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Report 89

CRIMINAL PRE-TRIAL
PROCESSES: JUSTICE THROUGH
EFFICIENCY

June 2005
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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The Hon Marian Hobbs
Minister Responsible for the Law Commission
Parliament Buildings
Wellington

20 June 2005

Dear Minister

I am pleased to present to you Report 89 of the Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

Warren Young
Acting President

Preface

IN *CRIMINAL PROSECUTION* (NZLC R66) we noted that status hearings in the summary jurisdiction were intended to address delays in the pre-trial resolution of cases, and last-minute trial adjournment or cancellation. We expressed concerns about their unregulated nature, and invited government to give us a reference for further work. In response, the Ministry of Justice asked us to review the purpose and practice of status hearings.

In July 2004, we published a joint report with the Ministry of Justice summarising the results of status hearing research in selected District Courts, entitled *Status Hearings Evaluation: A New Zealand Study of Pre-Trial Hearings in Criminal Cases*. We simultaneously published *Reforming Criminal Pre-Trial Processes: A Discussion Paper* (NZLC PP55), which made preliminary recommendations for pre-trial process reform.

Since the publication of the Preliminary Paper 55 and the 2004 Evaluation, we have consulted widely. We talked to the Police Prosecution Service and police prosecutors from around the country; non-police prosecution agencies; Crown Solicitors and the Crown Law Office; courts operations staff in head office and large and small court registries; Ministry of Justice policy staff; the New Zealand Law Society; other defence counsel; the Public Defence Service pilot; the Legal Services Agency; and many District Court judges. We received invaluable feedback, which has substantially shaped our final recommendations. We were encouraged by the large measure of consensus about the problem and its solutions.

Our recommendations take a broader approach than was originally envisaged by the terms of reference. That is because status hearings cannot be properly evaluated and reformed in isolation from the other parts of the pre-trial process with which they are inextricably linked. The fundamental issue is not how status hearings 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. Accordingly, in this report we have recommended a major overhaul of the way in which criminal cases are handled from first appearance through to trial, with a view to greater pre-trial efficiency and therefore better justice. Many of the recommendations reiterate or expand on those previously made in *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85).

Warren Young was the Commissioner responsible for this project. He was ably assisted in the preparation of this report by Claire Browning and Neville Trendle, and in the earlier stages of the project by Janet November.

Warren Young
Acting President

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.
-

Executive summary

1 CURRENT PRACTICE: MANAGING CRIMINAL CASES BY STATUS HEARINGS AND CALLOVERS

THE VAST MAJORITY of criminal cases in New Zealand do not reach defended hearing: approximately 95 per cent are resolved pre-trial. Notwithstanding its less visible nature, and although perceived as relatively unimportant, the pre-trial process must therefore meet the needs of its many participants, and the community at large, just as much as the trial itself. It is critical to the quality of justice delivered by the system.

Chapter 1 describes the problems with the criminal pre-trial process: an outdated and incomplete legislative framework; overcrowded and inefficiently managed lists; unnecessary adjournments; and trials that do not proceed on the scheduled day. The resulting delays and drain on resources adversely affect the ability to do justice.

The chapter explores the reasons why this culture has developed and persisted. It describes what happens at status hearings and callovers, which are the mechanisms developed in the summary and indictable jurisdictions respectively, in an attempt to address the criminal pre-trial process problems. The evidence (which includes the results of the 2004 Evaluation conducted jointly by the Law Commission and the Ministry of Justice) is equivocal as to the success of status hearings and callovers. In our opinion, this is because these initiatives have been add-ons to the existing process.

2 DOING JUSTICE EFFICIENTLY IN THE SUMMARY JURISDICTION

All cases in the criminal justice system proceed summarily from the outset; some (where jury trial is elected by the defendant, and purely indictable cases) are later transferred to the indictable jurisdiction, when a ruling is made that the defendant has a case to answer and he or she is committed for trial. Although purely indictable cases are initially summary cases, we have at this stage excluded them from consideration, for reasons that are explained in chapter 9. We are proposing new case management processes in the summary jurisdiction for summary and electable cases. There are some recommendations of general application, which are listed in chapter 9.

The terms of reference for this project focused only on status hearings. However, we consider it impossible to reform status hearings without more generally considering the criminal pre-trial process in the summary jurisdiction, because:

- In the pre-trial process, one thing leads to another: early guilty pleas are unlikely if charges have not been well-scrutinised and the evidence that supports them disclosed; the culture of adjournments in the list court

perpetuates that culture throughout; matters are brought into court because there is no provision for administrative intervention, or because registrars are inadequately utilising their powers; case management discussions may be limited in their efficacy if counsel are unwilling to disclose their defence or are poorly prepared or otherwise uncooperative.

- The problem is not just legal and operational: it is also cultural. Entrenched habits will not change without robust incentives and sanctions to drive the change.

For both of these reasons, the recommendations in this report need to be implemented as a package.

It is our intention to achieve both efficiency and justice: up to a point, efficiency gains will be justice gains. The second half of chapter 2 outlines the key components of our recommended process that will pay dividends for both efficiency and justice.

3 POLICE PROSECUTION SERVICE: STRUCTURE AND PROCESSES

It is imperative that when criminal charges are laid by an investigating officer, two things occur as soon as possible: independent prosecution scrutiny of the charges, to ensure that there is sufficient evidence to support them and that it is in the public interest to proceed; and disclosure to defendants of evidence relevant to the allegations, so that they know and can assess the case against them. Getting these things right early will promote optimal use of resources, by ensuring that prosecution time is not wasted pursuing spurious charges, or defence time trying to defend the indefensible.

