INQUISITORIAL TRIALS FOR SEXUAL OFFENCES AND 'FAIR TRIAL' RIGHTS

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I. Introduction

The genesis of this paper lies in events in 2007-8 when there were several very high profile trials of current and former police officers for alleged sexual offending during the 1980s. In some of these cases, the former police officers were convicted; in one the highest profile defendant, and at that time third most senior police officer in New Zealand, was acquitted. These trials, particularly the one which ended in acquittal, drew significant public attention to issues about the reporting, prosecution and trial of sexual offences in New Zealand. Firstly, an estimated 90% of sexual offences go unreported.[1] Police statistics make it difficult to tell what percentage of those reported offences result in a prosecution being brought. When this remaining tiny proportion of all sexual offences come to trial, the conviction rates are very much lower than for other forms of offending. Secondly, the conviction rate for all sexual offences in 2004-6 was 46% compared with 55% of all violent crimes and 70% for total crime.[2] Experience in other countries is similar.[3] Thirdly, and most significantly for current purposes, for many members of the public, and some lawyers, it appeared that the adversarial trial process was not designed to determine the truth of the allegations of sexual offending, historic or recent, but to make discovery of the truth more difficult. This was emphasised by the contrast between the defence tactic in the trials mentioned earlier of trying to discredit the complainant and the fact, disclosed later, that two of the defendants had been convicted of similar offending against another victim.

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1 A Morris, et al, *The New Zealand National Survey of Crime Victims 2001*, Ministry of Justice, Wellington, (2003), quoted in *Improvements to Sexual Violence Legislation in New Zealand - Discussion Document*, Ministry of Justice discussion paper August 2008.

2 Research and Evaluation Unit, NZ Ministry of Justice, 2006, quoted in *Improvements to Sexual Violence Legislation in New Zealand - Discussion Document*, Ministry of Justice discussion paper August 2008.

3 It appears reporting rates are lower; and prosecutions result less often in sexual offence cases than with other offences. The most recent study indicates that less charges are laid by police in less than one third of cases where sexual offences were reported to police, and in just over half the prosecutions, the defendant was discharged or acquitted. The result of the attrition is that only 13% of reported offences result in a conviction, see Sue Triggs, Elaine Mossman, Jan Jordan, and Venezia Kingi, *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (September 2009, Ministry of Women's Affairs, Wellington), parts 4 and 5. Those figures broadly parallel other western jurisdictions. In Canada, the conviction rate for prosecuted sexual offences appears to be typically 40-45%, about 10% lower than for other violent offending. Data drawn from Rebecca Kong, Holly Johnson, Sara Beattie and Andrea Cardillo, *Sexual offences in Canada*, Canadian Centre for Justice Statistics, 2002.

There was widespread dissatisfaction with the process as revealed in these trials. Many members of the public thought the process was flawed and unfair to complainants. Many critics considered that sexual offence trials could only be made more fair to complainants and more accurate in their results by some form of radical reform. Various options were raised, particularly some move away from an adversarial process. The New Zealand Law Commission, responding to these concerns, recommended in its annual report in 2008 that consideration be given to the merits of a move to inquisitorial trial for sexual offences. That question is now under active investigation.[4] A necessary element of that investigation is to consider whether the existing constitutional and statutory guarantees of a fair trial could be observed if inquisitorial trials were instituted.[5]

II. Adversarial and Inquisitorial Trials – The Theory

It is necessary first to define two of the critical elements which underlie this paper; an inquisitorial trial and an adversarial trial. Many writers have attempted to draw a clear delineation between the two. The critical features of an adversarial criminal trial are that the judge is, in essence, an adjudicator determining the case on the basis of evidence introduced by the parties to the litigation, each of whom gathers and presents the evidence in support of its case (subject to limiting rules as to relevance and admissibility). The trial court does not have any investigative function, and determines the issue of guilt or innocence solely on the basis of the evidence presented by the prosecution and defence. By contrast the inquisitorial model of criminal procedure, in the words of Jacqueline Hodgson:

> … entrusts the investigation and trial of criminal offences, not to individual and opposing parties, but to a central judicial authority whose role it is to act in the wider public interest. Representing the interests neither of the prosecution or the defence, the judicial investigator is charged with investigating evidence which exculpates, as well as incriminates, the suspect in the wider search for the truth.[6]

4 I and two colleagues at Victoria University Wellington, Associate Professor Elisabeth McDonald and Dr Yvette Tinsley have received funding from the New Zealand Law Foundation for a project to investigate alternatives to the current trial and pre-trial processes for sexual offences. That project includes an investigation of inquisitorial procedures. The Government has since specifically requested the Commission investigate the same issue, and the Commission has agreed with us that it will do so by responding in due course to our findings.

5 Although this paper sprang from my involvement in the joint research project, my co-researchers have not had an opportunity to give input into the paper. All faults are my own.

6 Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 2, Judgement and Calling to Account* (2006) 223-224. Other useful recent descriptions of the distinction between an adversarial and inquisitorial trials can be found in Jenny McEwan, 'Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 51-52 and John H Langbein, 'The Origins of Adversary Criminal Trial' (2003) 1; Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *Int J Law and Proof* 29, 38. Most modern writers are influenced by the work of Mirjan Damaska, particularly his article, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania*

As Hodgson explains, this does subordinate the role of the defence to that of the central investigating authority, a point which, as we will see in Part VIII of this paper has some significance when it comes to the calling of witnesses by the defence.

However these abstract models of adversarial and inquisitorial trial processes represent theory rather than actuality.[7] There has been a degree of convergence, with most adversarial trials being modified in some fashion and, often under the influence of case management principles, moving the role of the charge slightly towards the inquisitorial. A more marked shift in inquisitorial processes has come about as a result of international covenants protecting the rights of accused persons. Most European systems have adopted features of the adversarial trial system as a result of the adoption of the European Covenant on Human Rights and the subsequent jurisprudence of the European Court of Human Rights.[8] As a result, there may no longer be any 'pure' inquisitorial systems of criminal justice.[9]

Such changes have not always been welcomed by participants in the national systems. Jacqueline Hodgson has recounted the opposition in France to moves to reform the criminal justice process because it was believed the proposals represented a significant shift towards adversarial proceedings.[10] The changes in Europe have predominantly focused on ensuring a greater degree of impartiality of the trial judge, the right of the accused to call witnesses and especially the ability to cross-examine witnesses giving inculpatory evidence.

Even so, certain very fundamental differences remain. The most significant of these is that it is the judicial authority that directs both the investigation of the offence, and the course of the subsequent trial. There is little or no room for the parties to the litigation, the prosecution and the accused, to select the evidence on which each may seek to rely, or for the defence to select the issues on which it would challenge the prosecution case.

Law Review 506; see for example Peter Duff, 'Changing Conceptions of the Scottish Criminal Trial: the Duty to Agree Uncontroversial Evidence' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 30, and William Pizzi and Luca Marafioti, 'The New Italian Code of Criminal Procedure: the Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' (1992) 17 *Yale Journal of International Law* 1, 7.

7 Peter Duff, 'Changing Conceptions of the Scottish Criminal Trial: the Duty to Agree Uncontroversial Evidence' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 30.

8 Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 781, 788; Jenny McEwan, 'Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 51-52. The latter is a superb account which should be studied by all researchers in this field.

9 Heike Jung, 'Nothing but the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 153.

10 Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 781, 812-13.

III. Fair Trial Rights

The Courts have regularly asserted the fundamental importance to the criminal justice system of trials being fair. The Court of Appeal in *R v Burns* put it thus:[11]

> No right is more inviolate than the right to a fair trial. Not only is it the fundamental right of the individual but it permeates the very fabric of a free and democratic society. The notion that a person should be required to face a trial and endure the punishment which a conviction would bring, when the fairness of that trial cannot be assured, is repugnant. Indeed, it has been judicially observed that the right to a fair trial is as near an absolute right as any which can be envisaged.

Identifying Fair Trial Rights

The Courts have, however, been less ready to spell out what is needed to ensure a fair trial. Some years ago the Court of Appeal emphasised as components the accused's right to disclosure, her right to give evidence and to cross-examine Crown witnesses and the placing of the burden of proof on the prosecution. Yet the Court made no reference to the need for an impartial tribunal,[12] something later cases have emphasised.

The legislature has given some, but only limited, guidance. Our starting point must be the rights of persons who come in contact with the criminal justice system as enumerated in the *New Zealand Bill of Rights Act 1990* (NZBORA).[13] Those rights accrue at different stages of the investigative and judicial process. A defendant may at any stage of the criminal process rely on a right which accrues at that stage or at some earlier stage of the proceedings.[14]

Firstly, there are general rights enjoyed by all persons – such as the right to be free from unreasonable search and seizure,[15] as well as the right to be free from retrospective prosecution and from double jeopardy.[16] Persons arrested or detained under an enactment are afforded rights to be informed of the reason for such arrest or detention[17] and to have the validity of that detention determined by way of legal actions including habeas corpus.[18]

More specific rights – and rights more relevant to a 'fair trial' enquiry – are provided by s 24 to those charged with offences. Most importantly for our purposes these include a right to be informed promptly and in detail of the nature and cause of the charge (s 24(a)) the right to adequate time and facilities to prepare a defence (s 24(d)) and right to consult and instruct a lawyer (s 24(c)). There are conditional further rights under s 24(f) to receive legal assistance without cost if the interests of justice so require and the

11 [2002] 1 NZLR 387; (2000) 6 HRNZ 506, 404-405; 509-510.

12 *R v Accused* [1993] 1 NZLR 385; (1993) 10 CRNZ 152 (CA), 392; 159.

13 *The Canadian Charter of Rights and Freedom* ("The Charter") sets out a similar but not identical list, principally in ss 10 and 11.

14 *R v Barlow* (1995) 14 CRNZ 9, 31 per Richardson J.

15 *New Zealand Bill of Rights Act 1990*, s 21; Charter s 8.

16 *New Zealand Bill of Rights Act 1990*, s 26(1) and (2); Charter s 11(g) and (h). It should be noted that there are now significant exceptions to this latter right in New Zealand, see ss 378A-378F *Crimes Act 1961*, as enacted in 2008.

