



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 55

REFORMING CRIMINAL PRE-TRIAL
PROCESSES

A discussion paper

July 2004

Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

IN ITS REPORT *Criminal Prosecution* (NZLC R66, October 2000), the Commission discussed the advent of status hearings in the summary jurisdiction as a means of addressing the problem of last minute cancellation of trials and reducing undue delays in the disposition of cases. It expressed concerns about the unregulated nature of the practice and recommended that the Government institute an evaluation of the practice and potential of status hearings in the summary and indictable jurisdictions. It also invited the Ministry of Justice to give it a reference to review status hearings and propose legislation to regulate them.

In response, the Minister of Justice asked the Commission to review the purpose and practice of status hearings. The Ministry of Justice, with the assistance of the Law Commission, also undertook empirical research into status hearings in five district courts throughout New Zealand, which primarily involved a retrospective study of 549 status hearings, and interviews with defendants, complainants, judges, defence counsel, police prosecutors, victim advisers, criminal caseflow managers and probation officers. A joint report on that research, entitled *Status Hearings Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases*, is published in conjunction with this discussion paper.

Status hearings are merely one component of an overall pre-trial process that must be properly integrated and operate cohesively if they are to achieve their objectives. It therefore became apparent to the Commission that status hearings could not be properly discussed or evaluated in isolation from the other parts of the pre-trial process with which they are inextricably linked. The fundamental issue is not whether status hearings should be retained, and, if so, how they might be improved. Rather, it is how the pre-trial process as a whole should function in either resolving cases or preparing them for trial: its purposes; the principles that should underpin its structure; and the respective roles of judges, court officials, prosecutors and defence counsel in ensuring that it operates as intended. Accordingly, this discussion paper takes a somewhat broader view than the terms of reference for the project that were originally envisaged.

The proposals align closely with the Commission's suggestions for improving the criminal list process in *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004), and should be read in conjunction with that report. They focus on summary processes in the District Court. However, the proposals should in general be equally applicable (with adjustments to accommodate the committal process) to cases proceeding on indictment as well.

J Bruce Robertson
President

Structure of the report

REFERENCES IN THIS DISCUSSION PAPER TO THE *STATUS HEARINGS EVALUATION REPORT*

THROUGHOUT THE PAPER there are numerous references to the joint report published by the Ministry of Justice and the Law Commission on the evaluation of status hearings, *Status Hearings Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases*, which is referred to as the “2004 Evaluation”.

For ease of reference, quotations from interviewees refer to the type of respondent (for example, “judge” or “defendant”) followed by the section of the 2004 Evaluation report where the quotation is to be found (for example, 6.1.3). Quantitative data from the 2004 Evaluation are followed by a reference to the relevant table (for example, table 3.10).

Chapters 1–3 outline the problems with current processes, some existing New Zealand and overseas initiatives to address them and what is known about the effectiveness of those initiatives. Chapter 4 provides a rudimentary outline, or “road map”, of the whole pre-trial process and the objectives and principles that should underpin it. Subsequent chapters examine in more detail the Commission’s preliminary proposals in relation to plea and charge discussions; the pre-trial hearing (which would effectively replace status hearings and callovers); sentence indications; and unrepresented defendants. The concluding chapter considers how the proposed changes should be implemented, and, in particular, the extent to which they require legislative amendment. For ease of reference, chapters 5–7 and chapter 9 contain conclusions that summarise the Commission’s preliminary proposals.

Submissions

SUBMISSIONS OR COMMENTS on this discussion paper should be sent by 8 October 2004 to:

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This discussion paper is also available on the internet at the Commission's website: <http://www.lawcom.govt.nz>.

Terms of reference

THE LAW COMMISSION shall review the purpose and practice of status hearings in the summary jurisdiction, and in particular shall consider:

- whether status hearings improve the efficiency and effectiveness of the criminal justice system;
 - the role of the judiciary;
 - the role of the prosecutor and of counsel for the defendant;
 - the observance of the rights of defendants and victims;
 - media reporting of status hearings;
 - the desirability and legitimacy of sentence indications;
 - whether there is a need for regulation, either statutory or non-statutory;
 - whether status hearings should be extended to the indictable jurisdiction.
-

The problem and some responses

1 **L**ORD DEVLIN has said that “[t]he centrepiece of the adversary system is the oral trial”.¹ However, the oral trial is now very much the exception as a means of resolving a criminal case. A guilty plea by a defendant is the likely outcome in about 80 per cent of cases heard in the District Court.² Some guilty pleas will be entered at the first court hearing; others may be the result of pre-trial plea and charge negotiations or of a status hearing or callover; still others are guilty pleas “at the door of the court”. These “door of the court” guilty pleas were a major part of the problem that led to the advent of status hearings in summary proceedings and callovers in cases that proceed to a jury trial (indictable jurisdiction).

THE PROBLEM

- 2 The high proportion of cases set down for criminal trial but not proceeding to a hearing has emerged as a serious problem in a number of countries in the last decades of the twentieth century.³ Trial fixtures are cancelled for various reasons. In some cases, defendants plead guilty or prosecutors withdraw charges at the last minute. This problem is known as the “cracked trial” phenomenon in England.⁴
- 3 At times court administrators allocate hearings to more cases than could possibly be heard on the same day in the knowledge that there will be cancellations “at the door of the court”. Some of these hearings may not be reached on that

¹ Lord Patrick Devlin *The Judge* (OUP, Oxford, 1979) 54.

² A further approximately 15 per cent are withdrawn, leaving only about 5 per cent that proceed to defended hearings. See Department for Courts, Courts Business Forecasting and Modelling Project: Report 9, “Regional Variation in the Characteristics of Criminal Summary Cases” (July 2002). Note, these figures are estimates only for 1997–2001, because the data was subject to some inaccuracies.

³ See Judge B Buckton “Submission for the National Caseflow Committee” 13 June 1995: about 76 per cent of cases set down for hearing from August 1994–January 1995 in the Auckland District Court did not proceed. See, for overseas examples, Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, Final Report (Perth, WA, 1999) 227; D Weatherburn and J Baker *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, Sydney, 2000).

⁴ See Paul Robertshaw “Cracked trials’ – What is happening?” [1992] Crim LR 867; P Robertshaw “Plea, sentence discount and cracked trials” (1993) 143 NLJ 577; James Bredar “Moving Up the Day of Reckoning: strategies for attacking the ‘cracked trial’ problem” [1992] Crim LR 153; M Zander and P Henderson *Crown Court Study*, Royal Commission on Criminal Justice, Research Study No 19 (HMSO, London, 1994) 149–157.

day, or are adjourned because of the non-availability of a prosecution or defence crucial witness, or for some other matter that belatedly arises.⁵

- 4 Such last minute cancellations and adjournments involve substantial costs. Witnesses, complainants and defendants and their families have the anxiety of a trial left hanging over them. Witnesses turn up on the morning of the trial, and suffer inconvenience and incur unnecessary expense, stress and time off work if the trial is cancelled. Complainants may be confused and upset. Some defendants may be confused and wonder why it is taking so long to resolve.
- 5 It may be too late to substitute another case for hearing, so courtrooms lie idle and judges and court staff have to re-organise their time. In addition, prosecution and defence counsel have invested time and resources in preparation for trial, which may be wasted.
- 6 These problems arise in both summary and indictable jurisdictions.

REASONS FOR LAST MINUTE CANCELLATIONS

- 7 There has been some research into the causes of last minute trial cancellations and various reasons put forward.

Charging practices

- 8 The police at the scene of an alleged offence may lay multiple charges (mainly because of confusion as to what has happened) that are not reviewed by a prosecution section until some weeks later.⁶ Defendants can come to court unclear as to what to do; believing they are guilty of some sort of offence, but not of those charged, or guilty of some offences but not others, or feel they are not guilty because the incident was not “their fault”.

Lack of representation for defendants

- 9 Defendants may not always apply for legal aid for representation, or may do so late, or may not be eligible. In the report *Status Hearings Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases* (2004 Evaluation) by the Ministry of Justice and Law Commission, the two most frequently reported reasons defendants gave for not obtaining representation were that they were unable to afford a lawyer and ineligible for legal aid.⁷ Duty solicitors may assist, but have limited time to advise on a plea and course of action.

⁵ These adjourned trials are called “ineffective trials” in England. See Paula Rohan “Collapsed Prosecutions” (12 December 2002) 99 Law Soc’y Gaz 22; and “Thematic Review of Listing and Case Management of Criminal Cases in the Magistrates’ Courts” (data on overall “cracked”, “ineffective” and “effective” trial analysis in eight magistrates’ courts, collected 2 January to 28 March 2002: see Magistrates’ Courts Service Inspectorate Inspection of Court Services website <www.mcsi.gov.uk> (last accessed 21 April 2004).

⁶ See K Mack and S Roach Anleu “Late Guilty Pleas: Administrative Responses to an Administrative Problem” paper presented at AIJA Asia-Pacific Courts Conference (Sydney, Australia, 1997).

⁷ Ministry of Justice and New Zealand Law Commission *Status Hearings Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases* (Wellington, 2004) 4.8.1 (hereafter called the 2004 Evaluation).

Last minute counsel/client consultation

- 10 Defendants in the 2004 Evaluation frequently reported that there was little or no discussion about their case with their lawyer prior to the status hearings and that they took their lawyer's advice as to their plea.⁸ Similarly, an English Crown Court study found that, where a guilty plea was not notified to the court until the day of hearing, defence solicitors most frequently gave the reason that earlier consultation with the client had not taken place or was impossible.⁹

Last minute prosecution and defence discussions

- 11 A lack of communication between prosecution and defence until the day of trial appears to be a reason for last minute cancellations according to some participants in English studies.¹⁰ This "day of hearing" discussion can then lead to last minute withdrawals of charges or guilty pleas. There are cases that are not being properly considered until "the door of the court", perhaps because of the volume of cases or restrictions on legal aid funding. Recent statistics in England show that 35 per cent of "cracked trials" were caused by the prosecution offering no evidence, 35 per cent by a late change of plea by the defendant and 30 per cent by some sort of compromise on the day of trial.¹¹

Recognition of strength of prosecution case

- 12 Australian and English research shows that guilty pleas are most often a result of a realisation of the strength of the prosecution case.¹² In the 2004 Evaluation frequent reasons given by defendants for changing their plea to guilty included that: they were guilty; their lawyer had advised them to plead guilty; they wanted to get things over and done with or to have time to get a few things sorted out (completion of a course of study, or have a baby).¹³ It seems clear that clients usually take their lawyer's advice, but that some who are guilty delay changing their plea until the morning of the trial, when they see the prosecution witnesses and realise that they will most likely be convicted.¹⁴

⁸ 2004 Evaluation, 4.2.2.

⁹ Zander and Henderson, above n 4, 149-150, table 5.1.

¹⁰ Zander and Henderson, above n 4, 153-154. The Crown Prosecution Service reported that in 72 per cent of cases trials were cancelled on the day fixed because of such late discussions, and in 77 per cent of cases discussions led to charges being reduced or dropped. See also Joyce Plotnikoff and Richard Woolfson "From Committal to Trial: Delay at the Crown Court" *Research Study 11* (The Institute of Judicial Administration, University of Birmingham, The Standing Commission on Efficiency, The Law Society, 1993).

¹¹ Rohan, above n 5, noting official statistics for July to September 2002: 26 per cent of "ineffective trials" were caused by the absence of a prosecution witness, 20 per cent by lack of court time, 12 per cent by defendant non-attendance, 7 per cent by absence of a defence witness and 5 per cent by defence not being ready.

¹² Robertshaw, above n 4, 870. Where late changes to plea occur on a large scale this tends to correlate with low chances of acquittal. See too, K Mack and S Anleu *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, Carlton Sth, Victoria, Australia, 1995) 108, referring also to earlier research to the same effect.

¹³ 2004 Evaluation, 4.5.

¹⁴ 2004 Evaluation, 7.3.8, interviews with defence counsel in the callover part of the study.

RESPONSES IN SUMMARY JURISDICTIONS

- 13 To avoid the adjourned or cancelled trial phenomenon a variety of pre-trial conferences or reviews have been introduced in countries where the adversarial, common law system predominates. These solutions vary but have features in common:
- Most require early prosecution disclosure, followed by discussions between the prosecution and defence counsel as to the proper charges and possible plea. This discussion may or may not take place at a pre-trial review, but if it takes place beforehand it will be reflected at the hearing.
 - Some reviews are presided over by a judge (as are the New Zealand status hearings) or magistrate (in Victoria) and others by a court clerk (in England and Wales).
 - Prosecution and defence counsel will be present. Defendants are usually present and complainants may also be present and may have some input.
 - The judicial or other officer presiding will generally ask counsel about the progress of the case.
 - If presided over by a judicial officer, the officer may inquire as to whether some charges are appropriate or ask the defence what is contested.
 - “Sentence indications” are given in some reviews (including status hearings).
 - If a “not guilty” plea is maintained, most reviews will timetable the case for trial, fixing a date and estimated time.¹⁵
 - Some reviews attempt to refine the issues contested in order to reduce preparation and trial time.

RESPONSES IN INDICTABLE JURISDICTIONS

- 14 In the indictable jurisdiction in New Zealand, pre-trial callovers have been implemented to improve trial case management (in particular to reduce last minute cancellations) and also to address problems of systemic delay. Pre-trial callovers have similarities with status hearings. Again, there have been similar international initiatives, with some variations:
- In most cases it is expected that disclosure and any prosecution and defence resolution discussions have taken place.
 - Most reviews are for the purpose of ensuring full preparation for trial, or for making directions for any further disclosure or pre-trial hearings required.
 - Most set a date for trial after ascertaining witness numbers, estimated length of trial, whether interpreters or special equipment are required.
 - Judges in some reviews will ask whether there is any agreement of evidence or identification of issues for trial.
 - Some are more conference-like and provide a forum for possible resolution discussions between prosecution and defence with the judge as facilitator.
 - The conference-like reviews are usually not in public and discussions are “without prejudice”.

¹⁵ A summary trial is called a “defended hearing” in New Zealand, a “contest” in Victoria.

- Crown and defence counsel are present and the accused is generally present; complainants are not present.
- Sentence indication (that is, an indication of the type of sentence that will be imposed if a guilty plea is entered at that stage) is a feature of some of the New Zealand callovers and have been a feature of pre-trial hearings in indictable cases in a number of other jurisdictions.

MAIN ISSUE IN THIS PAPER: AN EFFICIENT AND FAIR PRE-TRIAL PROCESS

- 15 The Commission's work upon which this discussion paper is based began with a focus on the purpose and practice of status hearings in the summary jurisdiction, as required by our Terms of Reference. This proved to be too restrictive an approach. Status hearings are merely one component of an overall pre-trial process that must be properly integrated and operate cohesively if the hearing is to achieve its objectives. The fundamental issue, therefore, is not whether status hearings should be retained, and, if so, how they might be improved. Rather, the issue that this paper examines is how the pre-trial process as a whole should function in either resolving cases or preparing them for trial: its purposes; the principles that should underpin its structure; and the respective roles of judges, court officials, prosecutors and defence counsel in ensuring that it operates as intended.
- 16 At one level, the pre-trial process is about maximising efficiency. It is intended to process cases quickly, to reduce costs and delays, and to minimise inconvenience and stress, especially for complainants and witnesses.
- 17 However, these elements are obviously not the only considerations. A pre-trial process must also be fair and it must do justice according to law. A pre-occupation with efficiency can compromise due process and lead to injustice.¹⁶ Where efficiency demands clash with the requirements of fairness and justice, the latter must take precedence.
- 18 In order for the process not only to be efficient but also to protect rights and ensure fairness, the roles of all participants must be clearly articulated and understood. The judge must remain impartial and maintain his or her judicial role. The prosecutor must act fairly and in accordance with the rights of defendants as well as complainants. Defence counsel must not only act on the instructions of, and as advocate for, the defendant, but also perform a wider duty as officer of the court in ensuring that the process is not abused and that its integrity is maintained.
- 19 In order to ensure fairness to defendants and complainants and accountability to the public, it is also important that any pre-trial process adheres to the fundamental principles that underpin a fair criminal justice system. These principles, it is suggested, include the following:
- defendants have adequate information and advice to make an informed decision to plead guilty as early as possible, or to prepare their defence;
 - defendants' decisions to plead guilty are free from improper inducements, and without their compelled incrimination;

¹⁶ See P O'Malley "Technocratic Justice in Australia" 2 L in Con (1984) 31, 38-41; JW Raine and MJ Wilson "Beyond Managerialism in Criminal Justice" (1997) 36 How LJ 80.

- proper account is taken of the rights, interests and needs of complainants;
- court hearings are open and understandable and maintain public confidence in the integrity of the system;
- guilt is decided beyond reasonable doubt by an impartial adjudicator or admitted by defendants voluntarily;
- the outcome is just and proportionate.¹⁷

20 The main issue in this discussion paper is whether existing pre-trial processes (status hearings and pre-trial callovers) are improving efficiencies and reducing delays in the criminal process in a manner consistent with these principles of fairness, and, if not, what improvements can be made.

¹⁷ Adapted from Mack and Anleu, above n 12, 7, and the Law Reform Commission of Canada *Plea Discussions and Agreements* Working Paper 60 (Ottawa 1989) 11–37. See also T Weigend “The Bare Bones of Criminal Justice: Limits to the Simplification of the Criminal Process” in *Effective, Rational and Humane Criminal Justice*, a report of the European Seminar held in Helsinki, Finland, 31 May–3 June 1984, (the Helsinki Institute for Crime Prevention and Control, Valton Painatuskeskus, Monistus, 1984) 233.

2

Pre-trial review processes in New Zealand

STATUS HEARINGS IN THE SUMMARY JURISDICTION

- 21 **S**TATUS HEARINGS began in the Auckland District Court in 1995 as a form of pre-trial review, mainly to address the problem of large numbers of “defended hearings” in the summary jurisdiction being adjourned or cancelled at the last minute.¹⁸ They were modelled on the Victorian “contest mention” pre-trial review system (later adopted in Tasmania). The contest mention system has been described as:
- . . . an administrative arrangement designed to assist in case-flow management by bringing together the prosecution and the defence in the presence of a magistrate to undertake a preliminary evaluation of the strengths and weaknesses of each side’s case. Its aim is to identify the possibility of a guilty plea, or to narrow the issues in dispute between the parties if the matter is going to be set down for a full contested hearing.¹⁹
- 22 The aims of contest mention hearings are mainly to encourage defendants to consider their plea at an early stage of proceedings and to ensure matters will proceed on the date allocated.²⁰ Similarly, the original stated aims of status hearings were to:
- reduce the number of adjournments to a minimum;
 - ensure an appropriate plea is entered at the first opportunity;
 - reduce the time taken to hear each case by limiting the evidence to facts in issue.²¹
- 23 Status hearings are now held at most district courts for many offences tried summarily where a defendant has pleaded “not guilty”.²² They have no express statutory basis. Rather, they operate under the District Court’s implied power

¹⁸ Buckton, above n 3. About 76 per cent of summary cases set down for hearing did not proceed because the defendant pleaded guilty, the prosecution offered no evidence, or either party obtained an adjournment.

¹⁹ RG Fox *Victorian Criminal Procedure: State and Federal Law* (Monash Law Book Co-operative Ltd, Victoria, 2002) 162.

²⁰ Magistrates’ Court of Victoria annual reports from June 1995 (p 7) – June 2002 (p 27).

²¹ See Judge Buckton “Status Hearings” (unpublished, 1995). These aims did vary in later versions of this document but not substantially. The first was omitted and the third called a secondary purpose.

²² This includes indictable offences that are to be tried summarily. They are not held in all courts (for example, not in Napier, Hastings, Papakura or Pukekohe) nor for all offences in courts where they are heard. For example, in Hamilton there are no status hearings for Domestic Violence Act 1995 offences.

to enable it to exercise its statutory functions under the Summary Proceedings Act 1957.²³

From charge to status hearing

- 24 Criminal proceedings are initiated by the filing of an information in the court.²⁴ When the defendant first appears before the court²⁵ the charge will be read out and he or she will be asked to plead guilty or not guilty. Those who plead guilty are sentenced or remanded for sentence. Those who plead not guilty are usually required to attend a status hearing about six weeks later.
- 25 Before the status hearing, the prosecution should provide the defendant with a “disclosure package” (sometimes in more than one stage).²⁶ This will usually include a summary of facts, a copy of the defendant’s interview with the police, police “job sheets”, sometimes the relevant parts of a police notebook, the defendant’s criminal record, a victim impact statement if relevant, and a list of witnesses for the prosecution.

At status hearings

- 26 At status hearings²⁷ a District Court judge hears about 30–40 cases in open court.²⁸ The prosecutor, defendant and his or her counsel (if any) are present, and the complainant may be in the public gallery. Victim advisers are employed in all courts and may address the judge on behalf of the complainant. Sometimes complainants address the court at the invitation of the judge.
- 27 The media may also be present at status hearings but, because disclosure could be made of matters that should not be made public prior to a defended hearing, the judge may make an order prohibiting publication of anything said in court.²⁹
- 28 The prosecutor usually hands a copy of the police summary of facts to the judge at the status hearing. Defence counsel then reports on the status of the case. The judge can, and sometimes does, take an active role in exploring resolution of the case with both the defence and prosecution.

²³ See *Haskett v Thames District Court and Police* (1999) 16 CRNZ 376 with reference to *McMenamin v A-G* [1985] 2 NZLR 274 (CA), 276. The Court of Appeal in *Attorney General v Otahuhu District Court* [2001] 3 NZLR 740 referred to Hammond J’s view of status hearings in *Haskett v Thames District Court* as part of the three-stage “hearing of an information”.

²⁴ See ss 12–18 of the Summary Proceedings Act 1957. The information must “fairly inform the defendant of the substance of the offence with which he is charged”, s 17.

²⁵ This is sometimes known as the “list court”.

²⁶ See the Criminal Procedure Bill 2004 for proposed statutory two-stage disclosure, which will extend and formalise existing disclosure practice.

²⁷ This description is taken mainly from Judge Buckton’s unpublished papers on status hearings (1995–2000). See appendix A for 1998 version. Note that practice does vary from court to court and not all courts seem to have adopted Judge Buckton’s guidelines. See the 2004 Evaluation, especially 6.10. Some courts have developed their own practice notes. In particular, Christchurch District Court has a comprehensive Practice Note last updated in 2001.

²⁸ In the 2004 Evaluation numbers varied between 14 and 63 per day, but mostly were between 30–40.

²⁹ Buckton, above n 27, 4 (2000 version). Not mentioned in the 1998 version but see newspaper cutting regarding the Wellington Pilot “Oiling the Sticky Wheels of Justice” (1 July 1998) *Evening Post* Wellington 5, and Christchurch Practice Note.

- 29 At the hearing, the defendant’s plea may be confirmed or changed, and the prosecutor may ask that some charges be withdrawn or amended. The judge may suggest that the police apply for a charge to be amended or withdrawn if the facts do not seem to fit the charge.³⁰
- 30 Defence counsel (or the defendant) may request an indication of the sentence if the defendant were to plead guilty. Current guidelines permit a judge to give an indication on request if the judge has sufficient information to do so. The guidelines require that the indication be limited to the type of sentence that the judge thinks appropriate, that is, imprisonment, community service, supervision.³¹
- 31 If a defendant pleads guilty at a status hearing (either after a sentence indication or otherwise), the judge can sentence immediately, or adjourn the case until later the same day to obtain a pre-sentence report if a probation officer is available.³² Alternatively, the judge may adjourn to another date if a full pre-sentence report or other report is required.
- 32 Where the police summary of facts seems to establish the charge, the judge may ask defence counsel if he or she wishes to disclose the defence or what is contested. A defended hearing date will be fixed if a not guilty plea is maintained and the judge may ask defence counsel to identify issues for trial where possible.³³
- 33 Adjournments (to a reconvened status hearing) should only be granted if really necessary. This has recently been emphasised by new guidelines in one court.³⁴ Eighteen per cent of cases scheduled in the 2004 Evaluation were adjourned (other than to a defended hearing or for sentencing), mostly to a reconvened status hearing. (See table 3.19 in the 2004 Evaluation.)

