

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Criminal Justice (Mode of Trial) (No 2) Bill

Liberty (formerly The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

Background

This bill has had a chequered history. The first proposal to remove the right to choose jury trial was made during the last Conservative administration. Lord Cope of Berkeley explained why it was dropped in the debate in the House of Lords on 20.1.2000 c 1248:

"..my right honourable friend Michael Howard... considered the proposal now included in the Bill to end the option. But he listened to the clamour against it - including that from the present Home Secretary and the noble and learned Lord the Attorney-General - and did not proceed with the abolition of that option. Instead he introduced what is known as "plea before venue".

In May 1998 the government issued a consultation paper entitled 'Determining Mode of Trial in Either Way Cases'. 76 responses opposed the abolition of the right to elect jury trial, 56 responses supported change in some form or other.

At the beginning of the 1999/2000 session the Labour Government introduced a similar bill which included a right of appeal, and allowed magistrates to take into account the personal circumstances (reputation, livelihood and previous convictions) of the accused when deciding who should get a jury trial. During committee stage in the House of Lords an amendment effectively stopped the bill by restoring the status quo. A further No (2) bill was passed in the Commons before the summer recess and is due for second reading in the House of Lords on 28th September.

The Government's proposals in the (No 2) Mode of Trial Bill?

The government bill proposes to take away the right of defendants to choose where the case will be heard and give it instead to the Magistrates. When deciding whether to allow jury trial the Magistrates need to take into account:

- the nature of the case
- any circumstances of the offence (but not the accused) which appear to be relevant and
- whether, in considering these circumstances, the Magistrates' Court has powers to impose an adequate sentence.

General Principles

Liberty believes that the right to jury trial is a cornerstone of our democratic society. It ensures that the individual, when confronted by the power of the state, is judged by their fellow citizens. Jury trial ensures professionals do not dominate the criminal justice system. Having twelve people on a jury drawn from a variety of backgrounds lessens the likelihood of an error and ensures that the decision reflects the views of the community at large.

We believe the Government's proposed changes will lead to a decline in the standard of criminal justice, an increase in the number of wrongful convictions and a wide perception of unfairness and discrimination.

Liberty believes:

- That jury trial is fundamentally more democratic and likely to achieve a fairer result than trial in a Magistrates Court
- It is more important to deliver the very best and highest standards of criminal justice, rather than the cheapest.
- The Mode of Trial No 2 bill prevents ANY of the defendant's circumstances being taken into account, and equalises rights down rather than improving them.
- The proposals will have a disproportionate effect on black defendants because they are more likely to choose jury trial, less likely to have confidence in the system and more likely

to plead not guilty.

- The proposals only affect 4% of either-way cases. This number is still decreasing. The effect of alternative measures to reduce the numbers in the Crown Court, like plea before venue need to be properly assessed.
- There are other options (see below) the Government could take to reduce the numbers of people going to Crown Court without reducing everyone's right to choose jury trial.
- Lord Justice Auld is conducting a review of the criminal justice system. We support the view of EDM 406 that the Government should delay any action until the review has reported.

Fairness and the interests of justice

- Juries are likely to provide a more representative ethnic and social mix
- Jury members are likely to understand the situation faced by the defendant because they or their families may have faced similar experiences
- There are less likely to be errors because of the different perspectives people bring to a jury
- Acquittals in Magistrates' Courts are 25% as opposed to 40% when juries try people. This suggests that juries are more likely to carefully consider the evidence, for instance by being more open minded about police evidence.
- Public perception of fairness is vital to uphold confidence in the criminal justice system.
- In the Crown Court a judge decides on the admissibility of evidence and the jury only know about it if s/he decides the evidence is admissible. Magistrates consider admissibility and then have to pretend to forget what they have heard when making decisions - a difficult task.
- The defence doesn't always have full disclosure of the prosecution case in the Magistrates Courts, making it difficult for people to know exactly what the evidence is against them.
- Most criminal defendants are young men. There are very few young men sitting as Magistrates. Most defendants have no sense of being judged by their peers in the Magistrates Courts.