17 *New Zealand Bill of Rights Act 1990*, s 23(1)(a); Charter s 10(a). This may, of course, not be the same charge as that ultimately faced at trial.

18 *New Zealand Bill of Rights Act 1990*, s 23(1)(c); Charter s 10(c).

person arrested does not have sufficient means to provide for that assistance and under s 24(g) to have the free assistance of an interpreter if the arrested person cannot understand or speak the language used in court. Other s 24 rights do not of themselves affect the fairness of any subsequent trial, such as the s 24(b) conditional right to release from detention prior to the trial and the equally conditional s 24(e) right to jury trial where the offence carries more than three months imprisonment.

Lastly and most specifically s 25 provides for the minimum standards of criminal procedure which are to apply to the trial and sentencing of a person charged with an offence. Five of the first six of these must form part of our enquiry:[19]

> **25 Minimum standards of criminal procedure**
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
> (a) The right to a fair and public hearing by an independent and impartial court:
> (b) The right to be tried without undue delay:
> (c) The right to be presumed innocent until proved guilty according to law:
> (d) The right not to be compelled to be a witness or to confess guilt:
> (e) The right to be present at the trial and to present a defence:
> (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

The exception is the right under s 25(b) to be tried without undue delay, is not in itself a fair trial right. The Supreme Court in *Williams v R*[20] has indicated that the primary remedy for breach of s 25(b) is not the termination of proceedings in favour of the defendant but rather a lesser penalty following conviction. In cases where the delayed prosecution is unsuccessful, it may be that monetary damages or some other remedy could be granted.[21] The position is different if the delay has actually impacted on the ability of the defendant to present his or her defence – for example when potentially exculpatory evidence is not now available.

Nowhere in NZBORA is there an express statement of a 'right to a fair trial'. However the Supreme Court has made it clear that the right to a fair and public hearing by an independent and impartial court provided for in 25(a) is to be read as 'affirming' an absolute right to a fair trial.[22] As will be discussed later, that right has three aspects - that the trial be 'public'; that the hearing be 'fair' and that the tribunal be independent and unbiased. The right to be present and to present a defence has also been recognised as necessary for a fair trial.[23] The right to present a defence must necessarily be linked with the s 25(f) rights to examine the witnesses for the prosecution and to call witnesses on the same terms as the prosecution. The exercise of

19 Not all the rights set out in s 25 are concerned with the trial or with issues impacting on its fairness. Subsections (g) and (h) which deal with sentencing issues are necessarily not concerned with the trial but with events following a conviction, and subsection (i) requires young persons to be treated in a manner appropriate to their age.

20 [2009] 2 NZLR 750; (2009) 8 HRNZ 761 (SCNZ).

21 *Attorney-General v Chapman* [2009] NZCA 552, [80].

22 *Condon v R* [2007] 1 NZLR 300; (2006) 22 CRNZ 755, [77].

23 *R v Hines* [1997] 3 NZLR 529; (1997) 15 CRNZ 158 (CA), 549; 177, per Richardson P.

those rights will in almost all circumstances require observance of the s 24(d) right to adequate time and facilities to prepare a defence. We may reasonably encapsulate these various related rights as being a 'right to opportunity and resources to challenge the prosecution case'. In many cases this broad right will also be buttressed by the right given by 24(a) to be informed promptly of the reason for the detention.

A comprehensive right to challenge the prosecution case will require – in the majority of cases and certainly in those involving serious offences and/or complex issues of law or fact – a defendant to have the assistance of a lawyer if the right is to be of any value. Admittedly there will be cases where the right to consult and instruct a lawyer at the time of detention does not of itself affect the fairness of a later trial because the advice of the lawyer is to admit liability, avoid a trial and obtain the maximum possible sentencing discount![24] The *New Zealand Bill of Rights Act* gives both a universal right to consult a lawyer counsel at the time of arrest or detention,[25] and a conditional right to legal assistance without cost after a charge has been laid where the interests of justice so require.[26] That right will, in the vast majority of serious cases, require the state to fund defence counsel at trial.

Three further matters may also need to be considered in determining whether an accused can properly present a defence to criminal charges. The first is clarity as to the offences charged. A person arrested by police must be informed of the basis of the arrest. Given that there is usually a lengthy delay between charge and trial, breach of the right does not of itself impact on the fairness of the trial, yet clearly until the details of the charge and its basis are known, a defendant can not usefully consult and instruct a lawyer nor begin to prepare a defence. To add complexity to the issue, the offence alleged at trial may be different from that earlier alleged. It is of course essential for a defendant who is presenting a defence in an adversarial trial to be quite certain of the case which he or she has to meet. While the form of the indictment specifies the offences charged, the counts may be amended during the trial where this will not prejudice the defendant.[27] We therefore cannot regard the charges first presented as fixed, but we may say that there is a effective guarantee that the defendant will be able to formulate his or her defence free of concern that the charges he or she has to meet will be significantly altered without notice and opportunity to contest the alteration.

More important, and more difficult, is a further component to the ability to present a defence whether in an inquisitorial or an adversarial trial - the right to know the nature of the evidence which the prosecution will allege suffices for conviction – or the right to disclosure. This is considered in detail below in Part VII.

24 For the importance of early guilty pleas to obtain maximum sentencing discounts, see *R v Hessell* [2009] NZCA 450.

25 *New Zealand Bill of Rights Act 1990*, s 23(1)(b); compare Charter s 10(b).

26 *New Zealand Bill of Rights Act 1990*, s 24(f). By contrast the Canadian Charter contains no specific rights to counsel at trial, but the Canadian courts have effectively created a conditional right to state-funded defence counsel where this is necessary for a fair trial by reference to ss 11 and 7 of the Charter. See *R v Prosper* [1994] 3 SCR 236, 266-7.

27 *Crimes Act 1961*, s 335; compare Criminal Code RSC 1985, s 601(2).

Further, there is an important link between the right to present a defence and the right against self-incrimination which prevents a defendant from being compelled to be a witness against herself or himself.[28] Observance of that right means the right to present a defence or challenge prosecution evidence must be exercisable without the accused being required to give evidence.

Two other s 25 rights are, I suggest, also essential to the concept of a fair trial - the s 25(c) right to be presumed innocent until proved guilty according to law and the s 25(d) right not to be compelled to be a witness or to confess guilt. The former was considered and affirmed by the Supreme Court in *Hansen v R*,[29] although the Court there held that Parliament had specifically overridden the right when legislating for a presumption that possession of more than a set quantity of a prohibited drug was possession for the purpose of supplying it to others. By contrast, the right not to be compelled to give evidence has not been extensively discussed, although several appellate decisions have insisted that the drawing of adverse inferences from the accused's silence in the face of inculpatory evidence does not infringe the *Bill of Rights Act*.[30]

The provisions of NZBORA are not conclusive of the elements of a fair trial right. One key element only partially provided for in the statute is the right of a defendant in criminal proceedings to comprehend their nature and possible consequences. That right is clearly fundamental to the fairness of any criminal proceedings. There is express provision in NZBORA that the accused have access to the assistance of an interpreter where necessary,[31] a provision which accords with a broad curial consensus, in New Zealand and elsewhere, that a defendant who cannot comprehend the language in which the proceedings will be conducted must be given the assistance of a translator if there is to be a fair trial.[32] However, the fair trial right involved is broader than just a right to an interpreter. This becomes evident when we consider the differing rationales which have been offered for this broad right. It has been said to be a necessary element of the right to presence at the trial,[33] and also to be a necessary precondition to the exercise of other fair trial rights such as the right to present a defence and the right to examine

28 *New Zealand Bill of Right Act 1990*, s 25(d); Charter s 11.

29 [2007] 3 NZLR 1; (2007) 23 CRNZ 104.

30 The leading case on the drawing of such influences continues to be *Trompert v Police* [1985] 1 NZLR 357 (CA). It was first applied in a post-*New Zealand Bill of Rights Act* case in *R v Gunthorp* [2003] 2 NZLR 433 at [142]-[143], and subsequently in *R v Haig* (2006) 22 CRNZ 814 at [101] and *R v May* [2008] NZCA 221 at [19]-[20]. The issue may deserve further scrutiny, because in none of the post-*New Zealand Bill of Rights Act* cases has the issue been properly addressed - the later cases simply asserting that because the validity of drawing such influences was upheld in a post-*New Zealand Bill of Rights Act* case, the act is being complied with. However that first such case simply did not discuss the Bill of Rights issue involved.

31 *New Zealand Bill of Right Act 1990*, s 24. Compare Charter s 14.

32 *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226; (1996) 14 CRNZ 136; *MacDonald v Montreal (City)* [1986] 1 SCR 460 (SCC) [114]-[115]; *Kunnath v The State* [1993] 4 All ER 30 (PC) and *Ebatarinja v Deland* (1998) 157 ALR 385 (HCA).

33 *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226; (1996) 14 CRNZ 136 229; 139.

witnesses for the prosecution.[34] The Supreme Court of Canada has expressly linked language difficulties and deafness as matters which would make the trial of an unassisted defendant unfair.[35] Similar concerns underlie the decision of the European Court of Human Rights that the incapacity of an intellectually handicapped 11 year old boy to understand the proceedings made a criminal trial unfair.[36] In New Zealand, these concerns are addressed by specific legislation[37] so that NZBORA fairness issues rarely arise. However it is possible to challenge a conviction on the basis that a convicted defendant was insane at the time of the offence charged, or was not fit to plead at the time of trial, if the failure to raise the issue of insanity or fitness to plead was itself a consequence of the mental impairment.[38]

A final point must be borne in mind in determining what is required for a 'fair' trial. It must not only be fair to an accused but also to the prosecution, and to other interests. The point has not been widely discussed in New Zealand, but the Court of Appeal in *R v Robinson* put it thus:[39]

> [21] … Section 25(a) of the Bill of Rights specifically requires the position of the accused to be safeguarded. But the Bill of Rights does not pretend to be a comprehensive codification of constitutional basics. In particular, it says nothing of the right of the community and indeed of victims that the trial should be fair to the Crown as well as to the accused (while when the two are in conflict the former must give way, that is not the present case). But that also is fundamental.

