

TO: The Justice and Electoral Committee

**Submissions on the Criminal Procedure (Reform and  
Modernisation) Bill 243-1 (2010)**

Don Mathias  
17 February 2011

# Submissions on the Criminal Procedure (Reform and Modernisation) Bill 243-1 (2010)<sup>1</sup>

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## Introduction

I support many of the provisions in the Bill, so I confine these submissions to:

- specific matters on which I disagree with what the Bill proposes, and
- matters where I think evidence is needed before appropriate action can be identified.

I have read in draft form the submissions of James Richardson QC and I agree with them. His focus on detailed wording serves as a caution that a lot of legal aid money could be saved by better drafting of the legislation.

My focus is not on the semantics of the Bill, but rather on broader matters of policy.

I have listed specific suggestions for changes to the Bill at the end of these submissions.

## Clause 6: Categories of offence defined – the right to jury trial

The right to elect trial by jury would be removed for offences punishable by three years' imprisonment or less.

While I do not idealise the jury system, I recognise that the public may attach great significance to the right to elect trial by jury. This public sentiment may not be rational, but ideals need not be logical.

Perhaps a significant public perception is that a jury will restrain what is perceived to be over-zealous law enforcement. The "Waihopai spy base case"<sup>3</sup> may be an illustration of that restraint. The hope of some defendants is that the jury may return a perverse verdict when a judge would not. The right of a jury to return a perverse verdict has received unequivocal recognition as a cherished safeguard against oppression.<sup>4</sup>

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[http://www.legislation.govt.nz/bill/government/2010/0243/latest/whole.html?search=ts\\_bill\\_criminal+procedure\\_resel&p=1#d1m3359903](http://www.legislation.govt.nz/bill/government/2010/0243/latest/whole.html?search=ts_bill_criminal+procedure_resel&p=1#d1m3359903)

<sup>2</sup> B.Sc. (Hons.), LL.M. (Hons.), Ph.D., Barrister, Auckland. Author *Misuse of Drugs* and contributing and updating author, *Adams on Criminal Law* (both published in Brookers Criminal Library). For my commentary on developments in criminal law, see <http://www.nzcriminallaw.blogspot.com>. These submissions are accessible online at <http://donmathias.zoomshare.com/files/cpsubs.pdf> and the final version is dated 17 February 2011.

<sup>3</sup> I recognise that this case would still carry the right to trial by jury, but my point is that in some cases the verdict may appear to be against the weight of the evidence.

<sup>4</sup> Of course it is an unspoken power, as a jury cannot be told it may deliver a perverse verdict. Oblique reference to the right is occasionally found. For example, the Supreme Court of Canada, in *R v Krieger* [2006] SCC 47 (26 October 2006), cited Lord Mansfield's observation in *R. v Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824: "It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences." See also Sir Patrick (later, Lord) Devlin, "Trial by Jury" *The Hamlyn Lectures* (1956) at 162: leaving the last word to the jury is "an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement .... The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average member of Parliament or of the average juryman. I know of no other real checks that exist today upon the power of the executive." Consistent with this is the rule that a judge may not

A case that is objectively relatively trivial may nevertheless be of great importance to the defendant. On distributive justice principles<sup>5</sup> the way to approach a decision on where to set the boundary between non-jury and jury cases is to ask whether a lawmaker who might be falsely accused of a category 2 offence would rationally refuse an option to elect trial by jury.

In economic terms, since the jury courts will be busy all year, the relevant figure is the cost per year of running the jury courts. I do not think that is likely to depend significantly on the distribution of categories of cases dealt with. Any “saving” from removal of the right to jury trial for category 2 cases will only be in length of case backlog. A backlog of mixed cases would be replaced by a backlog of more serious cases. It would be sensible to leave aside the removal of right to jury trial until the effectiveness of other measures to address backlog is known.<sup>6</sup>

Since the right to jury trial is important for reasons based in fundamental community values, and since the Bill should reflect public views, I add no more on this point. It is a matter for public consultation.