PRE-TRIAL CALLOVERS IN THE INDICTABLE JURISDICTION

- 34 Pre-trial callovers were introduced to improve case management for trials, and were regulated by practice notes in the early 1990s.³⁵

Main aims of callovers

- 35 The principal aim of callovers according to the 1995 Practice Note is to set a case “on a firm and predictable path as soon as it enters the system”. This Practice Note anticipates a first callover seven weeks after committal, and a

³⁰ Buckton, above n 27, 3 (1995, 1998 and 2000 versions).

³¹ Buckton, above n 27, (1995 version, 7–8 and 1998, 4–5). See chapter 7, Sentence indications. Note that some judges do indicate approximate quantum as well.

³² This is known as a “stand down” or “same day” report. It may occur following the entry of a guilty plea at any type of hearing.

³³ In the 2004 Evaluation, this was done in only 13 per cent, overall, of status hearings cases studied, varying from 4 per cent of cases in Whangarei to 33 per cent of cases in Christchurch. See table 3.27 of the report.

³⁴ See Judge D Harvey, memorandum on status hearings for Manukau District Court, 20 June 2003. No adjournment is permitted unless there are exceptional circumstances.

³⁵ See *Pre-trial Conferences and Callovers* Practice Note 5 February 1991 (revoked by the Chief Justice in 2002) and *Criminal Jury Trials Case Flow Management*, Practice Notes issued by both the Chief Justice in 1995, and Chief District Court Judge in 1996.

period between committal and trial of 11 weeks or 22 weeks maximum where there are pre-trial applications.³⁶ Such applications may be, for example, for a discharge under section 347 of the Crimes Act 1961, or as to admissibility of evidence under section 344A of the Crimes Act.

- 36 The focus of pre-trial hearings in the indictable jurisdiction has been mainly on timetabling, identification of issues, requirements for trial and the formal disposition of pre-trial applications.

Auckland District Court callover system

- 37 Callovers in the Auckland District Court have also incorporated aspects of status hearings procedure. The Auckland system was studied for the 2004 Evaluation as an example of callovers operating comprehensively in a very busy court and (it was thought) incorporating some of the features of status hearings.
- 38 A number of respondents to the 2004 Evaluation mentioned sentence indications as the chief similarity between the Auckland callovers and status hearings; plea discussions were also referred to by some as a similarity, but these are mainly prior to the indictment being laid, and the judges' "proactive" approach was also noted (7.3.15).
- 39 The Auckland District Court has a system of three pre-trial callovers initiated by the Jury Liaison Judge. The first callover, held about six to eight weeks after the preliminary hearing, is for the purpose of making sure preparation for trial is underway, setting dates for trial and any pre-trial applications, finding out about problems (requirement for an interpreter, for example) and refining issues if possible. It is attended by the accused, their counsel (if any), the Crown, security and court staff (three in total). No complainants or victim advisers are present.
- 40 The judge takes an active part and may question the lawyers, for example about pre-trial applications, numbers of witnesses or what the issues will be at trial. The Crown and defence counsel are encouraged to discuss the case prior to the hearing.
- 41 The second callover takes place the week before the trial is scheduled, to ensure it is ready to proceed, and to deal with any guilty pleas or withdrawals or problems that may have arisen (for example, a counsel seeking leave to withdraw from a case, a witness overseas). Reading of witness statements can be discussed.
- 42 The third and final callover on the Monday morning before an accused's trial is to ensure all are ready to proceed as scheduled and to pick up any last minute problems or guilty pleas so that they can be dealt with before the case starts and, if necessary, another "stand by" case assigned to replace the scheduled case. There are about five trials set down for a week.
- 43 There is no mechanism for complainant input at callovers apart from the victim impact statement. When asked, Crown prosecutors said that complainants were always consulted before charges were withdrawn or reduced (7.3.9).

³⁶ See *Criminal Jury Trials Case Flow Management* issued by the Chief Justice, 7 December 1995.

Callovers in Wellington and Christchurch district courts

- 44 In Wellington and Christchurch callovers are essentially timetabling and directions hearings for all cases. In Wellington, there are two callovers for each case, in Christchurch there is a second one (called a conference, but largely a case management exercise) for cases identified as more complex. Occasionally a sentence indication is requested in both areas, and given, if the judge has sufficient information, and subject to any later information that may alter the situation. In some cases in Wellington the judge may ask if there is any agreement as to evidence or what is in issue.
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3

The efficiency and effectiveness of current processes

STATUS HEARING EVALUATIONS

- 45 **T**O INFORM the Commission's terms of reference for status hearings, the Ministry of Justice and the Law Commission undertook empirical research in 2002–2003 in order to describe and evaluate status hearings. The research has resulted in the publication of the 2004 Evaluation report.³⁷
- 46 The report describes the operation of status hearings in five courts, and also of pre-trial callovers in the Auckland District Court indictable jurisdiction, because it was considered that the Auckland callover system included some features of status hearings.
- 47 In addition, the report gives the views of defendants and complainants on the various issues they were asked about (for example, their understanding of the process, why they changed their plea), and the views of other “key informants” (judges, defence counsel, prosecutors, victim advisers, court staff and probation officers) on issues such as the aims of status hearings, plea discussions, sentence indication, media reporting and statutory regulation.
- 48 Prior to the 2004 Evaluation there had been earlier evaluations of pre-trial schemes in Auckland. One such evaluation, in 1996, had concluded that status hearings were an effective caseload management system for summary cases and possibly also for more serious cases.³⁸
- 49 The 1996 Evaluation had recommended that, if status hearings were to continue, the paradigm shift that they create should be debated; that all professionals involved should be trained; that uniform national standards should be developed; and that data should be collected on efficiency factors such as use of judicial time, reasons for adjournments and length of hearings.
- 50 There has been no ongoing, systematic collection of such data, so there are no national statistics on whether status hearings make efficiency gains.

EFFICIENCY OF STATUS HEARINGS

- 51 Some key informants for the 2004 Evaluation (judges, prosecutors, defence counsel, court staff) were asked whether they thought status hearings were achieving their aims of reducing to a minimum the number of adjournments in

³⁷ See above n 7.

³⁸ M Jakob-Hoff, M Millard and B Cropper *Evaluation of the Status Hearing Pilot Operating at the Auckland District Court* (prepared for the Department for Courts, November 1996).

summary defended cases, and ensuring that proper pleas were entered at the earliest opportunity. These could be called their “case management” aims.

Reducing adjournments

- 52 Just over half of the key informants in the 2004 Evaluation thought that status hearings were not reducing the number of adjournments. One said:
- Status hearings may actually increase the number of adjournments because a lot of cases go off into the netherworld of counselling and support and reviews. (Prosecutor, 6.1.2.)
- 53 In the 2004 Evaluation it was not possible to check from court records whether status hearings reduced adjournments. Neither the former Law Enforcement System records nor court files always identified which hearing was a status hearing, so quantifying numbers of adjournments “before” and “after” the commencement of status hearings was not possible. Statistics have been kept by some courts showing the number of resolutions (guilty pleas and withdrawals) at status hearings.³⁹ The 2004 Evaluation also showed that an average of 40 per cent of cases listed for status hearings were resolved at the observed status hearings (ranging from 30 per cent to 52 per cent).⁴⁰ However, it is not possible to know how many adjournments these cases had before being finalised (they may have had one or more earlier status hearings). Nor is it clear whether they would have been resolved at an equivalent or earlier stage, or whether they would have required a defended hearing, prior to the introduction of the status hearings system.
- 54 The 2004 Evaluation showed that, on average, across the five courts studied, about 18 per cent of status hearings were adjourned (usually to another status hearing). This proportion does not include those adjourned to a defended hearing, or those where there was a guilty plea and the case adjourned for sentencing or to complete police diversion.
- 55 Some adjournments may be necessary to reach a resolution and help avoid a last minute trial cancellation. However, it is likely that most are unnecessary, using additional judicial and court resources and taking up the valuable time of all participants, with unnecessary stress and anxiety for many defendants and complainants. The adjournment rate thus gives some credence to the concern of a recent report that status hearings may be “gathering their own moss”.⁴¹ Judges in courts where status hearings have been discontinued report an increase in efficiency of the process, in that there is a delay of eight weeks at most between first call and a defended hearing.⁴²

³⁹ Christchurch District Court statistics have been kept consistently and clearly in this respect, and show an average 22 per cent of “further remands” (adjournments to another status hearing) over the period 1998–2003.

⁴⁰ 2004 Evaluation, table 3.19.

⁴¹ In this context, the phrase means adding to delays and adjournments. See Anne Opie *The ‘General Practitioner’ in the Courts: Changing Organisational Environments and the Operation of the Duty Solicitor Scheme* (A report produced for the Legal Services Board, Wellington, November 2000) 16, 62 and 72. The report suggested that an unintended effect of status hearings may be that they are contributing to a different mode of organisational inefficiency.

⁴² Discussions with Judge G Rea about the Hawkes Bay “abolition” of status hearings, November 2002, confirmed in February 2004. The “last minute door of the court” cancellation of defended hearings still persists, however.

Ensuring a proper plea at the earliest opportunity

- 56 The former Department for Courts (now Ministry of Justice) has produced a report on the stages at which summary cases were finalised between July 1997 and June 2001.⁴³ This analysis is subject to inaccuracies because there was a lack of consistent recording of status hearings on the Law Enforcement System and not all courts keep status hearings statistics. An extract from the report is set out in Table 1.
- 57 Subject to the data limitations mentioned, the percentage of cases resolved at status hearings (or other pre-trial hearings) appears to have increased, on average, from 1997/98–2000/01 by about 6 per cent.
- 58 However, in the “undefended convicted” (guilty plea at list court) category there is a decrease from 64 per cent in 1997–1998 to 59 per cent in 2000–2001. One interpretation of the statistics is that about 5 per cent of guilty pleas that

Table 1: Trends in the percentage of summary cases disposed via each track, by circuit

Circuit	Disposal year	Undefended withdrawn %	Undefended convicted %	Defended withdrawn %	Status hearing %	Defended with plea %	Fully defended %	Total %
Northern	1997/98	8	55	8	18	7	5	100
Northern	1998/99	8	50	6	26	5	4	100
Northern	1999/00	8	48	8	27	4	5	100
Northern	2000/01	7	51	9	23	6	4	100
Waikato	1997/98	5	70	7	7	4	6	100
Waikato	1998/99	5	69	6	8	5	6	100
Waikato	1999/00	7	68	6	10	4	6	100
Waikato	2000/01	7	66	5	11	6	6	100
Central	1997/98	3	68	9	7	3	10	100
Central	1998/99	5	69	8	9	3	7	100
Central	1999/00	8	70	7	9	2	4	100
Central	2000/01	7	68	8	10	3	4	100
Wellington	1997/98	9	64	8	7	4	8	100
Wellington	1998/99	7	62	10	10	3	8	100
Wellington	1999/00	7	61	10	12	2	7	100
Wellington	2000/01	10	60	9	12	3	6	100
Southern	1997/98	6	72	7	3	5	7	100
Southern	1998/99	7	63	7	12	5	6	100
Southern	1999/00	8	62	7	12	5	6	100
Southern	2000/01	10	62	7	12	4	5	100
Total	1997/98	7	64	8	10	5	6	100
Total	1998/99	7	60	7	15	5	6	100
Total	1999/00	8	59	8	17	4	5	100
Total	2000/01	8	59	8	16	5	5	100

⁴³ Department for Courts, Courts Business Forecasting and Modelling Project: Report 9, “Regional Variation in the Characteristics of Criminal Summary Cases” (Wellington, July 2002).

formerly took place at a list court are now taking place at status hearings, which would increase the time and resources spent on these cases prior to a guilty plea, and thus negate any efficiency gains otherwise achieved. This interpretation is endorsed by the views of the majority of informants to the 2004 Evaluation who thought that status hearings are not ensuring that an appropriate plea is entered at the earliest opportunity. Many thought that status hearings could be encouraging a delay of a guilty plea for tactical reasons (“buying time” to get further disclosure, or to complete an anger management course, for example). As three interviewees said:

. . . it’s a lot easier for defence counsel to go along with a not guilty at the start, enter it, and sort matters out between then and the status hearing, rather than do the hard work that’s necessary in the case right from the outset, before a plea is entered. They disadvantage the defendant, and they just take up court time. (Judge, 6.1.3.)

This is one of the concerns I have . . . it has created a kind of inducement not to plead guilty early on. (Judge, 6.7.2.)

If I had pleaded guilty initially I was told that I would get a very rushed time. I wouldn’t have time to go to anger management or go to counselling, so, yeah . . . I needed time to, you know, come up with some, get things started. (Defendant, 4.5.)

- 59 While it seems reasonable that defendants wait for further disclosure before confirming their plea, status hearings may be encouraging defendants who are guilty not to plead guilty at first call.
- 60 On the other hand, status hearings may have encouraged earlier resolutions in the sense of decreasing last minute guilty pleas. There is a category of “defended with plea” (cases where there was a guilty plea either on the day of trial or during trial) where all years show 5 per cent except 1999–2000, which shows 4 per cent. However, no data has been recorded to show the situation before the introduction of status hearings.
- 61 Some key informants thought that the proportion of cases resulting in defended hearings on some or all charges has steadily declined in recent years, particularly since the advent of status hearings. Given the limitations in the available data, it is not possible to be certain as to the validity of this view. However, some support for it can be found from a comparison of the data in Table 1 with a 1981–1982 study of police prosecution files in three district courts over a period of six, three and one months respectively.⁴⁴ In the 1981–1982 study the proportion of all cases proceeding to a defended hearing was 16 per cent; in 2000–2001 the comparable figure was 5 per cent.
- 62 In summary, status hearings may have decreased the number of last minute guilty pleas and defended hearings, although the extent of their impact in this regard is unclear. Against that, there is evidence that status hearings have decreased the number of guilty pleas at first appearance, with some defendants taking advantage of status hearings to postpone the finalisation of their case. The overall impact of these competing effects cannot be gauged from available data. The avoidance of a defended hearing or a last minute trial cancellation clearly outweighs a delay in the entry of a guilty plea in terms of efficiency gains; the overall gains and losses in court time depend on the respective numbers.

⁴⁴ See M Stace “The Police as Prosecutors” in N Cameron and W Young (eds) *Policing at the Crossroads* (Allen & Unwin/Port Nicholson Press, Wellington, 1986) 145.

Time taken at status hearings in the 2004 Evaluation

- 63 There is a balance between the time and resources taken for status hearings and the time saved by the number of resolutions. Many of the criminal caseload managers interviewed believed that status hearings were not very efficient, and that they involved a great deal of time for all participants, although some of this would be spent in pre-trial case preparation or resolution in any system.
- 64 The average time taken for each status hearing varied between 3.4 minutes and 5 minutes across the five courts participating in the study (table 3.9). These times may be related to the numbers of “stand downs” during an individual hearing. These are cases that began to be heard and then, for some reason (to enable a solicitor to find a client perhaps), were adjourned until later in the day. The courts where hearings took the least time had the smallest proportion of cases with stand downs, and those where hearings took most time had the highest proportion of stand downs (table 3.10).
- 65 The study examined the number of reports (such as pre-sentence reports) ordered during status hearings. Cases where one or more reports were ordered took, on average, 75 per cent longer than those where no report was ordered.
- 66 There also appears to be a relationship between time taken and the number of sentence indications given. Additional analysis on the 2004 Evaluation data shows that those cases that involved a sentence indication or a sentence discussion took, on average, almost twice as long to be heard as those cases that did not involve a sentence indication or discussion.
- 67 But, on the other hand, the two courts where status hearings took the longest time, and also where most sentence indications were given and reports ordered, had the greatest proportion of resolutions.⁴⁵ So the relationships are not simple. Length of time taken is only one of several variables by which efficiency should be measured.

Efficiency gains overseas

- 68 English research in 1994 found that almost one-fifth of cases were settled at pre-trial reviews (due in large part to some form of informal cooperative plea or charge negotiation between the prosecution and defence).⁴⁶ Commentators have said that this produced definite savings of court time. In addition, cases where a pre-trial review was held were significantly more likely to be ones where advance notice was given that a trial was no longer necessary.
- 69 Scottish research has found a resolution rate of around 25 per cent for “intermediate diets” (pre-trial hearings) in summary cases to be a qualified success for the system. There has been a significant decrease in the number of trial diets and a dramatic increase in the number of withdrawals of a witness summons.⁴⁷

⁴⁵ Cases where a sentence indication was requested were more likely to be those where a defendant was inclined to resolution.

⁴⁶ ID Brownlee, A Mulcahy and CP Walker “Pre-trial Reviews, Court Efficiency and Justice: A Study in Leeds and Bradford Magistrates’ Court” (1994) 33 *How LJ* 109, 117. About 18 per cent of the study cases settled in Leeds, and 16 per cent in Bradford.

⁴⁷ P Duff and F McCallum “The Impact of Intermediate and First Diets” (2000) *Scot L T* 181. A “first diet” is a pre-trial hearing in “solemn” (indictable) procedure. The resolution rate is still around 25 per cent: email from Professor Duff, 27 January 2004.

- 70 In Australia, the Victorian Magistrates' Court annual reports estimated a 60 per cent resolution rate for matters listed for contest mention until 2000. The 2001–2002 report notes instead that the system “has realised significant savings in financial terms, court time and court resources”.⁴⁸ However, no evidence or studies are cited and there is no comparison with earlier resolutions. In Tasmania (Hobart) in 2001–2002, 63 per cent of cases referred to contest mention resulted in guilty pleas, 4 per cent were withdrawn and 1632 witnesses were excused from attending court.⁴⁹

BENEFITS OF STATUS HEARINGS OTHER THAN EFFICIENCY

- 71 Although the majority of key informants (judges, prosecutors, defence counsel, court staff) in the 2004 Evaluation thought the aims of original status hearings were not being achieved, many saw other benefits in them. These included:
- a focal point for case preparation;
 - judicial oversight of resolutions to cases (aided by sentence indications);
 - an opportunity for complainant input and resolutions satisfactory to complainants;
 - a chance for defendants to “have their say” in court, rather than being rushed through the list court.⁵⁰
- 72 Key informants also mentioned that the process encourages early and full disclosure of the case against the defendant by the prosecution, and early preparation and plea and charge discussion between prosecution and defence. This allows a plea to be entered on a more informed basis, and, in the absence of a guilty plea, may result in some agreement as to the evidence and issues for trial. Respondents commented:
- The status hearing is a useful intermediary step to enable lawyers to get the information they need to properly advise their client and then enter the plea. (Judge, 6.1.3.)
- . . . it's been my experience in the status court, that there is a lot more information available . . . better disclosure made to the defendant, there is better information available to the court in terms of victim reports . . . So a plea is entered in a situation where there is much better information on both sides. (Judge, 6.1.3.)
- 73 These benefits, together with an overall 40 per cent resolution rate across the five district courts, and the likelihood that there will be fewer cancellations of defended hearings so that fewer witnesses are coming unnecessarily to court than previously, point to the ongoing need for a well-constructed pre-trial review process.

⁴⁸ Magistrates' Court of Victoria *Annual Report 2001–2002*. Matters finalised at contest mention continue to increase – but matters listed also continue to increase.

⁴⁹ See <<http://www.courts.tas.gov.au/magistrate> for annual report> (last accessed 2 April 2004).

⁵⁰ Note that if the Law Commission's recommendations as to the establishment of a Community Court are adopted the “list court” may better provide for the defendant's “day in court”. See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

CONCERNS ABOUT STATUS HEARINGS OTHER THAN INEFFICIENCY

- 74 Some key informants in the 2004 Evaluation expressed concerns about the present status hearings system, including:
- breaches of defendants' rights, especially of the privilege against self-incrimination, and pressure on defendants (especially the unrepresented) to plead guilty (6.7.1);
 - concern about the effect on judicial impartiality of adopting a more interventionist role (6.2.1).
- 75 These two concerns relate to the inquisitorial or proactive role of the judge at status hearings, asking questions about a defence or what is at issue in a case, or occasionally being seen as "trying to obtain guilty pleas". Both concerns were also voiced to a lesser extent by a minority of respondents to the callover study.

EFFICIENCY IN THE CALLOVER PROCESS

- 76 Key informants interviewed as part of the Auckland callover study in the 2004 Evaluation generally agreed that efficiency (case management and timetabling) was the principal focus of the callover system, a main aim being to eliminate day-of-the-trial guilty pleas (7.3.1).

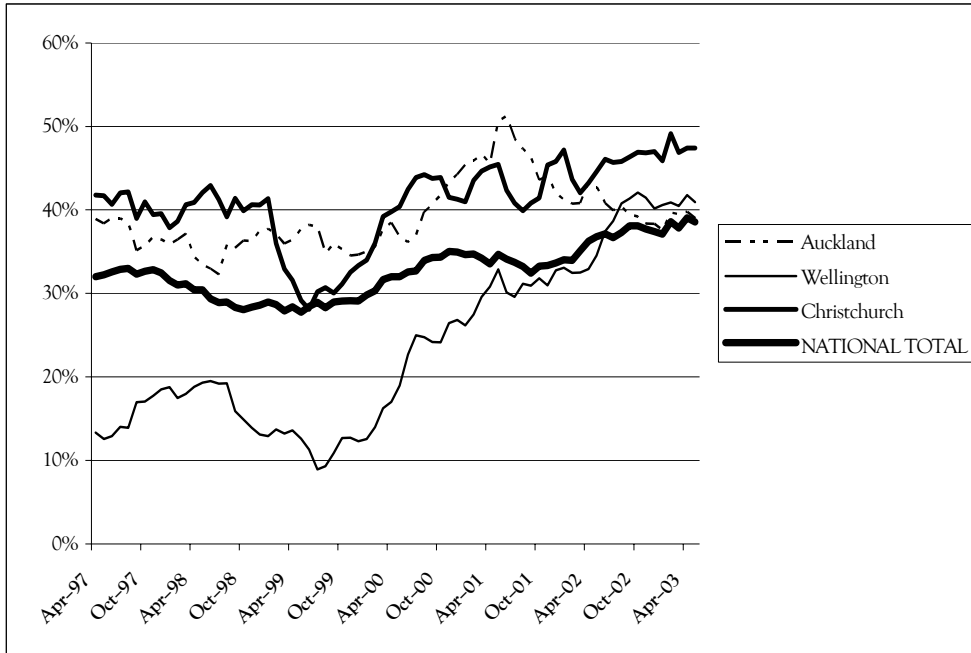
Time taken

- 77 Usually, there are 25–30 cases in an afternoon's callover. Most cases take 1–4 minutes. In the 2004 Evaluation study sample, 36 per cent took 1–2 minutes (figure 7.2). Forty-eight per cent of cases heard at first callover were remanded to second callover, 15 per cent to another first callover, 12 per cent to a pre-trial application hearing and 8 per cent transferred to another court. The remainder were remanded for a sentence indication, pleaded guilty, were discharged pursuant to section 347 of the Crimes Act 1961, or failed to appear (table 7.3). Of these outcomes, the group most likely to be "unnecessary adjournments" are the 15 per cent remanded to another first callover. The average number of appearances between first callover and resolution was six; slightly more than one-third of those accused had four or fewer appearances (table 7.7).
- 78 The time that elapsed between first callover and resolution varied between three months (28 per cent of cases studied) and more than 18 months (5 per cent of cases studied). Fifty-three percent were resolved in six to nine months and 84 per cent in less than one year (figure 7.3).
- 79 Key informants commented that, although the system took up a lot of time, it was efficient (largely because of the judges and court staff who organised it) and some thought that without the callover system there would be chaos. For others, it helped them to organise their time. Notwithstanding these perceptions, it does seem odd to claim that a pre-trial system involving an average of six appearances between first callover and resolution is efficient.