Fairness and Rights Which are Conditional, Limited or Waived

While the right to a fair trial is seen to be absolute, in many cases the component elements are themselves not fundamental, in the sense that they may on occasion be limited or are dependent on certain conditions being fulfilled – as with a right to legal representation. Lastly, most 'fair trial' rights may be waived by the defendant without the trial then being rendered unfair.

The most significant of these issues is the possibility of limitation of a right in some fashion where the limitation is justified in a free and democratic society.[40] Even the key right to be presumed innocent – a common law right now stated in s 25(c) – can be limited in exceptional cases where this is necessary and proper. While the Supreme Court in *Hansen v R*[41] was divided over the propriety of a statutory reverse onus provision in the *Misuse of Drugs*

34 *MacDonald v Montreal (City)* [1986] 1 SCR 460 (SCC), [114].

35 *MacDonald v Montreal (City)* [1986] 1 SCR 460 (SCC), [114] per Beetz J.

36 *SC v UK* (2004) 40 EHRR 10.

37 In relation to young offenders, see *Children, Young Persons and Their Families Act 1989*; for mentally impaired offenders see *Criminal Procedure (Mentally Impaired Persons) Act 2003*. Offenders who are intellectually handicapped will come within the provisions of that Act: *S v Police* 8/12/05, MacKenzie J, HC Palmerston North CRI-2005-454-47; *P v Police* 14/9/06, Baragwanath J, HC Auckland CRI-2006-404-203.

38 *R v Power* 22/10/96, CA187/96 and *R v N* 9/11/98, CA201/98, approving dicta in *Reference re Regina v Gorecki (No 2)* (1976) 32 CCC (2d) 135 (Ont CA); *R v Tucker* (1915) 15 SR (NSW) 504 (NSW CCA). See also *R v Canhoto* (1999) 140 CCC (3d) 321 (Ont CA), 334-5.

39 *R v Robinson* [2007] NZCA 336, [21]. For similar views in Canada see *R v Harrer* [1995] 3 SCR 562, [45], a passage applied in *R v Bjelland* [2009] SCC 38, [22].

40 *New Zealand Bill of Right Act 1990*, s 5.

41 [2007] 3 NZLR 1; (2007) 23 CRNZ 104 [SCNZ].

Act, the judges all accepted that there might be occasions under which a reverse onus provision, whether imposing an evidential or a legal onus, might be a justifiable limit on the right to be presumed innocent.[42]

We need not spend more time on that particular right in the context of this article, as it is clear that a right to the presumption of innocence may be as easily afforded in an inquisitorial trial as in an adversarial one. Much more difficult questions would arise however should the legislature decided to modify the substantive definitions of sexual offending to place some onus on a defendant to establish the presence of consent to sexual activity by a complainant, or of reasonable grounds for believing that consent had been given.

Other component elements of a fair trial may be subject to limitation in similar fashion. The right to be present at the trial is limited by the power of the courts to exclude a defendant who misbehaves or disrupts the trial.[43]

Other rights are conferred in conditional fashion. A right to state funded legal representation only exists where two separate conditions are met - that the provision of such legal assistance is necessary in the interests of justice, and that the defendant is not able to afford to pay for counsel. In addition, a defendant must make reasonable efforts to obtain such representation before he or she can complain that the lack of it made a trial unfair.[44]

Some rights are both limited and conditional. The right to jury trial is conditional – in attaching only to offences punishable by more than three months imprisonment – but may be limited in other ways where this is necessary for a fair trial. It has recently been held in England, in the context of determining that a criminal trial should be by judge alone because of a well-founded fear of jury-tampering, that a judge-alone trial would not be unfair because the usual procedural safeguards would be in place, and that trial by judge alone would meet the ECHR article 6 requirement for trial before an independent tribunal.[45] Similar legislative provision for judge alone trials exists in New Zealand, so that although there is usually a right to jury trial for offences where the defendant might be imprisoned for more than three months,[46] a court may order a trial without jury for any offence whatsoever where there is a risk of intimidation or interference with the jury,[47] and also for offences which carry not less than 14 years imprisonment on the grounds of practical convenience in carrying out a long trial. The general three months figure is very much lower than in comparable jurisdictions. In Canada, for instance, the right to jury trial is only guaranteed where the offence carries a penalty of five years imprisonment or more.[48]

Even where a fair trial right is not abridged or conditional, it can usually be waived without the trial is not usually rendered unfair as a result. The Supreme Court has held that an appellant who has waived a procedural right cannot later claim that the trial was rendered unfair by breach of the right.[49]

42 See also *R v Siloata* [2005] 2 NZLR 145 (CA), [34].
43 *Crimes Act 1961*, s 376(1).
44 *R v Condon* [2007] 1 NZLR 300 (SC), at [76].
45 *R v T* [2009] 2 Cr App R 25; [2009] EWCA Crim 1035, [18].
46 *New Zealand Bill of Right Act 1990*, s 24(e); *Summary Proceedings Act 1957*, s 66.
47 *Crimes Act 1961*, ss 361D and 361E, as enacted in 2008.
48 Charter s 11(f).
49 *Sharma v R* [2006] NZSC 81.

That principle will apply to most NZBORA rights as well. A defendant who enjoys a right to elect trial by jury may still opt for a judge-alone trial.[50] If the defendant does no more than put the prosecution to proof of the relevant facts, without calling any witnesses for the defence, there is effectively a waiver of the right to summon witnesses on the same terms as the prosecution – but no unfairness arises thereby.

Not all fair trial rights can be waived in this manner. The right to understand the proceedings is surely not capable of waiver – any defendant who is unable to comprehend the nature of the proceedings because of psychological, intellectual or language difficulties cannot possibly meet the criteria for informed waiver of the right! The right to assistance of counsel before, and at, trial may be waived, but a conviction may be set aside if the absence of counsel causes the trial to be unfair.[51]

IV. Friction Points Between Fair Trial Rights and an Inquisitorial Trial Process

The next step in our enquiry must be to identify the areas of potential friction between fair trial rights and the inquisitorial trail model. Clearly many of the NZBORA rights which impact on trial fairness are as easily observed in an inquisitorial as in an adversarial process. The nature of the trial should make no difference to the rights accruing on arrest and when a charge is laid, nor to the right to be tried without delay. These issues are not considered because there is no logical reason to believe that the position will be different in adversarial trials and inquisitorial trials. More pertinently, the right to understand the nature of the proceedings – including the right to an interpreter, or the right to not be tried when mentally incompetent- may easily be afforded in inquisitorial proceedings.

In classical inquisitorial trial procedure, a suspect enjoyed neither the presumption of innocence nor the right to refrain from self-incrimination. Indeed it is expected even today in some inquisitorial systems that a suspect will cooperate with the enquiry into alleged offending.[52] However, we may reasonably take from the statements of principle in *Hansen v R*,[53] as discussed earlier, that any trial process for serious offending which did not contain a presumption of innocence would be regarded as unfair. While there is no equivalent consideration of the right against self-incrimination, that right is regarded as so fundamental in other contexts that it too must be regarded as indispensable. Nor is this problematic. European experience since the coming into force of the European Convention on Human Rights shows that it is not difficult for an inquisitorial trial process to accommodate a presumption of innocence and the right against self-incrimination.

50 Either by not electing jury trial under s 66 *Summary Proceedings Act 1957* where that right of election applies, or by seeking judge alone trial under ss 361B or 361C *Crimes Act 1961*.

51 *R v Condon* [2007] 1 NZLR 300 (SC).

52 William Pizzi and Luca Marafioti, 'The New Italian Code of Criminal Procedure: the Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' (1992) 17 *Yale Journal of International Law* 1, 8.

53 [2007] 3 NZLR 1; (2007) 23 CRNZ 104 [SCNZ].

Legal representation rights are more difficult. The right to consult a lawyer is, likewise, as easily afforded in inquisitorial proceedings as in adversarial where this would be necessary for the trial to be fair. However, the issue of *effective* legal assistance will arise much more fundamentally in considering the extent to which defence counsel in an inquisitorial trial can really assist the defendant to challenge the prosecution case.

What then are the potential sticking points where aspects of the right to a fair trial may clash with the structure and nature of inquisitorial trial processes?

I suggest that there are four:

- the right to a fair and public hearing by an independent court;
- the right to be present at trial;
- the right to present a defence; and
- the right to challenge prosecution witnesses

These issues will be examined in turn.

V. A Public Hearing Before an Independent and Impartial Tribunal

Judicial Independence

The first prerequisite of judicial independence is that the judge is not subordinate to, nor influenced by, the executive government in the making of judicial decisions. Judicial independence is 'the cornerstone of the common law duty of procedural fairness'.[54] The vital importance of this principle has been recognised in New Zealand, though without substantial discussion.[55] That view mirrors the more extensive Canadian jurisprudence which need not be rehearsed here.[56] We may assume that for current purposes that in the normal criminal trial there will be no serious issue of judicial independence to be considered save any which arise from the status of the judges generally. This will be important if there were to be a move from an adversarial to an inquisitorial system.

There is very likely to be room for considerable debate as to the extent to which the judge's interaction with the executive government over the process of investigation impinges upon her or his judicial independence. The vital starting point is, however, that a judge is not to be considered as lacking independence merely because he or she has an investigative role under statute, though if the role is solely investigative independence may be lost.[57]

54 *Application under s. 83.28 of the Criminal Code (Re)* [2004] 2 SCR 248 ('*Re Bagri*'), [81].

55 *R v Te Kahu* [2006] 1 NZLR 459; (2005) 22 CRNZ 133 (CA).

56 See, among many authorities, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; *Application under s. 83.28 of the Criminal Code (Re)* [2004] 2 SCR 248 ('*Re Bagri*') and *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.

57 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 2007, [43].

