts of

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[193] New Zealand National Council of Women (NZNCW) resolutions 1896.
[194] Women Jurors Act 1942, s 2.
[195] Women Jurors Act 1942, s 2.
[196] NZNCW resolutions 1943.
[197] "A new deal for those ladies of the jury." *Auckland Star*, 17 November 1976, 32 ["A new deal for those ladies of the jury"]
[198] (8 May 1942) 261 NZPD 307. In fact it was only after the Prime Minister took up the Bill as a government paper that it was even granted a reading.
[199] (8 May 1942) 261 NZPD 307. Note for example the comment from Mr Lee who responded to comments about the perception of women as governed by the heart and not the head with "There is something to be said for that."
[200] An article at the time notes the opposition in England with comments from solicitors about the "sickly sentimentality" of women and their tendency to be "too emotional, too nervous". "Where are all the Women Jurors?" *The Evening Post*, 9 January 1948, 10. [Where are all the Women Jurors?] In New Zealand a amusing example of this preconception of women appears in an advertisement for Parisian Ties which runs "The woman juror shook her head, He can't be guilty, so she said; He has such innocent blue eyes, And wears such smart Parisian Ties!"

female frailty. In her introductory speech for example, Mrs Weaver notes that the Bill was not the product of "the popular call of feministic equality" but rather stemmed from the need educate women about the "sins and sufferings of their own world".[201] However, she does substantiate her argument with the submission that England had provisions for women in the jury as early as 1919.[202] Mrs Weaver concludes by noting that "women of New Zealand in their thousands are behind the Bill."[203]

It is clear that women's organisations supported the advancement of women into the jury service.[204] However, Mrs Weavers' assertion that thousands of women support the Act seems difficult to substantiate after looking at the statistics. After the Act was passed, only about 25 names of the 8000 on the jury list in 1943 were of women.[205] In this case however, the formulation of the Act had as much to do with the lack of female representation on the jury as did female apathy.

The Act required women to physically go to the Sheriff and *request* to be placed on the list. Some commentators posited that this in itself was a humiliating experience and stopped many women from actively going forward.[206] This formulation also ensured that only women who were aware, interested *and* able to get time off from work or family commitments could

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[201] (8 May 1942) 261 NZPD 307. To this end she also notes "the knowledge of evil need not make any one perverse in character or ideals, but rather should inspire one with a longing to help the fallen and to protect the innocent."

[202] Sex Disqualification (Removal) Act 1919, s 1(b). However, this act still maintained effective exclusion of women as instead of surreptitiously excluding women from the outset, it included everyone and then provided for exemption of women through judicial discretion.

[203] (8 May 1942) 261 NZPD 309.

[204] NZNCW resolutions.

[205] These statistics are from an article entitled "First Woman Juror" and is part of a collection of articles on women jurors held by Jan Jordon. Unfortunately, I have been unable to determine the origin of the article. However, other statistics from later papers have a similarly disproportionate number of male jurors within the system. "A new deal for those ladies of the jury" above n 197, 32.

[206] "Where are all the Women Jurors?" above n 200, 10.

even get to the jury list stage.[207] Little wonder then, that women were not rushing to fill the jury books with requests for admittance.[208]

A further restriction was placed on women's attempts to gain juror status in the form of the peremptory challenge.[209] The right of challenge to women was the same as for men[210] but it is clear that it was used far more regularly and indiscriminately with regards to women.[211] The Hon Mabel Howard noted this problem and questioned the appropriateness of the unofficial eradication of women from the juries.[212] Newspapers also noted the rarity of an unchallenged woman.[213] This seems to indicate the wide recognition that the challenge process was used to discriminate against women. It appears that in fact only three women passed the barriers of having to volunteer and proceed unchallenged into the jury between 1943 and 1960.[214]

This legislation therefore failed to quell the repeated calls for more equality in all public institutions. For example the NZNCW initiated a constant bombardment of requests for legislative change to Ministers[215] and the

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[207] The Wellington Professional Business Women's Club also noted the difficulty women had in getting out of work commitments to attend jury sittings. "Employers do not look favourably on women who volunteer for duty and are thus absent form their office where they perform such essential duties." "Where are all the Women Jurors?" above n200, 10. Also note that commentary about the first woman juror, Elaine Kingsford, mentioned she too was having difficulty in getting out of work commitments to attend the session. "Woman Juror" *Auckland Star,* 15 October 1943, 5.

[208] It is interesting to speculate whether the jury system would have existed had men been required to *apply* for the often-irksome task of service.