Resolution rates

- 80 In the 2004 Evaluation about half of the accused who had a first callover pleaded guilty at some stage during the callover process. Ministry of Justice

Figure 1: District Court indictable cases pre-trial resolution rates per annum⁵¹



statistics obtained in May 2004 show that the national average proportion of pre-trial “disposals” between committal and trial ranged from around 30 per cent to just under 40 per cent between 1997 and 2003. As shown in figure 1, Auckland varies from about 33 per cent to over 50 per cent; Christchurch ranges from under 30 per cent (in 1999) to just under 50 per cent (in early 2003); and Wellington has climbed steadily from under 10 per cent (in 1999) to around 40 per cent in 2002–2003 (although the reliability of the earlier figures is questionable). It should be noted that Auckland has a greater number of cases going through the system than have either Wellington or Christchurch.

- 81 However, the proportions of pre-trial resolutions are not necessarily related to the callover system. It has not been possible to locate data prior to callovers being introduced. It could be that callovers encourage pleas to be entered earlier than in the past, so that there are fewer cases cancelled at the door of the court, which is so costly in time and resources. Some respondents believed this to be the case. Half of those accused who pleaded guilty in the 2004 Evaluation callover study did so at callover and 29 per cent did so on the day of trial. (A further 12 per cent did so after a pre-trial application hearing, 5 per cent after a sentence indication hearing and 2 per cent halfway through their trial (table 7.4)).
- 82 It could also be that callovers lead to less protracted trials because of early refinement of issues and agreements of evidence, but there is no evidence to show this is the case.
- 83 By way of overseas comparison, the County Court of Victoria is optimistic about its new Criminal List Management System (CLMS) for trials, as outlined in its annual reports of 2000 and 2001. The latter notes that, in the second year of the CLMS system, of 578 contested cases committed to the Melbourne County

⁵¹ Graph based on statistics obtained from the Ministry of Justice in May 2004. The figures at each period represent the average for the previous 12 months.

Court, 28 per cent were resolved at case conference, 16 per cent resolved at directions hearings, 6 per cent at mention (callover), 20 per cent pleaded guilty at trial and 29 per cent were resolved by a trial.⁵²

- 84 However, it has been said that the success of the legislation and systems set up under it depends on the judges conducting the case conferences and directions hearings,⁵³ and the 2001 annual report notes that the CLMS requires substantial administrative support.

CONCLUSION

- 85 The 2004 Evaluation is at best equivocal about whether status hearings and callovers are achieving efficiencies. This is partly because a “before” and “after” study was not possible. There is certainly no clear evidence of earlier resolutions or fewer adjournments in either process. However, it may well be that status hearings (and their predecessors, the pre-trial conferences) have reduced numbers of defended hearings.
- 86 The 2004 Evaluation also suggests that status hearings may be producing benefits other than achievement of the original aims, in particular, a focal point for case preparation and early prosecution and defence discussions, and a more structured process for prosecution disclosure. Only 3 per cent of cases overall in the study were adjourned for discussions between defence and prosecution. Only 4 per cent of cases overall were adjourned because of late or incomplete disclosure (table 3.23). However, status hearings are not the only way of achieving this result; the proposed statutory criminal disclosure regime to be introduced in the Criminal Procedure Bill 2004 currently before Parliament should provide an equivalent structure for ensuring disclosure.
- 87 To conclude, the current procedures in both the summary and indictable jurisdictions vary significantly from judge to judge and court to court. There is small evidence of efficiency gains from status hearings, but it is by no means conclusive. The impact of the equivalent callover system in the indictable jurisdiction is equally unclear. Moreover, participants in the 2004 Evaluation raised concerns about the fairness of current procedures. In the Commission’s view, therefore, significant changes to current procedures are desirable both to enhance efficiency and fairness and to promote increased consistency of practice.
- 88 In subsequent chapters we consider details of how the pre-trial system should be structured. We begin with consideration of the objectives of the system and the overall framework that should be adopted. We discuss plea and charge discussions; examine the role of a pre-trial hearing; and discuss the place of sentence indications. We also consider the particular safeguards required for unrepresented defendants. We conclude by considering the extent to which effective implementation requires legislative change.

⁵² County Court of Victoria, Criminal List Management System, *Annual Report 2001*, 7-10.

⁵³ Judge Rea “Report on Trip to Melbourne and Adelaide to Study Pre-trial and Trial Systems for Jury Trials”, March 2002.

4

The pre-trial process: from initial appearance to trial

OBJECTIVES AND PRINCIPLES

- 89 **T**HE ULTIMATE OBJECTIVE of pre-trial processes is the same in both the summary and the indictable jurisdictions: to ensure that cases are dealt with as expeditiously and efficiently as is consistent with fundamental principles of fairness. In broad terms, therefore, the processes should be the same; they should differ only to the extent that this is necessary to take account of the particular requirements of committal procedures in the indictable jurisdiction.
- 90 In the Commission's view, the processes should be designed to promote the following:
- early consideration by the prosecution of the evidence and appropriateness of the charges laid;
 - full disclosure of the prosecution case upon request and otherwise as soon as possible following the entry of a not guilty plea;
 - the provision of effective legal advice prior to the taking of a plea and the availability of adequate legal aid funding for that purpose;
 - early advice to defendants about the strength (or otherwise) of the prosecution case, their plea and course of action;
 - discussion between prosecution and defence prior to plea about the nature and appropriateness of the charges and the facts;
 - early preparation of the defence case;
 - pre-trial discussion between prosecution and defence with a view to agreeing on some evidence or identifying the issues in dispute.
- 91 The present process often does not work as well as it should in these respects. By way of example, the first thing a defendant, who is appearing on a charge that carries the right to a jury trial, is asked when they appear in court, is whether or not they wish to elect trial by jury. That election is often made without the defendant having a proper understanding of the case and with the benefit of only minimal prosecution disclosure. A defendant who is contemplating a guilty plea, but who nevertheless wishes to seek a sentence indication, can only obtain that information by pleading not guilty and having the case adjourned for a status hearing. The process, therefore, has features that tend to inhibit rather than facilitate progress, with adverse implications for the defendant and for the timely hearing and disposition of the case.
- 92 The processes will maximise efficiency if they operate within a framework that ensures that:

- matters that require the agreement of the parties are dealt with outside the courthouse wherever possible;
- where a matter involves or requires a court process but does not require a hearing in open court, it is handled by the registrar outside the courtroom;
- where hearings in open court are required, they are before a registrar unless a judicial decision is required;
- the number of court appearances is limited to those necessary to advance the case and prepare for trial, and adjournments are granted only when they are necessary to ensure that the defendant receives a fair trial;
- trials are scheduled and witnesses come to court only when all pre-trial matters have been dealt with.

THE PRE-TRIAL FRAMEWORK

- 93 In *Delivering Justice for All* the Law Commission discussed a number of perceived problems with the criminal list procedure and proposed measures to streamline the management of preliminary criminal processes.⁵⁴ The guiding principles that underpinned those recommendations mirror those set out above.⁵⁵
- 94 In the Commission’s view, a pre-trial framework that is developed with reference to these principles will produce processes that deal with first things first, better allow for the timely and orderly preparation of the case and ensure that judicial resources are applied as soon as, but only when, they are required.

A ROADMAP

- 95 The rest of this chapter sketches a possible “roadmap” for the pre-trial stage of summary proceedings, under the following three headings:
- initial hearing;
 - standard adjournment;
 - pre-trial hearing.

This is presented in diagrammatic form in figure 2. The main features of this roadmap, which would require significant legislative and operational changes, will be canvassed in detail in subsequent chapters.

Initial hearing

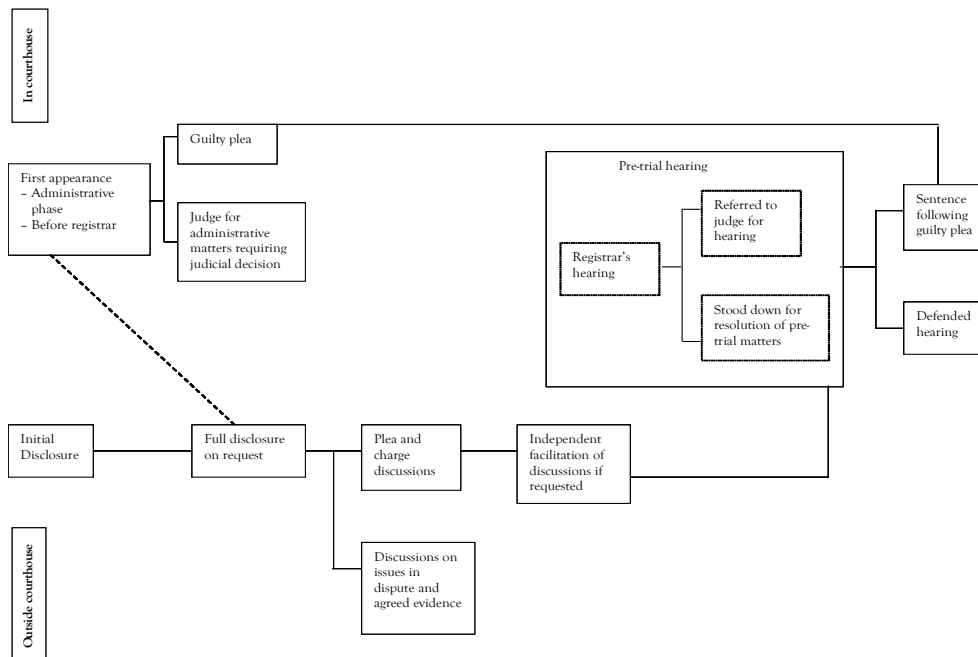
- 96 As the Commission recommended in *Delivering Justice for All*, the first appearance, or initial hearing, should take place after the defendant has had the opportunity to seek legal advice or consult the duty solicitor.⁵⁶ Where possible, initial prosecution disclosure should have occurred. The hearing before a registrar should be concerned principally with preliminary matters, including receiving initial guilty pleas and those matters for which the registrar has specific

⁵⁴ New Zealand Law Commission, above n 50, 139–146.

⁵⁵ Paras 90–92.

⁵⁶ New Zealand Law Commission, above n 50, 139–140.

Figure 2: Pre-trial process charges laid summarily



powers under the Summary Proceedings Act 1957.⁵⁷ The entry of a not guilty plea and the decision as to election of trial by jury should not be received at this point, but if, having regard to the information provided by the prosecution, the defendant intimates a guilty plea, the case should be referred to a judge to be dealt with on the same day.

- 97 At the conclusion of the hearing, unless a judicial decision is required, the registrar should adjourn the case for a standard period of six weeks to a pre-trial review hearing. If a judicial decision is required – for sentencing, if a guilty plea has been entered, or where there is a contested bail or name suppression application – the case should be adjourned by the registrar to be heard by a judge that day.

Standard adjournment

- 98 The standard adjournment should be a period of six weeks to enable the prosecution and the defence to prepare the case and for all essential administrative steps to be completed. In this period three important processes should occur. First, informal plea and charge discussions should take place between the prosecutor and counsel. If facilitation of those discussions is sought by the parties, the registrar should be advised and the necessary arrangements made. Secondly, disclosure issues should as far as possible be dealt with and, if possible, resolved by the parties. Full disclosure should be made by the prosecution following a request by the defence, who would be expected to make such a request if a not guilty plea is anticipated. Thirdly, if it is clear the case is to go to trial, counsel and the prosecutor should informally discuss and, if

⁵⁷ Summary Proceedings Act 1957, ss 36 (withdrawal of information), 45A and 61A (adjournments), 46A (publication of names). See also Bail Act 2000, s 28 (bail on adjournment).

possible, agree on those matters that will be in issue at the defended hearing, the evidence that may be admitted in written form by consent, the number of witnesses and a firm estimate of the time required for the hearing.

- 99 The registrar should maintain oversight of the progress of the case during the standard adjournment period. Before the pre-trial hearing date, the parties should inform the registrar whether there are disputed disclosure issues requiring resolution; whether plea and charge discussions have been finalised; and, if a not guilty plea is intimated, that the issues for trial and evidence that may be admitted by consent have been discussed. Whenever possible there should be written confirmation of these outcomes, and, in the event of a defended hearing, its estimated duration and the likely number of witnesses, by way of a completed checklist filed in court.

Extension of standard adjournment

- 100 In exceptional cases, because of complexity, multiple defendants, or other issues, the standard adjournment period may be insufficient to enable the parties to complete the three processes referred to. In such a case, the registrar should be empowered to extend the adjournment period at the request of the parties without the attendance of the defendant at court. If an extension to the standard adjournment is sought by either the prosecutor or defence counsel and the case is not exceptional, the application should be determined in open court by the registrar. An extension should then be granted only where the registrar is satisfied that it is necessary to ensure the defendant has a fair trial or an extension is otherwise required in the interests of justice. If an extension is refused and the party seeking it asks for a review of that decision, the registrar should refer the case to a judge.
- 101 The further adjournment of some cases may require a judicial decision – for example, where there is a remand in custody extending beyond eight days, or an extension is sought of a name suppression order made by the registrar. In such a case the matter will need to be set down for a hearing before a judge.

Pre-trial hearing

- 102 Pre-trial hearings should be conducted, at least initially, by a registrar. Where the parties advise the registrar that matters such as disclosure and plea and charge discussions have been resolved, and either a guilty plea is intimated or a sentence indication is sought, the case should be stood down for hearing before a judge as soon as possible that day. If prior written confirmation of those matters had been filed, the case could be set down by the registry for hearing before a judge in the first instance.
- 103 Where a not guilty plea is intimated, the registrar would formally receive and enter the plea, and where relevant, the election as to trial. A fixture should be given where the registrar is satisfied that the case is ready for a defended hearing; that the parties have confirmed the issues in dispute for the trial and the number of witnesses to be called; and that they have made a realistic assessment of the length of defended hearing. If full disclosure has not yet occurred, the registrar should set the fixture date on the basis that it will be attended to immediately after the pre-trial hearing. If a dispute as to disclosure subsequently arises, a

separate hearing to resolve that should be arranged and, if necessary, the fixture date extended.

- 104 The pre-trial hearing would take place, or continue, in front of a judge where, as a result of plea and charge discussions, there was an intimated guilty plea, where a sentence indication was sought by the defendant, where there are disputed disclosure issues requiring resolution, or where there has been a request for a review of the registrar's decision to refuse an adjournment.

Interim orders

- 105 There would be a need for court orders during the standard adjournment in some cases. If the order can be made by the registrar it should be. In cases where an order as to disclosure is sought, or where there are matters relating to custodial remands or bail, for example, they should be referred to a judge.

Exceptions to standard procedures

- 106 Some adjustments to these procedures are likely to be required where the proceedings are laid indictably, or where the defendant is unrepresented. The provisions in the Criminal Procedure Bill 2004 presently before Parliament relating to committal proceedings for indictable offences will need to be adjusted. With respect to unrepresented defendants, the procedure will need to take account of matters discussed in chapter 8.
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Plea and charge discussions

THE PRACTICE OF PLEA AND CHARGE DISCUSSIONS

107 **A** KEY ISSUE in the consideration of pre-trial processes is the role of “plea bargaining”, or (to use more neutral terminology) plea and charge discussions. In common law jurisdictions, such discussions can take three main forms:

- charge negotiations (discussions over which charge or charges, if any, the defendant will plead guilty to, and whether the prosecution will withdraw other charges);
- fact negotiations (which can lead to an agreement by the defendant to plead guilty if the prosecution is prepared to accept the defendant’s version, or part thereof, of the facts);
- sentence negotiations.⁵⁸

108 The third form of discussion, which may result in an agreement between the prosecutor and defence counsel on the appropriate sentence in return for a guilty plea, is dependent upon the existence of significant prosecutorial influence over the type or length of sentence, and is mainly confined to North American jurisdictions.⁵⁹ In contrast, the first two forms – charge and fact negotiations – have been accepted as normal practice in various jurisdictions during the last 20 years or so, for example, in England,⁶⁰ Scotland⁶¹ and Australia.⁶²

109 In New Zealand, too, it was standard practice, well before the advent of status hearings, for the prosecution and the defence to attempt to come to an

⁵⁸ A Ashworth (ed) *The Criminal Process: An Evaluative Study* (2 ed, OUP, Oxford, 2001) 271–276. See also Shorter Trials Committee *Report on Criminal Trials* (Australian Institute of Judicial Administration Inc, Canberra, 1985) 6.3–6.13.

⁵⁹ See AW Alschuler “Implementing the Defendant’s Right to Trial: Alternatives to the Plea Bargaining System” (1983) 50 U Chi L Rev 931, 975. Prosecutors’ sentence recommendations are almost universally followed: AW Alschuler “The Trial Judge’s Role in Plea Bargaining” (1976) 76 Colum L Rev 1059, 1107; A Horwitz “Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases” (1998) 40 Ariz L Rev 1305.

⁶⁰ In England it has been said that “plea negotiations” are widely used and valued as a means of case disposition. See A Mulcahy “The Justifications of ‘Justice’” (1994) 34 Brit J Criminol 411, who used the term “plea negotiations” to refer to the practice whereby a defendant pleads guilty to fewer, or less serious, charges in the expectation of receiving a reduced sentence.

⁶¹ AV Sheehan *Criminal Procedure in Scotland and France* (HMSO, Edinburgh, 1975) 120; SR Moody and J Tombs “Plea Negotiations in Scotland” [1983] Crim LR 297.

⁶² See *Prosecution Policy of the Commonwealth* (2nd edn, Australian Government Publishing Service, Canberra, 1990) ss 5.12–5.18; RD Seifman and A Freiberg “Plea Bargaining in Victoria: the Role of Counsel” (2001) 25 Crim LJ 64, 69; Mack and Anleu, above n 12, 6 and 26.

agreement about the charges to which the defendant would plead guilty. In return for a plea of guilty, the prosecutor might be willing to reduce the number of charges faced by the defendant, charge him or her with a less serious offence, or amend the summary of facts on which the charge was based. The practice occurred in both the summary and indictable jurisdictions.⁶³

RATIONALE FOR PLEA AND CHARGE NEGOTIATIONS

- 110 As the Commission has already noted,⁶⁴ negotiations that result in guilty pleas and/or the withdrawal or amendment of charges can produce significant benefits in terms of economy, efficiency and fairness, by saving an expensive trial and avoiding the need for victims and witnesses to testify. Negotiations can be an effective way of identifying and resolving the issues in dispute. They can produce timely justice for victims. They can result in an outcome that offenders accept as a just and proportionate response to their offending. Without them, there would likely be a significant increase in the number of defended hearings or trials, increased costs for the system, and higher levels of dissatisfaction amongst both victims and offenders.
- 111 Moreover, an amendment of the charges, or the facts upon which they are based, does not necessarily have a significant impact on either the eventual assessment of the offender's culpability or the sentence imposed. For example, the police may quite properly lay a number of charges relating to essentially the same incident.⁶⁵ Similarly, they may lay a large number of charges (for example, in relation to fraud) that cover a connected course of conduct. In both these instances, it may be in no one's interest to seek convictions on every count when a focus on the most serious count or a sample of charges is likely to produce only a change in the number of convictions or, perhaps, a small reduction in the quantum of punishment.
- 112 In any event, it would be impracticable to prevent prosecution and defence from communicating with each other, and, in many cases, disadvantageous to both complainant and defendant to attempt to do so. It is both inevitable and desirable that prosecution and defence be able to engage in some discussions as to charge or plea. The question that must be addressed is the extent to which such discussions need to be regulated or controlled to ensure defendants and complainants are treated fairly and the overall interests of justice are preserved.

THE IMPACT OF STATUS HEARINGS ON PLEA AND CHARGE DISCUSSIONS

- 113 Although plea and charge discussions have been recognised practice for some time, status hearings have provided a new focal point for them in two ways.

⁶³ See, for example, Stace, above n 44.

⁶⁴ New Zealand Law Commission *Criminal Prosecution* (NZLC PP28, Wellington, 1997) ch 17.

⁶⁵ Mack and Anleu, above n 12, 76, with references to Pegasus Taskforce *Report Reducing Delays in Criminal Cases* (Melbourne, 1992) about the inevitability of some overcharging; Attorney General's Advisory Committee *Report on Charge Screening Disclosure and Resolution Discussion Chair*: GA Martin, (Toronto, Ontario, 1993) 284; David Layton "The Prosecutorial Charging Decision" (2002) 46 *Crim LQ* 447.

114 First, they have explicitly or implicitly encouraged informal discussions before the hearing itself, by providing a forum for giving effect to the outcome of those discussions. It is clear from the 2004 Evaluation that discussions between the prosecution and defence prior to status hearings are often encouraged by judges and often take place, though not always.⁶⁶ As one defence counsel noted:

In the past, the discussions would have taken place fairly close to the fixture time ... there was always that dialogue between defence and police, but it was close to the hearing date (6.3.5).

A few of the defendants interviewed also reported that their lawyers had prior discussions with the police, which resulted in charges being dropped or amended if the defendant pleaded guilty. One said, for example:

He had spoken to the police and discussed a plea bargain. If I said I did it then the charges could be dropped (4.2.2).

115 Some key informants believed that status hearings depend for their success (in terms of resolution) mainly on discussions beforehand between the prosecution and the defence. One police prosecutor even described status hearings as “a waste of time” without prior discussions (6.3.4).

116 Secondly, status hearings have established a formal setting in which discussions that have either not been held informally between prosecution and defence or have failed to reach a resolution can be progressed through facilitation by, or through the intervention of, the judge. Status hearings guidelines contemplate that judges will be active in encouraging and even initiating resolution of cases, and judges interviewed for the 2004 Evaluation described their role in status hearings as “proactive”, “more inquisitorial” and “a facilitator” (6.2.1). They might fulfil this role by inquiring about plea discussions and creating opportunities for them to take place, asking, for example: “Is there any room to explore Sergeant?”; “Is there perhaps a lesser charge to which your client will plead guilty, Ms X?”; “I notice your client made some pretty damaging admissions to the police; what is the situation here, Mr Y?”; “This might be one of those occasions where diversion would be appropriate Sergeant?”. Or, “I am reluctant to set it down for defended hearing if there would be no real argument once it is properly looked into by both sides”. Or, as will be discussed in more detail in chapter 7, the judge might encourage a resolution by giving a sentence indication, either upon request or on his or her own initiative.

117 The 2004 Evaluation attempted to assess the degree of judicial intervention by asking questions about the involvement of judges in the resolution of cases. The data need to be treated with some caution: the interventions that were measured ranged from suggestions as to withdrawal of charges, through to vague efforts to “move things along” and determine readiness for trial, but they may not have captured all of the ways in which the judge interacted with participants during the hearing. However, the overall finding was that there was significant variation between courts,⁶⁷ and there appeared to be no relationship between a more interventionist⁶⁸ judge style as assessed and the number of resolutions

⁶⁶ See 2004 Evaluation, 6.3 and table 3.20.

⁶⁷ See 2004 Evaluation, 3.6.

⁶⁸ “Interventionist” in terms of the research meant asking if the prosecution and defence had discussed matters prior to the status hearing, suggesting they discuss a particular issue, suggesting the prosecutor withdraw a charge, asking questions about what was at issue, discussing the defence or prosecution case or “moving things along”.

at status hearings.⁶⁹ Status hearings may therefore be having a greater impact in encouraging prior informal discussions than they do in facilitating or prompting formal negotiations in the courtroom. Certainly, a significant number of resolutions did occur in status hearings, indicating that prior discussions had born fruit. In 21 per cent of cases studied in the 2004 Evaluation, charges were amended or withdrawn at status hearings, and, in almost half of these, the defendant pleaded guilty to other charges.⁷⁰ In a further 19 per cent of cases, the case was resolved by the entry of a guilty plea, giving an overall resolution rate of 40 per cent.

