



Fraud (Trials without a Jury) Bill Briefing for House of Lords Second Reading

March 2007

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Introduction and summary

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the United Kingdom section of the International Commission of Jurists.
2. JUSTICE has consistently fought to defend the right to jury trial and to preserve it from piecemeal erosion. We are very concerned about this Bill. It is easy in the UK, where the judiciary is extremely highly regarded and where fair trial guarantees are protected by the Human Rights Act and other legislation, to be complacent about safeguards in the criminal justice system. The jury trial is a key safeguard against injustice, and in favour of the rule of law: it is also, we believe, a crucial safeguard for public confidence. It is notable that trial by jury was reintroduced in both Spain and Russia – both countries with non-democratic pasts - in the 1990s.
3. The arguments that only a small number of defendants might be tried without a jury under section 43 Criminal Justice Act (CJA), and that there are other limitations on jury trial, do not in our view support the passing of this Bill into law. This Bill is not merely a ‘technical’ response to overly long fraud trials, but the removal of a key safeguard in our judicial system for one category of case. The principle of due process in criminal cases has been progressively undermined in recent years; the unnecessary removal of such a key safeguard should be resisted, whatever the number of cases potentially affected.
4. We are therefore opposed to this Bill in its entirety, because we believe that:
 - **In an adversarial system of justice like that of England and Wales, and that of Northern Ireland, trial by jury for all but minor crimes is a fundamental right;**
 - **If judge alone trials take place, public confidence in the criminal justice system will decline;**
 - **Judges will be ‘case-hardened’, and can hear inadmissible material;**
 - **Defendants in fraud cases should not have fewer safeguards than those accused of other serious crimes;**

- **There is no evidence that juries are not understanding fraud cases; indeed, fraud offences are defined by reference to the standards of ordinary people;**
- **A prosecution should on principle be intelligible to the general public;**
- **Removing the jury will not necessarily solve the problem of overly long trials; other measures can, and they should be given the chance to take effect;**
- **Appeals from section 43 applications may in fact prolong the pre-trial process, and there may be more appeals against conviction;**
- **If section 43 is implemented, jury trial may eventually disappear altogether.**

Briefing

- **In an adversarial system of justice like that of England and Wales, and that of Northern Ireland, trial by jury for all but minor crimes is a fundamental right;**
5. The constitutions/bills of rights of the United States, Canada, New Zealand and the Commonwealth of Australia, all common law jurisdictions, all recognise the importance of the right to jury trial.¹ We believe that in England and Wales and Northern Ireland jury trial for all but minor offences has acquired the status of a constitutional right. We also believe that, in the context of our adversarial system of justice, it is part of the guarantee of a fair trial under Article 6 of the European Convention on Human Rights.
 6. Article 6 does not expressly guarantee the jury, which is unsurprising given the different legal systems in place across the Council of Europe. However, it does guarantee trial fairness: in the adversarial tradition, which is based on scepticism of state power, the jury is one of the primary safeguards for trial fairness. It has traditionally been important in protecting defendants from oppressive or politically motivated prosecutions. It gives members of the public the opportunity to ensure that the criminal laws are being properly applied.

¹ See the 6th amendment to the US Constitution, s24(e) of the New Zealand Bill of Rights Act 1990, and s11(f) of the Canadian Charter of Rights and Freedoms 1982, and s80 of the Commonwealth of Australia Constitution Act 1900.

- **If judge alone trials take place, public confidence in the criminal justice system will decline;**