The recommendations in chapter 3 relate only to police. This is the prosecution agency most often charging “on the run”, and it is also the highest frequency criminal prosecutor by a significant margin.

Changes are recommended to both legislation and operational practice, to facilitate correct charging, and timely and comprehensive initial disclosure. We also recommend that not all cases should proceed through courts. For minor cases, where there is evidence of criminal offending but the public interest does not justify court proceedings, we propose a caution scheme, which would operate by consent, either with or without conditions.

Recommendations

- R1** Sections 316(5) Crimes Act 1961, 19A Summary Proceedings Act 1957 and 21 Bail Act 2000 should be redrafted to ensure consistency and transparency in the legislative framework for bringing arrested offenders to court.
- R2** The redrafting of section 316(5) should clarify that:
- the requirement that arrested offenders be brought before the court as soon as possible applies only to those offenders held in police custody;
 - arrested offenders may be released without being brought before the court if there is insufficient evidence to justify a prosecution;

- if there is sufficient evidence to justify a prosecution, arrested offenders need not be brought before the court in cases that meet the requirements of the recommended caution scheme.
- R3** Police operational practices should be changed as required, so that two essential things can occur before the initial hearing. First, evidence relevant to the allegation should be collated on the prosecution file. Secondly, the file needs to be independently scrutinised by both the investigator's supervisor and the prosecutor, to ensure that there is sufficient evidence to prosecute, and that prosecution is in the public interest.
- R4** The 7-day time period within which defendants released on police bail under section 21 Bail Act 2000 must appear in court should be extended to 14 days. This will allow police more flexibility to manage appearance dates, and thereby give themselves time for file preparation and independent scrutiny of the charges.
- R5** The Bail Act 2000 should be amended to allow the defendant to apply for review of any conditions of police bail imposed under section 21(4).
- R6** Where there is insufficient time to scrutinise the file before the initial hearing, the police prosecutor (in the absence of an immediate guilty plea) should ensure that such scrutiny occurs before the end of the administrative phase.
- R7** There should be statutory recognition of alternative disposition options, broadly comprising a police caution scheme. This would operate by consent, and might include conditions. As a minimum, the legislation should include the following criteria for the operation of the scheme:
- a decision is made, in accordance with the *Solicitor-General's Prosecution Guidelines*, that court proceedings are not required in the public interest;
 - the alleged offender is advised of the caution option, and any conditions, and consents to this course of action instead of a court prosecution;
 - no information is laid, or if an information has been laid, it is withdrawn;
 - the person is formally cautioned (with or without a requirement to fulfil specified conditions);
 - a record of the caution is kept for 2 years, so that it can be referred to by the police in the event of further offending within that period.
- R8** The present diversion scheme should be discontinued.
- R9** Section 36 Summary Proceedings Act 1957 should be amended so that charges may be withdrawn at any time on notice to the court by the prosecution, with the consent of the accused and without the leave of the court.
- R10** The criminal disclosure code in the Criminal Procedure Bill 2004 (presently before Parliament) should be amended in relation to initial

disclosure on request, to include the following material, both favourable and unfavourable to the prosecution case, if it is relevant to the allegation of an offence:

- copies of job sheets or other records (such as notebook entries) of interviews with witnesses;
- copies of records of evidence produced by a testing device (for example, breath alcohol);
- copies of diagrams and photographs (for example, of the crime or motor accident scene);
- copies of records concerning procedural compliance (for example, advice of the lawyer right under the New Zealand Bill of Rights Act 1990).

R11 Formal responsibility for meeting disclosure obligations should rest with the police prosecutor rather than the investigator.

4 THE ADMINISTRATIVE PHASE: THE LIST COURT AND OTHER MATTERS

Chapter 4 deals with defendants' early appearances in court (the stage of criminal proceedings that is colloquially termed the "list court"). In this phase of the case, as well as receiving early guilty pleas, the focus is on arranging administrative matters: bail, name suppression, initial disclosure, and legal aid. In the majority of cases it takes weeks and multiple adjournments to arrange these things, which ought to be straightforward. This in turn creates a perception that the same *laissez faire* approach can be taken to the rest of the criminal justice process.

The chapter briefly describes the Wellington District Court criminal list court pilot. Although this is still evolving, and endorsement would be premature, the project has elements that we consider critical for the optimal function of any list court, in particular:

- an early and regular approach to providing initial disclosure;
- facilities for prosecution and defence counsel to discuss the case out of court, where it is possible that a compromise on minor matters may produce a guilty plea;
- finding ways wherever possible for registry staff to dispose of uncontested administrative matters over the counter, leaving judges and the courtroom free for guilty pleas and contested applications.

Our recommendations are premised on this kind of approach. They also emphasise the importance of minimising adjournments, and to this end recommend that:

- the Legal Services Agency (LSA) should work to ensure that, in as many cases as possible, legal aid applications are processed and contact is established between counsel and their clients before or during first appearance;

- there should be a statutory maximum of one adjournment (two appearances) during the administrative phase of the case, with further adjournment only by judicial leave.

With a view to encouraging early guilty pleas, initial disclosure should be the first thing that occurs at first appearance. For the same reason, the amount of and reason for the sentencing discount given to those who do plead guilty at first call should be clearly stated in open court.

At the end of the administrative phase, cases that are proceeding will be adjourned for case management discussions to a provisional status hearing date. The date is provisional because the hearing may turn out to be unnecessary.

Recommendations

R12 The administrative phase of the case should allow for and encourage immediate guilty pleas in appropriate cases, by:

- ensuring initial disclosure occurs at the optimum time (that is, a time that facilitates the possibility of a guilty plea at first appearance);
- providing facilities at court to allow initial discussion between prosecution and defence (particularly in cases where a compromise on minor matters may produce a guilty plea); and
- always making explicit, in a sentence imposed following a guilty plea during the administrative phase, the amount of the discount given as a result of that plea.