[209] This problem does not seem to have been restricted to New Zealand however, with similar complaints being fielded in Britain. ""Where are all the Women Jurors?" above n 200, 10.

[210] Juries Act 1908, s 115-126.

[211] "Police check on early woman juror" *North Shore Section, The Herald* 5 August 1976, 6. Elaine Kingsford notes how disconcerting the practice of continual challenge was. Film Weekly Review 115 (1943)

[212] (20 September 1961) 328 NZPD 2843.

[213] "Jury Woman Sworn in Challenged When Called" *Auckland Star* 19 October 1943, 4; "Woman Juror is Unchallenged!" *Auckland Star* 5 May 1960, 1.

[214] The Hon Mabel Howard posits that women had only been allowed to serve on juries on 2 occasions. (20 September 1961) 328 NZPD 2843. But the newspaper reports note that at least 3 women made it onto the jury stand in this period.

[215] NZNCW resolution passed in meetings in 1945 to recommend to the Minister that women be called to service on juries in the same manner as men. Reaffirmed in 1946, 1947, 1948, 1953, 1954, 1956, and 1958.

Secretary for Justice, under the mandate of approximately 133, 000 women.[216] They similarly urged members and women in general to overcome their fears and inhibitions and volunteer in large numbers for jury service.[217] Despite all this however, women still seemed to feel restricted by the legislation and the social pressures against them and failed to volunteer in the numbers that would have made a noticeable difference to jury list ratios.[218] Indeed, there were so few women appearing on juries that the press and court officials declared the first woman juror to be three different women over a period of 17 years.[219]

2 *Continued Debate in the 1960's*

The agitation did make an impact however, and Parliament again debated the issue at length in the 1960's. As had happened in 1942, there were contrasting opinions on the propriety of women in the public service.[220] Opposition was still based on the flawed assumptions that women were unwilling to be on juries, and that they were prevented from jury service in any case because of occupations as mothers and housewives. This time however, the promoters of women jurors advocated equality and the break down of incorrect presumptions about women rather than a patriarchal justification of women's involvement in a male dominated system.[221]

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[216] NZNCW resolution 1954.
[217] NZNCW resolution 1952.
[218] For example even by 1948 there were only 11 women jurors on the Wellington list. "Where are all the women jurors?" above n 200, 10.
[219] Mrs Elaine Robinson was clearly the first woman juror, gaining a seat in 1943. However, in 1948 Mrs Lettie Allen of Wellington was announced as the first woman juror. "Where are all the women jurors?" above n 200, 10. Moreover, in 1960, the paper that ran the original story about Mrs Robinson has Mrs Erica Wrightson as the first woman juror. "Woman Juror" above n 207, 5. Indeed, this article quotes Mr J. Carrol the Supreme Court registrar and sheriff saying that Mrs Wrightson is the first woman juror in the Auckland Supreme Court, where Mrs Robinson had appeared 17 years earlier.
[220] (20 September 1961) 328 NZPD 2841-2845. See the comments form both the Attorney General the Hon Hanan, Mr Harker and Mr Edwards for the traditionally paternalistic approach verses the Hon Mabel B Howard and Hon A H Nordmeyer for a more progressive view of equality for all.
[221] (20 September 1961) 328 NZPD 2843.

3 *Debates over Racial and Sexual Equality*

The debate over compulsory jury service for women corresponded with the debate over the abolition of the separate Maori juries. The justification of the abolition of the separate Maori system was couched in terms of equality and one law for all.[222] However, these debates seemed to indicate that there should be one law only for all *men,* and advocates of sexual equality pointed to the inequality of this position.[223] Similarly, the government policy that required compulsory jury service for men and women in the dependency of the Cook Islands was pointed to as illustrative of the New Zealand double standard.[224]

4 *Legislative Equality*

Eventually, the arguments for equality were compounded into new legislation in 1963 which made jury service compulsory for both women and men.[225] It even made provision for gender neutral language. [226] However, once again there was a proviso that meant that women were not completely equal.[227] The presumption of a domestic occupation for women allowed them to claim an exemption without giving any reason.[228] Although this legislation did at least reverse the obligation of enrolling personally, it continued the gender distinction within the jury system. Jury service became a more easily accessible right but not the duty it was for men. Women's groups still agitated for change[229] and it was not until 1976 that the controversial section was amended to create gender equality.[230]