- 118 Whether or not status hearings have increased pre-trial resolutions, they have, at the least, provided a formal setting within which the outcome of prosecution and defence discussions as to plea and charges can be formalised and the case resolved, perhaps at an earlier stage than would otherwise have been the case.

THE NEED FOR SAFEGUARDS

- 119 Although plea and charge discussions are an accepted feature of the status hearings system, and can be supported on grounds of economy and efficiency, they do need to be conducted in a way that ensures that the rights of defendants and complainants are properly preserved, and the interests of complainants and the broader interests of justice are not overlooked.

Rights of defendants

- 120 The minimum standards of criminal procedure contained in section 25 New Zealand Bill of Rights Act 1990 are as applicable to pre-trial processes as they are at trial. In the context of plea and charge discussions, the right to a fair and public hearing enshrined in paragraph (a), and the right to silence and the right against self-incrimination reflected in paragraph (d), have particular relevance.
- 121 The “without prejudice” exchange between defence counsel and the prosecutor that occurs in plea and charge discussions allows the opportunity for the parties to review the prosecution informally at an early stage of the proceedings. However, there are features of plea and charge discussions that could result in an undermining of these rights. For instance, there are potential implications if:
- discussions occur without the defendant’s knowledge and prior to counsel receiving instructions;
 - the defendant feels pressured into pleading guilty to a charge because it was agreed by counsel and the prosecutor;
 - an admission made on behalf of the defendant is referred to by the prosecutor at a later stage of proceedings.

Needs and interests of complainants

- 122 It is equally important that the rights and interests of complainants are properly addressed during plea and charge discussions. Complainants cannot dictate whether a prosecution is brought or a charge withdrawn or reduced. However,

⁶⁹ See 2004 Evaluation, table 3.19 and table 3.24–3.34.

⁷⁰ See 2004 Evaluation, table 3.13. In 3 per cent of cases a more appropriate offence was substituted.

they have a right to be informed. In particular, section 12(1) of the Victims' Rights Act 2002 requires that a victim must, as soon as practicable, be given information about all charges laid or reasons for not laying charges, and all changes to the charges laid, and every guilty plea entered and sentence imposed. Moreover, the expectation in section 7 of the Act that they be treated with courtesy and that their dignity be respected dictates that they be consulted and that the reasons for decisions taken are adequately communicated to them. Unless plea and charge discussions give effect to this, they will fail to protect the basic rights and interests that have been given recent statutory recognition.

Overall interests of justice

- 123 In addition to the defendant's right to a fair trial, which is enshrined in the Bill of Rights Act 1990, there is an underlying requirement for pre-trial processes such as plea and charge discussions to operate fairly in the broader interests of justice. For instance, the potential for unfairness in this more general sense could arise if:
- the defendant does not understand the agreement reached between counsel and the prosecutor, but pleads guilty on counsel's advice;
 - the prosecution over-charges the defendant so as to provide "bargaining chips" in anticipation of the plea and charge negotiations;
 - the prosecution subsequently resiles from an agreement reached in the course of plea and charge discussions and seeks the leave of the court to give effect to a course other than that agreed to with counsel.

SUGGESTED SAFEGUARDS

- 124 As with any system of criminal justice that relies upon informal decision making, therefore, plea and charge discussions need to be accompanied by appropriate safeguards to ensure that basic rights are preserved and the overall interests of justice protected.
- 125 Current practice, both informal and formal, gives rise to a number of issues that need to be considered in the development of such safeguards. These include:
- the role of the prosecutor;
 - the role of defence counsel;
 - the involvement of complainants;
 - the enforceability of agreements;
 - the extent to which there should be protection for "without prejudice" discussions;
 - whether all discussions should have some independent facilitation or oversight of the process;
 - even if discussions do not always have independent facilitation or oversight, the extent to which there should be facilitation or intervention in the event that informal discussions do not reach a resolution.

The role of the prosecutor

- 126 The role and duties of the prosecutor, both prior to and during plea and charge negotiations, need to be clearly articulated and consistently applied. Four aspects require particular attention: disclosure; overcharging; prosecution discretion to lay lesser charges than the evidence supports; and prosecution initiation of discussions.

Disclosure

- 127 First, the defendant's right upon request to full disclosure of the evidence against him or her before being required to enter a plea (which we have proposed in chapter 4) is a right that equally applies prior to discussions between prosecution and defence. Otherwise, the defendant is not in an informed position to know the nature of the case against him or her and is being asked to agree on an outcome from a position of comparative ignorance. Moreover, discussions in the absence of disclosure are less likely to be effective in achieving a resolution of the case. In the Commission's view, therefore, a framework for the conduct of plea and charge negotiations needs to incorporate such a disclosure obligation.

Overcharging

- 128 In an environment where plea and charge discussions are encouraged there is a risk of overcharging to provide "bargaining chips". This apparently happens in the United States, and possibly also in Canada, in order to put pressure on a defendant to agree to plead guilty to a lesser count than charged.⁷¹ Some of the defence counsel in the 2004 Evaluation thought the police did overcharge at times (6.9). Likewise, a Victorian study in 2001 found there was the tendency for police officers to overcharge, in the view of the barristers.⁷² However, an English study found no real evidence of overcharging.⁷³
- 129 Those who allege "overcharging" use the term in two senses. First, they are referring to the laying of a more serious charge than can be justified on the available evidence, so that amendments following discussion merely lead to the charge that should have been laid in the first place. Secondly, they are referring to the laying of multiple charges in respect of a single incident or a connected course of conduct – charges that, although they can be legally sustained, appear unduly heavy-handed.
- 130 Overcharging in the second sense is not a matter for regulation or prohibition. Sensible prosecution practice should limit the charges laid so that they properly reflect the overall seriousness of the conduct. The court may suggest to the

⁷¹ Law Reform Commission of Canada *Plea Discussions and Agreements* Working Paper 60 (Ottawa, 1989) 21.

⁷² Seifman and Freiberg, above n 62, 66 and 73–74. This, and the occasional prosecutor reneging on an agreement, can also lead to a breakdown of the trust that "appears to be crucial to the successful conclusion of negotiations".

⁷³ J Baldwin and M McConville *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson & Co, London, 1977) 112.

prosecution that there is little to be gained by proceeding with the number of charges laid and that some reconsideration might be appropriate, but it should not go further than that; it is not for the court to interfere with charges that can be justified in law unless they amount to a clear abuse of process.

- 131 However, a framework for plea and charge discussions should include a prohibition on deliberate overcharging in the first sense. It should be the duty of police prosecutors, and Crown solicitors in cases laid on indictment, to ensure that the charges can be justified on the available evidence. It ought also to be part of the oversight function of the court, in agreeing to the amendment or withdrawal of charges following discussions (as recommended in chapter 6), to verify that some evidence was available to support the charges that had originally been laid.

Prosecution discretion to lay lesser charges than the evidence supports

- 132 In *Report 66 Criminal Prosecution*,⁷⁴ the Commission noted and supported the prohibition in the current *Solicitor-General's Prosecution Guidelines* (paragraph 7.5(b)(i)) against laying lesser charges, or agreeing to lesser charges, than the evidence supports, on the grounds that:

- no matter how guidelines might seek to regulate such a discretion there is a potential for inconsistency, bias and prejudice;
- administrative expediency could reduce the levels of charging;
- it is the role of the court, rather than the prosecution, to decide whether proven facts warrant a particular sanction, and it is not for the prosecution to attempt to limit the ability of the court in this respect.

- 133 However, the Commission now believes that this prohibition is based on an unduly mechanistic view of current charging practice. Police officers confronted with offending behaviour have the choice amongst a number of available charges and considerable discretion as to the charge they select. Moreover, they have considerable discretion whether or not to lay multiple charges arising from the same incident. An amended lesser charge or a reduction in the number of charges may be in the interests of the complainant, the defendant, and the community as a whole; it does not necessarily suggest that the interests of justice or the role of the court are being subverted.

- 134 The prohibition also implies that there is one correct version of “reality” (that supported by the evidence available to the prosecution). But the defence will often present a competing version of reality that, while not necessarily going to the essence of the defendant’s culpability, may nevertheless provide a different perspective on the nature of the offence and the circumstances leading to it. Unless that version is accommodated in some way, the defendant may not be willing to entertain a guilty plea. In these circumstances, the purpose of discussions is to arrive at a resolution that reflects a just outcome for all concerned, taking into account the variety of competing considerations – the nature of the sentence

⁷⁴ New Zealand Law Commission *Criminal Prosecution* (NZLC R66, Wellington, 2000) para 234. The Commission recognised the difficulties posed by unrepresented defendants and recommended that prosecutors should be given guidance regarding their obligations when entering into charge negotiations with them. For a discussion about the other protections for the unrepresented defendant which need to be put in place, see chapter 8.

that is likely to be imposed, the interests and needs of complainants, the consequences for defendants and the costs for the community.

- 135 The *Solicitor-General's Prosecution Guidelines* contemplate that charges for which there is evidential sufficiency should not be laid unless they can also be justified on public interest grounds. If the public interest warrants not laying charges at all, it is difficult to see why it should not also warrant lesser charges.
- 136 The Commission's present view, therefore, is that the current prosecution guidelines should be modified to make clear that discussions may result in amendments to charges, or a reduction in the number of charges, wherever that is required in the overall interests of justice.

Prosecution initiation of discussions

- 137 In *Report 66 Criminal Prosecution*, the Commission also noted that the current prosecution guidelines prohibit prosecutors from initiating charge discussions in indictable matters (paragraph 7.5(a), *Solicitor-General's Prosecution Guidelines*), and recommended that this prohibition be extended to summary cases, except in respect of unrepresented defendants at status hearings. However, the Commission is now of the view that, provided that there are safeguards in place to minimise the risk of overcharging, this prohibition is unduly restrictive. One of the objectives of an effective pre-trial process is to ensure that adjournments are kept to a minimum and that defendants who wish to plead not guilty are brought to a hearing as soon as practicable. It is therefore appropriate that the prosecution has the ability to initiate discussions to determine whether there is room for a resolution to address any defence concerns – through either an amendment to the charges or a change to the summary of facts – without the need for a trial. In the absence of that ability, there is a serious risk that a substantial proportion of cases will come to a pre-trial hearing without initiation of discussions by the defence (either through inertia or as a delaying tactic) and then result in a further adjournment to enable such discussions to occur. That is not only inefficient, but contrary to the interests of justice. In the Commission's view, the prohibition in the current prosecution guidelines in respect of cases laid on indictment ought to be removed and replaced by an explicit expectation that the prosecution will initiate discussions in all cases, except where the defendant is unrepresented (see chapter 8).

The role of defence counsel as negotiator

- 138 Defence counsel play a key role in discussions with the prosecution. Suggestions as to amendments to charges and to the summary of facts from the police are more likely to be suggested by the defence counsel than the prosecutor. Consistent with research conducted overseas,⁷⁵ the 2004 Evaluation found that the lawyer's advice plays a significant part in the defendant's plea decision:

The first lady said to go not guilty and come back because it was, ah, something was happening. I didn't really understand her so I just said "Yeah OK" . . . I didn't really know what she meant by it, I mean you just don't do it, eh, people tell you what to do. (Defendant, 4.2.2.)

⁷⁵ Baldwin and McConville, above n 73; Seifman and Freiberg, above n 62.

. . . I really, really wanted not guilty and I was adamant but then the duty solicitor told me to plead guilty. (Defendant, 4.5.)

During the course of the status hearing, there may be some further indication of movement by the prosecution, and then with a little bit of assistance by the judge pushing the prosecution in that direction . . . the client usually takes my advice and so that's where they change their plea. (Defence counsel, 4.5.)

- 139 In *Report 66 Criminal Prosecution*,⁷⁶ the Commission suggested that guidelines be drawn up for defence counsel who are undertaking charge negotiations. These have since been compiled by the Criminal Law Committee of the New Zealand Law Society (not to be elevated to rules) as follows:

Defence counsel may initiate discussion with the prosecution in advance of obtaining instructions from a client. The client must be kept informed of the progress of any negotiation.

Counsel must obtain instructions (preferably in writing) before the agreement is concluded with the prosecution.⁷⁷

- 140 The Commission agrees with these guidelines. It has been suggested that negotiation should only be with the client's consent; and that the lawyer should then give advice as to the plea with reasons, but avoid any pressure on the client.⁷⁸ However, it is not always possible to obtain full instructions from the defendant or determine a negotiating position, before contact is made with the prosecution. Indeed, it may well be that instructions are driven by the information that the prosecution provides. What is important is that the defendant be informed of the progress of discussions and that any plea be voluntary and made on a full understanding of the charges and the consequences of the plea.⁷⁹

The involvement of complainants

- 141 A framework for plea and charge discussions must ensure that complainants be advised of any resolution to the case arising from plea and charge discussions, including any guilty plea and any changes to the charges. That is the minimum required by the Victims' Rights Act 2002. However, the Commission believes that the framework should go further.
- 142 First, while the views and wishes of complainants should not determine the outcome of discussions (just as a victim impact statement should not determine the sentence), they are nevertheless relevant. As the Martin Committee in Ontario proposed,⁸⁰ prosecutors should always consider the interests of complainants and consult them prior to concluding a plea and charge agreement wherever that is feasible. Generally, this appears to be the practice already. Crown prosecutors interviewed for the callover study in the 2004 Evaluation,⁸¹ said that complainants were consulted about charge withdrawals and amendments (7.3.9). Most status hearings complainants interviewed also reported being impressed with

⁷⁶ New Zealand Law Commission, above n 74, para 243.

⁷⁷ See "Charge Negotiations and Defence Counsel" (18 June 2001) 563 Law Talk 12.

⁷⁸ Rodney L Uphoff, "The Criminal Defence Lawyer as Effective Negotiator: A Systemic Approach" (1995) 2 Clin L Rev 73, 95-107.

⁷⁹ *Adgey v R* (1973) 39 DLR (3d) 553, 557 (SCC) per Laskin J.

⁸⁰ Attorney-General's Advisory Committee, above n 65, 305-309; para 51.

⁸¹ See paras 37-43 above.

the contact they had and the information they received from the police (5.8). However, the consultation practice needs to be formalised and clearly articulated.

- 143 Secondly, the reasons for any amendments to the charges that lead to a resolution of a case need to be clearly communicated to the complainant before the case comes back to court. Amendments to charges as a result of discussion may be perceived by a complainant as trivialising his or her experience, especially if the decision is contrary to the complainant's wishes.⁸² Any dissatisfaction or grievance is likely to be mitigated if they understand the reasons why the decision was taken – for example, that the evidence to support more serious charges was equivocal; or that the withdrawal of some charges in return for guilty pleas on the most serious charges will make no substantial difference to the sentencing outcome.

The enforceability of agreements

- 144 In most cases where agreement is reached between defence counsel and the prosecutor during plea and discharge discussions, the outcome is formalised at the status hearing. Any outcome agreed to by counsel that is not in accordance with prior instructions cannot bind the defendant. There may also be occasions when the defendant has a change of mind after ratifying the result of the negotiations. Accordingly, the defendant's agreement to the outcome of plea and charge discussions cannot be binding.
- 145 Is it nevertheless unreasonable to require the prosecution to be bound by an agreement reached with counsel during informal plea and charge discussions? In *Fox v Attorney-General*,⁸³ charges had been withdrawn in the District Court following an agreement between the police and defence counsel, and the appellant pleaded guilty to amended charges. The Crown Solicitor who appeared at sentencing was of the view that the overall criminality of the offending was not reflected in the amended charges and, acting on the Crown's advice, the police re-laid the original charges. This was challenged by the defendant as an abuse of process.
- 146 In the District Court the outcome of the plea and charge discussions was treated as binding on the prosecution, the judge observing:
- As a matter of everyday routine, accommodations are reached between the Police and the defence about charges to be continued with and withdrawn. It is proper that such arrangements, if made after due consideration at appropriate level, be relied on. It is no excuse in my view, to say that an incorrect decision was reached through overwork and lack of resources.⁸⁴
- 147 On appeal, the Court of Appeal held that in this instance the backtracking on its agreement by the prosecution was not an abuse of process. The Court noted that plea and charge agreements were not capable in themselves as having binding force. They were to be seen as arrangements involving indications of acceptance by a prosecutor that different charges from those initially laid would

⁸² The potential impact on a victim, especially of a sexual offence, of a plea bargain, can be substantial: S Clark and D Hepworth "Effects of Reform Legislation on the Processing of Sexual Assault Cases" in JV Roberts and RM Mohr (eds) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto, University of Toronto Press, 1994) 127–128.

⁸³ *Fox v Attorney General* [2002] 3 NZLR 62; (2002) 19 CRNZ 378.

⁸⁴ *Fox*, above n 84, 66, para 15.

fairly reflect the criminality of the defendant and the willingness of the defendant to accept responsibility by pleading guilty to those lesser charges. The prosecutor was always subject to the constraints of the *Solicitor-General's Prosecution Guidelines*⁸⁵ and to direction if the prosecutor's actions or decision fell outside those guidelines.

- 148 The Law Commission agrees with the Court of Appeal's comment that it is plainly desirable that the prosecution gives effect to undertakings or agreements arising from plea and charge discussions. It will be rare that the public interest would require any departure from such undertakings or agreements. Even if an officer in charge of a case, or the complainant later disagreed with an undertaking given by a prosecutor, or if an error of judgment were made, the prosecution should only be able to resile from its undertakings as a result of the Solicitor-General's or Crown Solicitor's intervention in terms of the prosecution guidelines. That would not prevent a prosecutor advising counsel during plea and charge discussions that the prosecutor needed to consult before confirming arrangements, but even that should hopefully be rare. In the great majority of cases, the prosecution should be required to honour agreements reached in plea and charge discussions. Any other approach is likely to undermine the rationale for, and general confidence in, plea and charge discussions.⁸⁶ The extent to which agreements are binding, and the circumstances in which the prosecution may resile from them, should be clearly articulated in the prosecution guidelines.

Protection for “without prejudice” discussions

- 149 Where the discussions take place out of court and beyond the control of the court, it is not open to the court to impose duties of confidentiality, unless the parties to the negotiations have specifically agreed they were to be without prejudice.⁸⁷ However, unless discussions are held in confidence, their effectiveness is likely to be fatally undermined, because the requisite element of trust and candour between the parties will be lost. For example, if a defendant's admission as to particular elements of the offence, provided in the course of discussions about the possible entry of a guilty plea, could subsequently be used against him or her in the event of a trial, many defendants may well be dissuaded from participating in discussions of that nature. In the Commission's view, a framework for plea and charge negotiations should expressly stipulate that they are without prejudice and that information provided during discussions should not be directly provided in evidence in any subsequent proceedings.

Independent facilitation or oversight

- 150 The framework suggested for plea and charge discussions would incorporate a range of safeguards to protect the rights of defendants and complainants and to ensure that the overall interests of justice are maintained. Chapter 9 discusses whether such a framework can be sufficiently developed and monitored through

⁸⁵ Reproduced in New Zealand Law Commission, above n 74, appendix C.

⁸⁶ See R Lithgow “Fox – the Final Chapter” [2002] NZLJ 287, 288.

⁸⁷ *Police v Cresswell* (16 May 2001) District Court Nelson, Walker DCJ. The New Zealand Law Society Secretariat has advised that counsel intending to reveal their client's defence in out of court discussions would be well advised to obtain an undertaking of confidentiality: “Case Comment Status Hearings – Confidentiality of Information” (1 October 2001) 570 Law Talk, 8.

a system of administrative guidance, or whether it requires statutory regulation. In either case, the framework so far proposed would not alter the basic character of the discussions: that they are initiated and conducted by the parties at a time and place and in a manner that they think appropriate.

- 151 However, discussions that are conducted exclusively on this informal basis are inevitably limited; they depend not only on the goodwill of the parties, but also on the ability or willingness of the parties to appreciate and weigh the options available to them in a realistic way. That ability or willingness will not always exist. For example, the prosecution may be unduly rigid in its approach to the charges originally laid and be unwilling to contemplate an amendment even when it may make little or no material difference to the outcome. Alternatively, the defence may be unrealistic in seeking a reduction in the nature or number of charges because of a failure to appreciate the strength of the prosecution evidence or its legal implications. In these circumstances, an objective facilitator may be in a better position than the parties themselves to suggest a way forward. Indeed, that is a role that some judges at times now play in status hearings, albeit in fairly muted terms.
- 152 The Commission does not favour any mandatory requirement that all discussions be facilitated or overseen by a third party, whether a judge or some other official. Many matters that are the subject of discussion (such as amendments to the summary of facts or a reduction in the number of charges) are resolved by the parties without difficulty; it would be counter-productive, and add significantly to costs and delays, to require that they be conducted in a formal setting in every case. In the absence of independent facilitation or oversight of the process, there is always the danger of unfair bargaining tactics or undue coercion.⁸⁸ However, that danger can be averted by ensuring that there is proper judicial scrutiny at the subsequent pre-trial review hearing of any resolution arising from discussions (as is proposed in chapter 6). It does not require that there be mandatory oversight of the discussions themselves.
- 153 However, there may well be significant benefits if the courts were to provide a system of independent facilitation on a voluntary basis where either prosecution or defence or both believe that this could assist their negotiations. Some overseas pre-trial review systems have put such arrangements in place. For example:
- In the early 1990s Queensland had a programme called the Early Intervention Programme. A retired barrister with wide criminal trial experience acted as a mediator or moderator between the prosecution and defence. The mediator contacted both prosecution and defence and invited them to negotiate. Negotiation in these cases was voluntary and the function of the mediator was to act as a catalyst for negotiations and give an opinion only if asked. In a nine-month period in 1993 the mediator estimated that he had conducted some 300 negotiations and that about 60–70 per cent had been resolved. It was reported as well supported and a “considerable success”.⁸⁹

⁸⁸ That danger is particularly acute with unrepresented defendants, and is the subject of separate discussion in chapter 8.

⁸⁹ J Wills “The Processing of Cases in the Criminal Justice System”, ch 9 of D Chappell and Paul Wilson (eds) *Crime and Criminal Justice in Australia: 2000 and Beyond* (Butterworths, Sydney, 2000) 152; Mack and Anleu, above n 12, 139.

- A number of pre-trial reviews in English magistrates' courts are in effect mainly plea and charge discussions between the prosecution and defence, "chaired" by a court clerk or a magistrate, sometimes with the defendant present.⁹⁰ An early example was the Nottingham Magistrates' Court pre-trial review system, where defendants were not present, and discussions have been described as "full and frank".⁹¹ The court clerk's role in these proceedings was to listen to discussion between the defence and prosecution but retain overall control of the conduct of the review, and to complete a form containing relevant information if the matter was proceeding to trial.⁹² A more recent example of a similar pre-trial review system is one initiated in the Birkenhead Magistrates' Court in April 2002.⁹³ A review is attended by the defendant, chaired by the clerk of the court and is essentially a conference or discussion between counsel and the prosecutor. Defendants sit behind the conference table, and are sometimes brought into the discussion. For example, a prosecutor may offer to drop some charges if the defendant pleads guilty to another, and defence counsel will then discuss this privately with the client. The clerk keeps a low profile, dealing with any administrative matters such as bail changes, arranging for a magistrate to hear a guilty plea, or setting trial dates and time estimates and noting any issues.
- In Ontario, and in a number of other Canadian provinces, pre-hearing conferences are mandatory where an accused is to be tried by jury, and optional for other trials.⁹⁴ A Crown and defence resolution meeting following prosecution disclosure (by phone or in person) is a prerequisite.⁹⁵ Pre-hearing conferences take place in chambers or closed court, about five per hour. Present are the Crown and defence counsel of record, and possibly the police (the investigating officer, who should have the complainant's views). The accused sits outside with a court officer. One purpose of the conference is to discuss a possible resolution of the case on a "without prejudice" basis. The judge acts as a facilitator of the informal and confidential discussion, ensuring topics are fully explored, for example. If there is a possibility of a resolution the accused is consulted by counsel and there could then be a guilty plea in open court. At the end of the conference the judge completes a form that has been prepared in draft by the prosecutor and counsel at their resolution meeting, covering matters such as the extent of disclosure,

⁹⁰ See Ashworth, above n 58, 280; P Darbyshire "A Comment on the Powers of Magistrates' Clerks" [1999] Crim LR 377, 378-379; Rt Honourable Lord Justice Auld *A Review of the Criminal Courts of England and Wales* (The Stationery Office, London, 2001) paras 204-206, ch 10, 482 as to the variations in pre-trial reviews.