Various forms of jury trial are used in other countries, those in Europe being surveyed in *Taxquet v Belgium*.<sup>7</sup> For all forms it is essential that the defendant should know, if he or she is found guilty, of the reasons for that, and reasons are usually delivered, or questions formulated by the judge are answered, but even in the English system the defendant should be able, with the aid of the judge’s detailed summing up, to work out why there was a guilty verdict.<sup>8</sup> Reasons are given for verdict in judge-alone proceedings, but I think it is important that judges should have the same right to deliver a conscience verdict as does the jury. This arguably would require some revision of the judicial oath.

## **Clauses 53(2)(b), 54(3), 64-67, 88(2)(a), 105(1)(b), 106, 110(2), 112-114, 361: issues in dispute**

These clauses should be deleted or revised as indicated in the summary at the end of these submissions.

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in any circumstances direct a jury to find a defendant guilty: *R v Wang* [2005] UKHL 9 (10 February 2005). See also Geoffrey Robertson QC, “The Justice Game” (1998) at 72 “[t]his remains the most significant feature of English criminal law.” He adds that the rule that the decision to convict can only be made by the jury operates, especially in politically-motivated prosecutions, to ensure that “the only enemies of the State who are put in prison are enemies of the people as well.” Robertson says he prefers to call perverse verdicts “sympathy acquittals”, even when he sits as a judge.

<sup>5</sup> John Rawls, *A Theory of Justice* (1971). His “original position” (that is, the position from which a group chooses its rules) is that none of the members of the group of rule-makers are able to tailor the rules to suit their own interests because the rules apply to all alike. Social arrangements are to be evaluated from the standpoint of the worst off (here, defendants). This may challenge the cost-benefit analysis approach taken by utilitarians. The point is that differences in views of the appropriateness of jury trials for minor charges reflect differences about fundamental moral conceptions. Of course the falsely accused legislator would always want the option of choosing trial by jury, as would any falsely accused person. It would not be “self interest” for the legislator to take that position. Whether that option should be exercised is a matter on which a rational person would take expert advice, and that is where self-interest is properly recognised. The only valid reason to remove the right to jury trial can be that the cost of such trials outweighs their benefit. Much turns on how “cost” and “benefit” are measured.

<sup>6</sup> Backlog is a complex concept. Some cases are lengthy because of the stages they need to go through, and arguably this is not delay. They should not be included in a count of cases awaiting trial. Delay is the total time, beyond that needed for preparation, between procedural stages. The current three week period where disclosure is sought between first appearance and entry of plea is only a “delay” to the extent that disclosure could have been completed and advice received in a shorter time. Whether delay is unacceptable depends on how long people need to do their work, and whether they could have done it more quickly. There does not at present seem to be much complaint at the length of “delays” and the vast majority of cases are disposed of on a defendant’s first appearance. Category 2 cases would create their own backlog of judge-alone trials, and it is not clear that there would be much saving of judicial time once the time needed to prepare reserved decisions is taken into account. Reforms in the UK – in many ways similar to those proposed in this Bill - aimed at efficiency and cost saving, do not seem to have been successful: see the articles by Peter Thomson QC at [2009] 159(7358) NLJ 293, and Michael Zander QC at [2009] 159(7360) NLJ 367.

<sup>7</sup> [2010] ECHR 1806, <http://www.bailii.org/eu/cases/ECHR/2010/1806.html> (Grand Chamber), at [43]-[60].

<sup>8</sup> This was regarded by Lord Judge CJ as the feature likely to save the English procedure from the criticisms advanced by the Grand Chamber in *Taxquet*, above: see his speech “Jury Trials” Judicial Studies Board lecture, Belfast, 16 November 2010, available at <http://bit.ly/dnq82E>. Lord Judge alluded there (p 2) to the power of the jury to return a perverse verdict: “But even in a democracy, it is possible for the legislature to create potentially oppressive and unjust criminal laws. The very fact that such laws will be exposed to the scrutiny of a jury in the event of a prosecution may – and for my own purposes “may” is enough – cause the legislature to pause and reflect on whether it is wise to enact such a law. It is one small aspect of the very subtle relationships which govern the operation of our society and the well being of the community.”

I do not think it credible that a fact-finder would be assisted by witness notice of issues.

It is inevitable that notice of issues will be drawn to the attention of relevant witnesses.