R13 The police should make available to the Community Probation Service (CPS) the list of overnight arrests, and the dates on which those arrested are to appear. The CPS should, in advance of the appearance, determine whether a recently prepared pre-sentence report is available in the event of a guilty plea.

R14 The LSA, as part of its current review of initial criminal legal services, should consider changes to current practice to facilitate:

- the completion and processing of legal aid applications before or at the time of the defendant's first court appearance; and
- contact between the defendant and assigned counsel before the defendant is bailed and permitted to leave court.

R15 Defendants should appear before a judge during the administrative phase only when:

- they have intimated that they wish to enter a guilty plea;
- there is an opposed application for name suppression or bail (including a dispute as to bail conditions); or
- the registrar is satisfied that the defendant's behaviour or circumstances (for example, a history of non-cooperation) indicate a risk of non-

compliance with his or her obligations that is likely to be reduced by appearance before a judge.

- R16** All other matters should be dealt with by registry staff over the counter.
- R17** The media should have access to the full list of defendants appearing on the day and the decisions or orders made in respect of them.
- R18** There should be only one adjournment (that is, two appearances) during the administrative phase of the case. A further adjournment should be granted only after judicial consideration, and when it is clearly in the interests of justice. The reason for the adjournment should be recorded on the court file. Sanctions on the defaulting party should also be considered.
- R19** Section 28(2) Bail Act 2000 should be amended so that the registrar can grant bail with the consent of the prosecution in respect of any offence.
- R20** Section 41A Summary Proceedings Act 1957 should be amended to enable a registrar to receive and record a guilty plea as well as a not guilty plea.
- R21** At the end of the administrative phase, if there has not been a guilty plea, the case should be adjourned to a provisional status hearing date.
- R22** This adjournment period should be as short as is required to complete any applicable case management processes, having regard to:
- the nature of the offence;
 - the number of co-accused;
 - the number or complexity of the issues to be addressed by the parties;
 - the court's own scheduling pressures.
- R23** If the parties cannot reach agreement as to the appropriate adjournment period, or the registrar believes that the agreed period is too long or too short, it should be referred to the judge for resolution.
- R24** Where a defendant is remanded to a status hearing date, it should be a standard condition of bail that he or she provides instructions to counsel within a specified time about case management matters. Section 31(3) Bail Act 2000 should be amended to enable the imposition of such a condition.
- R25** There should be provision for the Chief District Court Judge by practice note to exempt any category of case from case management, status hearing, or both, either nationally or in a particular district.

5 REQUIREMENT ON DEFENDANTS TO STATE THE NATURE OF THEIR CASE

Chapter 5 explains why there should be a requirement on defendants whose cases are proceeding to trial to state pre-trial the nature of their case. This means that, in addition to identifying what (if any) facts are agreed, and what (if any) evidence can be admitted by consent, they must say what issues are

contested: for example, identity of the offender, an element of the offence, a positive defence, procedural error.

Some defence disclosure is voluntarily occurring with increasing frequency in New Zealand. It is increasingly recognised as good practice because it facilitates the smooth running of a case and the targeting of scarce resources. We are recommending a compulsory requirement.

The chapter discusses what the objections in principle are likely to be. Chiefly, these are the right to silence, the onus of proof, and New Zealand's adversarial (as opposed to inquisitorial) criminal justice system. In this context, we consider them unpersuasive.

The United Kingdom and Victoria have similar, but more extensive, defence disclosure requirements. In the United Kingdom it has so far not worked well: the defence bar is rigorously opposed, and the sanctions for non-compliance have not been well enforced because they are considered in most quarters to be unprincipled. We do not favour the overseas approaches.

Finally, there is a brief discussion of the distinction between disclosure of the nature of the case (which we are recommending for defence), and the evidence on which it will be based (the prosecution requirement). The Criminal Procedure Bill 2004 requires evidential defence disclosure for alibi and expert evidence, which we consider appropriate, but we do not recommend it more generally.

Recommendations

R26 Defendants who are proceeding to trial should be required by statute to disclose pre-trial the issues in dispute (for example, identity of the offender, an element of the offence, a positive defence, procedural error).

R27 Section 367(1A) Crimes Act 1961 should be amended, to provide that defence opening statements are mandatory in jury trials.

6 CASE MANAGEMENT MEMORANDUM AND DISCUSSIONS

Plea and charge discussions have a long history in New Zealand. We consider them to be in the interests of justice and endorse their continuance, with some modification.

Parties need to take responsibility for having their own discussions before the status hearing (which is currently where they occur), with judicial involvement only as a last resort. A completed case management memorandum must be filed 10 working days before the scheduled status hearing. The form proposed for the case management memorandum is in appendix A.

The discussions are case management discussions: that is, they should have broader scope than charge and plea. If the case is proceeding to trial, over half of the questions on the case management memorandum relate to the shape of that trial.

It is our view that the prosecution must initiate the discussions, and file the case management memorandum. The most important reason for this is that prosecutors are more likely than defence counsel to comply. Prosecutors have a disincentive to delay (the spectre of case dismissal for abuse of process), whereas amongst defence counsel the perception is entrenched that they should not have to engage pre-trial and may disadvantage their clients by doing so.

The remainder of the chapter deals with how to ensure that everyone's interests are recognised and protected, notwithstanding the informal out of court nature of the discussions, and the degree of information exchange that is envisaged. The following are discussed:

- prosecution overcharging and charge reduction;
- the enforceability of agreements;
- the interactions and responsibilities of defence counsel and their clients;
- the degree to which discussions should (or can) be without prejudice;
- consultation with complainants.