7. We believe that the presence of a jury is of great benefit in safeguarding the perception of independence of the tribunal from the state and in encouraging public confidence in verdicts. In serious fraud trials, where the percentage of middle-class professional defendants is likely to be much higher than in Crown Court trials generally, it is possible that acquittals will be called into question after judge alone trials. Further, if a serious fraud trial involves a public figure, trial by judge alone may also reduce public confidence in the verdict.
 8. In judge alone trials, the characters and 'conviction rates' of individual judges will come under much closer scrutiny. Convictions and acquittals may be dismissed as being due to a judge's character or career history, with different judges open to comparison as to their percentages of convictions and acquittals, and their views on particular legal arguments, etc.
 9. In a survey commissioned by The Bar Council and the Law Society in 2001-2002, 80% of respondents thought a jury was more likely than a judge and two magistrates to reflect the views and values of society at large, and 73% thought a jury was more likely to reflect their own views and values.²
- **Judges will be 'case-hardened', and can hear inadmissible material;**
10. The standard of proof in criminal cases is rightly high. The jury system requires that for a conviction, ten people, who are likely to have different views and experiences of life, are all sure of a defendant's guilt. The requirement that ten people be convinced of guilt is an important method of ensuring that the criminal standard of proof is maintained.
 11. Judge alone trials will only require that one person is convinced of guilt. Further, that person will be 'case-hardened'. The small number of cases heard by juries during their service is another important way in which the criminal standard of proof is preserved.

² *Views on Trial By Jury: The British Public Takes the Stand*; available from Department for Constitutional Affairs website. The survey also found that 80% of respondents had confidence in juries, compared with 71% in judges and magistrates.

12. The system for Crown Court trials in England and Wales relies upon the separation of the tribunals of law and fact. The judge can hear admissibility arguments about evidence that has potential unfairly to prejudice the jury, or that has been obtained illegally. In judge alone trials judges could hear these arguments and then be forced to put from their minds any evidence that they had ruled inadmissible when deciding their verdict.
13. 'Diplock' courts in Northern Ireland have been criticised on the grounds of 'case-hardening' and adjudicating after hearing inadmissible evidence.³ While we have great respect for the integrity of our judges there remains a risk that judges will be affected by such factors. The fact that under the Bill as currently printed a High Court judge or Crown Court judge nominated by the Head of Criminal Justice would hear the case will not, in our view, nullify this risk.
14. While these disadvantages undoubtedly apply to the magistrates' courts, they do not try the most serious criminal cases, and there is an automatic right of appeal to the Crown Court, which consists of a full re-hearing of the case. However, when asked in a Parliamentary Question what the implications for rights of appeal of a judge-alone fraud trial would be, the Solicitor General said that 'a defendant would have a right of appeal in a similar way to a defendant tried before a jury'.⁴
- **Defendants in fraud cases should not have fewer safeguards than those accused of other serious crimes;**
15. It is, in our view, wrong in principle that a person accused of one serious crime should be provided with fewer safeguards than a person accused of another. We agree that

The principle of equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.⁵

Respondents were more than twice as likely to say that their position was to oppose reductions in the number of jury trials in order to preserve their current right to a jury trial (69%) than to favour reductions if it would save taxpayers' money (27%).

³ Northern Ireland: Submission by Amnesty International to the Criminal Justice Review, 5 May 1999, EUR 45/023/1999.

⁴ *Hansard*, Commons 23 November, col 681.

⁵ *Matadeen v Pointu*, [1998] 3 WLR 18 at 26, PC.

There is no principled justification, in our view, for treating serious frauds differently from other serious and complex crimes. In particular, many criminal trials currently depend upon complex evidence, such as that from forensic, medical and technical experts.

16. One argument that has been put forward in support of the Bill is that it can be difficult to place the full criminality of defendants before a jury, because this would make the trial too lengthy and complex. However, in our view, this argument does not justify the removal of the jury, but should rather provide an incentive for judges and prosecutors, in particular, to manage cases effectively; prosecutors should select charges that will allow the judge to have appropriate sentencing powers. In a trial by judge alone, if there were a large number of counts on the indictment there would still be potential for trials to be lengthy. The civil rules of evidence would not apply: witnesses whose evidence was disputed would still normally, therefore, have to give their evidence live.

- **There is no evidence that juries are not understanding fraud cases; indeed, fraud offences are defined by reference to ordinary people;**
- **A prosecution should on principle be intelligible to the general public;**

17. At the heart of many fraud cases is the question of whether a person has been dishonest – an issue that a jury is best placed to decide. Where it is necessary to define dishonesty, the jury must decide as part of the test

whether according to the ordinary standards of reasonable and honest people what was done was dishonest.⁶

The new offences of fraud in the Fraud Act 2006 rely upon the concept of dishonesty rather than deception: in some cases, dishonesty may be all that separates legitimate conduct from a serious criminal offence.