*(a) Testing evidence at trial*

Surprise is an important way of exposing inaccurate testimony. It is inappropriate to try to disparage this with terms like “trial by ambush”, because ambush is exactly what is needed to combat witnesses whose evidence is wrong, and a strong prosecution case will be immune to ambush.

*(b) The Judge’s limited perspective*

Judicial criticism of failure to disclose issues can hardly be well-founded. If defence counsel says that the defendant does not accept that a witness is reliable, how can a judge undermine that? No one is required to trust prosecution witnesses.

*(c) Bringing the administration of justice into disrepute*

There is a need to take account of the level of confidence that the public would have in procedures that made absence of notice of issues a matter for adverse inference or criticism. The perception would be that the procedures are skewed in favour of the prosecution by giving its witnesses opportunities to inaccurately modify their evidence, or by penalising the defendant for failing to give prosecution witnesses those opportunities. The administration of justice would, because of this perception, be brought into disrepute.

*(d) Prosecutor’s resources*

In most cases prosecuting counsel will be well aware of what is in issue, without the need for notice. Where the judge considers it would be fair to permit the prosecution to call rebuttal evidence, this can be allowed.

*(e) Unfair consequences*

I acknowledge that in the great majority of cases no harm may come from defence disclosure of issues. Pre-trial disclosure should protect against embellishment of evidence. There should, in general, be no prejudice to trial fairness caused through giving the defence an opportunity to disclose issues, but it would be going too far to make failure to disclose a matter for judicial criticism, or a matter from which the judge might invite the fact-finder to draw an adverse inference.

*(f) Improper objective is implied*

I also acknowledge that the Bill avoids some of the criticisms of the case management procedures in force in England and Wales, made by the editor of Archbold in a lecture delivered on 16 November 2010 at Auckland University.<sup>9</sup> These criticisms arise from the consequences of the “overriding objective” of the relevant legislation; while such an objective is not stated in the present Bill, the disclosure requirements I have criticised do presuppose the same inappropriate objective.

*(g) The task of a criminal trial*

Requiring disclosure by the defence of its issues at a time when that could jeopardise the defendant’s ability to expose weaknesses in the prosecution case, is to mistake the task of a criminal trial. This task is to do justice between a defendant and the public. Doing justice here is not the same as discovering the truth at any cost.<sup>10</sup> The defendant’s rights are those enjoyed by us all and they include the right to challenge the

<sup>9</sup> James Richardson QC, “The Criminal Procedure Simplification Process: Lessons from England and Wales” available at <http://donmathias.zoomshare.com/files/jrsimplif.pdf> . Particularly problematic, according to Richardson, is that jurisdiction’s “overriding objective”, discussed on pp 12-14 of his paper. If an objective is the acquittal of the “innocent”, that should include the acquittal of any defendant against whom the prosecution case cannot be proved. There is no need to have such a purpose as it is presupposed by the existing law on the presumption of innocence.

<sup>10</sup> See Alan Dershowitz, “Is the Criminal Trial a Search for Truth?”, available at <http://www.pbs.org/wgbh/pages/frontline/oj/highlights/dershowitz.html> . He observes, “In practice, the adversary system leads both sides to do everything in their power -- as long as it is lawful and ethical -- to win. Since most defendants are guilty, it follows that

admissibility of evidence, the right to confront witnesses, the right not to be interrogated, the right to privacy (including privacy of communications with counsel), and the right to be presumed innocent until proven guilty. It is the state that has the task of proving the citizen's guilt and the state should not have the right to compel the citizen's assistance.<sup>11</sup>

*(h) Punishing counsel*

Clause 361 is bizarre. No counsel, whether prosecution or defence, should be liable to punishment for acting in the interests of his or her client. The proposal is unworkable: wealthy clients would pay costs imposed on counsel; counsel would refuse to continue to act and an impossible situation would develop as antagonisms escalated.

Disclosure of defence issues could, when against the client's interests, result in liability of counsel for negligence, or for disciplinary action within the profession.

The proposal undermines the joint interest of bench and bar in the proper working of the courts.

### **Clause 107: decision of court**

In the interests of consistency with clause 340, and to avoid uncertainty, this should be expanded to require that reasons should be given (cf clause 340).

As reasons should always be given, this would not change the law.