Recommendations

- R28** Out of court case management discussions should occur in all summary and electable cases, unless they fall within any category of case exempted by the Chief District Court Judge.
- R29** Case management discussions should be a formally recognised part of the criminal justice process, provided for in legislation and rules.
- R30** Case management discussions should have broader scope than charge and plea: if the case is proceeding, there will be case management matters such as resource requirements and the likely shape of the trial that can usefully be discussed.
- R31** The discussions ought at first instance to involve only the parties. This will require prosecution and defence counsel to meet or otherwise arrange to discuss the case out of court (for example, by email correspondence or a telephone conversation).
- R32** The prosecution should always initiate case management discussions (except where the defendant is unrepresented). The *Solicitor-General's Prosecution Guidelines* should be amended accordingly.
- R33** Parties should be statutorily required to jointly complete a case management memorandum, a draft of which appears in appendix A (and which, in summary and electable cases, will be the vehicle for the defence statement of issues in dispute).
- R34** The memorandum should be filed by the prosecution no later than 10 working days before the scheduled status hearing.
- R35** The memorandum should have attached to it a copy of the material initially disclosed by the prosecution to the defence, and any further relevant information (for example, supporting material for sentence indication, defendant's instructions in relation to guilty plea).

R36 The *Solicitor-General's Prosecution Guidelines* should be amended, to provide that:

- if it is necessary in the overall interests of justice, lesser or fewer charges can be laid than there is evidence to support;
- it will be rare that the public interest will require any departure from matters that have been agreed between the parties in case management discussions;
- prosecutors should carefully consider, before taking advantage of pre-trial admissions, whether this is in fact in the wider public interest, if in the long run it will undermine the effectiveness of case management discussions; and
- as they are already required to do under the Victims' Rights Act 2002, prosecutors must consult with complainants about the outcome of case management discussions.

R37 It is important for the integrity of case management discussions that the defence, as well as the prosecution, not be able to lightly resile from agreed matters. Subsequent changes of approach by either party should be rigorously judicially scrutinised, to ensure that they are not occurring in bad faith, or just on a whim. Where judges are satisfied that the latter is the case, it will be necessary and appropriate to impose sanctions.

R38 When the agreed outcome of case management discussions is a guilty plea, written and signed instructions to this effect should always be obtained from the defendant, and should be attached to the case management memorandum.

R39 There should be legislative provision to ensure that information provided in the course of case management discussions, both out of court and at status hearing, is not admissible in any subsequent proceedings.

7 OUT OF COURT PROCESSES FOR BRINGING CASES TO TRIAL

The case management memorandum having been filed, chapter 7 describes what should happen next. Although a status hearing will have been scheduled in all cases, we do not recommend that all cases should proceed to status hearing. This means that mechanisms for managing some cases out of court are required.

At the beginning of court proceedings, defendants in summary cases are presently asked how they plead, and in electable cases they are asked to elect. We recommend that defendants should not be asked to formally plead until the end of the case management process, although earlier guilty pleas could of course be taken. In electable cases (with a maximum penalty of more than 3 months' imprisonment), where the defendant has a right to choose jury trial, they should only be asked to make that election after entering a not guilty plea. These changes will require legislative amendment. We further recommend that, in some cases, plea and election should be entered on the papers.

Currently, judicial pre-trial involvement with cases all occurs at status hearings: that is, in court. We recommend some judicial preparation out of court, and propose that judges should scrutinise the filed case management memoranda. The resource implications of this are discussed. It means that court time saved will not necessarily be equally matched by savings in judicial time. However, the costs and benefits of the new process need to be weighed against the extent to which status hearings as presently conducted are wasting the time of the judge and everyone else.

We recommend additional resourcing for District Court registry staff, in the form of a case officer to monitor the progress of criminal cases.

Recommendations

- R40** Only guilty pleas should be taken during the administrative phase of the case. In all summary and electable cases, the entry of a not guilty plea should be deferred to the end of the case management process.
- R41** Election of summary or jury trial in electable cases should also be deferred, so that the defendant is asked to elect only upon the entry of a not guilty plea.
- R42** The case management memorandum should sometimes be the vehicle by which plea and election occur:
- There will be no requirement to plead (and therefore no requirement to elect) if the parties are requesting a status hearing: those things will occur at status hearing, at the conclusion of the case management discussions.
 - If as a result of case management discussions the defendant wishes to plead guilty, that will be recorded in the case management memorandum and entered on the papers.
 - If the parties agree that the case should proceed to trial, the not guilty plea and election (if applicable) will be entered on the papers, with one proviso.
 - The proviso is that if the judge who subsequently reviews the case management memorandum considers that there is a need for a status hearing, the plea and election previously entered is vacated, and the defendant will be asked to plead and elect again at the end of the status hearing.
- R43** The point of plea (and mode of trial election if applicable), when it occurs on the papers, should be the date on which the case management memorandum is filed.
- R44** Change of election of mode of trial should require judicial leave.
- R45** For the cases where a plea (and mode of trial election if applicable) is entered on the papers, the status hearing should be abandoned and the case administratively adjourned, to a sentencing hearing in the event of a guilty plea, or the next court event if the plea is not guilty. To facilitate progressing these cases on the papers:

- Judges should order pre-sentence reports based on their review of the filed papers, so that these will be available at the sentencing hearing.
- Section 45A Summary Proceedings Act 1957 should be amended so that, if defendants consent to an extension of custodial remand (by responding in the affirmative to that question in the case management memorandum), registrars can adjourn the fixture. Alternatively, if defendants do not consent, they can be brought back to court for consideration of the issue of bail and judicial adjournment of the case.