The current Lord Chief Justice Lord Bingham, a supporter of the Bill, agreed (20.1.00 - c1255) that:

"there are instances where it will be important, from the defendant's perception ... that he should be entitled to challenge the evidence of the policeman before a jury".

The criminal justice system and ethnic minorities

There is a need for further research about the impact of the criminal justice system on ethnic minority defendants. The body of existing evidence concludes that there is persistent overcharging of ethnic minorities by the police which the defendants, their legal advisers and others in the criminal justice system struggle to rectify at every stage.

- Zander's study for the Royal Commission showed that black defendants had their charges reduced or dropped more often than white defendants in Crown Court
- The same study showed black defendants were also acquitted more often.
- Recent Home Office evidence shows that at every point of decision following charge that there is a small differential in favour of ethnic minority defendants.

Denying the right to choose trial by jury would have a disproportionate effect on ethnic minorities. This would be a retrograde step for the Government at a time when the Lawrence Inquiry concluded that it was essential that ethnic minority communities should feel confidence in the criminal justice system. Government must address:

- what measures can be taken to reduce 'over-charging' in the criminal justice system
- how confidence in the criminal justice system can be increased among black and Asian communities.

This Bill fails to tackle either issue. It compounds the problem. This is why Sir Herman

Ouseley of the Commission for Racial Equality has asked the Home Secretary to reconsider the proposals to remove the right of trial by jury.

What are the Government arguments for changing the system?

These are mainly about saving money. Ministers who previously opposed the bill say they have changed their minds because there is now a right of appeal against the magistrates' decision on venue.

Delays for witnesses and victims

The Government argues that waiting for Crown Court hearings is distressing for witnesses and victims. One practical outcome of hearing more serious or complex cases in Magistrates' Courts is that cases could actually take longer to resolve. In any event there are also delays in hearings in Magistrates' Courts, and these are increasing. Magistrates often sit for only half a day or one day a week. Trials that over-run will have to be rescheduled at a time and date that the same three Magistrates are available. This will be just as distressing for victims.

The right of appeal that is to be introduced for those objecting to the Magistrates' decision on venue will also lead to delays. Even an appeal to a single Crown Court judge will take time and is likely to delay listing of the case in the Magistrates' Courts.

Additional delays for witnesses and victims will occur where defendants found guilty in Magistrates' Courts appeal for a re-hearing in the Crown Court. Evidence would have to be given on more than one occasion.

Abuse of the existing system

The Government claims that nine out of ten people electing jury trial have previous convictions. This is based on Hedderman and Moxon's research. This relied on the responses of convicted people, heavily weighted to those in prison (because they were easier to follow up). It is impossible to conclude from the research how many people who elected jury trial were acquitted.

Zander's study also found that 50% of defendants who changed their plea in Crown Court did so as a result of changes in the charges. The Crown Prosecution Service and independent counsel review cases going to Crown Court to assess the likelihood of a conviction, and often review the charges as a result.

In the House of Lords Debate c1279, Baroness Kennedy of the Shaws, a practicing barrister, said:

"I ..accept that steps should be taken to prevent abuse. As other noble Lords have said, there are people who delay the evil day and play the system. I do not accept that they do so in anything like the numbers that have been suggested. Some people plead guilty in the Crown Court because they have been over-charged in the first place, and it is only by then that the Crown have had the opportunity of considering all the evidence and accepting a reduced plea."

There is no current evidence to suggest that the main reason defendants elect jury trial is to achieve delay. Delaying the start of the trial was eighth on the list of eleven reasons for defendants choice of jury trial in Hedderman and Moxon's study of convicted defendants. In fact more defendants thought Crown Court trial would be quicker! As Lord Cope observed: c1248

"there is a discount on the sentence for those who save the courts ... time and money by pleading guilty at an early stage in the process... the main savings are expected to be in the area of prison expenditure -- and we are expected to believe that experienced old lags will delay a plea of guilty in order to spend more time in gaol in total".