### **Clause 183: stay of proceedings**

A sub-clause should be added, out of abundant caution, to provide that this clause does not derogate from the power of the judge to stay proceedings to prevent abuse of process.

This common law power is well established, and no one has suggested that it should be removed.

### **Clause 234: first appeal courts**

If a category 3 offence is dealt with by judge-alone trial,<sup>12</sup> the first appeal is to the High Court, whereas if the same conviction had resulted from a jury trial the first appeal would be to the Court of Appeal.

Given that such convictions are for the same offence, the first appeal court should be the Court of Appeal. A judge alone may make the same errors in instructing him or herself about the law in a reasoned decision, as he or she may make in instructing a jury. Since the errors are likely to be the same, they warrant attention from the same level of appeal court (three or more judges, as opposed to one judge). Similarly, the second appeal court should be the Supreme Court in such cases.

Making the multi-judge appeal courts harder to reach could be a disincentive for defendants to elect trial by judge alone.

Similar comments apply to clauses 251 and 300.

### **Clause 236(3): criteria for allowing appeals**

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the defence will more often be in the position of advocating ultimate falsity than will the prosecution. But since the prosecution always puts on a case -- often relying on police testimony -- whereas the defence rarely puts on any affirmative case, it follows that the prosecution will more often be in the position of using false testimony in an effort to produce its ultimately true result."

<sup>11</sup> Of course there are exceptions, as where the Serious Fraud Office can require attendance for interview and production of documents: Serious Fraud Office Act 1990, ss 5, 9, 27.

<sup>12</sup> As they may be pursuant to clause 75(2)(a), 102, or 103.

(a) *General comments*

The use of the expression “substantial miscarriage of justice” (which is not defined) echoes the present criterion<sup>13</sup> where the proviso permits appeals to be dismissed in the absence of a substantial miscarriage of justice.

The measure of “substantial” has been contentious. A project of modernisation must address whether the requirement of a substantial miscarriage of justice remains apt. Difficulties in applying the phrase have led our appellate courts to change their approach in 2009, from deciding whether a *reasonable jury* might have reached a different verdict if the error hadn’t happened, to deciding whether they, *as appellate judges*, would have a reasonable doubt as to the defendant’s guilt on the basis of the record of the trial and imagining that the error hadn’t happened. The consequence of this change in approach is that if a trial would have been unfair under the original interpretation, the defendant is, under the new one, now to be judged by the appellate judges, and so may be convicted by them without ever having had what would previously have been called a trial conducted according to law.

Before this is hailed as an efficient cost-saving approach, it must be remembered that there is no dollar saving on an annual basis, because the courts will always be working at something, and the only “costs” are in the delay experienced by another defendant whose case can’t be heard because a successful appellant’s retrial has to be conducted, and to witnesses who have to give evidence again. While those costs are acknowledged, one must wonder whether they balance the loss of the right to a properly conducted trial.

There is an incongruity in the current form of clause 236(3) which I mention only briefly. The difference between clause 236(3)(a) and (b) is unnecessary: each refers to the assessment of the evidence, and each could be governed by whether the verdict or finding of guilt was unreasonable. However, I favour a more radical revision of clause 236(3) which would involve removal of its paragraphs.

The phrase “a substantial miscarriage of justice has occurred” in clause 236(3) should be removed and replaced by a new criterion of trial fairness.

This would require a focus on the defendant’s right to a fair trial.<sup>14</sup> I discuss this further under (c) below.

(b) *The appeal burden*

As drafted, clause 236(b) requires an appeal to be allowed if the court is “satisfied” that a substantial miscarriage of justice “has” occurred. Clearly this puts the burden on the appellant to persuade the court, and the standard of persuasion would quite rightly not be specified but it would come down to requiring the court to be sure.<sup>15</sup>

In contrast, s 385(1)(c) of the Crimes Act 1961 read with the proviso, allows the court to dismiss an appeal if it “considers” that no substantial miscarriage of justice “has” occurred. The appellant had to persuade the court that there had been a miscarriage of justice, and then it was for the Crown to persuade the court that nevertheless the miscarriage was not substantial. This burden on the Crown was thought to be a heavy one.<sup>16</sup>

The Bill therefore changes the current law by requiring the appellant to satisfy the court of the “substantial” nature of the miscarriage. This could mean – to take one of the formulae mentioned in *Sungsuwan* – that the appellant must satisfy the court that there was a real risk that the error at trial affected its result. Whereas currently the Crown has the burden of excluding this risk, under the Bill the appellant has the burden of establishing the risk.

