Liberty’s briefing on the Fraud (Trials without a Jury) Bill for 2nd reading in the House of Lords

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at

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Introduction

1. The Fraud (Trials without a Jury) Bill is a short, subject-specific Bill which seeks to remove an order-making power put into the Criminal Justice Act 2003 (CJA). When the Criminal Justice Bill was before Parliament, plans to remove juries from complex fraud trials were heavily criticised in both Houses. Eventually a compromise was introduced, requiring an affirmative resolution of both Houses of Parliament before the powers allowing trial without jury (s. 43 CJA) could come into force. The order making power was contained in Section 330(5)(b) CJA.

2. In June 2005 the Attorney General, Lord Goldsmith, made a statement to the House of Lords, indicating the Government’s intention to make an order under S. 330(5)(b) CJA. Debates at the time seemed to indicate a consensus among opposition peers and interested crossbenchers that there would be strong opposition in that House to any order. The current Bill is the Government’s response to the prospect of continued opposition from the Lords.

3. Liberty would not normally consider suggesting that a Bill should not be given a second reading. However, given that the Bills main purpose is simply to remove the order-making power in S330, there is little that can be amended. Because of this we would urge peers to vote against giving the bill a second reading. The order-making power introduced in the CJA was considered the appropriate mechanism for allowing limitation on jury trial. The Government should have the confidence to rely on being able to persuade Parliament to approve the order rather than to coerce them to pass fresh legislation.

4. The bill also provides that the fraud trial will take place either before a High Court Judge exercising the jurisdiction of a Crown Court Judge or before a nominated Crown Court Judge. This scope for hearing by High Court Judge does not alter our view that fraud trial without jury is always undesirable. Indeed, the venue being part of the civil rather than criminal jurisdiction compounds our concern that the removal of a jury is likely to make serious fraud appear a regulatory rather than criminal affair.

1 http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050621/text/50621-34.htm#50621-34_head0
5. By the Government’s own estimate only a small number of trials each year will be affected. Earlier this year in an exchange with the journalist Henry Porter in the Observer, the Prime Minister said the ‘estimated number of cases per year is around 20, out of a total of 40,000 jury trials’\(^2\). The principle of jury trial is at the heart of the Criminal Justice system. The Government’s argument that only a small number of trials will be affected can also be seem as a reason not to undermine such a vital principle for only a handful of trials each year. In the debate on the CJA order in June 2005 the Attorney General said that the Government had no plans to extend removal of jury trial to any further category of case\(^3\). Despite this, Liberty is concerned that once the current Bill becomes law similar arguments will be put forward for other types of trial. Before voting in favour of this Bill Parliamentarians might consider how arguments in favour of removing jury trial in fraud cases might equally be used for other types of offence. The Government has, for example, pointed out that many terrorism trials involve a massive volume and complexity of evidence. At present this complexity is being used as an argument for 90 days pre-charge detention.\(^4\) If the principle of jury trials is undermined in serous fraud trials, what is to say that the complexity of terrorism cases will not be used as an argument for the removal of jury trials in terrorism cases. We also imagine prosecutions for corporate manslaughter which will presumably occur once the Corporate Manslaughter Bill is law will share many of the complexities associated with serious fraud. Many other factors can make a trial complex such as detailed expert evidence; multiple defendants; crimes with trans-national elements; defendants facing multiple charges; factors common to organised crime trials (such as the use of front companies) and the need for specialist knowledge particular to a sector. It is easy to see how any of these factors might be used to justify the removal of a jury according to the same rationale as used to remove juries in fraud trials.

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2 23 April 2006
3 Section 44 CJA allows for trials to be conducted without a jury if there is danger of jury tampering but this is for particular circumstances rather than particular types of trial.
4 The length of pre-charge detention allowed in serious fraud cases remains at 4 days.
Arguments against the removal of Jury Trial

6. Fundamental to Liberty’s concern about the Bill is our belief that jury trial is the best way to determine a case and that wherever possible consideration of facts and the law must be separate. We also believe that one great benefit of trial by jury is its openness. The defendant’s case is heard by twelve independent members of the public and justice can be seen to be done. For most people jury service is one of the few occasions where they will have direct input into the criminal justice system. It seems ironic to us that a Government which speaks so much of “community justice” is so keen to take the public out of the criminal justice process.