18. We do not accept that the evidence in fraud trials is by its nature incomprehensible to jurors. Following the collapse of the ‘Jubilee Line’ fraud

⁶ *R v Ghosh*, [1982] QB 1053, CA.

case, one juror gave a media interview in which she asserted that the jury understood the evidence and that it was very easy to understand.⁷

19. Indeed, it would be wrong in principle if a criminal trial were conducted, even without a jury, in such a way that the evidence was not intelligible to the public. To do so would increase the risk that the defendant would not be able effectively to participate in his trial, which would be contrary to his rights under Article 6 of the European Convention. It would also undermine the principle of transparency – it is in the interests of public confidence in the administration of justice and the maintenance of a fair trial process that the public can understand the evidence for and against an accused person and the reasons why he is convicted or acquitted.
 - **Removing the jury will not necessarily solve the problem of overly long trials; other measures can, and they should be given the chance to take effect;**
 - **Appeals from section 43 applications may in fact prolong the pre-trial process, and there may be more appeals against conviction;**
20. The removal of the jury will not necessarily result in shorter trials. The example of the *BCCI* litigation has shown us that civil cases can be even more protracted than criminal ones. Evidence will still have to be put before the court and legal arguments will still have to take place.
21. What will be effective to shorten trials will be the concerted use of case management powers by judges – the Criminal Procedure Rules 2005 and the Lord Chief Justice’s protocol on the control and management of heavy fraud and other complex cases make clear that judges have extensive powers to prevent unnecessarily protracted litigation.
22. Further, the Fraud Act 2006 – which simplifies the law of fraud – has only just received Royal Assent. The new fraud offences should be allowed to take effect before further reforms are considered.

⁷ D. Leigh, ‘Juror tells of outrage after collapsed trial’, *The Guardian*, 24 March 2005.

23. In any event, where multiple counts are charged, the Domestic Violence, Crime and Victims Act 2004 already provides for the trial by jury of sample counts only, if certain conditions are fulfilled, with the remaining counts to be tried by judge.⁸ The relevant provisions of the Act were only brought into force in January 2007.
24. We agree that trials should last no longer than six months unless the circumstances are exceptional. However, it should be possible to reduce trials to a manageable length using the above measures. Alternative measures could also be considered, such as the provision of alternative jurors who can step in, in the event of jurors becoming ill, etc., to prevent the collapse of the trial. We would also welcome a review of the facilities provided to jurors, allowances available, and the restrictions upon unfair treatment by employers as a result of long jury service, in order to ensure that the experience of jury service is not more disruptive to a person's life than necessary.
25. Further, it is likely that the implementation of section 43 may even prolong the prosecution process, as there is an opportunity to appeal against the judge's decision on an application for the trial to be heard without a jury. Appeals from these preliminary decisions may delay trials considerably.
26. We also expect that there will be more appeals against conviction from judge-only trials than from jury trials, especially at first. Judges will provide reasoned judgments, and the Court of Appeal may decide to enquire into the judge's conclusions on the facts as well as the law. Appeal hearings may therefore be longer as well as more frequent. The hoped-for savings in court time and costs may therefore not occur if this measure is implemented.
- **If section 43 is implemented, jury trial may eventually disappear altogether.**
27. Although the government has stated that it does not plan to extend the provisions of section 43 to other categories of serious crime,⁹ we fear that once judge-alone trials for serious fraud become established, other

⁸ See sections 17-21 of the Act.

categories of serious crime, or categories of evidence, may follow in the future. The question has already been raised in relation to scientific evidence, by the House of Commons Science and Technology Committee.¹⁰

28. We believe that the jury provides an essential safeguard in our criminal justice system and that we remove it at our peril. We therefore oppose the Bill in its entirety.

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March 2007

⁹ *Hansard*, Commons written answers, 17 Oct 2005, Col 696W – 697W.

¹⁰ Seventh Report, *Forensic Science on Trial*, 29 March 2005.