This may not seem particularly objectionable until one considers how arguments are presented. Currently, the Crown endeavours to exclude the risk by reference to the strengths in its own case. That is a natural way to argue. Under the Bill, the appellant would have to establish the risk by reference to the opponent’s case

<sup>13</sup> Crimes Act 1961, s 382(2), 385(1).

<sup>14</sup> New Zealand Bill of Rights Act 1990, s 25(a).

<sup>15</sup> In *R v White (David)* [1988] 1 NZLR 264 (CA) “is satisfied” was held to mean that the court “makes up its mind”, and is indicative of a state where the Court on the evidence comes to a judicial decision. The standard may be variable according to the importance of the issue, and it is arguable that an appellate court must be sure that a conviction should stand before it can dismiss an appeal against conviction.

<sup>16</sup> *Sungsuwan v R* [2005] NZSC 57 (25 August 2005), and see my commentary at <http://nzcriminallaw.blogspot.com/2005/08/proviso.html>

and that is likely to lead to time-wasting selective argumentation.

It would be better to simplify the dispute by requiring the court to be satisfied that there was no real risk that the trial was unfair. Each side could then argue the appeal by reference to its own case. The appellant would have to establish an error of the kind that *could* create that risk, and the court would then need to be convinced by the respondent that no such risk *actually* arose.

(c) *Trial fairness and substantial miscarriage of justice*

Recent judicial experience has been that, notwithstanding the 100 year history of the current formulation of the appeal proviso and its concept of the miscarriage of justice that is not substantial, the closer one examines the meaning of that expression, the more confusing it seems.

The defendant's right to a fair trial is an absolute right.<sup>17</sup> Trial unfairness is a substantial miscarriage of justice,<sup>18</sup> and so too is an unreasonable verdict.<sup>19</sup> Difficulties in identifying a substantial miscarriage of justice can arise from uncertainty over the way to assess the reasonableness of a verdict. As mentioned above, the Supreme Court changed its position on this relatively recently,<sup>20</sup> to bring New Zealand law into line with the new method that appears to be taken by the High Court of Australia<sup>21</sup> (and in contrast to the Privy Council's approach<sup>22</sup>). But assuming the appellate court can adopt a coherent way of assessing the reasonableness of a verdict, the question remains as to which is the more general (or umbrella) concept: substantial miscarriage of justice, or trial unfairness?

This is important because it is necessary to know what each concept means and which is logically prior. If the first question is whether the trial was fair,<sup>23</sup> this could lead to an inconsistency if that was answered affirmatively but the court then proceeded to find that there had been a substantial miscarriage of justice. This would deprive the (undefined) concept of a fair trial of much of its potential meaning. The better method is to define what a fair trial is and use that as the criterion for determining these appeals.

However, instead of defining a fair trial, the Supreme Court has defined a "substantial" miscarriage of justice: a miscarriage of justice that affects the result of the trial.<sup>24</sup> The obviously unintended consequence is a conflict with the fundamental proposition recognised at common law that no matter how strong may be the case against a defendant, he is entitled to a fair trial.<sup>25</sup> The conflict is where there is a miscarriage of justice at the trial of a person whom the appellate court thinks is guilty: that court would not hold that the miscarriage was substantial because it did not affect the result. But if fairness is required no matter how strong the evidence, there must be room for recognition of substantial miscarriages of justice in those clear-cut cases.

The Supreme Court's new method of addressing conviction appeals also appears to give the appellate court the power of a jury in determining guilt beyond reasonable doubt.<sup>26</sup> That would lead to dismissal of the appeal. But if the court, as a surrogate jury, had a reasonable doubt about the appellant's guilt, why should it have the power to order a re-trial?<sup>27</sup> In such cases it should quash convictions and enter acquittals.

These difficulties are a result of the obscure concept of the substantial miscarriage of justice. It has been

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<sup>17</sup> *Condon v R* [2006] NZSC 62 (23 August 2006), and see my commentary at <http://nzcriminallaw.blogspot.com/2006/08/absolute-right-to-fair-trial.html>.