⁹¹ See J Baldwin *Pre-Trial Justice: A Study of Case Settlement in Magistrates' Courts* (Blackwell, Oxford, 1983) 124.

⁹² A Desbruslais "Pre-trial Disclosure in Magistrates' Courts: Why Wait?" (1982) 146 JP 384-385, and Baldwin, above, comparing the Nottingham pre-trial reviews with those in Leeds presided over by magistrates. See too, later research in 1994, described by Brownlee, Mulcahy and Walker, above n 46.

⁹³ Observed in June 2002.

⁹⁴ In Ontario, the conferences are governed by Rule 27 of the Ontario Court in Criminal Proceedings 1998.

⁹⁵ The description outlined in this paragraph is summarised from a telephone discussion with Justice Lloyd Budzinski of the Ontario Court of Justice on 29 April 2004.

possibility of resolution or, if continuing to trial, any admissions, estimated duration and a date for trial. The judge then summarises the result of the discussion (and any action agreed to by the parties before the next appearance) in open court, for the record.

- In Victoria, the Case List Management System (CLMS) adopted by the County Court to facilitate the implementation of the Crimes (Criminal Trials) Act 1999 has introduced a case conference preceding the statutory directions hearings for most cases.⁹⁶ Case conferences take place in court outside normal court hours to facilitate the attendance of practitioners. The conference is “without prejudice” and informal, and the purpose is to identify the issues after close analysis of the case, and see if pre-trial resolution is possible. The accused must generally be present in person or by video link. The judge asks the parties questions and explores salient points with a view to providing assistance and guidance to help the parties reach resolution in their discussions. The judge will not give sentence indications and will not hear any plea or preside over any trial of the case. At the conclusion of the case conference, the judge may give timetabling orders for the directions hearing and trial if the case is to proceed.

- 154 Independent facilitation should not have the intent or the effect of imposing a resolution on unwilling parties. If defendants were coerced or felt constrained to plead guilty to charges on which they continue to profess innocence, justice would not be done. Equally, if the prosecution felt pressured to withdraw or amend the charges to such an extent that it substantially distorted or understated the seriousness of the offending or the offender’s role in it, the interests of complainants would be overlooked and public confidence in the system undermined. In neither case would the interests of justice be served. Independent facilitation should have a much more modest purpose: to identify cases where there is agreement as to the defendant’s overall guilt, but disagreement as to matters of detail, which, if resolved, will prevent the case from unnecessarily proceeding to a defended hearing. A skilled facilitator (perhaps along the lines of the Queensland model) has the potential to increase the number of resolutions in cases that fall into this category, and thus to reduce the number of defended cases and overall delays in the system.
- 155 At present there is some facilitation of discussions at status hearings, although this varies between judges and courts. The proposal here is that this be systematised and taken out of the courtroom. It would therefore replace one of the functions of status hearings and enable an increased number of cases to be resolved in advance of the pre-trial hearing, saving court time and judicial resource. The independent facilitator should be available on request as of right, and should be provided at the cost of the Ministry of Justice through either court officials or others contracted for the purpose.

A judge or other official?

- 156 Should voluntary facilitation be undertaken by a judge or some other official? There are advantages in leaving the responsibility with the judge, perhaps in the context of a pre-trial hearing. Possible options to promote a resolution – for example, a suggestion to the prosecutor as to the substitution of one charge

⁹⁶ County Court of Victoria, Practice Note No 1 of 2000.

with another, or a comment to the defence that there appears to be little basis upon which to defend a particular charge – may carry more weight if put forward by a judge than by some other official, simply because the judge’s position carries more authority and may be seen as approximating the final view that will be taken in the case. Indeed, the original guidelines for contest mention hearings in Victoria, which were largely adopted in Tasmania, were quite prescriptive of the magistrate’s role in putting pressure on either the prosecution or the defence to resolve weak cases:

If the prosecution case is weak or unlikely to reach the required standard of proof, the prosecution should be reminded that costs may follow a dismissal and be invited to consider whether it should proceed with the matter.

If the prosecution case is strong, the defence should be reminded of the loss of benefit in terms of discount to the defendant if he/she is found guilty.⁹⁷

It is for precisely this reason that the Commission does not believe that it is appropriate for judges to facilitate pre-trial discussions.

- 157 Facilitation does not require judges to “descend into the arena” or cast aside their impartiality. The 2004 Evaluation showed that judges in status hearings and callovers were conscious of the dangers in this respect and generally strived to avoid asking questions or making suggestions that might be interpreted as undue judicial activism or perceived as pressure to plead guilty:

You’ve got to be very careful that you don’t become overbearing and put unwarranted pressure on people to change the plea simply because of convenience for the court or the fact that you don’t think there’s any merit in a not guilty plea. (Judge 6.7.1.)

I think there can be [a breach of rights] if you get a judge who . . . is interventionist and kind of jollies things along . . . people may plead guilty when they possibly shouldn’t because they feel that is what they should be doing. (Judge 6.7.1.)

Indeed, few prosecutors in the 2004 Evaluation said that judges put pressure on them to resolve charges, and judges suggested amending or withdrawing charges in only 4 per cent of cases overall (table 3.30).

- 158 Nevertheless, the judge is not best placed to act as a facilitator for two reasons, both related to the power and authority that necessarily attaches to the position. First, the fact that judges are conscious of the need to avoid the appearance of undue judicial activism is likely to inhibit their ability to act successfully as a facilitator, because they may resist asking questions or suggesting ways forward when this would be appropriate as a means of finding a resolution. Secondly, even if they manage to avoid undue judicial activism, there remains the danger that any comments they make or views they express on the case carries the authority of their office and may well be seen as judicial pressure to obtain a guilty plea or to encroach on a prosecutor’s discretion to choose the appropriate charge.⁹⁸

⁹⁷ Magistrates’ Court Practice Note Guidelines for Contest Mention, 20 October 1994, 1.4 and 1.5. Note that the current Victorian guidelines supersede these earlier, more detailed guidelines.

⁹⁸ See for example, *R v Pitman* [1991] 1 All ER 468; Mack and Anleu, above n 12, 74, 135–139; Seifman and Freiberg, above n 62, 69 and 73; Scottish Law Commission Responses to 1993 *Review of Criminal Evidence and Criminal Procedure and Programming of Business in the Sheriff Courts* (Scottish Office, Edinburgh, 1993) para 8, 12–16, 18–25.

Public or private?

- 159 Should discussions in the presence of an independent facilitator remain confidential, or should they be in open court in the presence of the media? As is discussed in more detail in chapter 6, overseas pre-trial hearings that include facilitation or oversight of discussions vary in their approach. For example, English pre-trial reviews and Victorian contest mention hearings are in public, while Ontario pre-trial conferences are in chambers or closed court.
- 160 The Commission's proposal envisages facilitation outside the context of court proceedings. The discussions would be under the control of the parties; no independent decisions would be taken; and agreements reached by the parties would be subject to subsequent oversight by a judge in open court. In view of this, there is no reason, in principle, why these discussions should occur in public. Moreover, any such requirement might inhibit the free and frank exchange of views between the parties, and could also reduce the number of resolutions.⁹⁹ The discussions should therefore be conducted in private.

CONCLUSION

- 161 The Commission is of the view that it is both inevitable and desirable that the prosecution and defence be able to engage in discussions as to charge and plea, and that where the defence wishes, this should occur prior to election and the entry of a plea. However, such discussions need to take place within a clearly articulated framework that safeguards the rights and interests of complainants and defendants and protects the overall interests of justice. That framework should include:
- a right for the defendant, upon request, to receive full disclosure of the evidence prior to discussions;
 - a modification to the current prosecution guidelines prohibiting deliberate overcharging to obtain leverage during discussions;
 - a duty on police prosecutors, and crown solicitors in cases laid on indictment, to ensure that the charges can be justified on the available evidence;
 - a modification to the current prosecution guidelines to make it clear that discussions may result in amendments to charges, or a reduction in the number of charges, wherever that is required in the overall interests of justice and whether or not the evidence is sufficient to prove other charges;
 - an ability for the prosecution to initiate discussions in both summary and indictable cases, and an expectation that the prosecution will take the first step in determining whether discussions are warranted;
 - a requirement that defence counsel keep defendants fully informed of progress in discussions; that instructions from the defendant are obtained (preferably in writing) before any agreement is concluded; and that any change of plea be voluntary and made on a full understanding of the charges and the consequences of the plea;
 - a duty on police prosecutors to consider the interests of complainants; to consult with them prior to concluding plea and charge discussions wherever

⁹⁹ See Baldwin, above n 91.

that is feasible; and to communicate to them the reasons for any charge amendments before the case returns to court;

- an expectation that, once concluded, arrangements are made in good faith and will bind them as far as possible, especially where the agreement has been implemented;
- a stipulation that discussions are without prejudice and that information provided during discussions should not be directly provided in evidence in subsequent proceedings.

162 The Commission also proposes that courts should make independent facilitators available to the parties where they have been unable to reach a resolution during discussions but believe that progress towards a resolution might be made with some outside assistance. The Commission recommends against judges exercising that facilitative role.

6

Pre-trial hearings after plea discussions

MATTERS TO BE DEALT WITH AT A PRE-TRIAL HEARING

- 163 **I**N CHAPTER 4 it was proposed that, at first appearance in the criminal list:
- Administrative matters should be dealt with by a registrar.
 - Defendants should appear before a judge in the list court only if there are matters requiring a judicial decision (for example, the defendant has pleaded guilty or the police are opposing bail).
 - In the absence of a guilty plea, all defendants should be remanded to a pre-trial hearing (the equivalent of current status hearings and callovers) before election as to jury trial (if applicable) and the entry of a not guilty plea. In many cases, therefore, this hearing would be the first hearing before a judge.
- 164 As discussed in chapter 2, pre-trial hearings are now a routine feature of the criminal process in many jurisdictions. They take a variety of forms, some of which are noted in chapter 5. They include pre-trial reviews in English magistrates' courts;¹⁰⁰ plea and directions hearings in English Crown Courts;¹⁰¹ intermediate diets in Scottish Sheriff Courts;¹⁰² pre-trial conferences in the Ontario Court of Justice;¹⁰³ case conferences and directions hearings in Victorian County Courts;¹⁰⁴ contest mention hearings in Victorian Magistrates' Courts;¹⁰⁵ and pre-trial hearings in the New South Wales Supreme Court.¹⁰⁶
- 165 As discussed in chapter 5, such hearings sometimes attempt to facilitate resolution of the case through encouraging and overseeing discussions between prosecution and defence. Equally, however, they have the overall case management function of ascertaining whether the defendant intends to persist with a not guilty plea, and, if so, ensuring that preparation for trial by both parties is expedited and delays or adjournments reduced to a minimum.

¹⁰⁰ Above n 90–93.

¹⁰¹ The detailed procedures are contained in consolidated practice notes at [2002] 1 WLR 2870.

¹⁰² These are provided for in section 148 Criminal Procedure (Scotland) Act 1995. Their operation and effectiveness are discussed in the recent report of the Summary Justice Review Committee (Scotland) *Report to Ministers* (Scottish Executive, Edinburgh, 2004); <<http://www.scotland.gov.uk/library5/justice/sjrcrm>> (last accessed 28 May 2004).

¹⁰³ Above n 94.

¹⁰⁴ Above n 96.

¹⁰⁵ Above n 20.

¹⁰⁶ The procedure is contained in a Practice Note (No 103) in October 1998.

- 166 In the Commission’s view, pre-trial hearings are an essential component of an efficient and fair justice system, and should have the following functions:
- judicial oversight of plea and charge agreements reached;
 - sentence indication;
 - election of jury trial and entry of plea;
 - case management for trial.

Oversight of plea and charge agreements

- 167 Where a pre-trial hearing is subsequent to all plea and charge discussions, the judge should not be proactive in initiating discussions and facilitating resolutions, for the reasons discussed already (paragraphs 156–158). Instead, the judge has an important role in providing an independent check on plea and charge agreements. Such agreements should be explained to the judge so that he or she can ratify them before accepting any guilty pleas or granting leave to withdraw or amend charges. An independent check of this sort is desirable for four reasons.
- 168 First, judicial screening of informal plea and charge agreements is desirable to allay concerns about the non-transparent nature of “behind closed doors” discussions between prosecution and defence, and to provide reassurance that the outcome of the discussions is in the interests of justice.
- 169 Secondly, the court should have a role in scrutinising whether or not there was initial overcharging when charges are amended or withdrawn. Genuine overcharging – that is, charges for which there is no prima facie case – is likely to be rare, and it will not necessarily be easy for the court to ascertain whether it has occurred. Nevertheless, where there is some indication that overcharging may have occurred it is appropriate for the court to enquire as to the basis for the initial charges and the reasons for any withdrawal or amendment, so as to discourage the laying of initial charges for the purpose of gaining leverage in subsequent discussions.
- 170 Thirdly, there should be a judicial check that there has been adherence to the requirement that prosecutors always consider the interests of complainants and consult them prior to concluding a plea and charge agreement wherever that is feasible. This is particularly important given that, under the Commission’s proposal, complainants will not otherwise have a formal role in the pre-trial hearing.
- 171 Finally and most importantly, defendants are generally vulnerable people and in a relatively powerless position in the pre-trial process. They are typically young, poorly educated, unemployed or in lower income brackets and have few resources.¹⁰⁷ The 2004 Evaluation found that many defendants rely on their lawyers, do not understand the processes, and feel they are in a marginal

¹⁰⁷ See K Mack and SR Anleu “Choice, Consent and Autonomy in a Guilty Plea System” (2000) 17 L in Con, 75, 81. See too, a study for the Legal Services Board in November 1999 by CM Research Ltd (Eligibility for Legal Aid Discussion Document, December 2002). The profile of defendants in the 2004 Evaluation shows that they were mainly male (85 per cent, overall) and between 20–39. Overall 39 per cent were classified as Māori.

position.¹⁰⁸ Yet, at the same time, defendants are often perceived (even by their counsel) as unreliable, uncooperative and “morally culpable and substantively guilty”.¹⁰⁹ It is therefore not surprising that many defendants report that they change a plea to guilty following discussions because they “won’t be believed” or want to “get it over and done with” or because they are prepared to live with an amended charge.¹¹⁰ A guilty plea in these circumstances may well leave defendants dissatisfied with the outcome because they feel that they have had to plead guilty when they think they are not guilty. As one defendant said in the 2004 Evaluation:

I have pleaded guilty to something I am not guilty of, you know? (Defendant, 4.6.7.)

- 172 The risk that plea and charge discussions will place undue pressure on defendants to plead guilty is therefore real.¹¹¹ As one judge said:

It worries me sometimes they will plea [guilty] simply because the cost of going through the process and taking another day off work is too great. (Judge 6.5.2.)

- 173 In the Commission’s view, this risk can be minimised if the judge, before accepting any guilty plea, is not only fully informed as to the nature of any agreement reached between prosecution and defence, but also enquires in plain language as to the defendant’s understanding of the substance and consequences of the plea agreement.¹¹² This is not currently the practice at status hearings.
- 174 It may be argued that such an inquiry will not make any difference to either the understanding or the pleas of defendants. To this there are two responses. First, judges should express themselves in plain English and check that the defendant has heard and does understand; secondly, whether or not all defendants do understand, it is important for the credibility and integrity of the system that it endeavours to find out.

Sentence indication

- 175 A second function of a pre-trial hearing should be to give a sentence indication to a defendant who is considering whether or not to plead guilty.
- 176 The giving of a sentence indication, particularly if it was unrequested, caused concerns for key informants in the 2004 Evaluation (6.14.2). It has also been the subject of adverse comment by the Court of Appeal.¹¹³ The issue will

¹⁰⁸ 2004 Evaluation 4.5–4.6. “Even though you’re standing there, they seem to cut you out and make you feel as though you’re not there” (defendant 4.6.5). See too, Baldwin and McConville, above n 73, ch 3 and 4; C Haney and MJ Lowy “Bargain Justice in an Unjust World: Good Deals in the Criminal Courts” (1979) 13 Law & Soc Rev 633.

¹⁰⁹ A Mulcahy, above n 60, 411, 412, 423. See also M McConville and C Mirsky “The Skeleton of Plea Bargaining” (1992) 142 NLJ 1373, 1373–1374.

¹¹⁰ 2004 Evaluation, 4.5. See also Baldwin and McConville, above n 73, 28–32, 65; M McConville “Plea Bargaining, Ethics and Politics” (1998) 25 J Law & Soc 562, 576; and J Wundersitz, N Naffine and F Gale “Production of Guilt in the Juvenile Justice System” (1991) 30 How LJ 192, 197.

¹¹¹ 2004 Evaluation, 6.7.1. Compare McConville, above. Some in the 1976 study by Baldwin and McConville, above n 73, felt pressured or even ordered to plead guilty by their barristers, ch 3, 46, 49. See also Mack and Anleu, above n 107.

¹¹² See the recommendations of the Law Reform Commission of Canada, above n 71, 52–62. See also Attorney General’s Advisory Committee, above n 65, rec 55–56 (recommending a plea comprehension inquiry in all cases involving a guilty plea).

¹¹³ *R v Gemmell* [2000] NZLR 695; *R v Edwards* (2000) 17 CRNZ 604.

therefore be discussed in detail in chapter 7. Suffice to say here that it is a matter that must be dealt with by a judge rather than a caseload manager or court officer.

Election of jury trial and entry of plea

177 Another purpose of the pre-trial hearing should be to finalise the defendant's plea and, if applicable, determine whether the defendant wishes to elect jury trial.

178 At present, the election procedure is governed by section 66 of the Summary Proceedings Act 1957, which requires that, before the charge is gone into, the defendant must be informed that the case is one where there is a choice of being tried summarily or by a judge and jury and asked to elect one or the other. There seems to be no rationale, and a rather uncertain legislative basis, for the current practice of requiring that the accused make an election as to jury trial before pleading, because the right to a jury trial is only relevant in the event of a not guilty plea.¹¹⁴ The Commission proposes instead that the pre-trial hearing should adopt the following procedure:

- if there has been an agreement as to plea following discussions, the court should ensure that the defendant is fully informed of the agreement and understands its substance and consequences (as proposed in paragraph 173);
- in the event that the defendant requests a sentence indication, this should be provided subject to the safeguards outlined below (chapter 7);
- the defendant should then be asked to enter a plea;
- if a not guilty plea is entered and the charge is one which entitles the accused to trial by jury, the accused should then be asked to make an election.

To give effect to this, section 66 of the Act would need to be amended to make clear that the defendant should be asked to elect only on the entry of a not guilty plea.

Case management

179 If a not guilty plea is entered, the fourth function of a pre-trial hearing should be case management. This is a primary aim of the present status hearing and callover systems. There are three components to effective case management: efficient processing of cases; ensuring readiness for trial; identifying issues in dispute and agreed evidence.

Efficient processing of cases

180 The hearing should ensure that the case proceeds to trial as expeditiously as possible. This means that the practice of the courts must be designed so as to

¹¹⁴ It may be argued that the election of a jury trial has also been a mechanism in more serious cases to obtain full disclosure through a preliminary hearing, so that the defendant is fully informed before deciding whether or not to plead guilty. The disclosure regime introduced by the Criminal Procedure Bill 2004, currently before Parliament, abolishes the automatic right to an oral preliminary hearing in cases laid on indictment and requires full disclosure in every case following the entry of a not guilty plea, thus effectively abolishing the distinction between summary offences and offences laid on indictment in this respect.

ensure that in the majority of cases only one pre-trial hearing before a judge is required; that delays for tactical or strategic reasons are minimised; and that adjournments sought by the parties are granted only where this is clearly necessary to ensure that the defendant receives a fair trial. There is overseas evidence that a strict policy of this sort in respect of adjournments may lead to high levels of negotiated pleas and early settlement.¹¹⁵ Whether or not this outcome always occurs, such a policy is likely to result in fewer adjournments and more timely and less costly justice.

Ensuring readiness for trial

- 181 The hearing should allocate a date for the fixture and ensure that the parties will be ready to proceed on that date. This involves determining the projected length of the hearing; the number and availability of witnesses; whether there are any pre-trial applications that need to be disposed of before the hearing; whether there are disputed disclosure issues requiring resolution; whether some evidence would be in writing; whether interpreters are required; whether evidence is to be given by video link; and any other matters affecting preparation for, or conduct of, the trial.

Identifying issues in dispute and agreed evidence

- 182 Effective case management should aim, so far as is practicable, to refine the issues for trial and identify evidence that can be admitted in written form by consent, so that the hearing is not protracted and witnesses are not unnecessarily attending court. Status hearings and callovers sometimes perform this function at present, but only in a minority of cases: in the 2004 Evaluation judges asked what was in issue in only 13 per cent of cases across all the courts studied in the summary jurisdiction (table 3.27).¹¹⁶ In the Commission's view, issue identification needs to be a much more widespread and routine function of pre-trial hearings.
- 183 The role of pre-trial hearings in identifying issues in dispute and evidence that can be admitted by consent is now formally recognised in some overseas jurisdictions. For example:
- Section 257 of the Criminal Procedure (Scotland) Act 1995 places a duty upon both the prosecution and defence to identify evidence that they believe is unlikely to be disputed by the other party and to take all reasonable steps to secure the agreement of the other party to that evidence; and it requires the other party to take all reasonable steps to reach such agreement. The duty of the prosecution and defence in this respect is supposed to be enforced through the intermediate diet system,¹¹⁷ although a recent report concluded that they have not been as effective as they should have been in achieving

¹¹⁵ Fiona Leverick and Peter Duff *Adjournments of Summary Criminal Cases in the Sheriff Courts* (Scottish Executive Central Research Unit, Edinburgh, 2001) 16, 36–38, 44, 52–53.

¹¹⁶ Note that judges “discussed the defence case” with counsel or an unrepresented defendant in 26 per cent of cases, and “discussed the prosecution case” with the prosecution in 23 per cent of cases (table 3.28). The issues in dispute may have emerged during these discussions as well.

¹¹⁷ See above n 102 and section 148 of the Criminal Procedure (Scotland) Act 1995.

this and in reducing the number of witnesses who are required to attend court to give oral evidence.¹¹⁸

- Sections 6 and 7 of the Crimes (Criminal Trials) Act 1999 in Victoria require the prosecutor to file a summary of the prosecution opening (outlining the facts and circumstances being relied upon to support a finding of guilt). The defence must then serve a response identifying facts and circumstances with which issue is taken and on what basis, and what evidence is agreed.
- Sections 5 and 6 of the Criminal Procedure and Investigations Act 1996 (UK), as amended by the Criminal Justice Act 2003 (UK) (enacted but not yet in force), require in respect of specified indictable offences and summary offences laid on indictment, that the accused provide a written statement to the court and the prosecutor (a “defence statement”) setting out:
 - the nature of the accused’s defence, including any particular defences on which he or she intends to rely;
 - the matters of fact on which he or she takes issue with the prosecution;
 - in respect of each such matter, why he or she takes issue;
 - any point of law (including any point as to the admissibility of evidence or an abuse of process) that he or she wishes to take, and any authority on which he or she intends to rely for that purpose.