R46 Judges should have access to, and make time to review, filed case management memoranda and their attachments before the status hearing. They will need to do three things:

- request pre-sentence reports where guilty pleas are entered;
- where a not guilty plea is entered and neither party has requested a status hearing, assess whether the case is proceeding properly to trial (that is, whether it could be resolved or managed better);
- if a status hearing is required, prepare in advance for that hearing and thereby conduct it more efficiently and fairly.

R47 The registry staff of each District Court should include a case officer, who is responsible for monitoring the out of court progress of each criminal case, and may assist judges in their review of case management memoranda.

8 STATUS HEARINGS

Status hearings will not occur in all cases. One reason why they may be necessary is to provide defendants with a sentence indication, and sentence indications are the subject of the bulk of this chapter. We support the giving of sentence indications, and believe they ought to be formally recognised in statute and made more consistent in practice. We recommend that:

- An indication should specify the likely type and quantum of penalty if the defendant were to be convicted following a defended hearing or trial, compared with the type and quantum of penalty that will be imposed if the defendant pleads guilty now.
- Section 9(2)(b) Sentencing Act 2002 should be amended to make explicit that the sentencing discount available for an early guilty plea should be greatest when that plea is entered at the first reasonably available opportunity, and should be progressively reduced thereafter.

The chapter also explains why we have reached the view that judicial involvement at status hearings is the best means of resolving an impasse between counsel. Other options considered included an independent expert facilitator, mediating out of court. However, there was virtually unanimous support amongst stakeholders for continued judicial involvement: it was thought that no equally efficient combination of expertise and authority could be found.

Status hearings, like other court hearings, should be open to media coverage subject only to suppression orders.

Recommendations

R48 Status hearings should only be held:

- where either party or the judge thinks that judicial intervention would be in the interests of justice, to facilitate a resolution of the case or to manage it better; or
- to provide a sentence indication on the request of either party.

R49 While some judges are better suited to conducting status hearings than others, specialist judges should not be appointed for this purpose. The selection of judges should be a matter for courts' rostering practice.

R50 Rules should provide for the giving of sentence indications as follows:

- There should be judicial discretion to give a sentence indication when requested by either prosecution or defence counsel. The judge may ask counsel whether a sentence indication is sought.
- Complainant information upon which a sentence indication is based should be derived from a properly prepared victim impact statement.
- An indication may be given subject to information still to be provided by way of a pre-sentence report or victim impact statement. However, it should be confined to a sentence range or not given at all if the sentence is likely to be significantly affected by such a report or statement, or there is otherwise insufficient information.
- An indication should generally specify:
 - the likely type and quantum of penalty if the defendant were to be convicted following a defended hearing or trial (on the basis of the information currently available about the offence and the offender); and
 - the type and quantum of penalty that will be imposed if the defendant pleads guilty now.
- A record of both components of the sentence indication should be retained on the court file and should be available to the sentencing judge following either a guilty plea or the entry of a conviction as a result of a defended hearing or trial.
- An indication should also include advice that it does not detract from the defendant's right to require the prosecution to prove its case.
- Where an indication is given and results in a guilty plea, and subsequent information leads to a different view as to the appropriate sentence, the defendant should always be given the opportunity to withdraw his or her plea.
- The sentencing judge on a guilty plea should, wherever possible, be the judge who provided the sentence indication.

- If a defendant pleads guilty on the basis of a sentence indication, and a subsequent Crown appeal against the sentence is upheld, the defendant ought to be given the opportunity to file an appeal against conviction, vacate his or her guilty plea and have the case remitted back to the District Court for trial.

R51 Section 9(2)(b) Sentencing Act 2002 should be amended to make explicit that the sentencing discount available for an early guilty plea should be greatest when that plea is entered at the first reasonably available opportunity, and should be progressively reduced thereafter.

R52 More detailed guidance as to the way in which the sentencing discount should operate should be developed in rules.

R53 In the majority of cases that proceed to status hearing, the case management memorandum will be incomplete when filed. If the case is not resolved at status hearing, counsel will then need to complete the memorandum. This can be facilitated by the judge in court; alternatively (and preferably, depending on prosecutor availability) the case can be briefly stood down for an out of court discussion.

R54 Status hearings should be held in public and open to the media.

9 THE INDICTABLE JURISDICTION

Chapter 9 describes the two categories of case that proceed indictably after committal: electable cases where the defendant's preference is for jury trial, and purely indictable cases. It considers the implications of our case management recommendations for electable cases (chiefly, the deferral of committal proceedings).

The increasingly unwieldy callover system in the indictable jurisdiction may benefit from some fresh thinking, taking into account the principles in this report. Further consultation should be undertaken with the High Court judiciary, counsel, and officials about the merits and workability of our proposals for purely indictable cases.

10 UNREPRESENTED DEFENDANTS

Chapter 10 concludes that out of court case management discussions will be unworkable for unrepresented defendants. It briefly considers how unrepresented defendants might be better assisted in their pre-trial dealings with courts.

Recommendations

R55 It is not feasible to require out of court case management discussions between prosecutors and unrepresented defendants. Unrepresented defendants should proceed straight to a status hearing.

R56 The role of the case officer should include responsibility for informing and assisting (without legally advising) unrepresented defendants.

R57 There should be a duty solicitor available when unrepresented defendants are called at a status hearing.

- R58** The judge should facilitate the completion of the case management memorandum at the status hearing. In relation to defence disclosure, this is likely to require more careful and specific questioning about why the defendant is proceeding to trial than will be necessary when a defendant has counsel (for example, “do you deny that you hit him”, “did you believe you were in danger”).
- R59** Court registry staff should consider the merits of scheduling unrepresented defendants in a separate session at the end of the day.