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[222] (13 July 1961) 326 NZPD 500.
[223] (20 September 1961) 328 NZPD 2843.
[224] "Where are all the women jurors?" above n 200, 10.
[225] Juries Amendment Act 1963, s 2(1).
[226] Juries Amendment Act 1963, especially s 2(1) and s 4.
[227] Juries Amendment Act 1963, s 4 (9).
[228] Juries Amendment Act 1963 s 4(9).
[229] NZNCW resolutions 1976.
[230] Juries Amendment Act 1976 s 2(3). This act repealed any remaining gender specific language and made room for exemption form jury service by request only for caregivers of children under the age of 6 years. A similar section exists under current legislation, which allows exemption from jury service on application for occupational, business, health, family

IX CONCLUSION

The jury system has been a central feature of Westminster style constitutions for literally hundreds of years. In New Zealand, the antiquity of the system was reflected in both the speed with which it was introduced and the importance placed on its use and regulation. Throughout its history, the New Zealand jury system has continually adapted to the changing needs of New Zealand's social conditions.

Many of these changes were unheralded and the evolution of the New Zealand jury system is a difficult one to trace. Given the importance that was ascribed to this institution, the lack of commentary is an interesting feature of jury development. However, this is readily explained by the legislative practice of passing often-significant amendments in innocuous pieces of legislation. Moreover, notwithstanding the fact that the jury system was and still is regarded as a central part of the legal system, the actual task of jury service has rarely been regarded as a particularly exciting task. Similarly, it remained almost entirely uncontroversial for the majority of its evolution.

This lack of controversy and lack of coverage seems primarily attributable to its close correlation with social development. The three most controversial issues in jury development sprang from a discontinuity between the progress of the system and social development generally. The focus of this controversy was on the pursuit of equality within the jury system, which is an issue that still remains controversial today.[231]

As calls are made for a re-evaluation of the current jury system, a reflection on its origins and development becomes both topical and necessary. While civil juries have declined in use, it seems widely accepted that the jury trial process

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or personal circumstances. Juries Act 1981, s 15(1)(a) and (b).

[231] As commentators have noted that Maori are being disadvantaged by the current system. *Juries in Criminal Trials* above n 155, 62-79.

should remain central in criminal cases.[232] To this end it seems likely the jury system will receive significant alteration. In reformulating juries, regard must be had to the previous components of this system. If this is done, any new system will not only be consistent with current public perceptions of justice, but can include reflection on the jury's compatibility with social development in previous years.

[232] Timothy Brewer "Juries in Criminal Trials" (1998) NZLJ 255, 255.

APPENDIX I

A chronological list of legislation relating to New Zealand Juries. [1]

1828 An Act to Provide for the Administration of Justice in New South Wales and Van Dieman's Land (UK) 9 Geo IV c 83
1841 Jury Ordinance
1841 Supreme Court Ordinance
1844 Jury Amendment Ordinance
1884 Supreme Court Ordinance and Supreme Court Rules
1844 Native Exemption Ordinance
1846 Resident Magistrates Court Ordinance
1861 Jury Ordinance Amendment
1862 Jury Law Amendment Act
1862 Supreme Court Amendment Act
1863 Jury Law Amendment Act
1865 Provisional Jury List Act
1865 District Court Amendment Act
1868 Juries Act*
1870 Juries Act Amendment Act
1871 Juries Act
1874 Juries Act 1868 Amendment Act
1876 Juries Amendment Act
1878 Juries Act Amendment Act
1880 Juries Act*
1884 Supreme Court Act
1885 Volunteers Act
1886 Volunteer Amendment Act
1893 Criminal Code Act
1898 Juries Amendment Act
1908 Juries Act*
1908 Crimes Act*
1919 Juries Act
1939 Statutes Amendment Act
1942 Women Jurors Act
1945 Statutes Amendment Act
1949 Statutes Amendment Act
1950 Statutes Amendment Act
1951 Juries Amendment Act
1954 Crimes Act
1955 Judicature Amendment Act
1957 Summary Proceedings Act
1959 Juries Amendment Act
1960 Juries Amendment Act
1961 Crimes Act*

1961 Juries Amendment Act
1962 Juries Amendment Act
1963 Juries Amendment Act
1966 Juries Amendment Act
1967 Juries Amendment Act
1968 Juries Amendment Act
1974 Juries Amendment Act
1975 Juries Amendment Act
1976 Juries Amendment Act
1980 Crimes Amendment Act
1981 Juries Act*
1982 Juries Amendment Act
1985 Juries Amendment Act
1994 Juries Amendment Act

* Denotes Consolidating Legislation.