7. We can see how this Bill could be seen as an attempt to be tough on white-collar crime, to increase the likelihood of success in serious fraud trials. We fear that these proposals could, in fact, have the opposite effect. To take away jury trial from complex or lengthy cases would set it apart from normal criminal procedure – and make it appear more like a regulatory or professional disciplinary tribunal. White-collar crime should not be treated as different from other offence.

8. The use of a single judge as fact finder will also give rise to another, more practical, concern. If it is established on appeal that a witness was lying or that evidence was false and the judge gave credit and weight to the account then it will seriously undermine the credibility of that judge. In the future they will be thought of as flawed or unable to consider evidence properly even if there was good reason for the mistake being made. Removal of juries may also undermine the credibility of the criminal justice system if judges alone try controversial cases. The defendant(s) in a serious fraud case are likely to differ from many in the Criminal Justice system in that (in common with the judge) they are probably white and middle class. The presence of a jury is vital to ensuring that any acquittal is above reproach and is not attributed to bias within an unrepresentative criminal justice system.

9. We appreciate that the Government is putting forward practical and logistical rather than principled reasons why there needs to be scope for removal of juries. We do not take issue with the fact that some fraud trials can last a long time and be extremely expensive. However, we would argue that the importance of retaining
juries in all cases would outweigh these financial consideration, especially when there are more proportionate ways of tackling the cost of the most expensive cases through, for example, better trial management. Indeed, it is questionable whether removal of juries would make cases significantly shorter. There is a danger that any incentive to simplify issues for the jury and to keep trials as short as possible will disappear. If advocates are dealing solely with a professional tribunal there will be no need to do this resulting in a longer and costlier case. The experience in civil fraud trials seems to indicate that this is a very real danger. An example of how removal of juries might impact upon presentation of cases arose in the Committee Stage debates in the House of Commons. In reference to a trial at Winchester Crown Court in 2004 involving the defrauding of the Talbot Village Trust the Solicitor General Mike O’Brien MP said ‘In the case of Talbot Village Trust, the judge ordered that the scope of the prosecution case should be reduced for trial management reasons. In the SFO’s opinion, that reduction made the case appear disjointed, and undermined the prosecution case in a number of key areas, although it was none the less successful.’ The Solicitor General was using this as an example of why removal of juries is desirable. However, another interpretation of the Talbot Village Trust case is that the absence of a jury would have removed the need for effective case management. The implication from this is that the removal of a jury will remove any need for the prosecution to put together a well presented and concise case.

10. The length and complexity of trials has lead to the suggestion that jurors are unable to comprehend the detail. Conviction statistics would not seem particularly supportive of this. According to the Attorney General the rate for fraud (70 per cent) is only slightly lower than other cases (75 percent). It is arguable that a juror who does not understand the detail of a case would be more likely to acquit as uncertainty would result in some element of doubt. If this were the case then a much lower conviction rate might be expected. Steps have recently been taken that might reduce any problem with juries. For example, Schedule 33 of the CJA greatly restricted the ground for ineligibility from jury service to ensure that professionals and others who had traditionally tended to seek exemption from service would not be able to do so. This has greatly increased the range of those likely to serve. The Fraud Act 2006 has

5 http://www.publications.parliament.uk/pa/cm200607/cmpublic/fraud/061212/pm/61212s03.htm
6 http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050621/text/50621-06.htm
simplified the nature of fraud by replacing the range of previous fraud offences with a single general offence. A further practical step has been the establishment of a separate and specialist fraud prosecution division within CPS. This means that case management panels are now able to advise lawyers working on fraud cases as to the best way of conducting a case. Liberty believes it would be sensible to allow these changes to take effect before pushing through plans to remove juries.