11 CHANGING THE CULTURE OF NON-COMPLIANCE

Legislative provision for procedural change will not, by itself, secure the acceptance and compliance of criminal justice system participants. To motivate them to change what are often rewarding habits, robust incentives and sanctions are vital. That is the subject of this chapter. We recommend:

- judicial monitoring of counsel performance, with notification to the Legal Services Agency (LSA) and the New Zealand Law Society (NZLS) as appropriate, and more regular and robust responses by these organisations to proven performance failures;
- legislative provision for costs orders against prosecution agencies or defence counsel, where they have unreasonably failed to comply with their procedural obligations;
- codification of the factors set out by the English Court of Appeal in *Jones*, in relation to the discretion to proceed with a trial in the absence of the defendant, with a requirement on judges to consider exercising that option in all cases of defendant non-appearance.

Recommendations

R60 Primary responsibility for reviewing and enforcing the performance of legal aid providers should rest with the LSA. Where there is misconduct sufficient to amount to a professional disciplinary issue, or counsel is not a legal aid provider, the NZLS should be notified and take responsibility. Judges will need to record and collate evidence of counsel misconduct or performance failures. We recommend the following process:

- As a matter of natural justice, allegations of misconduct or other failures by counsel must be put to the person concerned, with a fair opportunity to respond. The process for achieving this should be a matter for judicial discretion; a brief dialogue in court may suffice in many cases.
- Where the judge is not satisfied with any response that is given (that is, there appears to be no reasonable excuse for the failure), counsel should be advised that the incident and a brief summary of the discussion about it will be recorded and reported to the executive judge in that district.
- This may include matters brought to judicial attention by registry staff: there are some forms of misconduct, such as disrespect or bullying of registry staff, of which only those staff will be aware.

- The executive judge should collate such reports. Where he or she believes, either individually or cumulatively, that further action is required, a complaint should be lodged with the LSA and copied to the NZLS (or, where counsel is not a legal aid provider, only with the NZLS).
 - There should be protocols for closer liaison between the LSA and the NZLS about disciplinary matters (because it may sometimes be appropriate for the latter to take the lead).
 - Any decision to suspend counsel from the legal aid provider list, or impose other conditions, should be subject to review under the Legal Services Act 2000.
- R61** The Legal Services Act 2000 should be amended to allow a range of sanctions short of suspension from the legal aid list (for example, suspension for short periods, the imposition of conditions, supervision of counsel, the withholding of payment, reassignment of the case).
- R62** The Legal Services Act 2000 needs to clearly stipulate that LSA contracts with counsel are conditional on satisfactory performance.
- R63** Legislative provision should be made for costs orders against either defence counsel or prosecution agencies, if they fail without reasonable excuse to comply with procedural obligations.
- R64** There should be a legislative provision that, when an accused fails to appear at a pre-trial hearing or trial of which he or she has been notified, the judge should consider whether to commence or to continue the hearing, taking into account the factors set out by the English Court of Appeal in *Jones* and endorsed by the House of Lords.

12 LEGISLATIVE VEHICLE

Chapter 12 recommends that only the core pre-trial process rights and obligations should be stated in legislation. Rules are recommended for most of the procedural provisions, with practice notes issued as required. The rules should be initially drafted by the Parliamentary Counsel Office, and appended to the proposed new Criminal Procedure Act. Authority for subsequent amendments would be delegated to a rule-making body.

The interface between this report and the Ministry of Justice *Simplification of Criminal Procedure* project is discussed. We recommend that priority be given to that project and the two progressed together: it will be difficult to implement our recommendations without a prior rationalisation of the existing criminal procedure provisions.

Recommendations

- R65** Core criminal pre-trial process rights and obligations should be asserted in legislation, for example:
- alternatives to court prosecution;
 - the exercise and extent of powers that affect personal liberties, such as arrest and bail;

- the extent of registrars’ powers (that is, what are administrative matters, as opposed to judicial);
 - disclosure requirements on the prosecution;
 - a requirement on defendants whose cases are proceeding to trial to state pre-trial the nature of their case;
 - timing of not guilty pleas, and election of mode of trial;
 - the sentencing discount principle;
 - power to proceed when a defendant is wilfully absent.
- R66** A comprehensive set of rules is required to provide for the operational detail of criminal trial and pre-trial processes. The rules should not exclude the possibility of further administrative guidance (such as practice notes) as required.
- R67** The rules should initially be drafted by the Parliamentary Counsel Office and appended to the new Criminal Procedure Act. They should thereafter be amended on the recommendation of a rule-making body.
- R68** In *Delivering Justice for All*, the Law Commission recommended a rule-making body “that includes all parties with a legitimate interest and that consults widely”. We reiterate that view. If the Rules Committee is to undertake this work:
- there needs to be a better balance of representation on the Committee between legal professionals and the executive;
 - the Committee should be required by statute to consult with stakeholders on any draft amendments to the rules.
- R69** The *Simplification of Criminal Procedure* project previously recommended by the Law Commission and already on the Ministry of Justice work programme should be given high priority with a view to providing a vehicle for this further work.
- R70** The Solicitor-General should convene an inter-agency working group for the purpose of reviewing the *Solicitor-General’s Prosecution Guidelines* and developing draft amendments for his consideration.