An 'Impartial' Tribunal – the Principles of Judicial Impartiality

The impartiality of the tribunal conducting a trial is perhaps *the* most fundamental element of ensuring that such a trial is fair.[58] The issue has not been the subject of significant judicial discussion in criminal cases in New Zealand, but the principle was clearly stated by the Supreme Court of Canada in the leading case of *R v Curragh Inc*.[59] Fairness in this context requires not only that the trial is actually fair, but that it is perceived by an objective observer as fair.[60] Although it has been said that the standard of judicial impartiality does not vary between cases where matters of fact are determined by the jury from those where the judge acts as trier of both fact and law,[61] the difference in roles is significant, and the issue must be explored carefully.

While very occasionally issues as to impartiality arise from other factors (as indeed was the case in *R v Curragh Inc* itself), by far the common basis for challenging the impartiality of a judge or a tribunal is that she, he or it may be influenced by prior knowledge of one of the parties - usually the defendant in a criminal case - or by matters not produced in admissible evidence at the trial. In most, but not all, cases what is in issue in a criminal trial is whether a judge is impartial given his or her knowledge of a defendant's prior criminal history.

Courts in both New Zealand and Canada, as well as in other jurisdictions, have considered whether the judges are disqualified by an appearance of bias from presiding over trials where they have some significant knowledge of the defendant's prior history.

The New Zealand position is straightforward. A Judge who has determined some issue in the proceeding at an earlier stage – for example the admissibility of evidence including inculpatory statements by the accused – is not disqualified from presiding over a jury trial for that reason alone. There must be some other real ground for doubting the Judge's ability to bring an objective judgment to bear.[62] Judges are expected to be able to put their prior knowledge of the accused to one side.[63] The position may be different in cases where the judge is sitting without a jury and is aware of a defendant's prior criminal history which might influence the judge's decision making on the finding of guilt or innocence.[64]

Canadian law is similar, but perhaps less limiting. It was held in the leading case of *R v Kelly*[65] that a judge may preside over the trial although he or she has some knowledge of matters concerning the defendant as a result

58 *AWG Group Ltd v Morrison* [2006] 1 WLR 1163; [2006] 1 All ER 967 (CA) at [6].

59 [1997] 1 SCR 537; (1997) 144 DLR(4th) 614; (1997) 113 CCC(3d) 481, [7].

60 *Muir v CIR* [2007] 3 NZLR 495, [62]. See also *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72. The law in Canada is the same: *R v Curragh Inc* [1997] 1 SCR 537; (1997) 144 DLR(4th) 614; (1997) 113 CCC(3d) 481, [12].

61 *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146; (1987) 3 CRNZ 38 (CA) 153; 45.

62 *Jessop v R* [2007] NZSC 96, [6].

63 *R v Cullen* [1992] 3 NZLR 577; (1992) 8 CRNZ 353 (CA).

64 *Pickering v Police* (1999) 16 CRNZ 386; 5 HRNZ 154.

65 *R v Kelly* (2005) 199 CCC (3d) 336 (BC CA).

of decisions on the admissibility of evidence or other pre-trial matters.[66] However, a judge who has had to make adverse findings going past guilt or innocence on a particular charge about a defendant should not preside over any later trial of that defendant.[67] In *R v Kelly*, the judge had determined on a previous occasion that the defendant was a dangerous offender and likely to reoffend, so qualifying for the imposition of an indeterminate sentence of imprisonment. That decision was enough to disqualify the judge from presiding over the later trial.

The issue is different if the judge is acting as the trier of fact and the issue is a rehearing or fresh assertion on guilt or innocence on a charge. A judge may be able to put aside inadmissible evidence and render a decision; he or she is unlikely to be able to put aside a full chain of reasoning and evaluation of evidence.[68]

The Canadian courts have noted there is a countervailing consideration here. While judges may well err on the side of caution by recusing themselves from trying cases where there is a possibility of an appearance of bias, judges have a duty to try cases before them and should not regard themselves as disqualified by an appearance of bias unless there are good grounds for that view.[69]

Judicial Impartiality in an Inquisitorial System

Is judicial impartiality possible in an inquisitorial system? The critical point is, of course, that in classical inquisitorial theory the trial is conducted by the same judge who conducted the previous investigatory process. On that basis we have a judge who has investigated alleged offending, determined that there is evidence of such offending sufficient to demand a trial and then determined that the defendant should be put on trial for that offence deciding whether or not the evidence suffices to establish guilt.

Although, as we have seen above, the adversarial system frequently permits the trial judge to know a great deal about the history of the accused, nothing in the adversarial system presents such an obvious basis for an allegation of at least the appearance of bias. The risk that objections of this kind could be made has led to changes in some European jurisdictions. In France, for example, a judge who has decided that an accused should be detained before the trial may not preside at the trial.[70]

Obviously one possible solution to issues of possible judicial bias is to have a jury or other independent fact finder determine the sufficiency of the evidence at trial. If this were to be done, there could be little room for an allegation that the judge's role in supervising an investigation which led to the trial has led to the defendant, or the prosecution, being prejudiced by that judge determining the facts of the case.

66 *R v Kelly* (2005) 199 CCC (3d) 336 (BC CA), at [17] per Low JA; and per Ryan JA at [35].

67 *R v Kelly* (2005) 199 CCC (3d) 336 (BC CA), at [17] and [35] per Low JA and Ryan JA respectively.

68 *R v Kelly* (2005) 199 CCC (3d) 336 (BC CA), at [17] per Low JA; at [35] per Ryan JA; *Re Regina and Nolin* (1982), 1 CCC (3d) 36 at 39 (Man CA), leave to appeal to SCC refused (1982) 1 CCC (3d) 36n.

69 *Lesiczka v Sahota* [2007] 10 WWR 456; (2007) 70 BCLR (4th) 265, [21].

70 Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 761, 807.

Yet such a major change may not be necessary. The jurisprudence of the European Court of Human Rights holds that a judge is not to be regarded as biased simply because he or she has been involved in the preliminary investigation.[71] Much depends on the extent to which the judge has, in the investigatory phase, been required to determine not just whether the evidence suffices to put the accused on trial, but to make a determination similar to that involved in deciding whether guilt had in fact been established. For example, in *Hauschieldt v Denmark*[72] the judge had determined that pre-trial detention was justified on the basis there was 'a very high degree of clarity as to the question of guilt', a decision too close to that of guilt or innocence.

Most of the ECHR jurisprudence on judicial impartiality involves not the judge's prior knowledge of the accused, but whether a judge could preside over the trial where he had previously acted as prosecutor in the case,[73] or could sit on an appellate hearing from his own decision on guilt.[74] In each case there was held to be actual or apparent bias – decisions which would surely be the same in any adversarial system.

Yet the issue does require particular care. There is some evidence which suggests that judges in inquisitorial trials who have seen the full prosecution dossier are more likely to convict than those who have not.[75] Jenny McEwan attributes this to the fact that the judges have seen the prosecution material ahead of the trial and are influenced by the prosecution reasoning. It does seem possible that the issue is not knowledge of the prosecution reasoning per se but rather the routine practice of including in the full dossier the details of a defendant's criminal history. Such evidence is likely to be highly influential in any decision by any trial judge.

A 'Public' Trial

Thomas Weigend encapsulates the major argument of principle for open and public trials - that a pronouncement of offending by the court acquires legitimacy only if justice has been seen to be done.[76] It is the element of 'publicness' of the trial, and the ability of observers to see that the judgment

71 *Sainte-Marie v France* (1993) 16 EHRR 116. See generally Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed, 2006), 617; Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 761, 787.

72 (1990) 12 EHRR 266. In *Tierce v San Marino* (2000) 34 EHRR 25 it was held, at [79]-[80], that an investigating judge who had conducted an investigation over more than two years, including intensive questioning of the defendant, and had ordered preventive sequestration of the defendant's assets was disqualified from sitting as the trial judge by the objective appearance of a lack of impartiality.

73 *Piersack v Belgium* (1982) 5 EHRR 169.

74 *De Cubber v Belgium* (1984) 7 EHRR 236.

75 Jenny McEwan, 'Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 63-64.

76 Thomas Weigend, 'Why Have a Trial When You Can Have a Bargain?' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial, volume 2: Judgement and Calling to Account* (2006) 208.

is based on the evidence, which confers this legitimacy.[77] Yet it is clear that the 'publicness' element of a trial may properly be limited by the suppression of evidence, or more rarely by the holding of the trial in a closed court, where some countervailing principle trumps the openness principle. Usually this principle is the protection of vulnerable witnesses.

The New Zealand law confers on judges wide powers to prohibit or limit the reporting of matters to do with criminal trials before, and during, the accused's trial.[78] There is also the power to clear the court in certain circumstances.[79] The Courts have repeatedly stated that there may be a conflict between two critical policy considerations – the defendant's right to a fair trial and the public interest in open justice - but this conflict must be resolved by favouring the fair trial rights of the accused. Publicity and openness in the justice system is vital, but that interest can be served, in most cases, by later publication of material relating to the trial.[80]

VI. The Right to Legal Assistance Before and at Trial

Throughout the common-law world, the courts have held that a person charged with serious criminal offending may require legal assistance if he or she is to receive a fair trial.[81] Resource constraints may mean that not every criminal defendant will receive the assistance of counsel, and some defendant may choose to dispense with the services of counsel who are available. However the general rule is clear: a defendant who is in jeopardy of conviction for a serious offence, wishes to be legally represented but does not have legal representation is unlikely to be seen as having received a fair trial.

In the 'truly' inquisitorial system, by contrast, the position is less clear. It as traditionally assumed that the investigating judge before trial, and the judge at trial, will seek to discover the truth. That active neutrality leaves little scope for a defence lawyer to act. The position has altered somewhat under pressure from the European Court of Human Rights, which has insisted that the right to a lawyer is an essential element in ensuring a fair trial.[82]

Practice does not entirely accord with that principle, as an accused in most European inquisitorial systems may not always receive substantial assistance from her or his lawyer. When Jacqueline Hodgson analysed reforms made to the French criminal justice process in the early years of this decade, she

77 John D Jackson, 'Managing Uncertainty and Finality: the Function of the Criminal Trial in Legal Inquiry' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 128; Mireille Hildebrandt, 'Trial and "Fair Trial": from Peer to Subject to Citizen' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume, 2 Judgement and Calling to Account* (2006) 27-28.