184 The giving of formal recognition to such a function of pre-trial hearings is likely to raise the objection that, because it carries with it the expectation that the defendant will disclose his or her defence, it may be seen as contrary to the so-called right to silence. In fact, about half of the key informants in the 2004 Evaluation thought that there was potential for a breach of the defendant’s right to silence at status hearings, especially in the case of unrepresented defendants. As those interviewed said:

Privilege against self-incrimination is a real concern. (Defence counsel, 6.7.1.)

. . . my concern is that it is a whittling down of the fundamental principles, that you have a right to silence as a defendant and that you have the right to have the charges against you proven. The onus of proof is on the prosecuting body. And I think this process is being used to ever so slightly change that, without proper debate having been entered into. (Judge, 6.7.1.)

My real concern is with the judges coming down into the arena, and the defence may very well have a defence that they don’t want the prosecution to know about, or a defence position. I don’t think the judge should be asking those questions. (Judge, 6.7.1.)

185 If this objection implies that any questioning as to the nature of the defence infringes the right to silence, it is based on a misconception as to the nature of that right. The “right” is in fact a right for the defendant to require that the prosecution prove its case to the required standard without assistance from the defence. A not guilty plea is a plea that the defendant is not criminally responsible for the alleged offence; it does not necessarily imply that the defendant denies responsibility for the actus reus of the offence or even lacked the requisite mens rea. A requirement that the defendant indicates whether he or she contests all

¹¹⁸ See Summary Justice Review Committee (Scotland) above n 102, para 20.7. The report also recommends that section 148 of the Criminal Procedure (Scotland) Act 1995 should be clarified with a view to enabling the court to identify the issues that are to be in contention at the trial and to encourage agreement as to evidence that is not contentious.

aspects of the prosecution case or merely some aspects is therefore a refinement of the not guilty plea. It does not in principle reduce the burden on the Crown, or involve a requirement that the defendant lend assistance to the prosecution; it simply clarifies what has been denied or disputed. To suggest otherwise would be to suggest that the requirement that the defendant enter a plea of guilty or not guilty in itself infringes the right to silence, a patently nonsensical proposition.

- 186 The need for a more systematic process for identifying issues in dispute is supported by available empirical research. For example, research undertaken on behalf of the Law Commission into jury decision making¹¹⁹ demonstrated that the identification of issues in dispute at the commencement of a trial enhances the ability of a jury to comprehend and assimilate the evidence and evaluate its significance; and, at least where the defence has a positive defence to run, that works as much to the benefit of the defence as to that of the prosecution. In the absence of knowledge of the nature of the case and the issues in dispute, the jury is liable to assimilate and interpret the evidence, including the cross examination of witnesses, with the wrong factual “frame” in mind.¹²⁰ Although this research focused on juries it is likely to be equally applicable when the judge is the fact-finder.
- 187 The research into jury decision making also supported the desirability of having evidence admitted by consent in writing whenever it is agreed to by the parties. It demonstrated¹²¹ that juries have great difficulty in assimilating large volumes of testimony given in oral form, particularly in longer trials, and that this could be mitigated by the provision of an increase in the proportion of evidence provided in written form. That would clearly be facilitated by prior agreement as to those portions of the evidence about which there is no dispute. Indeed, even when some of the evidence of a witness is contentious and needs to be tested through cross examination, it may be that other parts of that evidence involving matters of factual detail could be much more effectively introduced in written form and read by the jury before the appearance of the witness. This is likely to have greater benefits in jury trials than in trials before a judge alone, who is better equipped and resourced to record and analyse information presented orally than a jury would be.
- 188 The underlying concern about any process that encourages the advance identification of issues in dispute and of evidence that should be admitted by consent is that there may be undue pressure on defendants to make admissions that will be contrary to their interests. In particular, unrepresented defendants who do not understand that they have a right to deny everything may well make incriminating statements, reliable or otherwise, if questioned about their defence by a judge who they see as an authority figure. In order to mitigate this concern, the Auckland guidelines for status hearings note that where the facts seem to establish the charge, defendants or counsel should be asked if they wish to tell the court why they pleaded not guilty, or what is contested, but it should be made plain that they do not need to admit anything.¹²² The Commission believes that defendants or counsel should be asked if they wish

¹¹⁹ New Zealand Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP37, Volume 2, Wellington, 1999).

¹²⁰ Above, para 3.13.

¹²¹ Above, paras 3.2–3.19.

¹²² Judge B Buckton, *Status Hearings*, 1998 and 2000, 3. See appendix A.

to tell the court what is contested whether or not the facts seem to establish the charge, but it agrees that it should be made plain that there is no obligation upon them to do so. It ought always to be open to the defence to assert that everything is in contention; in the absence of any agreement as to evidence that should be presumed. Moreover, where the parties have not identified the issues in dispute or evidence to be admitted by consent in advance of the pre-trial hearing, any active encouragement at the hearing for them to do so should be in open court. This will ensure that the proceedings are transparent; that the risk of undue pressure is minimised; and that justice is seen to be done.

- 189 In its report *Juries in Criminal Trials* the Commission considered whether there should be a formal regime for identifying the nature of the defence and the issues in dispute.¹²³ The report recommended against such a regime, primarily on the basis that the majority of those consulted did not support the imposition of further obligations of disclosure on the defence; that existing procedures were adequate; and that a mandatory requirement of disclosure would create difficulties because, prior to the presentation of the prosecution case, the defence will not always know what weaknesses in the prosecution case can be exposed or whether a positive defence should be raised. However, the report noted that formal admission of alleged facts under section 369 of the Crimes Act 1961 (which by virtue of section 3(1)(k) of the Summary Proceedings Act 1957 applies to summary proceedings as well as to proceedings laid on indictment) are made with reasonable frequency; such admissions are often initiated by the prosecution, who will prepare the documentation and send it to the defence in advance of a callover for their consideration and admission by consent without formal proof. The report recommended that this practice should be encouraged by active judicial enquiry at callover.
- 190 The Commission's report also drew attention to section 311(1A) of the Crimes Act 1961, inserted in 2000, that allows the defence, with the leave of the court, to make an opening statement for the purposes of identifying the issue or issues at the trial.¹²⁴ The report noted that the provision is of considerable use in enabling defence counsel to clarify issues for the jury. Since then, defence opening statements have become increasingly common.
- 191 In its more recent report *Delivering Justice for All* the Commission revisited the question of a mandatory regime.¹²⁵ It noted that there are indications that the Victorian legislation has reduced the number of guilty pleas at trial, decreased the time taken to resolve cases and reduced the backlog of cases awaiting trial. The report also drew attention to the substantial strengthening of the burden of disclosure on the accused in the Criminal Justice Act 2003 (UK).
- 192 In the Commission's view, there are no overriding arguments of principle against a statutory disclosure regime with wide-ranging obligations on the defence, and it may well have substantial benefits in terms of both the efficiency and fairness of trials. However, it would arguably necessitate a system of prosecution and defence pleadings, as is required under the Victorian regime, with its attendant costs and potential for delays. On balance, therefore, it may be preferable to test the effectiveness of an informal regime promoted by active enquiry from a

¹²³ New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, Wellington, 2001) paras 321–330.

¹²⁴ Above n 123, paras 309–312.

¹²⁵ New Zealand Law Commission, above n 50, paras 74–81.

judge or court official before imposing statutory obligations. Where independent facilitation of plea and charge discussions (as proposed in chapter 5) takes place without any consequent resolution, it may also be valuable to test whether the independent facilitator can play a role in issue identification as well. The Commission therefore reiterates its previous recommendation that prosecutors should routinely initiate discussions with the defence as to whether there is evidence that can be admitted by consent without formal proof; that such evidence should be identified at the pre-trial review hearing; and that judges or court officials (see paragraphs 193–196) should actively encourage prosecutors and defence to hold such discussions and identify evidence that can be admitted by consent where this has not already occurred by the time of the hearing. The Commission also proposes that a major function of the pre-trial hearing should be the identification of the issues in dispute, so that, wherever possible, the focus of the trial is clear from the outset.

THE ROLE OF JUDGES IN THE PRE-TRIAL HEARING

- 193 One of the principles of an efficient pre-trial process enunciated in chapter 4 is that hearings should be before a judge only where a judicial decision is required. Three of the functions of a pre-trial hearing outlined in this chapter clearly do need to be undertaken by a judge: oversight of any plea and charge agreement reached, including a plea comprehension enquiry and the consequent entry of a guilty plea; the resolution of disputed disclosure issues; and the giving of a sentence indication on request. The other functions, however, do not require a judicial decision. Under sections 41A and 66A of the Summary Proceedings Act 1957 a registrar may receive a not guilty plea and an election as to jury trial respectively, and there is no reason in principle why they should not do so. Similarly, all the case management functions we have outlined either do not require a decision at all, or require a decision (such as the allocation of a fixture date) that is properly an administrative rather than a judicial one.
- 194 It might be argued that active encouragement to identify issues in dispute and agree on evidence should be undertaken by a judge rather than a registrar, because a judge may be more likely to get results. To the extent that this is so, it is a consequence of the fact that the judge can use his or her position of authority to bring increased pressure to bear; and this can too easily become undue pressure. On balance, therefore, the Commission believes that, with the right skills and training, registrars are better suited than judges to the task of identifying issues in dispute.
- 195 Some courts already have a system whereby pre-trial matters are, in the first instance, dealt with in a registrar's court, and only referred to a judge when this is necessary. Status hearings were discontinued in Hawke's Bay in 2002, partly because they had apparently become inefficient in these courts, causing delay and increasing adjournments. In Hawke's Bay the "registrar's list" court appears to act as an efficient "pre-trial callover" court and some resolutions (involving guilty pleas and the withdrawal or amendment of charges) signalled at that court can be dealt with by judges in the following list court.¹²⁶ A sentence indication hearing by a judge is still possible. Meanwhile, defended hearings

¹²⁶ Discussion with Judge G Rea in December 2002 and 16 February 2004. The purpose of the registrar's list is essentially timetabling and recording of charge amendments, agreed evidence and changes of pleas.

are fixed for about four to eight weeks after first appearance. Although there are last minute pleas and withdrawals, (which could prove more problematic in a larger court) the removal of status hearings seems to have increased efficiency in the sense that there are fewer hearings for each case and time from first appearance to resolution is much shorter.¹²⁷ Other benefits of having an early hearing date are clarity of the evidence because of less delay between the alleged offence and the hearing, less likelihood that witnesses “disappear”, early preparation of the case by counsel and more rapid finalisation of their plea by defendants because they know a defended hearing is not in the distant future.

- 196 There is a risk that a system of this sort, where judges have a less active role in case management than is currently the case in status hearings and callovers, may increase the numbers of last minute guilty pleas, withdrawals and/or defended hearings. It may also be more difficult to achieve early hearing dates in busy metropolitan courts than in, say, Hawke’s Bay. However, a well managed two-tier process, involving judges where they are needed, should be able to achieve the required efficiencies in a fair and transparent way.

CONFIDENTIALITY AND THE MEDIA

- 197 The current practice is that status hearings and callovers are held in open court. The early Auckland guidelines for status hearings suggested that the court be open to the media but cleared at appropriate times by an order under section 138 of the Criminal Justice Act 1985. Both the current Christchurch Practice Note 2001 and an earlier draft note for Wellington state:

As status hearings are an open court, the media are entitled to be present. However, there is a general order prohibiting publication of any case unless and until a guilty plea is entered or there is some other final determination of the case in question.

The Christchurch Practice Note makes clear that any pre-trial discussion where no agreement results, or any sentence indication that is not accepted, should be treated as privileged. If a case is adjourned for a defended hearing, no record of discussions or of the sentence indication is retained on the court file and, as a general rule, the status hearing judge does not preside at the trial.

- 198 Overseas schemes vary in this respect. In South Australia, British Columbia and Ontario, pre-trial conferences are not open to the public and are treated as confidential discussions without prejudice, although in British Columbia and Ontario they are recorded. In contrast, pre-trial conferences in English magistrates’ courts are generally in open court, as are the Scottish intermediate diets; and Victorian contest mention hearings are “without prejudice” but in open court.
- 199 Most key informants for the 2004 Evaluation thought that status hearings should be open to the media and the public because “justice has to be seen to be done”. However, some thought that there were situations where it was appropriate to close the court (for example, in domestic violence cases). A few thought that status hearings should generally not be open at all:

My understanding had always been when we introduced them that the status hearings following a not guilty plea was to be an ‘in chambers’ matter ... Now it seems to be

¹²⁷ Email exchange with the Support Services Manager for Hawke’s Bay courts, March 2004. Note that automatic status hearings for all not guilty pleas have been discontinued in Papakura and Pukekohe after consultation (30 April 2004) 15 Law News, 1.

that you would have to regard status hearings as open to the public and all parts of it able to be reported. And that's a shame because I think once you get into that open court scenario, people naturally enough will not be as open as they otherwise would have been because of the possibility of publication. (Judge, 6.8.)

I have always objected to them being open to the public, and I object to the press being present. This is a little private discussion. I would rather it was a closed court and the public weren't even allowed in. (Defence counsel, 6.8.)

- 200 Calls for closed hearings are based on the fact that the hearing may involve the free and frank exchange of views between the parties that would be inhibited by the presence of the media or the public.¹²⁸ Similarly, calls for restrictions on publication are based on the fact that hearings may lead to sentence indications or the disclosure of other material that, if it were in the public domain, would prejudice the chances of a subsequent fair trial.
- 201 The Commission does not believe that either of these is a reason to depart from the normal rule that hearings should be held in public and open to the media. As has been made clear in chapter 5, plea and charge discussions between the parties (with or without facilitation) should precede the court hearing. The functions that we have suggested for the hearing itself are functions that ought to be done in open court in the presence of the media and the public. There will from time to time be matters (notably sentence indications) that should not be published. Existing provisions enabling the suppression of prejudicial material are sufficient to provide such protection for the accused as is required.

A PRE-TRIAL HEARING FOR ALL CASES?

- 202 The Commission has considered whether a pre-trial hearing is necessary in all cases where there is not an initial guilty plea. Practice in this respect, both in New Zealand and overseas, is currently variable. In Manukau, for example, status hearings are no longer held for dog, tax and fisheries prosecutions and less serious drink/drive and driving whilst disqualified cases.¹²⁹ In Hamilton, there are no status hearings for Domestic Violence Act 1995 offences. In Victoria, matters listed for a contest mention hearing are limited to those estimated to take half a day's hearing or more, unless the registrar or senior magistrate approves of their by-passing the system or they are cases such as minor traffic matters. In Tasmania, cases that go to a contest mention hearing are those estimated to be of more than two hours' trial duration.¹³⁰
- 203 However, given the functions proposed for pre-trial hearings and that they will be held before a registrar unless judicial involvement is required, the Commission is of the view that they are a useful step in the process for all types of cases. Indeed, in order to ensure the most efficient use of court time, it may be just as important to identify issues in dispute and evidence that can be admitted by consent in a minor traffic case as in an indictable case.

¹²⁸ See Baldwin, above n 91.

¹²⁹ Harvey, above n 34.

¹³⁰ See <<http://www.courts.tas.gov.au/magistrate>> for the guidelines and annual report (last accessed 2 April 2004).

CONCLUSION

- 204 The Commission takes the view that a pre-trial hearing is an essential component of an efficient and fair justice system and should occur in every case (regardless of the nature or seriousness of the offence) where a guilty plea is not entered at the first court appearance.
- 205 Administrative and other matters should so far as is practicable be resolved by the parties before the hearing, including:
- plea and charge discussions with or without independent facilitation;
 - identification of issues in dispute;
 - agreement as to evidence that may be admitted in writing by consent;
 - identification of witnesses to be called;
 - estimations as to the duration of the trial.
- Details of matters resolved should be filed in the court (perhaps by way of the completion of a checklist by prosecution and defence).
- 206 At the pre-trial hearing, all cases should, in the first instance, be called before a registrar, who would:
- check that plea and charge discussions have been concluded, and, if not, stand the case down for that to occur;
 - if a not guilty plea is intimated, take the plea and (where applicable) the election as to jury trial;
 - check that the parties have done what they can to identify the issues in dispute and evidence that can be admitted by consent, and, if not, stand the case down for that to occur;
 - check that other pre-trial matters have been or will be addressed and that the case can proceed to trial, and, if so, allocate a fixture date;
 - if a guilty plea is intimated, a sentence indication is sought or other matters requiring a judicial decision are identified, refer the case to a judge for hearing on the same day.
- 207 The role of the judge at the pre-trial hearing should be to:
- oversee plea and charge agreements to ensure that there has been no overcharging, that prosecutors have considered the interests of complainants and that complainants have been consulted prior to the conclusion of the agreement to the extent that this is practicable;
 - provide sentence indications upon request;
 - take guilty pleas and make such decisions as are required to proceed to sentence;
 - deal with any other matters requiring a judicial decision.
- 208 Pre-trial hearings should normally be held in public and open to the media. To the extent that there are matters that would lead to undue prejudice if published, existing suppression powers are sufficient to provide such protection for the accused as is required.
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7

Sentence indication

- 209 **S**ENTENCE INDICATIONS are a feature of some pre-trial hearings in both the summary and indictable jurisdictions. A sentence indication is given when a judge advises the probable sentence, or type or range of sentence, to be expected if the defendant were to plead guilty.
- 210 This chapter discusses the role of sentence indications in the pre-trial process; the arguments for and against them; the risks they pose in terms of fairness to the accused; and the safeguards that might be put in place to minimise these risks.

SENTENCING DISCOUNT PRINCIPLE

- 211 Underpinning the practice of providing sentence indications is the sentencing discount principle. That principle is reflected in section 9(2)(b) Sentencing Act 2002, which is itself a codification of pre-existing case law. It provides that, while a sentence should not be increased merely because a defendant has exercised the right to put the prosecution to proof by pleading not guilty, it is nevertheless generally appropriate to make a reduction in the sentence that would otherwise be appropriate where a defendant has pleaded guilty.¹³¹
- 212 An early guilty plea is regarded as meriting a sentence discount because it indicates remorse or contrition,¹³² or spares witnesses the stress and trauma of a trial, especially in sexual cases,¹³³ or avoids the costs of a trial.¹³⁴ Sentence discounts for early guilty pleas that are in the public interest are common throughout common law jurisdictions,¹³⁵ and are statutorily endorsed, even mandated, in some jurisdictions, although not always in clear terms.¹³⁶
- 213 There is no “hard and fast formula”, or specific quantum for a discount.¹³⁷ Much depends upon the circumstances of the individual case. The Court of Appeal has noted that the discount is generally within the range of 20–33 per cent,¹³⁸

¹³¹ *R v Taylor* [1968] NZLR 981, 987 referring to *R v de Haan* [1967] 3 All ER 618.

¹³² See, for example, *R v Lynn* (20 June 2001) CA 90/01.

¹³³ See *R v Palmer* [2000] 1 NZLR 546, 556; *R v Accused* (1997) 14 CRNZ 645, 647–648; *R v Edwards* (25 February 1998) CA 362/97; *R v Strickland* [1989] 3 NZLR 47, 51.

¹³⁴ See, for example, *R v Lynn*, above n 132.

¹³⁵ *R v de Haan*, above n 131; *R v Shannon* (1979) 21 SASR 442, especially 452–453 (per King CJ) *R v Morton* [1986] VR 863, 867, *R v Winchester* (1992) 58 A Crim R 345; *R v Bond* (1990) 48 A Crim R 1, 6. See CEM Chatterton “Should there be a discount for a Guilty Plea?” (1991) 155 JP 135 and 153 and 169. For the Australian position see J Willis “New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty” (1995) 13 L in Con 39.

¹³⁶ For example, Sentencing Act 1991 (Vic) s 5(2)(e); Criminal Justice Act 2003 (UK) s 144.

¹³⁷ *R v Mako* [2000] 2 NZLR 170, 176, para 14.

¹³⁸ *R v Tryselaar* (2003) 20 CRNZ 57. See also *R v Woolley* (23 July 2001) Court of Appeal, CA 02/01.

but these are not fixed averages or bands. Moreover, that range derives from prison sentences imposed for fairly serious offences and may not reflect the average discount in a summary case.

- 214 The discount is supposed to vary according to the time when the plea was entered. For indictable cases the Chief Justice issued a Practice Note that states:
- The discount for a plea of guilty is always a matter for the sentencing Judge's decision. Subject to that discretion, as a general principle, the discount will diminish after the first appearance, and diminish further after the first call-over.¹³⁹

RATIONALE FOR SENTENCE INDICATIONS

- 215 The primary purpose of a sentence indication is to ensure that a defendant is aware of the likely sentence in the event of a guilty plea, taking into account the discount that may be applied, and is therefore in a position to make an informed decision as to plea. There is also the expectation that, by advising defendants as to the likely sentence and relieving their anxiety, an increased proportion of guilty pleas will be encouraged.

CURRENT PRACTICE IN NEW ZEALAND

- 216 Sentence indications in the summary jurisdiction are broadly governed by guidelines prepared by status hearings judges. These state:
- (a) A sentence indication will be given only if asked for by the Defendant.
 - (b) An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Report.
 - (c) The defence cannot be compelled to disclose anything, but can give the Judge such material as it wishes.
 - (d) The Judge is not bound by the indication if, after it is given, fresh evidence shows that the indication is inappropriate.
 - (e) The indication will be limited to the type of sentence which the Judge thinks is appropriate, that is, imprisonment, . . . community service, or . . . community programme or supervision.
 - (f) If the indication is not accepted no record of it will be kept on the file to come before the trial or sentencing Judge.
 - (g) Sentencing Judges will not be told by counsel of the Judge's indication, and if told will ignore the indication.¹⁴⁰
- 217 A later version of the guidelines, circulated to other courts, makes it clear that sentence indications should, in appropriate cases, refer to the availability of a discount in the event of an early guilty plea. It has been said that the experience of the judges conducting the scheme at Auckland is that, frequently, the combined effect of knowing what type of sentence will be imposed and that a discount will be given for a change of plea persuades defendants to face up to

¹³⁹ Practice Note, 1995, above n 35, para 14. This paragraph was also included in District Court Pilot Practice Note of 7 October 1996. In *R v Wong-Tung* (14 March 1996) High Court Auckland T195/96, Tompkins J reduced the sentence of those who pleaded guilty at the first opportunity by 25 per cent and those who pleaded guilty a week later by 20 per cent, while those who pleaded guilty a few days before trial received a 10 per cent reduction and on the morning of trial they received a 5 per cent discount.

¹⁴⁰ See appendix A.

the probability of a conviction when otherwise they would have taken their chances at a defended hearing.¹⁴¹ In the 2004 Evaluation, two judges also mentioned the fact that they explained the significance of the sentence indication and the discounted component within it:

I give them the indication so they know exactly what will happen if we can deal with it today. But I also say to them “that’s the indication today, that’s the going rate today, if you elect to go ahead and defend it, and lots of other people get involved with time and police and prosecution witnesses, you may find that the fine will be more substantial and you have other costs awarded against you. So you’ve got to look at that as well. (Judge, 6.5.2.)