13 RESOURCE IMPLICATIONS

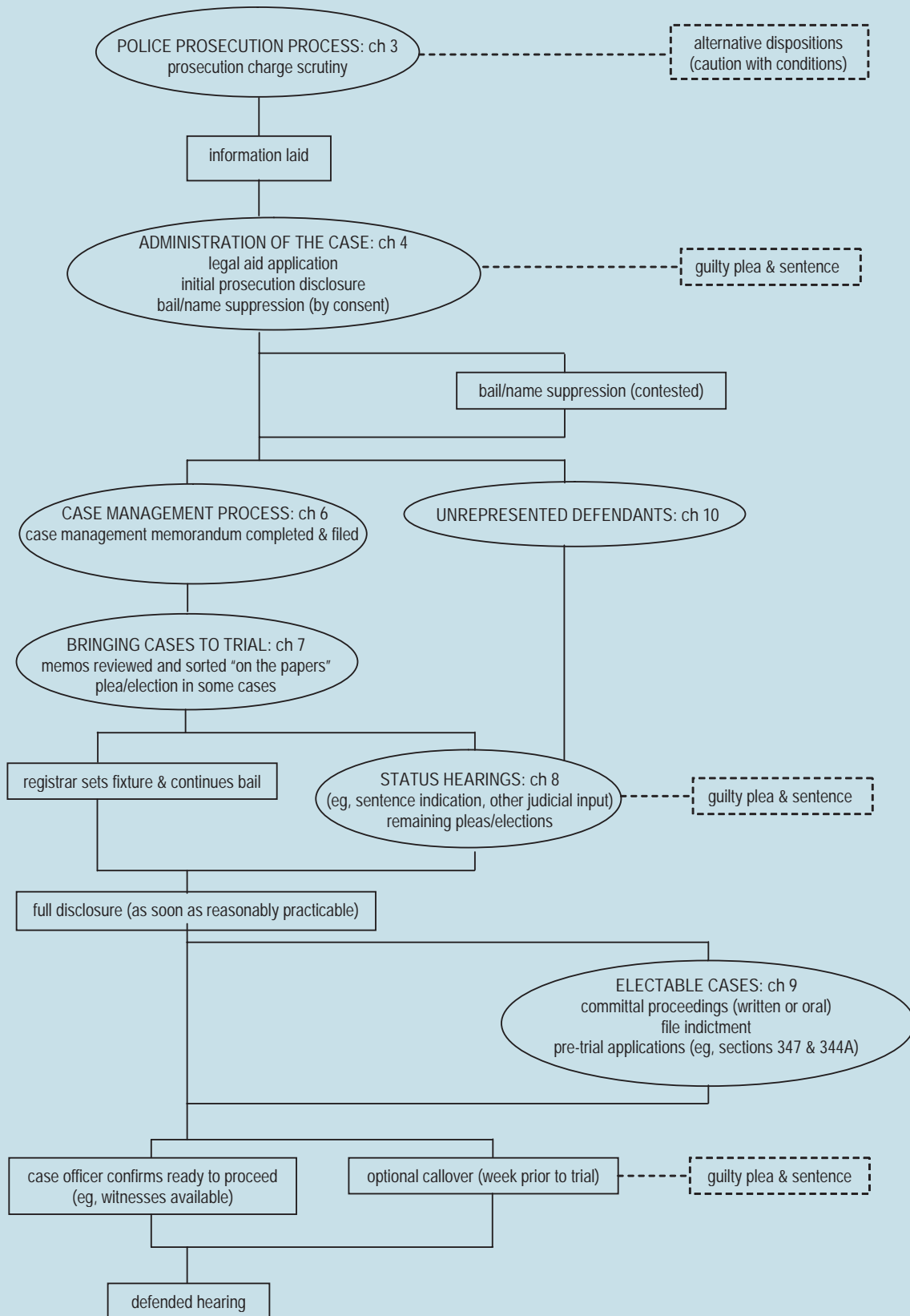
This chapter assesses at a high level the potential for efficiency gains in the use of court resources. The potential is substantial. Some agencies, most notably the Police Prosecution Service, are likely to incur costs if these pre-trial process recommendations are implemented.

RECOMMENDED PROCESS FLOWCHART

The flowchart on page xxviii summarises our recommendations for the criminal pre-trial process. Chapters in which the respective parts of the process are discussed are indicated in bold type.

The flowchart (like the rest of this report) has been drafted in anticipation of two pending legislative reforms, one of them imminent:

- the Criminal Procedure Bill 2004 (before the Law and Order select committee with a report back date of 29 July 2005: this codifies disclosure obligations, and provides for automatic written committal); and
 - the *Simplification of Criminal Procedure* project (to which the government agreed in 2001, and which is awaiting drafting: this will simplify and consolidate criminal procedure provisions in one Act, and remove the prosecution choice of forum).
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1

Current practice:
managing criminal cases by
status hearings and callovers

- 1 THE CRIMINAL PRE-TRIAL process begins with the laying of a criminal charge. In very general terms, it may end in three ways: the withdrawal of the charge, an early guilty plea, or defended hearing or trial. The vast majority of criminal cases do not reach defended hearing: approximately 95 per cent are resolved pre-trial. Notwithstanding its less visible nature, and although perceived as relatively unimportant, the pre-trial process must therefore meet the needs of its many participants, and the community at large, just as much as the trial itself. It is critical to the quality of justice delivered by the system.
- 2 The theme of this report, as its title suggests, is justice through efficiency. These twin goals are complementary: in large measure the current pre-trial process fails, by virtue of its inefficiency, to achieve anything that could be described as justice. Resources are wasted, cases are not dealt with in a timely way, and in extreme examples of abuse of process, they cannot be dealt with at all. These failings bring the system into disrepute, and undermine the public confidence that is essential to its acceptance and its effectiveness.
- 3 It is, therefore, evident that the pre-trial process requires significant change. There is likewise almost universal recognition of its shortcomings: it is governed by an outdated and incomplete legislative framework, and has for years been bedevilled by overcrowded and inefficiently managed lists, unnecessary adjournments, and trials failing to proceed on their fixture date.
- 4 However, notwithstanding the absence of dispute about these matters, there has never been any concerted effort to assess their impact and determine an appropriate response. Instead, ad hoc solutions, notably status hearings in the summary jurisdiction and callovers in the indictable jurisdiction, have been initiated by individual judges to address particular issues. As District Court judges noted in their submission to the Law Commission on changes to the criminal list court (which is the court in which defendants first appear, but the point is equally applicable to pre-trial processes generally): list courts today are operated largely in the same way as they were in the middle of last century; they have failed utterly to adapt to change; nobody has stepped back to take a fresh look; and everybody tolerates their ongoing inferior performance.¹ It is therefore hardly surprising that there are major operational problems.