78 *Criminal Justice Act 1985*, ss 138-140.

79 *Crimes Act 1961*, s 375A; *Criminal Justice Act 1985*, s 138.

80 See *Television New Zealand Limited v Rogers* [2008] 2 NZLR 277 (SC); *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546; (2000) 18 CRNZ 55; 6 HRNZ 1 (CA); *R v Burns* [2002] 1 NZLR 387, also reported as *B (CA308/00) v R* (2000) 6 HRNZ 506 (CA), [11].

81 See, for example, *Condon v R* [2007] 1 NZLR 300; (2006) 22 CRNZ 755 and *R v Prosper* [1994] 3 SCR 236, 266-67; compare *Gideon v Wainwright* 372 US 335, 344 (1963).

82 *Van Geyseghem v Belgium* (2001) 32 EHRR 24, [34].

noted that the French had moved to allow a suspect held in police custody to have access to a lawyer. However even this reformed system only provided for the defence lawyer to discuss matters with the suspect for a maximum of 30 minutes; the lawyer does not have an opportunity to look at the police evidence and, most crucially, the defence lawyer has no right to be present during any police interview or interrogation. As Hodgson puts it:[83]

> The lawyer serves a legitimating purpose in enabling France to make claims about respecting defence rights, but it is clear that, in the majority of cases, she is neither expected nor allowed to play any significant role in the pre-trial process.

The role of lawyers has expanded somewhat. There is now a more formal process for the defence – and the victim - to suggest that certain witnesses be examined by the judge, and now at least the judge must give reasons for not calling any such suggested witness.[84]

VII. A 'Fair Trial Right' Right to Challenge the Prosecution Case

A fair trial requires that there be some opportunity for the accused to challenge the prosecution case – which requires both the right to know the case against the accused, and the right to answer that case.[85] There are in essence only two ways in which the prosecution case can be challenged although these two are frequently both used in the same trial. Firstly, the accused may seek to discredit the evidence given by witnesses on whom the prosecution rely, usually by a process of cross-examination of the witnesses. Secondly, the defence may challenge the prosecution case, and sometimes the credibility, or the weight, of prosecution evidence, by calling witnesses of its own. These tactics can only be effective if there has been disclosure of the prosecution case. Those three elements, cross-examination, calling defence witnesses, and disclosure will be examined in turn later.

Who Challenges?

We may consider here a significant matter about the manner in which fair trial rights for an accused are usually expressed. In almost all cases statutory expressions of the rights of the defendant use the active voice – that is the defendant is entitled to do X. This is a very important matter when we look at the ability to challenge the prosecution evidence. If we use the active voice to express the right, we will formulate the right as something like 'to ensure the fairness of the trial the defendant may challenge the evidence' – a formulation which effectively requires that any challenge to the evidence of a witness by way of cross-examination should be carried out by the defendant or his or her agent – the defence lawyer.

83 Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 781, 813.

84 Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 2, Judgement and Calling to Account* (2006) 232-3.

85 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, [29].

However, if we express the right in a passive voice – 'a fair trial requires that the evidence of a witness be subject to challenge' – we impliedly accept that there may be an alternative to cross-examination by the accused. The questioning of the witness by a lawyer acting for the court – or by the judge – may suffice; or possibly the judge may determine that a witness's evidence has been sufficiently challenged by cross-examination by one defendant and therefore refused to commit further cross-examination by the lawyers for any co-accused.

Limits on Challenging the Case

In theory adversarial trials offer the parties a high degree of autonomy in their choice of material to present to the court and the tactics used in cross-examination or otherwise to advance their respective cases. In practice the law, or professional obligations, place significant limitations on the degree of autonomy which the parties actually enjoy in an adversarial trial. The judge can refuse to put an intended defence to the jury if he or she thinks there is no evidential basis for it. (The American jury nullification theory might allow counsel to advance the ground regardless, but that theory is not widely accepted as necessary in adversarial trials.[86]) The rules of evidence determine what material may be put before the court; professional obligations may prevent counsel from advancing allegations that some other person was responsible for offending unless there is a good faith basis for that allegation.

More significantly for our purposes, in some cases the law limits the manner in which prosecution evidence may be challenged. This is most particularly the case in the overlapping categories of violent or sexual offences and offences involving child victims or vulnerable victims. As is discussed in Part 9 most common law jurisdictions allow such complainants or victims to give evidence by way of closed-circuit television or video recording, with some limits on the manner of cross-examination at any hearing before the trial.

Disclosure

In an adversarial system, it is often said that there must be 'equality of arms'. This is often misconstrued as meaning there must be some kind of equivalence of resources in terms of lawyers or access to scientific experts, but there are good grounds to restrict the idea of equality of arms to the central element of ability to seek out evidence which may assist the party to support the case it wishes to present to the court and to bring that evidence before the court. One element of this equality of arms is the ability of a defendant to summon witnesses on the same basis as the prosecution. However, as many defendants do not call evidence on their own behalf, this part of the principle is not always an issue.

By contrast, in virtually every criminal case it is necessary for the defence to know the case it has to meet before it can determine whether the accused should seek some accommodation with the prosecution, plead guilty to the

86 For jury nullification see, for example, Matt Matravers, '"More than Just Illogical": Truth and Jury Nullification' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 71.

charges laid or mount a defence. It is on that basis that the European Court of Human Rights has held that the equality of arms requirement obliges the State to provide 'to the defence all material evidence in their possession for or against the accused'.[87]

The courts therefore insist, in both adversarial and inquisitorial procedures, that the state, with its far greater powers to investigate matters and gather evidence, should be compelled to provide some assistance to the defence by disclosing to it all the evidence that the prosecution intends to call, and also the details of potential witnesses which the state will not call but who might be able to give evidence which would assist the defence. Unless the accused has timely notice of the nature of the evidence relied on by the prosecution, he or she cannot readily determine whether evidence in rebuttal is required, nor plan any effective process for challenging the credibility of a witness either in cross-examination or by calling rebuttal evidence.

It is notable that neither the *New Zealand Bill of Rights Act* nor its forerunner the Canadian Charter specifically provide for any issue of disclosure by the prosecution. In New Zealand the matter is now governed by the *Criminal Disclosure Act 2008*. In Canada, the obligations of disclosure are governed by the case law,[88] but the Supreme Court has noted the necessity for disclosure to protect the fair trial rights of an accused.[89] While these are largely the same as in New Zealand, there is a greater likelihood the Court may order disclosure of material held by third parties, a requirement which may impact particularly unreasonably on victims of sexual offending.[90]

VIII. The Right to Call Evidence

The second element of the equality of arms principle is that the defendant should be able to call witnesses on the same basis as does the prosecution. To that end the law usually provides for the defence to be able to summons witnesses to appear at trial.

In the adversarial trial, the defence has a high, but not unlimited, degree of autonomy as to the witnesses it may call. There are two principal limitations. Firstly, the defence may not call witnesses who cannot give admissible evidence. Secondly, there is the witness's privilege against self-incrimination, which means that the defence may not *compel* a person to answer questions if the evidence which the defence wishes the witness to give might incriminate the witness.

We should note an incidental but significant issue arises from deciding who calls a particular witness – that of the right to cross-examine the witness. In adversarial proceedings, a party cannot normally impeach the testimony

87 *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, [60]. This dictum was cited with approval by the House of Lords in *R v H* [2004] 2 AC 134; [2004] 2 Cr App R 10 (HL), at [37].

88 *R v Stinchcombe* [1991] 3 SCR 326; (1991) 68 CCC (3d) 1 (SCC); *R v Chaplin* [1995] 1 SCR 727; (1995) 96 CCC (3d) 225 (SCC); *R v O'Connor* [1995] 4 SCR 411 and *R v McNeil* [2009] SCC 3.

89 See *R v Bjelland* [2009] SCC 38 and the cases there discussed.

90 See, for example, Maureen Moloney QC, 'International Human Rights Treaties and Canadian Criminal Law Reform: A Gender Analysis', paper presented at 20th Conference of International Society for the Reform of the Criminal Law, Vancouver, 2007.

of a witness which that party has called. Thus a defence witness cannot be cross-examined by the defendant to show his or her evidence is not true. This puts a premium on the defence to arrange for the prosecution to call the witness so as to open up the possibility of cross examination. In New Zealand, the judge may order the prosecution to call a particular witness, or in rare cases simply call the witness by judicial order.[91]

It is implicit in this analysis that the accused must have a right to give evidence if he or she so chooses. Most defendants choose not to do so, and the right against self-incrimination prevents them from being forced to do so.

The position is significantly different in inquisitorial trials. In strict inquisitorial theory, the investigating judge may determine the matter without calling on the defendant at all for any evidence – or could require the suspect to give evidence which might establish his or her guilt. As with a number of other cases, the European Court of Human Rights has recognised very significant changes to the former trial procedures as a result of rights stated in, or implicit in, the Convention. While the Convention does not expressly mention a right to silence or protection from self-incrimination, the Convention has held that this is an essential feature of a fair trial.[92] It has also held, though rather less clearly, that a judge should not make findings of criminality of conduct by an accused who has not been given the opportunity to give evidence, before the trial or at it, as to the relevant events and conduct, or to call other witnesses to give evidence as to those matters.[93]

However, the right to call witnesses is subject to a similar relevance criterion as applies in adversarial trials. The judge in an European court may refuse to call and examine a defence witness where the defence cannot show the evidence would be relevant to matters before the court or would not assist in establishing the truth.[94]

One consequence of the primacy of the neutral judge as investigator is the restricted scope for the defence to call witnesses at trial to challenge the prosecution case. As Jacqueline Hodgson has noted, to call a witness at trial who has not been examined in the pre-trial judicial process is to challenge the integrity of the judiciary itself. Further, in most inquisitorial systems, the defence lawyer is seen as a less impartial and reliable source of information than the police whose investigation has been directed by the judge.[95]

91 *Crimes Act 1961*, s 368. For a recent discussion of the possibility this section could be used to require the Crown to call evidence of what an accused said in a police interview see *R v King* [2009] NZCA 607.