<sup>18</sup> *Condon* at [89].

<sup>19</sup> *Owen v R* [2007] NZSC 102 (11 December 2007), and see my commentary at <http://nzcriminallaw.blogspot.com/2007/12/when-is-verdict-unreasonable.html>.

<sup>20</sup> *Matenga v R* [2009] NZSC 18 (13 March 2009), and see my commentary at [http://nzcriminallaw.blogspot.com/2009/07/appellate-jury\\_09.html](http://nzcriminallaw.blogspot.com/2009/07/appellate-jury_09.html) and also at <http://nzcriminallaw.blogspot.com/2009/07/aiming-les-brickbats-at-le-top.html>.

<sup>21</sup> *Weiss v R* [2005] HCA 81 (15 December 2005), and see my commentary at <http://nzcriminallaw.blogspot.com/2006/01/revising-history.html>. The *Weiss* approach is not apt for all appeals, for example *R v Nguyen* [2010] HCA 38 (3 November 2010), and see my commentary at <http://nzcriminallaw.blogspot.com/2010/11/whither-weiss.html>.

<sup>22</sup> For example, *Bain v R* (New Zealand) [2007] UKPC (10 May 2007), and see my commentary at <http://nzcriminallaw.blogspot.com/2007/05/justices-marple-and-poirot.html>. The Privy Council felt obliged to apply the *Matenga* approach in *Barlow v R* (New Zealand) [2009] UKPC 30 and it took the opportunity to comment (para 21) that its decision in *Bain* would have been the same if it had there applied *Matenga*.

<sup>23</sup> This seems to be the approach in *Matenga*, above.

<sup>24</sup> *Matenga v R* [2009] NZSC 18 at [31] footnote 39.

<sup>25</sup> Lord Bingham in *Procurator Fiscal v Brown* (Scotland) [2000] UKPC D3, also cited as *Brown v Stott* [2001] 2 WLR 817 (PC); *Randall v R* (Cayman Islands) [2002] UKPC 19, [2002] 1 WLR 2237, [2002] 2 Cr App R 267, at [28].

<sup>26</sup> *Matenga v R* [2009] NZSC 18 at [31].

<sup>27</sup> Crimes Act 1961, s 385(2).

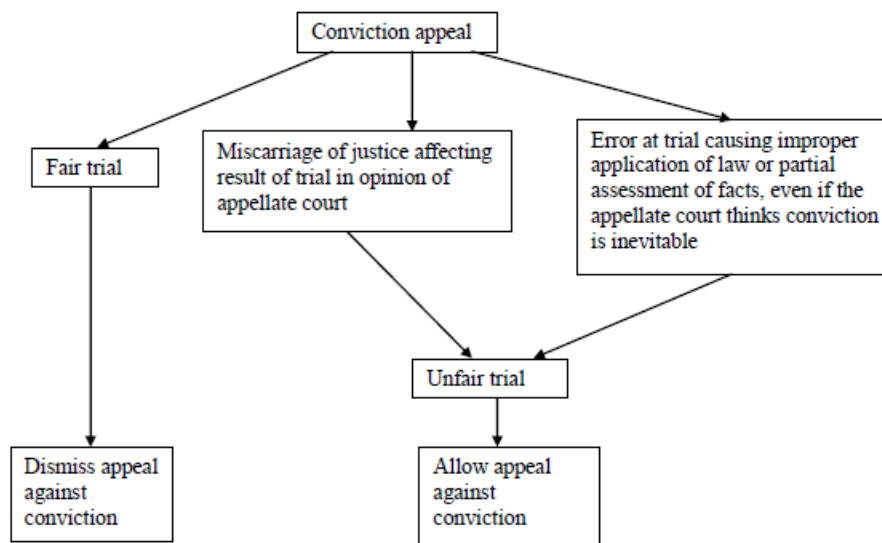
given differing interpretations and applications. It is unwieldy and demonstrably inapt. If this Bill seeks to modernise the law, it should do so on this point by discarding “substantial miscarriage of justice” and replacing that phrase by a criterion focused on whether there was unfairness in the conviction. The idea of a fair trial potentially has sufficient content to be useful for this purpose. It may not be appropriate to define “fair trial”, because the courts can work this out as situations arise in the cases.<sup>28</sup>

There is currently sufficient common law to support the proposition that unfair trials are those where the result has been affected by the law not having been accurately applied to facts that have been determined impartially, and unfair trials include those where fresh evidence casts doubt on the conviction.