11. During Committee stage debate Simon Hughes MP stated what he believed to be one of the underlying justifications for the Bill saying ‘The unspoken reason motivating the Government in part, which sort of slipped out on Second Reading, is that they think convictions will go up if there is no jury. If that is in their minds explicitly or implicitly, then it is a worrying thought’\(^7\) We have no reason to doubt this is the case. However, justifications that are explicitly stated are more likely to focus on perceived problems with the existing system, particularly by reference to high profile fraud cases such as the failure of the Jubilee Line fraud trial in March 2005. The case collapsed after nearly two years at a cost of £25m. Part of the reason for the collapse was attributed to problems experienced by and with the jury. However, a report into the trial by Stephen Wooler, Chief Inspector of the Crown Prosecution Service (CPS), said that the lack of a clear strategy by the CPS was the principal cause of failure. The report criticised the management of the case (and recommended the creation of the case panels which are now in place, described above) and said that this had resulted in unnecessary delay and complexity. The report’s principal finding was that the delays and ultimate collapse of the trial were caused three separate factors: the laying of an inappropriate charge, the inefficiency of the proceedings and the illness of a defendant. None of these would have been resolved by the trial taking place without a jury. As the report says

‘One or even two of these factors might not have been sufficient to cause the collapse of the trial: it was the combination of them that was fatal. This outcome was not a systemic failure of the criminal justice system or the nature of jury trial.’\(^8\) [emphasis added]

\(^7\)http://www.publications.parliament.uk/pa/cm200607/cmpublic/fraud/061212/pm/61212s03.htm
\(^8\)http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf Paragraph 7
12. The Wooler Report specifically ruled out the complexity of the case being too much for a jury saying, ‘The size and nature of the case was not such as to make it intrinsically unmanageable before a jury. The fundamental reason the trial had to be terminated was because it had gone on too long.’ However, it cannot be denied that lengthy fraud trials will result in serious inconvenience for jurors. Problems with employment, financial recompense and many other factors can make a lengthy trial a difficult experience for a juror. The perception that jury service is something to be avoided was presumably the motivation behind the greater compulsion introduced in the CJA. The Wooler report accepted that it was inevitable that long trials will be problematic for jurors and said much more needs to be done to ensure that the process is as easy as possible saying, ‘There is a need in such cases for more structured support for jurors, to enable them to plan more effectively and minimise disruption to their personal and family lives; and to provide authoritative assistance in resolving difficulties directly attributable to the length of jury service. Without that, the problems which may flow from long periods of jury service are greater than those which a citizen can properly be expected to bear simply as part of civic duty.’

13. Liberty believes that jury system is the cornerstone of the criminal justice process. Once precedent has been set in determining that a type of case is too complex, too long and too troublesome to allow jury trial, identical arguments will invariably be made for other types of case. There are difficulties in running complex fraud prosecutions but these can be minimized through proper preparation and presentation of a case and due consideration of the financial and practical needs of the jury. It is clear from the Wooler Report that any costs arising from providing appropriate financial assistance to jurors would be offset in savings from more efficient case management. It can be argued that the need for proper and cost efficient case presentation for a jury is a driver that may well be absent if evidence were to be considered by a Judge alone. As the Government points out, this will only affect a tiny number of cases a year. The importance of jury trial is too great to provide a precedent for that figure to increase.

9 Ibid paragraph 5
The Government seems to view juries with suspicion. The Prime Minister has frequently made reference to the criminal justice process as an outdated relic of the 19th Century in urgent need of reform. This reform model is based on criminal justice as an essentially regulatory mechanism where efficiency is the priority. If efficiency is key then it is easy to view jury trial as problematic. Using a single judge as arbiter of both law and fact is clearly a more streamlined process than use of judge and jury. We agree with Stephen Wooler that much can be done to improve the efficiency and effectiveness of the criminal justice process. However efficiency is not the only factor. Criminal justice must always be about transparency, due process and accountability. Inroads into jury trial will permanently undermine these.

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