92 *Saunders v UK* (1996) 23 EHRR 313, [68].

93 *Tierce v San Marino* (2006) 42 EHRR 47; *Ferrantelli and Santangelo v Italy* [1996] ECHR 29.

94 *Perna v Italy* (2004) 39 EHRR 28; *Bonisch v Austria* (1984) 6 EHRR CD467.

95 Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 2, Judgement and Calling to Account* (2006) 223.

IX. The Right to Cross-Examine

Cross-Examination as a Way of Challenging the Prosecution Case

An extraordinary amount of ink has been spent on accounts of the centrality of cross-examination to adversarial trials, and of its alleged effectiveness. We may take as a convenient summary the views of Louise Ellison:[96]

> The primary evidentiary safeguard of the adversary trial process is cross-examination in court. In common law jurisdictions, cross-examination is seen to be the most effective device for testing the veracity of witnesses. Inordinate faith is placed in the capacity of the skilful cross-examiner to expose the dishonest, mistaken or unreliable witness, and to uncover inconsistency and inaccuracy in oral testimony. Consequently, it is viewed as a fundamental right of the accused in a criminal trial to have the evidence of prosecution witnesses tested by live cross-examination.

Allied to the simple fact of the availability of cross-examination are certain values about evidence being in given in public so as to further dissuade witnesses from giving untruthful evidence, and in some jurisdictions at least, a claimed right of the accused to confront witnesses against her. The existence of any such 'right' is discussed below.

By contrast one European writer has suggested that there are some kinds of evidence – 'documents, scientific and psychological expert evidence and the results or secret surveillance' – which are not suited to oral presentation of evidence and any reliance on adversarial cross-examination as a method of establishing the truth of a case may be unjustified.[97]

It is important to note that a right to challenge evidence by way of cross-examination cannot always be exercised effectively without the observance by the courts and the parties to the litigation of a number of implied rights which the defendant must enjoy. Firstly and most obviously, there can be no cross-examination if the relevant witnesses do not have to take part in the relevant parts of the prosecution process or, if present, do not have to answer questions put to them. Secondly, effective cross-examination may require exploration of a number of issues, and therefore cannot readily be performed in a short period of time, nor without a degree of latitude being extended to counsel, on some good faith basis, to explore matters not raised directly by the witness's own testimony. Lastly, but vitally, effective cross-examination cannot be done without significant preparation. It is essential for an advocate who intends to cross-examine a witness on a significant matter to have prior information as to what the witness is likely to say - and therefore in the case of defence counsel cross-examining prosecution witnesses, an effective system of disclosure of the prosecution case is essential.[98]

96 Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch comparison' (1999) 3 *Int J Law and Proof* 29, 35.

97 Thomas Weigend, 'Why Have a Trial When You Can Have a Bargain?" in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial, volume 2: Judgement and Calling to Account* (2006) 210-211.

98 Whether there should be greater duties of disclosure on the defence is a point which deserves attention but falls outside the scope of this paper.

The So-Called 'Right of Confrontation?'

Often the 'right' to cross-examine or challenge the other party's witnesses is said to extend to a 'right to confrontation' of those witnesses. The English courts have never accepted that there is an absolute right of confrontation;[99] as early as 1919 the courts had determined that a trial judge has a discretion to remove the accused from the sight of a witness who might be intimidated by his presence.[100] In New Zealand, the position is governed by ss 103 and 105 of the *Evidence Act 2006*, which allows, inter alia, evidence to be given by closed circuit television rather than in the presence and sight of the defendant.[101]

More recently the House of Lords in *R v Camberwell Green Youth Court*[102] decisively rejected challenges to a regime for the trial of alleged young offenders whereby the child complainants or witnesses would give evidence by way of the closed-circuit television or by the playing of video recordings, in each case with an opportunity for the defendant to cross-examine the witness. There was no direct confrontation, in that the accused in the witnesses were not present in the same room, but that was not required as part of the European Convention.

By contrast the Sixth Amendment to the US Constitution guarantees to the defendant a right to confront the witnesses against him.[103] This right is predicated on the (perhaps less than immediately convincing) belief that a witness is less likely to lie in the witness box if they are in the presence of a person who would be harmed by untrue testimony.[104] Justice Scalia has suggested that the Sixth Amendment was directed at the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.[105]

The ECHR jurisprudence is somewhat equivocal on the issue. There is some support for a limited right of confrontation of the prosecution witnesses in the judgement in *Van Mechelen v Netherlands*.[106] In that case the applicant's had been convicted of robbery and attempted manslaughter on the basis of pre-trial statements by police officers whose identities were not disclosed to the accused. These police officers had made statements before the trial but were not examined by the investigating judge nor were they called at the trial. The Netherlands Court of Appeal referred the matter back to the investigating judge who conducted a fresh hearing in which the investigating judge, the witnesses, and a court official were in one room, connected by a sound link to another room in which the accused, their lawyers and the Advocate-General

99 *R v Camberwell Green Youth Court* [2005] 1 WLR 393; [2005] 1 All ER 999, [14].
100 *R v Smellie* (1919) 14 Cr App R 128.
101 For the genesis of the sections see *R v Williams*, 16/12/09, Heath J HC Auckland CRI 2009-092-10225.
102 [2005] 1 WLR 393; [2005] 1 All ER 999.
103 For a recent reassertion of the breadth of this right see *Melendez-Diaz v Massachussetts* 129 S Ct 2527 (2009).
104 *Coy v Iowa* (1988) 487 US 1012, 1016-1020.
105 *Crawford v Washington* 541 US 36 (2004). Historians might well attribute greater weight to hostility to the practice of allowing anonymous accusers in Star Chamber proceedings than does Justice Scalia.
106 (1997) 25 EHRR 647.

were present. The accused and their lawyers could hear the testimony of the police officers, but could not see them give evidence. The majority judgement of the European Court held there had been a breach of the fair trial rights not merely by the non-disclosure of the identity of the police witnesses but because the accused and their lawyers had been prevented from observing the demeanour of the witnesses under direct questioning, and thus from testing their reliability. No good reason had been given for depriving the accused of this right. The applicability of the judgments is clearly affected by the unusual element of anonymity of the witnesses – a matter which must of itself limit the scope for effective cross-examination. That concern has led the European Court to hold invalid convictions where the conviction was based solely or decisively on anonymous statements.[107]

By contrast, in *SN v Sweden*[108] the Court held that it was acceptable to have a procedure whereby a child witness gave evidence by way of videotaped statement, with one of the interviews involving a police officer who asked questions which defence counsel had requested be put to the witness. There was no direct cross-examination by the lawyer, nor any confrontation in the sense of the evidence being given in the presence of the accused. However, given the vulnerable nature of the witness, the European Court considered that the trial met the convention requirements.

We may thus conclude that both the common law and the civil law jurisprudence, as modified by the European Convention, do not see the so-called 'right of confrontation' as an essential element of a fair trial. It is important to note that while a defendant may have no right of confrontation, an investigating judge may confront an accused with his or her alleged victim, though it is not clear how common such a practice is.[109]

Criticisms of Cross-Examination

Critics of the practice of cross-examination as practised by some defence counsel might suggest that frequently cross-examination is not aimed at detecting or deterring dishonest testimony but rather to confuse an honest witness into error, or to deter a witness from attempting to maintain truthful testimony because of the pressure exerted by the cross-examiner. In the words of Jenny McEwan:[110]

> … witnesses in adversarial criminal trials are not allowed to express themselves freely, but have to give their evidence while contending with the rigid control and, sometimes, downright cruelty, of the examining advocate.

107 *Doorson v Netherlands* (1996) 22 EHRR 330, 350, [72]; *Van Mechelen v Netherlands* (1997) 25 EHRR 647, 673, [54]-[55]. Evidence of anonymous witnesses is not admissible at common law, see *R v Davis* [2008] 1 AC 1128, but is permitted in NZ in limited circumstances under ss 110-117 *Evidence Act 2006*.

108 [2004] 39 EHRR 13.

109 Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *Int J Law and Proof* 29, 39.

110 Jenny McEwan, 'Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 59.

In most discussions of cross-examination, as in most of this paper, analysis is centred on trials involving a single defendant. This is the norm in the sexual offence cases. However it is not universal. The adversarial trial produces particular problems of overall fairness when we look at the problem of multiple defendants, unless all defendants are represented by a single lawyer. (That is generally poor legal practice and we may dismiss the probability for current purposes). In the classic single defendant trial, each prosecution witness is cross-examined, once, by counsel for the accused. However, where there are multiple defendants, each defendant, or each defendant's counsel, can cross-examine every witness. This leaves a position where a single victim may be cross-examined by two, three or four – or more – different lawyers. In some cases, this can create an appearance of a concerted defence tactic of repeated cross-examination at length not so much to impeach credibility as to destroy the complainant's willingness to continue to testify.

Particularly difficult issues arise where a criminal defendant wishes to cross-examine the alleged victim of her or his offending. This is most commonly likely to arise in cases of domestic violence or sexual offending, particularly where the sexual offending took place after the termination of a prior relationship between the defendant and the victim. The legislatures in both New Zealand and Canada have intervened to prevent a self-represented defendant from cross-examining the complainant in cases of alleged sexual or violent offending – in New Zealand requiring any questions to be put by a lawyer engaged by the defendant, or by a person appointed by the Judge for the purpose.[111] This provision will be most important if the judge has already also given leave to cross-examine the victim as to her or his previous sexual experience on the grounds that the general right to privacy has been overridden by the fair trial interest of the accused in cross-examining on a matter relevant to guilt or innocence.[112]

Placing Limits on Cross-Examination

The autonomy of the defence to challenge the prosecution case is heavily affected in some cases by legal rules limiting or avoiding the opportunities for cross-examination. Common law systems have long been prepared in certain circumstances to accept evidence in circumstances where there is no possibility of cross-examination at trial.