The United Kingdom has been sensible enough to reform the criterion for allowing appeals, and the current formula there is that the Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe”.<sup>29</sup> The merits of avoiding the phrase “substantial miscarriage of justice” are obvious. The “unsafe” criterion was introduced before the Human Rights Act 1998[UK] emphasised the importance of rights; a modern criterion would focus on the requirement of a fair trial.

The criterion for allowing appeals against conviction should be whether there is a real risk that the trial was unfair.

Schematically, the concepts are ordered as follows:



Assessment of whether the error at trial “affected” the result, or whether it “caused” improper application of the law or partial assessment of the facts, is an assessment of the centrality of the error in the context of the issues in the trial. It is not an assessment of guilt. This is the traditional method of deciding appeals against conviction. The difference between the traditional and the new methods for deciding these appeals can be illustrated as follows. If the case against the defendant has points A,B,C, D and E, and it is alleged he is

<sup>28</sup> For detailed discussion of the meaning of “fair trial” in the criminal context, see my article in *NZLawyer extra* Edition 18 (4.2.11, online at <http://www.nzlawyermagazine.co.nz/NZLawyerextra/Bulletin18/tabid/2929/Default.aspx> ). An easier to read version is available at <http://donmathias.zoomshare.com/files/facapp.pdf> .

<sup>29</sup> Criminal Appeal Act 1995[UK], s 2, amending s 2 of the Criminal Appeal Act 1968[UK]. Lord Bingham CJ (as he then was) has endorsed Professor Sir John Smith’s view, in [1995] Crim LR 920, that no obvious answer can be given to the meaning of “unsafe” but that the effect of the amendment is to concentrate the mind on the real issue in every appeal from the outset; it does not substantively affect the prior law and the ultimate question of whether there has been a [substantial] miscarriage of justice is the same as whether the conviction is unsafe: *R v Graham* [1997] 1 Cr App R 302, 308. Lack of safety of a conviction can arise from pre-trial impropriety: *R v Mullen* [1999] EWCA 278 at [66]: “for a conviction to be safe it must be lawful”. In *Mullen* the defendant had been improperly brought within the jurisdiction and the proceedings should have been stayed for abuse of process. The conviction was therefore “unsafe”. Similarly, it could be said that the trial was unfair because the failure to stay the proceedings had meant that the law had not been applied properly. In *Randall v R* [2002] UKPC 19 convictions were quashed because the Board could not be sure that the defendant had received a fair trial.

guilty either because of A, B, and C, or because of D and E. The defendant is convicted and he appeals on the grounds of errors concerning points D and E. Under the new approach the appeal court could decide that the defendant was guilty because of A, B and C, so that errors concerning D and E did not matter, and it would therefore dismiss the appeal. But the traditional method would be to acknowledge that the jury may have regarded D and E as central points and the appeal would be allowed.

## **Suggested changes to the Bill**

**Clause 53(2)(b): delete.**

**Clause 54: revise (3) by omitting reference to 53(2)(b).**

**Clauses 64-67: delete.**

**Clauses 88(2)(a): delete.**

**Clause 105(1)(b): delete.**

**Clause 106: delete.**

**Clause 107: add (6):**

**(6) Reasons must be given for all decisions given under subsection (1) of this section.**

**Clause 110(2): delete.**

**Clauses 112-114: delete.**

**Clause 183: add (4):**

**(4) Nothing in this section affects the power of a court to stay proceedings.**

**Clause 234(b): amend to read:**

the **Court of Appeal**, if the appeal is against a conviction entered by a District Court presided over by a District Court Judge.

**Clause 236(3): amend to read:**

The first appeal court must allow a first appeal under this subpart if satisfied that **there is a real risk that the trial was unfair.**

**Clause 251(b)(ii) and (c): delete.**

**Clause 300(b)(i): delete the phrase “after the person elected a jury trial”.**

**Clause 361: delete.**