- 218 The 2004 Evaluation found that, in the summary jurisdiction, sentence indications were requested in 17 per cent of cases overall (ranging from 30 per cent in Manukau to 4 per cent in Christchurch), although there were sometimes unrequested indications given (2 per cent overall, ranging from 9 per cent in Whangarei, 2 per cent in Manukau, 1 per cent in Christchurch to none in Hamilton and Masterton) (table 3.17).
- 219 In most cases the indication was as to type of penalty only, but in about one-fifth of cases there was some indication of quantum (for example, “around four months periodic detention” or “a substantial fine”). This is not in accordance with the guidelines (see (e), paragraph 216, above). In 7 per cent of cases the indication was “not imprisonment” (table 3.18).
- 220 Judges interviewed said they sometimes added a proviso: “I may say, ‘highly likely there will be imprisonment but I cannot discount the possibility of a non-custodial sentence, if there is a very positive pre-sentence report’”. Or they may qualify the indication slightly and say, “a short sentence of something or other or a substantial fine” (6.5.1).
- 221 The 2004 Evaluation also found that, in the indictable jurisdiction, sentence indications were given in 13 per cent of the callover cases studied, notwithstanding the fact that imprisonment was a foregone conclusion in a substantial number of them. Once a request for a sentence indication had been made, counsel for both the accused and the Crown prepared submissions in writing for the judge to consider. An indication of sentence was then given if the judge thought it appropriate, either at the end of the callover or at a separate time.
- 222 Sentence indications in both the summary and indictable jurisdictions have been well received by defendants and their counsel. In the 1996 Evaluation, they were perceived as extremely useful by most respondents because they relieved the defendant’s anxiety about what the sentence would be: “You wait for the magic words ‘I won’t be sending him to prison’, then you can usually talk your client round”.¹⁴² The 2004 Evaluation elicited similar responses:
- [M]ore often than not that will bring about changes of plea . . . If you can give these people indication that they’re not going to prison, that’s all they’re looking for and they’ll plead to it. (Judge, 6.5.5.)
- . . . if the client can learn at the earliest opportunity that this sentence isn’t going to be a, you know, a ten-year jail cell, but a bit of community work, well a great deal of stress is alleviated. (Defence counsel, 6.5.5.)

¹⁴¹ Judge Buckton “Status Hearings”, guidelines accompanying letter dated 23 March 2000.

¹⁴² Jacob-Hogg, Millard and Cropper, above n 38, 13–16.

- 223 Satisfaction with the status hearing outcome was related to receiving a non-custodial sentence (or a lighter penalty than expected) for many of the defendants interviewed for the 2004 Evaluation. A number perceived their status hearing as “fair” if they were not going to jail: “I’m not going to jail, one of the big things” (4.6.7). Of the 96 sentence indications given during the study, only 17 per cent were imprisonment.

SENTENCE INDICATION: OVERSEAS VIEWS AND EXPERIMENTS

- 224 Sentence indications in court have been used in some overseas jurisdictions for many years.¹⁴³ They have taken place in various ways, in judges’ chambers or in open court, possibly more often in indictable than in summary jurisdictions.¹⁴⁴

England and Wales

- 225 Prior to the Criminal Justice Act 2003 (UK), the leading case on sentence indication in England and Wales, *R v Turner*,¹⁴⁵ permitted the judge to indicate that the sentence would or would not take a particular form (for example, a probation order, a fine or a custodial sentence), provided that there was no suggestion that on conviction following a plea of not guilty a more severe sentence would be imposed. Notwithstanding the existence of the sentencing discount, there was thus a prohibition on any mention of it.
- 226 The rule in *R v Turner* was considered in a number of subsequent reports on the criminal justice system. The UK Royal Commission on Criminal Justice recommended a “sentence canvass” procedure to relax the *Turner* rules.¹⁴⁶ This was normally to take place in chambers and only at the request of defence counsel on instructions from a defendant. Counsel for the Crown and defence, and a shorthand writer, were to be present.¹⁴⁷ The Royal Commission did not envisage that the judge would explicitly mention the possibility of a more severe sentence in the event of a not guilty plea, but would nevertheless indicate the maximum sentence that would be imposed in the event of a plea of guilty at that stage of proceedings. Some implicit recognition of the sentencing discount principle was thus envisaged.¹⁴⁸

¹⁴³ AW Alschuler “The Trial Judge’s Role in Plea Bargaining” (1976) 76 *Columb L Rev* 1059, 1090–1099. For example, in response to high volumes of cases a “conference and discussion court” in Brooklyn was assigned to a judge on a full time basis in the 1960s. Conferences rarely took longer than five minutes each and typically ended with the judge stating the sentence that the defendant would receive on a guilty plea. If a not guilty plea was continued the case was assigned to a “trial part”.

¹⁴⁴ Australian superior courts have disapproved of sentence indication discussions: *R v Marshall* [1981] VR 725, 732 and 734; *Plastics Fabrications v The Crown* [1999] TASSC 95. But see endorsement of sentence indication in open court with the rights of the accused observed by Hon Mr Justice Hamper “Plea Bargaining – a Judge’s Involvement” (1985) 59 *Law Inst J* 1304.

¹⁴⁵ *R v Turner* [1970] 2 QB 321 (CA).

¹⁴⁶ Royal Commission on Criminal Justice *Report*, Chair: Viscount Runciman (Cmd 2263, London, HMSO, 1993) para 7.50.

¹⁴⁷ Runciman report, above, paras 7.50–7.58.

¹⁴⁸ Academic commentators have consistently criticised this suggestion on the basis that judges may not have sufficient information to predict sentence, and that it could put unacceptable pressure on defendants to know what a judge thought was the likely sentence on a timely guilty plea: Ashworth, above n 58, 297; R Young and A Sanders “Plea Bargaining and the next Criminal Justice Bill” (1994) *NLJ* 1200, 1214.

- 227 The *Review of the Criminal Courts of England and Wales* in 2001 went further. While recognising that an advance sentence indication “would introduce an element of a bargain between the defendant and the court as to sentence in the event of a guilty plea”,¹⁴⁹ the report recommended that a defendant should be able to request a formal indication of the maximum sentence in the event of a guilty plea at the time of the request, and the possible sentence on conviction following a trial. The proceedings would be private and subject to certain safeguards for defendants. If a defendant indicated a change of plea to guilty the judge would question the defendant to ensure that he or she understood the effect of the plea and that it was voluntary.¹⁵⁰
- 228 In response to this report, the UK Government produced a White Paper, *Justice for All*,¹⁵¹ that proposed “to encourage early guilty pleas by introducing a clearer tariff of sentence discount for those pleading guilty, backed up by arrangements where defendants could seek advance indication of what the discounted sentence would be if they pleaded guilty and ensure appropriate safeguards so that innocent defendants are not put under pressure to plead guilty”.¹⁵² This proposal was enacted in a very limited form in the Criminal Justice Act 2003 (UK) which introduces sentence indication on request by an accused for whom a summary trial is considered more appropriate than a trial on indictment. The accused may request an indication of whether a custodial sentence or non-custodial sentence would be more likely to be imposed were he or she to be tried summarily and plead guilty. The court is not bound to give an indication of sentence but if it does the accused may reconsider his or her indication of plea.¹⁵³

New South Wales

- 229 The Criminal Procedure (Sentence Indication) Amendment Act 1992 (NSW) provided for a sentence indication hearings pilot scheme. An accused in indictable proceedings could apply for an indication of the sentence that the judge would impose if the accused had pleaded guilty. The application was heard in open court and proceeded effectively as a guilty plea.¹⁵⁴ If the indication was refused the matter was listed for trial by a different judge who was not told of the indication.
- 230 The aim was to obtain earlier and more pleas of guilty,¹⁵⁵ the rationale being that people pleaded not guilty initially because of the fear of receiving a severe

¹⁴⁹ Rt Honourable Lord Justice Auld, above n 90, 434, para 92.

¹⁵⁰ Rt Honourable Lord Justice Auld, above n 90, 443–444.

¹⁵¹ Lord Chancellor’s Department (now Department of Constitutional Affairs) *Justice for All* (Cmd 5563, 2002). See <http://www.cjsonline.gov.uk/publications/whitepaper_2002/cjs_white_paper> (last accessed 15 April 2004).

¹⁵² Lord Chancellor’s Department, above, ch 4, 68. See also N Padfield “Reduction in Sentence for a Guilty Plea” *Archbold News*, 2 December 2003, 3, on the Sentencing Advisory Panel’s announcement that it is “minded to propose” to the Sentencing Guidelines Council that guidelines should be issued on the reduction in sentence for pleading guilty.

¹⁵³ See sch 3, s 6 of the Criminal Justice Act 2003 (UK) providing for amendments to s 20 of the Magistrates’ Courts Act 1980.

¹⁵⁴ For the procedure see J Willis “The Sentence Indication Hearing” (1997) 7 *Jnl Judicial Admin* 98, 99. The pilot began in 1993 and lasted until January 1996.

¹⁵⁵ Don Weatherburn, Elizabeth Matka and Bronwyn Lind *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, Sydney 1995) 1.

sentence. It was hailed as a great success by many.¹⁵⁶ At the same time there was anecdotal evidence (and criticism by Supreme Court judges) of the extreme leniency of some of the sentence indications.¹⁵⁷

- 231 However, an evaluation of the scheme in 1994 showed that the statistical data presented no evidence that the scheme had achieved its aims of encouraging earlier or more frequent guilty pleas.¹⁵⁸ The scheme was therefore discontinued.¹⁵⁹

Victoria and Tasmania

- 232 The Victorian magistrates use sentence indications (specifying type of sentence only, as in the status hearings guidelines) in their contest mention hearings, if the court thinks it appropriate.¹⁶⁰ They usually make it clear that the defendant pleading guilty in response to a sentence indication will be entitled to a discount, the same as on a plea of guilty, at the earliest opportunity. An indication is only given if the magistrate is aware of all relevant factors and of the attitude of the informant and the victim. The indication may stand until the prosecution has prepared its briefs of evidence, but a note of the indication must be removed from the file if the matter proceeds as a contest.¹⁶¹

CRITICISMS OF SENTENCE INDICATIONS

- 233 There are four main concerns about, or criticisms of, sentence indications, most of which emerged from the 2004 Evaluation:
- the pressure on defendants to plead guilty when confronted with a sentence indication;
 - the lack of information available to judges giving the information;
 - the problem of subsequent inconsistent sentences; and
 - the status of a sentence indication on a Crown appeal against sentence.

Pressure on defendant to plead guilty: “judicial plea bargaining”

- 234 Some respondents in the 2004 Evaluation had concerns that sentence indications could place undue pressure on defendants to plead guilty. Some thought they

¹⁵⁶ See Weatherburn *et al*, above regarding newspaper reports claiming that criminal trials had been “slashed by half” saving 376 weeks of court sitting time in just 14 months. See also Willis, above n 154, 106, and Mack and Anleu, above n 12, 67.

¹⁵⁷ Willis, above n 154, 102–103; and *R v Warfield* (1994) 34 NSWLR 200, 209 where Hunt CJ made it clear that those who plead guilty following a sentence indication may not expect as much leniency as those who plead guilty at an earlier stage.

¹⁵⁸ Weatherburn *et al*, above n 155, iii, 20, 29–30. Delay was reduced, but this apparently began before the scheme and was not affected by it.

¹⁵⁹ Willis, above n 154, 106.

¹⁶⁰ Victorian County Court judges have favoured indications as an administrative device to save costs and reduce caseload since at least the early 1980s, although Supreme Court judges disapproved of them: RD Seifman “Plea Bargaining in Victoria: Getting the Judges’ Views” (1982) 6 CLJ 69, 83.

¹⁶¹ Email from Deputy Chief Magistrate 9 April 2002. See also the ACT sentence indication scheme for case management hearings governed by Practice Direction 2, 1999, described in A Freiberg and J Willis “Sentence Indication” (2003) 27 Crim LJ 246, 253.

were philosophically wrong: a type of judicial plea bargaining (“that bargain basement kind of atmosphere” as one judge put it, 6.5.6). However, in the Commission’s view the giving of a sentence indication cannot in itself be criticised as exerting undue pressure on a defendant. In the absence of a sentence indication, defence counsel would be expected to advise their client of the likely sentence or range of sentences; an indication from a judge is merely providing the same advice in more accurate form, thus enabling the defendant to enter a plea in full knowledge of the likely consequences.

- 235 In fact, the real concern relates not to the sentence indication in itself, but rather to the sentencing discount embedded within it. There are two aspects to this concern. First, it is argued that a sentence indication that explicitly incorporates a discount encourages judges to offer an excessively lenient sentence (and perhaps an even more lenient sentence than the defendant would have received if he or she had pleaded at first appearance) in order to encourage a guilty plea. While there was no evidence from the 2004 Evaluation that excessively lenient sentence indications were being given, it remains a possibility to be guarded against. Secondly, it is argued that a sentence indication that is accompanied by a significant discount for an early guilty plea is inescapably coercive in nature partly because of the judge’s position of power and authority.¹⁶² As one respondent in the 2004 Evaluation said:

There are times, and probably every status hearing, you see probably one person come through and they just take the better deal . . . especially if the judge has sort of said to them “look, I don’t think your defence is a good defence. If you plead guilty now I am going to offer you this. If you go to defended hearing you are probably going to get this”. And the defendant thinks “I may as well take this, even though I don’t think I did it”. That is where they are disadvantaged especially if they are unrepresented. (Police prosecutor, 6.7.1.)

It may be for this reason that many judges at status hearings do not mention a sentence discount when they give an indication.

- 236 It is beyond the scope of this paper to consider the merits of the sentencing discount principle. However, given the existence of the principle, it is the Commission’s view that it should be explicitly incorporated into sentence indications. A defendant is entitled to all relevant information as to the consequences of his or her plea option; it should therefore be made clear whether or not a sentence indication includes a discounted component, or at least whether or not the sentence, in the event of a conviction following trial, may differ from that indicated. Otherwise, in the absence of knowledge of the basis upon which the sentence indication is being given, the defendant is liable to be misled. It is true that the defendant may be presented with a choice between two evils and see a guilty plea as the lesser of the two. However, that is the reality that flows from the existence of the sentencing discount principle. It serves the interests of neither the defendant nor the community to disguise that reality or to pretend that it does not exist.
- 237 The sentence indication process could better safeguard the rights and interests of defendants by ensuring that the defendant is objectively informed about the sentence discount policy and also by lessening the risks of a defendant being unduly influenced by a sentence indication. Those safeguards could be provided in three ways.

¹⁶² Alschuler, above n 143, 1103–1107.

- 238 First, there should be more explicit recognition of a graduated discount principle – that is, that the discount will progressively diminish with each subsequent court appearance. This would mean that a defendant pleading guilty at first appearance would receive a greater discount than a defendant pleading guilty at a pre-trial hearing after full disclosure. Similarly, a defendant pleading guilty at a pre-trial hearing would receive a sentencing discount that would not be available where there was a finding of guilt following a defended hearing or trial.
- 239 This principle, which in general terms is already acknowledged in a High Court Practice Note issued by the Chief Justice,¹⁶³ should be formalised in legislation for reasons of transparency and notice. It is arguably as important for defendants to have notice of the existence and implications of the sentencing discount at their first appearance as it is at a status hearing or pre-trial hearing.
- 240 Secondly, judges should give a sentence indication when requested to do so by defence counsel or by the defendant. Even if no request is made, it should be open to the judge to enquire whether a sentence indication is sought.
- 241 Thirdly, there should be a standard approach to the way in which a defendant is provided with a sentence indication by the court, so that the chances for misunderstanding as to its nature and purpose are reduced. A common approach should include advice that a sentence indication does not detract from the defendant’s right to require the prosecution to prove its case; that the law provides for a sentence discount where a defendant pleads guilty; that the earlier the guilty plea is made the greater the sentencing discount; and that, for that reason, the sentencing indication given by the judge would not apply at any subsequent stage of the proceedings.

Lack of information

- 242 The second concern is that judges giving a sentence indication do not have full information about the case. As the Court of Appeal has said:
- The matter of judicial sentence indications presents difficulties. In principle it seems inappropriate for matters of sentence to have any judicial consideration prior to conviction and without the aid of essential pre-sentence and victim impact reports. Any indication given in such circumstances must be so qualified as to be no real indication at all and certainly no reliable basis on which to plead. It is, of course, the role of counsel to advise (inter alia) on possible sentence implications when assisting an accused in deciding how to plead.¹⁶⁴
- 243 It is not practicable for pre-sentence reports to be prepared in advance of a determination of guilt. This would not only be wasteful of the resources of the Community Probation Service, but also potentially incomplete and misleading. If a pre-sentence report is clearly necessary and may make a difference to the indicated sentence, one option would be for the judge to make the indication “subject to the pre-sentence report”. However, the implications of this may well be lost on the defendant. Indeed, it is significant that the judge giving the indication at callover in *R v Gemmell* did say that the indication was given and accepted subject to a pre-sentence report, but the appellant did not recall the judge using “those words”. In the Commission’s view, therefore, if a reliable

¹⁶³ See para 214 and above n 35.

¹⁶⁴ *R v Gemmell*, above n 113, 698, para 13.

sentence indication cannot be given in the absence of a pre-sentence report, it ought not to be given at all.

- 244 The position with victim impact statements is less straightforward. At present a fairly cursory victim impact statement is often prepared at the commencement of the case and is part of, or attached to, the summary of facts. In that event, it can be made available to the judge giving a sentence indication. However, in more serious cases a fuller statement is often prepared at a later stage and may not be available by the time of a pre-trial hearing.
- 245 Partly because of the cursory nature of victim information in many cases, the current practice at status hearings in most courts is that a victim adviser contacts each complainant before the hearing, advises them of the purpose of the hearing and their right to attend, and prepares an up-to-date “complainant input memorandum” in conjunction with complainants who want their views known to the judge. This memorandum covers some of the same ground as the victim impact statement, including the complainant’s version of the facts and attitude to the case. However, the 2004 Evaluation indicates that it sometimes goes further and includes complainants’ views as to the appropriate outcome.
- 246 In the Commission’s view, victim input into the case that is predicated on the assumption of a guilty plea should be provided within the statutory framework of the victim impact statement. It should also conform with the established principles governing the content and use of such statements.¹⁶⁵ Otherwise there will be a risk that the court will receive more than one set of victim information, prepared by different people at different times – not only an inefficient practice but one that is likely to produce contradictory and conflicting information and an increase in the volume of disputed facts. Where a sentence indication is given, therefore, the victim information upon which it is based should, in all cases, be derived from a properly prepared victim impact statement. If the prosecution is aware that a sentence indication is to be sought, it should normally be able to ensure that a victim impact statement is prepared. Where a statement is not available and a reliable sentence indication cannot be given in its absence, it again ought not to be given at all.

The problem of subsequent inconsistent sentences

- 247 The third concern is that the sentencing judge may take a different view of the appropriate sentence from the judge who gave the indication at the pre-trial hearing and may therefore wish to depart from the indicated sentence. This would cause injustice to a defendant who had entered a plea of guilty on the understanding that the indicated sentence would be imposed.
- 248 In *R v Gemmell*, the Court of Appeal accepted that a departure from the sentence originally indicated was a miscarriage of justice, overturned the convictions and remitted the case back to the District Court to allow the accused to plead again.¹⁶⁶ The High Court has followed the same approach where a defendant has pleaded guilty in reliance on a sentence indication at a status hearing,

¹⁶⁵ Hon Justice Robertson (ed) *Adams on Criminal Law* (Brooker’s, Wellington, 1992), SA 8.10(3).

¹⁶⁶ The court has since confirmed that its observations in *Gemmell* are of general application: *R v Edwards* above n 113, another case in the indictable jurisdiction.

and said the sentencing judge is not free to depart from the earlier indication without offering an opportunity to withdraw the plea or return the matter to the status hearing judge.¹⁶⁷

- 249 The risk that a sentencing judge may not adhere to a sentence indication can be mitigated in two ways. First, wherever possible the judge who gives the indication should also sentence the defendant. Secondly, if a judge gives an indication only as to the type of sentence and not as to the quantum, as the status hearings guidelines suggest, it is likely to be easier to “stick to the indication”. It will also avoid the problem that arose in *R v Edwards*, where it was unclear whether the quantum indicated was the “starting point” before consideration of aggravating and mitigating factors or the final sentence.¹⁶⁸

Appeals

- 250 Finally, the New South Wales sentence indication scheme found that there could be a problem if the Crown appealed a sentence that had been the subject of an indication, on grounds that it was inadequate. The Court in *R v Glass* held that if a Crown appeal were to be upheld, the respondent should be permitted to withdraw the plea and file an appeal against conviction.¹⁶⁹ Again, this problem can be largely avoided if the present status hearing guidelines are followed and only the type of sentence is indicated.

CONCLUSION

- 251 The Commission proposes that sentence indications should be a feature of pre-trial review hearings on the following basis that:
- a sentence indication should be given when requested by the defendant or defence counsel (although this should not preclude the judge from enquiring whether a sentence indication is sought);
 - no reference should be made to the likely penalty if the defendant were to be convicted after a defended hearing or trial;
 - the availability of a discount in the event of an early guilty plea should be an explicit component of a sentence indication;
 - a graduated discount system should be formalised through legislation, so that a guilty plea on first court appearance would receive a greater discount than a guilty plea following a sentence indication;
 - a sentence indication should normally be as to the type of sentence rather than its specific quantum;
 - it remains within the discretion of the judge to determine whether or not to give a sentence indication;
 - a sentence indication should not be given if the type of sentence is likely to be affected by material in a pre-sentence report or if there is otherwise insufficient information to give an indication;

¹⁶⁷ *Ferguson v Police* (14 July 2000) High Court Auckland A99/00, para 6, Fisher J.

¹⁶⁸ *R v Edwards*, above n 113, 607, para 14.

¹⁶⁹ *R v Glass* (1994) 73 A Crim R 299.

- complainant information upon which a sentence indication is based should, in all cases, be derived from a properly prepared victim impact statement, and if a reliable indication cannot be given in the absence of such a statement it should not be given at all;
- the sentencing judge should, wherever possible, be the same judge who provides the sentence indication;
- in the event that the defendant chooses to proceed to a defended hearing or trial, no record of the sentence indication should be retained.

252 The Commission also proposes that when a sentence indication is given it should include the following standard advice:

- a sentence indication is not intended to undermine the defendant's right to require the prosecution to prove its case;
 - where, however, the defendant pleads guilty, the law recognises this by way of a sentencing discount, the amount of the discount reflecting the promptness of the plea;
 - the sentence indication includes the discount for the plea of guilty that is appropriate in the circumstances of the case at that stage of the proceedings;
 - the sentence indication given at that point would not be applicable at a later stage of the proceedings.
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Unrepresented defendants

253 A SIGNIFICANT PROPORTION of defendants appearing before the courts are not legally represented. This is even more so in summary cases because of the increased availability of legal aid for those facing indictable charges. About a fifth of defendants in the 2004 Evaluation were not represented by a lawyer at the status hearing stage of proceedings (table 3.6). The reasons defendants most frequently gave for this were that they were unable to afford a lawyer, that they were ineligible for legal aid, or that the matter was not serious enough to warrant representation. Some chose to represent themselves because in their view it was more effective to do so (4.8.1).

254 Defendants in criminal proceedings who are not legally represented are often at a disadvantage. In *Delivering Justice for All*¹⁷⁰ the Commission noted that unrepresented defendants are in a vulnerable position; they lack an understanding of the procedures and proceedings; they usually do not have the skills and knowledge to represent themselves; and they may be too close to the situation to do so objectively. These disadvantages were largely confirmed by the 2004 Evaluation. Defendants who are not represented:

- will often be in unfamiliar surroundings in court and unaware of the sources of assistance available to them;
- may have little understanding of what is happening and what will happen when they appear in court (4.8.4);
- may be unaware of their legal rights and entitlements;
- are more likely to encounter problems with prosecution disclosure (4.8.2);
- often have difficulty in communicating with the prosecution – and vice versa (4.8.3 and 4.8.4);
- will tend to be at a disadvantage with respect to plea and charge discussions with the prosecution;¹⁷¹
- may feel under pressure from the court to make decisions (4.8.4 and 6.7.1).