A simple example is the possibility of the reading at trial of depositions evidence where the person who provided the deposition has subsequently died or is overseas or otherwise unable to attend the trial. In all those cases the defendant had an opportunity to cross-examine at depositions, though in most cases it was not normal practice to do so. The effect of such rules is discussed below, in the context of hearsay evidence.

111 *Evidence Act 2006* (NZ) s 95; Criminal Code RSC 1985, s 486.3.

112 *Evidence Act 2006* (NZ) s 44; compare Criminal Code RSC 1985, s 276. England has rather weaker and less apparently effective provisions, see *R v A* [2001] 3 All ER 1, criticised trenchantly by Jenny McEwan, 'Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 64-65.

The right to cross-examine does not require that a potential witness be available for cross-examination at every stage of criminal hearings. It is common place in most common-law jurisdictions for a complainant in a sexual offence case to be able to give evidence at any preliminary process or hearing without being cross-examined, or only being subject to cross-examination where the court so orders. Indeed, in many jurisdictions some witnesses, particularly children or otherwise vulnerable witnesses, may give their evidence at the pre-trial stage in recorded form, either in writing or by oral testimony recorded on a video recording. In New Zealand, for example, the complainant in a sexual offence case will give evidence in writing at the committal stage unless the judge is satisfied both that an oral committal hearing is necessary and that the victim should give evidence orally and be subject to cross-examination.[113] The inability to cross-examine the complainant at a preliminary inquiry does not in any way infringe the defendant's fair trial rights.[114] Canadian law provides similar protection to complainants. The Supreme Court of Canada on more than one occasion has held that there is no fair-trial right to cross-examine witnesses at preliminary hearings.[115] In sexual offence cases, the admission of videotape evidence at a preliminary hearing is consistent with the right to a fair trial and the fundamental principles of justice provided the accused has some opportunity to cross-examine the complainant or witnesses at trial.[116]

There may also be limits on the cross-examination of witnesses who are vulnerable. In New Zealand, the grounds include physical or intellectual handicaps or because of their youth as well as a wide range of other factors including relationships to the accused and cultural background.[117] The comparable Canadian provision seems more limited.[118]

When considering the question whether limits should be placed on the cross-examination of a victim or other witnesses, it is relevant to consider a possible distinction between adversarial and inquisitorial processes. In an adversarial process, the witness is likely to be cross-examined only once (in some cases there may be two cross-examinations - the first at the preliminary hearing - but this is rare). The cross-examiner therefore has effectively only one opportunity to challenge that witness's evidence. The result is likely to be a concentrated, and often therefore very unpleasant, period of questioning for the witness. By contrast, where there is an inquisitorial process, it is quite possible that a witness may be examined on several occasions by the

113 *Summary Proceedings Act 1957*, ss 180 and 185C. Amendments to the *Summary Proceedings Act* in 2008, in force since June 2009, will probably mean the very small number of cases where the complainant gives evidence orally at a preliminary hearing will diminish even further.

114 *R v Accused* [1993] 1 NZLR 385; (1993) 10 CRNZ 152 (CA) at 392; 159.

115 *R v Bjelland* [2009] SCC 38 and the cases discussed there.

116 *R v L(DO)* [1993] 4 SCR 491, [3]; *R v Levogiannis* (1999) 85 CCC (3d) 327.

117 *Evidence Act 2006* (NZ), s 103. The research project on which I and my co-researchers are embarked may need to consider whether the rules as to cross-examination of vulnerable witnesses should be extended more expressly to victims of sexual offending, either generally or where there is evidence of trauma or post traumatic stress disorder. However there are some very difficult issues of principle involved which cannot be explored here.

118 Criminal Code RSC Canada 1985, s 486.2.

investigating authority. As we will see below, the modern European practice requires that there be some opportunity to challenge the evidence of a witness at some stage in the proceedings, although he or she may not be required to give evidence and be subject to cross-examination at the trial. It is therefore at least possible that a complainant or witness may be examined on a number of different occasions before the trial. Whether this will impose greater stress on the victim than would an adversarial cross-examination at trial may well depend on the extent to which the inquisitorial judge permits any defence challenge to be repeated on different occasions.[119]

The European Jurisprudence on Cross-Examination in Inquisitorial Trials

It is clear that the European practice generally changed significantly as a result of the European Convention on human rights and the practice of the European Court of Human Rights. Since the 1980s, the court has consistently held that an accused person must have some opportunity to challenge the evidence of prosecution witnesses. Thus, in *Unterpertinger v Austria*,[120] the conviction was quashed where the defendant had had no opportunity to cross-examine his wife and daughter at the trial because they exercised a right not to give evidence, and thus their statements alleging violent offending could not be impugned. Similarly, if the prosecution rely on depositions by a co-accused who does not give evidence at the trial, the other accused must still be afforded an opportunity to question the co-accused.[121] As will be seen later, the ECHR jurisprudence on the right to cross-examination in cases where witnesses do not give evidence at trial is currently uncertain.

More straightforward is the right to cross-examine witnesses who actually give evidence. An early and much-cited judgement is that in *Kostovski v Netherlands*[122] where the defendant, accused of armed robbery, was convicted largely on the basis of evidence of anonymous witnesses who had been examined by the judicial officer in the absence of the accused or his lawyers. The Court emphasised the need to recognise the right of the accused to challenge a witness's evidence:[123]

> In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.

119 This is a matter on which I have so far been unable to discover any useful information but it is hoped that further research in our project will have considerable light on this matter.

120 (1986) 13 EHRR 175.

121 *Kaste and Mathisen v Norway* (2009) 48 EHRR 3.

122 (1989) 12 EHRR 434.

123 (1989) 12 EHRR 434, 447-448, [41]. See also *Luca v Italy* (2003) 36 EHRR 46, [39].

We may note that the second paragraph of that quotation is most significant in accepting that there may be a sufficient right to challenge, and opportunity to challenge, the evidence of witnesses at some stage before the trial itself,[124] a point which has been made by the English House of Lords when commenting on the requirements of the ECHR. In the words of Lord Rodger of Earlsferry:[125]

> The critical element for the European Court is that the defence should have an adequate and proper opportunity to challenge and question a witness on his statement at some stage.

In a more recent decision, *Pervushin v Estonia*,[126] the European Court of Human Rights reaffirmed the validity of a trial where some evidence was given in written statements by anonymous witnesses provided there was some opportunity to challenge it. In that case it was seen as significant that the charges relied heavily on documents from the appellant's own business records, and these had been supported by evidence from witnesses whose identity was known and who were available for cross-examination.

It must be noted that in these cases, affording the right to challenge the prosecution witnesses does not necessarily require that *the defence* mount the challenge. In France, defence lawyers have only in the last few years been permitted to question witnesses directly, rather than through the trial judge.[127] In the Netherlands there may be a sufficient challenge where an examining magistrate has questioned the prosecution witnesses, though examination by both magistrate and defence lawyer may be more usual.[128]

The Problem of 'Absent Witnesses' and Hearsay Evidence

A particular problem in all criminal trials is the extent to which the parties may introduce and rely on hearsay evidence. Generally, the common-law prohibited hearsay evidence, except in relation to certain recognised exceptions such as recent complaint or res gestae. These exclusions are of relatively recent origin. John Langbein has noted that until the late 18th century, hearsay evidence was frequently permitted in criminal trials in the English courts, particularly in the case of rape prosecutions where child victims were involved when the courts would allow persons to whom the child had spoken contemporaneously to give evidence of what the child had said.[129] Such evidence would of course now generally be regarded as admissible as recent complaint evidence.

New Zealand courts have consistently given effect to legislative provisions allowing documentary hearsay statements to be admitted in criminal cases. Until the passage of the *Evidence Act 2006*, the position was governed by

124 Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *Int J Law and Proof* 29, 39.

125 *R v Camberwell Green Youth Court* [2005] 1 WLR 393; [2005] 1 All ER 999, [12].

126 [2009] ECHR 1578.

127 Jacqueline Hodgson, 'Recent Reform in the French Criminal Process' (2002) 51 *International & Comparative Law Quarterly* 781, 788.

128 Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *Int J Law and Proof* 29, 39-40.

129 See generally, John H Langbein, *The Origins of Adversary Criminal Trial* (OUP, 2003), 233-241.

s 18 *Evidence Amendment Act (No 2) 1980* which conferred on the court a discretion to admit such statements where this was in the interests of justice. That discretion permitted the courts to admit hearsay evidence despite the inability of the defendant to cross-examine the maker of the statement. In *R v L*,[130] the Court of Appeal held that there was no absolute right of a defendant to cross-examine all witnesses. Later cases applying that section gave greater weight to the risk that the inability to cross-examine might make a trial unfair, holding that such documentary hearsay should only be admissible if the loss of the right to cross-examine would not make any real difference to the ability of the defendant to challenge the prosecution case.[131]

The law has now changed, and under the *Evidence Act 2006*, hearsay statements are much more readily admitted in all proceedings. Section 18(1) of that Act provides that hearsay statements, oral or documentary, may be admitted provided the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is not available as a witness, or requiring the maker to give evidence as a witness would cause undue expense or delay. There is a requirement to give notice of the intention to adduce hearsay evidence.[132]

In the absence, to date, of any appellate guidance on the new provision, the courts have generally had regard to the cases decided on the previous section, but have recognised that the legislative purpose of broadening the admissibility of hearsay evidence requires the court not merely to ask whether there will be a loss of opportunity to cross-examine, but whether that absence will impact unfairly on the accused. This question is apparently to be considered having regard to the likelihood that the hearsay evidence would be difficult to challenge because of its consistency with other evidence.[133]

The importance of the question goes far beyond the technical sphere of the law of evidence. As has been observed by recent British writers:[134]

> Should hearsay evidence be admitted? This may depend on whether it proves anything. However exclusion might turn on other matters and reliability such as whether the accused ought to be provided with a proper opportunity to contest the evidence or witnesses and this may reflect the importance of autonomy in trials. However whether or not such evidence is admissible will clearly affect pre-trial investigation of procedure. It will have an impact on how Crown crime is investigated which cases are taken to court when the accused is likely to plead guilty and so on.