Costs

We accept that jury trial is more expensive than hearings in a Magistrate's Court. However, we do not believe that you can put a price on justice. To deprive people of their rights on the basis of cost leaves the door open to future miscarriages of justice.

It is an irony that this effort to reduce court costs before the implementation of the Human Rights Act in October 2000, is potentially to be achieved by removing the right to choose trial by jury!

The Government suggest that £105 million is likely to be saved under their proposals.

- Two-thirds of the savings are expected to come from Magistrates imposing shorter prison sentences than judges for similar offences. If this is the case the government could tackle the problem of inconsistent sentencing directly
- The other third is derived from an assumption that of the 18,500 defendants currently 'electing' 12,000 will be denied trial by jury. The savings are based on average costs. These cases, however, are not average and are likely to be among the most expensive in Magistrates' Courts.
- The estimates of savings do not consider the cost of legal aid for venue appeals to the Crown Court.

Why are we worrying? It's like this in Scotland already.

The government claims that the Bill puts England and Wales on a par with Scotland. This isn't true. In Scotland the decision where "either-way" cases are heard rests with the prosecutor (the Procurator Fiscal). Where the prosecutor decides that the case should be tried summarily the powers of the Sheriff are strictly limited, normally to no longer than three months custody.

There is no power for the Sheriff, a professional judge, to commit the defendant after a summary trial elsewhere for more severe punishment. In England and Wales, a defendant can be processed to conviction by lay magistrates and then face a lengthy prison sentence imposed by the Crown Court. David Kidney MP raised this issue at c993 25 July 2000, during the guillotined third reading of the bill. A separate briefing outlining the system in Scotland is available from Liberty or on the Liberty Website at www.liberty-human-rights.org.uk.

So what are the alternatives to taking away people's rights and safeguards?

A number of fundamental issues need to be addressed. How we can achieve a fairer and more streamlined court system with an associated reduction in costs? Liberty is pleased that Lord Justice Auld has agreed to consider mode of trial issues as part of his review of the criminal justice system. The following issues particularly need to be addressed:

- disparity in sentencing between the Crown and Magistrates Courts for similar offences
- laying of accurate charges - currently each year a quarter (125,000) of indictable or either-way charges are terminated without the matter being decided by a court.
- why 62% of the 46,000 either-way cases directed by Magistrates to the Crown Court end up with sentences that could have passed in Magistrates' Courts.
- how Magistrates Courts procedures need to be altered to comply with the Human Rights Act, for example in relation to evidential matters.

· what procedures could be introduced to make Magistrates' Courts inherently fairer, such as allowing full disclosure of the prosecution case?

The Government needs to evaluate the full impact of 'plea before venue' and 'discounted sentence for early plea' to see what affect these have had, and are having on the number of cases in the Crown Court. If the Magistrates' Courts procedures are seen to be as fair as possible, there will be improved confidence in dealing with them.

There are other ways to significantly reduce delays for example, once a defendant has elected jury trial their case could be sent immediately to the Crown Court without an additional committal hearing.

Conclusion

The Government's Criminal Justice (Mode of Trial) (No2) Bill takes away a long held right. Removing consideration of any personal circumstances of the defendant, is unrealistic, equalizes down and does not deal with the root causes of inefficiency in the court system.

The right to choose jury trial is being removed mainly on the grounds of cost. There will be a considerable in workload that all the courts will have as a result of the implementation of the Human Rights Act in October 2000. Without a significant increase in the number of Magistrates, courts and sitting dates, we do not believe that there will be any increase in the speed with which cases will be heard.

We urge the Government to recognise our particular concerns about the disproportionate effect these proposals will have on black defendants. We believe that there are other ways of improving efficiency and reducing cost, and that the Government should consider the outcome of Lord Justice Auld's review rather than act to reduce civil liberties.

urge members of the House of Lords to prevent this bill from p

Juries are seen to reflect some ownership, by the public, of the criminal justice system.

They are a way of participating and are perceived as fair. It is very important that justice is done and from the point of view of confidence in the criminal justice system, that it is also seen to be done.