255 In *Delivering Justice for All*¹⁷² the Commission also noted a number of implications for the court where a defendant is unrepresented:

- proceedings may become prolonged;
- additional time and resources of judges and court staff may be required;
- court staff may be asked for advice they cannot give;

¹⁷⁰ New Zealand Law Commission, above n 50, 26.

¹⁷¹ See also Opie, above n 41, 46.

¹⁷² New Zealand Law Commission, above n 50, 26.

- lack of preparation may lead to unnecessary adjournments and delay;
 - the judge may need to assist the unrepresented person to ensure a fair hearing, which in turn may lead to an appearance of bias and thus endanger the judge's impartial role;
 - because of the defendant's lack of legal knowledge, the judge may not be provided with all relevant information to enable a just decision to be made.
- 256 The duty solicitor scheme does not presently extend to providing advice or representation at a status hearing, although it is not uncommon for such representation to occur. Where it does, both earlier research¹⁷³ and the 2004 Evaluation (4.8.4) identified limitations with the practice. In a busy criminal list court, the duty solicitor's principal role is to provide initial information and advice and there is insufficient time to take proper instructions or to prepare for a status hearing. An unrepresented defendant will not necessarily see the same duty solicitor at a subsequent court appearance; if they do, it is because of a coincidence in the roster. In addition, in some smaller courts where status hearings and list courts do not operate on the same day, a duty solicitor may be unavailable for the status hearing.
- 257 *Delivering Justice for All* concluded that improved representation, particularly in summary criminal cases, would enable courts to function more fairly and efficiently. It therefore recommended that the duty solicitor scheme should be reformed, or a new scheme developed, to ensure a minimum standard of representation and advice for unrepresented defendants that would include:
- advice before the case is first called at court;
 - representation for the first call of the case;
 - advice and representation during pre-trial phases, including at a status hearing;
 - representation where a guilty plea is entered.
- 258 The changes recommended to the duty solicitor scheme were largely directed to improving the value of preliminary court appearances so that defendants would be better prepared and able to understand and participate in the process. They should also lead to more efficient use of court time, particularly if the number of adjournments could be reduced.
- 259 A restructured duty solicitor scheme along the lines proposed in *Delivering Justice for All* would provide advice and representation in respect of all pre-trial matters for those defendants who needed help and who did not otherwise have a lawyer. Although it would not extend to the defended hearing, it would undoubtedly better prepare both the defendant and the case itself for that hearing. There will, nevertheless, be a small group remaining who, by choice, are not legally represented and special arrangements will be needed to safeguard their interests. At their initial court appearance, it is important that the unrepresented defendant understands the nature of the charges they face and their rights with respect to such pre-trial matters as bail and prosecution disclosure.
- 260 The dynamics of plea and charge discussions between the prosecutor and the defendant will also require special arrangements to be made for unrepresented

¹⁷³ Opie, above n 41.

defendants. Just as some unrepresented defendants are at a disadvantage with respect to negotiations with the police, some prosecutors in the 2004 Evaluation reported feeling uncomfortable dealing with unrepresented defendants:

It's very very difficult because you can very easily give them the impression that you are trying to bully them into making a plea they don't want to make . . . I feel in a very uncomfortable position (4.8.4).

Generally defendants are difficult to deal with, not always. They're dealing with the person who's arrested them who has done them no favours and they're now facing charges as a result of that person (4.8.4).

Even an attempt by a prosecutor to initiate discussions with the defendant may be misunderstood. Furthermore, if discussions about the case follow, there are a number of potential risks with respect to the outcome.

- 261 The pre-trial hearing will require considerable judicial care in ensuring that:
- if a guilty plea is entered, the unrepresented defendant is fully informed and the plea is voluntary;
 - the implications of a sentence indication are explained; and
 - where there is a not guilty plea, the defendant is under no pressure to identify issues in dispute or possible defences.
- 262 Additional steps will be needed to enhance the robustness of the process to safeguard the rights and interests of unrepresented defendants at each of these areas of the pre-trial process:
- At first appearance the registrar should ensure that defendants understand the nature of the proceedings, their rights and the matters to be dealt with at the pre-trial stage.
 - The registrar should also be satisfied that the disclosure process is being attended to and that there are no issues between the parties.
 - The prosecutor should not initiate discussion with the defendant in respect of pre-trial matters. However, the defendant should have control of his or her case and therefore have the right to initiate discussions with the prosecution if he or she chooses to do so.
 - If there has been no contact between the prosecution and the defendant before the pre-trial hearing, the registrar should explore the potential for such discussions and facilitate their occurrence when required.
 - Whenever it is practicable to do so, the pre-trial hearing for unrepresented defendants should be held separately from those cases where counsel appears. This practice has operated successfully in at least one court¹⁷⁴ and enables the judge to take the additional steps and time required to be satisfied as to the defendant's understanding of the proceedings, and that any decisions are properly and fully informed.

¹⁷⁴ Palmerston North District Court observed by a researcher in 2002.

The implementation of reforms: statutory regulation or administrative guidance?

- 263 **H**OW SHOULD THE PRE-TRIAL PROCESS proposed in this report be implemented – in particular, to what extent do the proposed reforms require statutory change? Most of the innovations in the last two decades, both in New Zealand and overseas, have been developed on the initiative of judicial or court officers rather than as a result of legislative change. However, aspects of the reforms have been given legislative effect – for example, in the Criminal Procedure and Investigations Act 1996 (UK) and the Crimes (Criminal Trials) Act 1999 in Victoria. In Scotland, too, the Criminal Procedure (Scotland) Act 1995 provides a fairly comprehensive legislative framework for the practice of intermediate diets.

ARGUMENTS IN FAVOUR OF A COMPREHENSIVE LEGISLATIVE FRAMEWORK

- 264 There are essentially two arguments in favour of a comprehensive statutory framework of the type enacted in Scotland.

Clarity and certainty

- 265 Legislation provides clarity and certainty for participants. Jurisdictional limits are clearly specified, and all participants know what is expected of them. It was for this reason that a number of key informants interviewed for the 2004 Evaluation saw advantages in legislation. Some judges in particular supported statutory authorisation:

It should have a statutory backing because it means that you are not subject to challenge for exceeding jurisdiction. It is therefore given the recognition that it probably requires in order to be part of the tools of management of the court. I think judges would be more comfortable overall if they did have the statutory backing. (Judge, 6.10.3.)

Consistency

- 266 Legislation has the benefit of promoting consistency of practice. Implementation through administrative guidance carries with it the risk that individual judges, court staff or practitioners will continue with existing practices, or develop new practices, as a result of inertia, resistance or personal idiosyncrasy rather than the need to accommodate local conditions and needs. The result may well be local practice that does not reflect the principles for effective and efficient pre-trial processes outlined earlier in this paper. Legislation minimises that risk,

because it mandates what practice should be and provides a vehicle for challenge in the event that the practice is not adhered to.

ARGUMENTS IN FAVOUR OF ADMINISTRATIVE GUIDANCE

- 267 While these arguments suggest that some legislative framework is desirable, there are three reasons why a comprehensive and detailed set of procedures may well be insufficient and even counter-productive.

The importance of local culture

- 268 The effective implementation of pre-trial processes of the type proposed in this paper depends on the establishment and maintenance of trust and cooperative working relationships between judiciary, court staff, prosecutors and defence counsel. That in turn is a function of the local legal and court culture: shared beliefs, attitudes and practices that become entrenched in a particular locality and court over time and dictate the expectations and approach of those working within it.¹⁷⁵

- 269 The Scottish experience with intermediate diets demonstrates that, unless practical steps are taken to change the working culture, legislative reforms in themselves will, at best, have only limited impact and, at worst, be doomed to failure. For example, one research study of the Scottish system concluded that the first and intermediate diet system established by statute had been only a qualified success and that the key to success lay in changing the culture:

What is clear is that in order for intermediate/first diets to work, there must be a continuing effort to create and maintain a “court culture” where accused, defence agents, prosecutors and judges all approach cases with a view that potential problems should be addressed and possible pleas discussed at the earliest possible opportunity.¹⁷⁶

An English study on adjournments came to the same conclusion, finding that “culture is likely to be the key determinant of performance with regard to delay, convenience to parties and use of court resources”.¹⁷⁷

- 270 At the least, therefore, formal legislation by itself seems unlikely to achieve desired efficiencies; it must be accompanied by strategies to reform local culture and to change operational practice. Moreover, to the extent that legislation imposes formality and uniformity, it may well impede the development of such strategies, which must necessarily vary from one place to another according to the pre-existing substratum of working rules.¹⁷⁸

Lack of flexibility

- 271 A formal statutory scheme with detailed procedural rules may introduce undue rigidity and thus remove the flexibility that is required to be responsive to local

¹⁷⁵ See, for example, T Church “Examining Local Legal Culture” (1985) 3 Am Bar Found Res J 449, 458, 470 citing studies showing no relationship between caseload and trial rate; Seifman and Freiberg, above n 62, 66; M McConville, J Hodgson, Lee Bridges and A Pavlovic *Standing Accused* (Clarendon Press, Oxford, 1994) especially 186–196.

¹⁷⁶ Duff and McCallum, above n 47, 186.

¹⁷⁷ C Whittaker, A Mackie, R Lewis and N Ponikiewski “Managing Courts Effectively: The Reasons for Adjournments in Magistrates’ Courts” (Home Office Research Study, London, 1997) 168.

¹⁷⁸ Brownlee, Mulcahy and Walker, above n 46, 122.

conditions and needs. Equally, it may hamper the ability to test the workability of various operational procedures and to change those procedures in the light of experience and changing local conditions and needs. This led the Ontario Criminal Justice Review Committee in 1999 to conclude:

We recognize that it would be inappropriate to mandate a single system of pre-hearing conferences for the whole province. Each court location requires the freedom to experiment with different service delivery models in order to find the system that best suits its need.¹⁷⁹

- 272 Key informants in the 2004 Evaluation voiced similar concerns at the prospect of legislation, preferring guidelines as a means of retaining flexibility:

As long as the guidelines were just guidelines and not rigid rules which could not be departed from . . . I would be comfortable with it. (Judge, 6.10.5.)

[Statutory provisions] would make it too embedded in legislation and would make it really complicated, I think. It would take away the flexibility, the ability to be creative . . . I think it would be unfortunate. (Judge, 6.10.4.)

Avoidance of delays

- 273 Legislation has the potential to increase rather than reduce inefficiencies if it becomes too prescriptive and intricate. It provides increased scope for the development or manufacture of disputes, which can result in additional hearings or appeals and consequent delay. It is partly for this reason that magistrates interviewed in Victoria in 1995 opposed increased regulation there of the contest mention system.¹⁸⁰ Similar concerns were expressed by a small number of key informants in the 2004 Evaluation relating to the indictable jurisdiction:

I currently trust the system and I think it needs some flexibility. If you start legislating, things get harder and you provide something which people can use to gain purchase to maybe unfairly use the system. (Defence counsel, 7.3.11.)

CONCLUSION

- 274 On balance, the Commission takes the view that a prescriptive and detailed statutory scheme is neither necessary nor desirable. We agree with the majority of key informants in the 2004 Evaluation that it would lead to undue complexity; provide increased scope for appeals and delays; remove the flexibility to be responsive to local conditions and needs; and perhaps most importantly, restrict the ability to make operational changes in the light of experience. In general terms, administrative guidance (whether through Practice Notes or some other vehicle), accompanied by the appropriate strategies to effect changes in legal and court culture, are likely to prove the more effective means of implementation in the long run.
- 275 Strategies to change culture depend upon the good faith and cooperation of all the key players in the system. Unless prosecutors and defence counsel, as well as judges and court staff, recognise the need to change local culture and work together to achieve that, many of the benefits of the proposed changes in

¹⁷⁹ Criminal Justice Review Committee *Report of the Criminal Justice Review Committee* (Toronto, The Committee, 1999), recommendation 7.1

¹⁸⁰ Serge Sztrajt "The 'Contest Mention System' in the Magistrates' Court – Some of Its Effects and Impact on the Administration of Criminal Justice" (unpublished, Victoria, 1995). More recently some were in favour of statutory authorisation: email from Deputy Chief Magistrate, 9 April 2001.

terms of increased efficiency and fairness will be lost. Plea and charge discussions and other pre-trial matters will not be finalised before pre-trial hearings; defence counsel will continue to seek adjournments because of lack of preparation or a failure to get instructions; and cases will continue to be cancelled on the day of trial. There needs to be widespread acceptance of the view that a system operating in this way does not, in the final analysis, benefit anyone, together with a willingness to work together to change it.

- 276 Reliance on good faith and co-operation, however, may not be enough. In the Commission's view, serious consideration needs to be given to the sort of sanctions that should apply to parties who come to a hearing having unreasonably failed to attend to the matters that are to be dealt with before that hearing. In relation to the prosecution, the ultimate sanction is dismissal of the case. In relation to defence counsel, it may be the withdrawal of a legal aid assignment and the appointment of different counsel, or, in the case of private representation, a costs order payable by counsel.
- 277 The view that an overarching legislative scheme is not required is consistent with the stance taken already by the Law Commission. The Commission's report *Criminal Prosecution*¹⁸¹ recommended against the use of legislation to regulate plea and charge discussions. The report argued that there was no demonstrable need for legislation and that the *Solicitor-General's Prosecution Guidelines* would suffice, if they were appropriately revised and expanded to give effect to the Commission's recommendations, and extended so that they clearly covered police prosecutors in summary cases. The Commission affirms that position.¹⁸²
- 278 Although the disadvantages of a prescriptive and overarching statutory scheme outweigh the advantages, this does not mean that a degree of legislative change is not required. In the first place, some components of the Commission's proposals require legislative amendment because they are at odds with current statutory provisions. Furthermore, while our view is that the overall package is best delivered administratively rather than statutorily, specific components of it should, in the Commission's view, be supported by statute to ensure that the fundamental principles that should underpin all pre-trial processes, regardless of local conditions, are adhered to.
- 279 In particular, we propose that:
- the principles governing pre-trial processes, articulated in chapter 4,¹⁸³ should be given statutory recognition;
 - there ought to be a statutory basis for the administrative guidance that would give effect to those principles – perhaps a provision to the effect that a Practice Note may be issued giving guidance in accordance with the statutory principles;

¹⁸¹ New Zealand Law Commission, above n 74.

¹⁸² In 1999, the Western Australian Law Reform Commission proposed an Alternative Criminal Charge Resolution Process that would be mandated by statute and have the purpose of reaching some agreement between the prosecution and the defence (both as to plea and charges and as to matters that might need to be addressed before a defended hearing). See Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, Final Report (Perth, Western Australia, 1999). As at the time of writing, this proposal has not yet been given legislative effect.

¹⁸³ Above paras 90–92.

- there ought to be a statutory regime governing disclosure requirements on the prosecution, as contained in the Criminal Procedure Bill 2004 currently before Parliament;
 - the Summary Proceedings Act 1957 should be amended to clarify what matters must be heard in open court and what may be dealt with within the registry; the statutory basis for some current practice and some of our proposals is presently uncertain;
 - the Summary Proceedings Act 1957 should also be amended to clarify the powers of the registrar, and, in particular, to ensure that he or she may receive and record oral guilty pleas and hear matters in open court;
 - section 66 of the Summary Proceedings Act 1957 should be amended so that a not guilty plea is entered only at the pre-trial hearing, and so that the defendant is asked to elect jury trial only on the entry of a not guilty plea;
 - registrars should be given the power to grant extensions to the adjournment date administratively without the need for a hearing;
 - section 9(2) of the Sentencing Act 2002 should be amended so that more explicit recognition is given to the graduated sentencing discount principle advocated in chapter 7;¹⁸⁴
 - there should be specific statutory provision for sentence indications, incorporating the procedures and safeguards outlined in chapter 7.¹⁸⁵
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¹⁸⁴ Above para 252.

¹⁸⁵ Above paras 250–251.

APPENDIX A

JUDGE BUCKTON'S GUIDELINES ON STATUS HEARINGS

- A1 **T**HE STATUS HEARING PILOT SCHEME was introduced in the Auckland District court on 3 October 1995. Its aim was to overcome the problems created by defendants maintaining guilty pleas until the last minute, namely the date fixed for hearing.
- A2 The situation in the Auckland Court prior to the introduction of the pilot scheme is shown in the following table.

District Court Auckland – August '94 to January '95 Results of Criminal Prosecution Not Guilty Hearings

Total Set Down for Hearing	Warrant to Arrest	Guilty Plea	No Evidence Offered	Adjourned Prosecution	Adjourned Defence	Total that did not proceed	% Total that did not proceed
2635	9.7%	25.9%	11.6%	8%	21.2%	2018	76.5%

- A3 The percentage shown in the last column was calculated without including cases where the defendant failed to appear, that is where warrants to arrest were issued. Thus, in those six months 76.6% of cases set down for hearing did not proceed because the defendant pleaded guilty, the prosecution offered no evidence, or an adjournment was granted.
- A4 In many of the cases witnesses were present. They attended court at the expense of their employment or other obligations for no useful purpose.
- A5 Prosecutors prepared for trial when much of the preparation was unnecessary. Police officers involved wasted their time in preparation and in attending Court.
- A6 Defendants appeared time after time when that was not necessary, although some had only themselves to blame for not facing up to the reality of their situation, wanting to delay the evil day or failing to keep in touch with counsel. Even for recalcitrant defendants, others suffered. Families, dependants, employers and others anxious of the outcome were kept in suspense.
- A7 Finally the system was a great waste of limited judicial resource. Although daily lists were stacked so that if all cases proceeded there was no hope of them all being heard, on some days Courts finished well before the end of the day. On others Judges worked furiously knowing that there were more cases to be heard than could be disposed of, and at the end of the day had to adjourn cases which had not been reached. Judges were rostered for work without anyone knowing what work there would be.

- A8 The problem was not simply one of the efficient use of judicial resources for the benefit of the Judiciary. It was problem of the efficient use of the available sitting time for the benefit of the community.
- A9 The proposal advanced to the National Case Flow Committee to overcome the problem was the Status Hearing pilot scheme. Status Hearings are a form of pre-trial conference but, partly because of the stigma attached to that term in recent years as in some areas they were perceived to be ineffectual, the new appellation is used. It is more accurate in any event, as the hearing is an enquiry into the status of the plea of not guilty which has earlier been entered.

AIMS

- A10 The principal aim of the scheme is to identify as soon as possible those cases which are defended because the charge is inappropriate and those where inappropriate pleas of not guilty have been entered. A secondary purpose in respect of cases which are to proceed to hearing after the status hearing is to identify the issues and to limit the evidence to those issues by obtaining admissions of undisputed facts.

HEARING

- A11 The scheme operates in this way. Before any plea is entered it is sensible to know the strength of the prosecution case, a truism which apparently is not known to a number of counsel.
- A12 Early and full disclosure of the prosecution case is essential. Pursuant to an agreement reached by a Committee of representatives from the Police and the Auckland District Law Society chaired by Judge Kendall the Police provide copies of all documents on their file when a defendant first appears in Court. In very few cases some material is withheld, for example, where the disclosure of the identity of an informant could result in intimidation.
- A13 All cases where a plea of not guilty has been entered are adjourned for a Status Hearing. At that hearing the Judge is given the Police summary of facts and the defendant's list of previous convictions.
- A14 The Judge assesses whether the charge is appropriate to the offending alleged in the summary and, if it is not, suggests to the Prosecutor that another, invariably lesser, charge may be appropriate.
- A15 Where the facts seem to establish the charge the defendant or counsel is asked whether he wishes to tell the Court why he has pleaded not guilty. It is made plain that he need not do so.
- A16 Where the case is to proceed to a hearing Counsel are asked whether any facts can be admitted so as to dispense with proof of them.
- A17 The Police advise complainants that they may attend the hearing. Complainants are invited to address the Court if they wish.

SENTENCE INDICATION

- A18 When the proposal was first discussed with the profession it was not intended that sentence indication would be part of it because it was believed that the

New Zealand Law Society was against indicated sentences. However at meetings with representatives of the profession it was plain that they saw sentence indication as an important matter.

A19 On 22 May 1995 in *R v Reece & or* (CA17/95) the Court of Appeal described the indication of a sentence as very unusual.

... it is one that we strongly deprecate in the absence of any settled guidelines covering plea bargaining involving a judge. There is obvious scope for manipulation and erosion of public confidence in the administration of justice if this is seen to be done in the course of informal and unstructured discussions between counsel and the trial Judge.

A20 In summary the Court deprecated the absence of settled guidelines and informal and unstructured discussions between counsel and the Judge. We prepared what we believed to be settled and structured guidelines.

GUIDELINES FOR SENTENCE INDICATION

1. A sentence indication will be given only if asked for by the Defendant.
2. An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Report.
3. The defence cannot be compelled to disclose anything, but can give the Judge such material as it wishes.
4. The Judge is not bound by the indication if, after it is given, fresh evidence shows that the indication is inappropriate.
5. The indication will be limited to the type of sentence which the Judge thinks appropriate, that is, imprisonment, periodic detention, community service, or an essentially rehabilitative sentence such as community programme or supervision.
6. If the indication is not accepted no record of it will be kept on the file to come before the trial or sentencing Judge.
7. Sentencing Judges will not be told by counsel of the Judge's indication, and if told will ignore the indication.

A21 In fact sentence indication has become an important part of Status Hearings but, as with other techniques of case-flow management, consultation with all parties, Police, victims and defendant, is essential. In very few cases are sentences imposed which do not have the approval of the Police and victims. The defendant must agree because sentence is imposed only if the indication is accepted.

RESULTS

A22 Recently there has been a hiccup in collating results. The latest statistics show results for the period from 3 October 1995 to 1 August 1996.

- | | |
|-------------------------------------------|------|
| 1. Cases disposed of (guilty & withdrawn) | 2455 |
| 2. Cases proceeding to hearing | 906 |
| 3. Sum of both | 3361 |
| 4. 1 as % of 3 | 73% |

- A23 Thus 2,455 cases which would have been set down as fixtures have been disposed of without sitting time being allocated.
- A24 However, the Police and the public have benefited most. Anecdotally, the average number of witnesses summoned for each defended fixture is three. Thus 7,365 people (2455 cases x 3 witnesses) have not had to reorganise their affairs in order to attend Court for a defended hearing.
- A25 Despite their initial concerns about the time taken in arranging disclosure the Police are now enthusiastic supporters of the scheme. Although it takes some time to prepare disclosure packages, the compensation is that files do not need to be fully prepared for defended hearings, they do not have to waste time preparing, filing and serving summons and they can get on with policing rather than setting days aside for appearances in Court.
- A26 No efficient monitoring of the saving of Judge time has been kept at the Auckland Court. The administration's intuition has it that we have saved 25% of the time formerly allocated for defended hearings. It is difficult to properly assess the saving in a large Court because Judges who would normally be rostered for summary hearings are allocated to other Courts. A proper assessment would require statistics covering the increased work done in those Courts.
- A27 At North Shore the administration calculate that the saving in Judge time for the three months that Status Hearings have been conducted is 200 days. That sounds impressive, but the method of calculating the savings is not particularly scientific.
- A28 What is indisputable is that we have achieved a more efficient use of Judge time. Inappropriate pleas are so identified at an early stage, unnecessary adjournments are largely avoided, and the Judge presiding over defended cases is able to start defended hearings without wasting an hour or so conducting a mini list Court.
- A29 An evaluation of the scheme has been completed by an independent company. Generally the evaluation is very positive. It is to be considered by the National Case Flow Committee at its next meeting. We expect that the Committee will recommend the extension of the scheme through out the Country.
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