1 This may well be an incomplete list as the method of legislation used for jury provisions means some statutes are obscured by their title or lack of application. However, I am fairly confident that this is the most accurate compilation to date

APPENDIX 2

Current Debate over Jury Membership

The Dom Sat 18/7/98. p2.

Call for more Maori jurors when Maoris are on trial

By JONATHAN MILNE
and NZPA

LAW experts from around New Zealand met at talks on Maori criminal law in Wellington yesterday, after the Law Commission suggested options for ensuring Maori jurors help decide the fate of Maori defendants.

The Law Commission raised serious concerns about the under-representation of Maoris on juries. A spokesman said "justice is not being seen to be done".

The *Juries in Criminal Trials* paper asks "whether judges in New Zealand should have the power to direct ... that one or more people of the same ethnic identity as the defendant serve on the jury". It says jurors of the same ethnicity as the complainant could also be required by the judge.

Forty-two per cent of people convicted for crimes, other than traffic incidents, were Maoris, according to the most recent figures.

The commission's move follows concerns that Pakeha-dominated juries have a bias against Maoris.

A report by lawyer Moana Jackson states: "Maori defendants were often faced with non-Maori juries which exhibited monocultural attitudes, denying Maori fair trials."

The concept has drawn strong support from a past president of the Maori Law Society, Gina Rudland. "It's long overdue," she said. "It's the fundamental tenet of trial by your peers. Your peer group best understands the cultural values and undue pressures."

The discussion paper says fewer Maoris serve on district court juries: 7.8 per cent, compared with 10.1 per cent of the jury pool. According to Statistics NZ, Maoris made up 15 per cent of the population in the 1996 census.

Both prosecution and defence lawyers are entitled to six "challenges" of potential jurors, and they do not have to give a reason for their opposition. The report says Maori men are particularly unlikely to make it on to a jury as a result.

Law Commission spokesman Tim Brewer, a crown prosecutor, said all New Zealanders stood to lose if juries were unrepresentative of society, as the credibility of the judicial system was undermined.

Though he said race was not a factor in his decisions on which potential jurors to challenge, he said "I think some crown prosecutors are probably more likely to make a snap judgment based on a person's appearance".

However, Wellington defence lawyer John Billington QC said he would not support conscripting Maoris on to panels. "I don't accept that as a reasonable response."

He said too much was being read into the jury composition statistics, and questioned whether more Maoris on juries would help Maori defendants.

Other suggestions in the discussion paper for increasing the numbers of Maori jurors included limiting lawyers' ability to challenge potential jurors, increasing efforts to enrol Maoris on the electoral roll, and adding Maoris from tribal registers and Maori Land Court rolls into the pool of potential jurors.

Wellington lawyer Donna Hall said "those challenges will come from the Crown prosecutors because there is a theory that if you're an unemployed Maori man, you are more likely to sympathise with the unemployed Maori man in the stand".

She believed this was a misconception. She said the abolition of all-Maori juries in the early-1900s was because Maoris were seen to be too hard on their own people.

Ms Hall said the commission's most valuable suggestion was increasing the pool of Maori jurors, by working to increase the numbers on the electoral rolls.

She said 40,000 Maoris were not on either the general roll or the Maori roll.

The Dominion 29/7/98 p12

All-Maori juries

Sir, — I write in response to Donna Hall's July 18 comments concerning the historical provision for all-Maori juries. She stated that this institution was abolished in the early 1900s "because Maoris were seen to be too hard on their own people". This is incorrect.

The provision for all-Maori juries was introduced in 1862 and became a controversial issue only in the 1960s. The proposal to abolish the provision was first introduced into parliamentary debates in 1961, when opinion was divided over the matter.

The issue then went on to be vigorously debated in 1962 and legislation was passed to abolish the institution in December 1964. The legislation was constructed in this manner to give Maoris the opportunity to show their support or objection to the Act in the next election.

Opposition to the provision was primarily on the basis that it created an unnecessary and discriminatory distinction between Maori and European. The attorney-general even compared it with practices in South Africa and Alabama. The Maori Council supported the initiative.

Advocates of the provision were concerned that its eradication would lead to Maoris being kept off the jury through the challenge mechanism, as has been argued is happening today. They were also concerned that the potential of this mechanism to reduce the disproportionate number of young Maori offenders in prison would be eradicated.

There is no mention of any concern over Maoris being "too hard" on their own people.

Rather, there was concern that Maoris would not get a chance to make any decision over their own people.

MICHELE POWLES
Te Aro

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See also Appendix 1.

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