130 [1994] 2 NZLR 54; (1993) 11 CRNZ 8, 61; 15-16.

131 See *R v Mataa* 28/10/99, CA282/99, [12], applied in *R v Hamer* [2003] 3 NZLR 757; (2003) 20 CRNZ 731, [31].

132 *Evidence Act 2006*, s 22.

133 See *Bishop v Police* 28/2/08, Lang J, HC Gisborne CRI-2008-416-3, written hearsay statement by the victim of an assault admitted; contrast *R v Kereopa* 11/2/08, Cooper J, HC Tauranga CRI-2007-087-411, hearsay statement by a deceased eyewitness identifying the defendant as one of a group of offenders excluded where there were conflicts between the statement and the evidence of other witnesses.

134 Antony Duff, et al, 'Introduction: Towards a Normative Theory of the Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 1, Truth and Due Process* (2004) 12.

Indeed, the writers suggest that '… permitting the accused to have a proper opportunity to contest hearsay evidence is to provide the accused with a trial'.[135]

In other jurisdictions, other claimed 'fair trial' rights may determine whether hearsay evidence is admissible. The US Supreme Court in *Crawford v Washington*[136] held the explicit right to confrontation in America may require the exclusion of any hearsay evidence, no matter how reliable that evidence might appear to be. That decision significantly altered American law from the general acceptance of reliable hearsay evidence on the basis that no breach of the Sixth Amendment was involved.[137] One American writer has ascribed the primacy of the right to confrontation as an embodiment of a common American value system whereby an accusation must be made face-to-face and persons making it must be prepared to undergo public scrutiny and publicly challenge the person whom they are accusing.

> It is somehow wrong - base and cowardly and inconsistent with the respect we owe our fellows - to accuse someone without being willing to look them in the eye and stand behind that accusation.[138]

While the New Zealand position in relation to such hearsay evidence under the new Act awaits clarification, the position in inquisitorial trials in Europe has been rendered considerably less certain by the decision of the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom*.[139]

In the case of *Al-Khajawa*, the prosecution the defendant had charged with two counts of indecent assault on his medical patients. It was effectively common ground that the only evidence against the defendant on the first count was that contained in a statement made by the alleged victim who had died before trial. It was equally common ground that the contents of the statement afforded the defence opportunities to challenge its accuracy by pointing to inconsistencies between it and other evidence. The trial judge determined that the evidence should be admitted in the interests of justice, as was permitted by statute.[140]

The defendant was convicted on both counts, after a summing up in which the jury was reminded of the disadvantage to the defence of not being able to cross-examine the nature of the statement. An appeal against conviction was dismissed by the Court of Appeal, and the House of Lords refused leave to appeal to that body. However, the European Court of Human Rights, sitting

135 Ibid 12-13 (emphasis in original).

136 541 US 36 (2004).

137 See *Ohio v Roberts* 448 US 56 (1983).

138 This is discussed by Sherman J Clark, '"Who do you think you are?" the Criminal Trial and Community Character' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: volume 2: Judgement and Calling to Account* (2006) 92-4. The quoted passage appears at 93. There would appear to be a number of cultural and gender assumptions built into that statement which cannot be explored here.

139 [2009] ECHR 110; (2009) 49 EHRR 1. For critiques of the judgment see Ashworth [2009] *Criminal Law Review* 352 and J R Spencer, 'Hearsay Reform: the Train Hits the Buffers at Strasbourg' (2009) 68 *Cambridge Law Journal* 258-61.

140 *Criminal Justice Act 1988* (UK), s 23.

as a Chamber, took a different view, holding that the inability to challenge what was effectively the only evidence against the accused on that count by cross-examining the maker made the trial on that count unfair.

That, however, does not conclude the matter. The English Court of Appeal and Supreme Court successively have issued a direct challenge to the reasoning and the result of the European Court judgement in *Al-Khajawa v UK*, insisting that the English law and practice applied in that case are fully consistent with the European Convention on Human Rights.[141] Indeed the Supreme Court insists the European Court itself has misconstrued the relevant law. It is likely that the United Kingdom's request that *Al-Khajawa* be considered by the Grand Chamber of the European Court of Human Rights will be granted.

The other case, *Tahery*, concerned a different issue in that the trial judge had admitted a written statement made by T, an eyewitness to the alleged offending, which identified the appellant as the guilty party, where T was not willing to give evidence in person.[142] The identity of T was known to the defendant. There existed no real opportunity for the defendant to challenge the accuracy of the statement by cross-examining other witnesses – there were none willing to give evidence – but, in the view of the English Court of Appeal, the defendant himself could have challenged T's statement by himself giving evidence. The ECHR held there was a breach of the Convention right to challenge the prosecution case and noted that:[143]

> The right of an accused to give evidence in his defence cannot be said to counterbalance the loss of opportunity to see and have examined and cross-examined the only prosecution eye-witness against him.

X. Evaluation and Conclusion

As we have seen, there are many components to a fair trial but very little agreement between legislators, judges or indeed academic commentators as to the balance between these elements.

The minimum standards for a fair trial may perhaps be stated as being:

(a) that the accused enjoys a presumption of innocence with the burden being on the prosecution to prove guilt and thus to justify the imposition of a penalty. All current models of protection of rights add to this the requirement that the accused cannot be compelled to incriminate himself or herself. The exact limits of that right, particularly where it extends to the possibility that adverse inferences will be drawn from an exercise of a right to silence, are difficult to measure and need not be explored now;

(b) that the trial is held before an impartial tribunal, generally in public. This does not mean the tribunal must have no knowledge of the parties or the matter prior to the trial but rather that there is nothing in the

141 *Horncastle v R* [2009] UKSC 14, on appeal from *R v Horncastle* [2009] EWCA Crim 964, [2009] 4 All ER 183, [2009] 2 Cr App R 15.

142 The statement was admitted under of evidence of a witness too fearful to attend trial was admitted under *Criminal Justice Act 2003* (UK), s 116.

143 [2009] ECHR 110; (2009) 49 EHRR 1, [46].

circumstances suggesting that the decision is affected by such prior knowledge. Nor does it require that the entire process of pre-trial and trial hearings be held in public, nor that all material may be published.

(c) that there has been a reasonable opportunity for the prosecution case to be challenged by the accused, either by cross-examination of prosecution witnesses or by calling evidence to challenge or about the prosecution case. I have deliberately placed that statement in the passive voice, so as to avoid suggesting it is the inherent right of the accused to conduct the cross-examination. Implicit in the right to challenge. or to seek to have challenged, the prosecution case is the further requirement of disclosure to the accused of the evidence relied on to establish guilt, in circumstances which allow the accused to make an informed decision as to whether, and how, to seek to avoid a finding of guilt. That process of informed decision-making will almost inevitably require that the accused be provided, in a timely fashion, with legal assistance and advice. It will normally require the assistance of a lawyer not only at the pre-trial statement but during the trial itself.

It is obvious that a 'classical' inquisitorial trial, with no added safeguards for the accused, would not comply with the requirements. In large measure, however, a modified inquisitorial system, as exists in diverse forms in Europe, which has some added elements of protection for the accused may largely meet those theoretical requirements.

That however cannot complete an enquiry. We have to ask whether the rights protected by NZBORA would be infringed if a European-style inquisitorial process were to be adopted. We may readily accept that most of the rights would be equally protected in an inquisitorial model as in an adversarial one. We may give the accused the benefit of the presumption of innocence and we may recognise a right against self-incrimination as easily before an inquisitorial judge as in an adversarial trial. Equally we may provide the accused with legal assistance, and we may insist on prosecution disclosure to ensure the accused may know the case he or she is facing.

Where then are the difficulties? Three principal issues require considerable analysis and may show that NZBORA or Charter rights, as currently understood, might be diminished.

The first is in relation to the possible concern as to impartiality of any trial judge who has had supervision of any part of the investigative process. We must concede that if there has been extensive pre-trial investigation, there is a very real appearance of a lack of impartiality where the same judicial officer presides over the investigation and the trial. That can be avoided in some cases by requiring that there be a change of judicial personnel between the investigative and the trial stage where there has been a prolonged or controversial investigation, and/or by having a trier of fact at the trial who is independent from the investigative judge. (In our current laws that trier is usually a jury, but alternatives can be imagined). If the pre-trial investigation has not been prolonged or there has not been significant challenge during that period to the prosecution case, nor reason to believe that the judge has been affected by prior knowledge of the accused, there is unlikely to be any issue of actual bias. That does not entirely resolve the possible issues as to an appearance of bias, but it should significantly moderate them.

Secondly, an inquisitorial process will almost certainly significantly limit the element of publicity and openness of the proceedings. If we accept that in many cases witnesses may give their evidence away from the court room, although possibly subject to challenge by defence counsel or by the judge, and that only a written summary or recorded version of it will be produced at the trial – there is a very clear diminution of the 'public' character of the trial.

Lastly, there is the issue of the 'right' to challenge the prosecution case. In accordance with the use of the active voice generally in the *New Zealand Bill of Rights Act*, it is currently the right of the accused to cross-examine the prosecution witnesses at a public hearing and to determine, subject to issues of relevance etc, which witnesses will be called. In an inquisitorial procedure, as we have noted any cross-examination may take place in private, and the judge will be far more likely to be able to place very significant limits on the ability of defence counsel to cross-examine witnesses at length. We may be certain that any suggestion that the current wide right to cross-examination may be diminished, particularly in sexual offending cases, will be met with thunderous opposition by defence lawyers generally.

Would then a change to an inquisitorial system necessarily involve a breach of the rights supposedly guaranteed to an accused under the *Bill of Rights Act*? Not necessarily. The rights of the accused under that and other statutes are not absolute, but may be modified where other interests are properly afforded priority in a free and democratic society. I suggest ample justification for change can be found in the need to remedy the unnecessary and unfair distress caused to the victims of sexual and violent offending in the current adversarial system, and in the societal need to ensure the conviction of offenders where the evidence which can fairly be adduced – and adduced fairly to all parties – justifies a guilty verdict.