¹ “District Court Judges’ Proposals for Reforming Criminal List Courts” (unpublished paper) 2. An extract from the paper is reproduced in New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) Appendix B, hereafter referred to as *Delivering Justice for All*.

THE PROBLEM OF FIXTURES THAT DO NOT PROCEED

- 5 Significant adverse consequences flow from avoidable pre-trial adjournments and consequent delays:²
- They put additional strain on court resources because of what is termed “churn”. “Churn” describes the need for every adjourned case to be listed again, so the system is forced to accommodate not only new but repeated old cases. This increases the number of cases pending and the length of the lists for each sitting day.
 - With too many cases in the system, more time elapses before each can be allocated a hearing. This increases the likelihood of duplication of resources, since with long adjournments parties may not remember what has been discussed and previously agreed.
 - There are resulting delays in the disposal of individual cases. This prevents victims from receiving timely closure on the offence. In the event that the case goes to trial, it affects the ability to do justice: clarity of the evidence declines as memories become hazy, and over time witnesses may disappear or complainants (particularly in domestic violence cases) lose their nerve. Ultimately, an undue delay carries the risk of dismissal for abuse of process.
 - Repeated appearances are stressful and inconvenient for defendants and for others with an interest in proceedings who want to attend, such as the defendant’s support group, or complainants.
 - Repeated appearances by defendants are administratively inconvenient for those in custody and the prison authorities responsible for them (including custodial escort services). Bailed defendants with small motivation to appear, who may find it difficult to transport themselves to court, are at risk of breaching bail (resulting in the issue of an arrest warrant and sometimes additional charges), which further adds to the administrative demands upon police and courts.
 - There may be community safety implications, if defendants who pose a risk of reoffending where there are not sufficient grounds for custodial remand remain at large or otherwise unsentenced (for example, a recidivist drunk driver).
- 6 The fact that a substantial proportion of cases do not proceed to trial on the scheduled day is equally problematic.³ This may occur because of last-minute guilty pleas, or because parties are not ready to proceed (for example, because the defendant or a crucial witness has failed to appear). When this happens, it sometimes is not possible to reallocate the judges and courtrooms previously scheduled, notwithstanding the queues of pending cases, because of the impossibility of arranging substitute hearings at short notice. Registrars

² Judge Jeremy Doogue et al “Best Practice in the Summary Jurisdiction: A Principled Approach” (Institute of Judicial Studies, March 2004) 5–6; “District Court Judges’ Proposals for Reforming Criminal List Courts”, above n 1, 20.

³ The terminology used in England for this phenomenon is “cracked trials”: see New Zealand Law Commission *Reforming Criminal Pre-Trial Processes: A Discussion Paper* (NZLC PP55, Wellington, 2004), hereafter referred to as Preliminary Paper 55.

attempt to address this problem by allocating for hearing more cases than could conceivably be heard in a day, over-scheduling by the proportion of cases they have come to expect will be cancelled or postponed. However, this solution brings its own problems. In the event that more cases are ready to proceed than expected, some must then be adjourned. Fixtures that do not proceed are emotionally and financially costly for everyone involved (parties, support groups, complainants, witnesses, court staff), which brings the justice system into disrepute. Impacts include the anxiety for witnesses of expecting, preparing for, and sometimes arriving at a trial that is then deferred or cancelled; inconvenience and expense for those who have taken leave from work and transported themselves to court; and prosecution and defence expenditure of resources to prepare for trials that are then abandoned.

- 7 In relation to both pre-trial adjournments and trials that do not proceed, the problem in a nutshell is lack of preparedness. Perhaps more to the point, it is a lack of early preparedness: it is the court appearance that currently focuses the minds of participants, rather than between-hearing preparation. This does not work, for two reasons. If either party finds, on the day, that they are not ready to progress the case through the stage for which it is set down, it is too late to do anything remedial and the case must be adjourned. If discussions between parties occur directly before or during a court hearing, and the case is resolved, this outcome, although superficially positive, nonetheless inconveniences everyone who scheduled and prepared for trial.
- 8 The concerns with the current process are not simply about their inefficiency; they are fundamentally about the quality of justice delivered by the system. Inefficiency produces injustice.

REASONS FOR THE PROBLEMS

- 9 Although the current practice is so clearly counter-productive, changing it has proved an intractable problem, for two reasons. First, there are obstacles in the form of established practices, and occasionally legislation, that make it difficult to initiate change informally. Secondly, and probably more importantly, parties often find delay rewarding, or at least a comfortable habit, and therefore are not motivated to change. These two drivers apply to a greater or lesser extent to everyone in the criminal justice system. Some specific instances can be listed.
- 10 The drivers for defence delays include:
 - Where busy counsel are under pressure, they will work to immediate demand. In the current process, a court hearing is the only such imperative; depending on the ease with which adjournments can be obtained, sometimes even the need to prepare adequately for that is disregarded.
 - Counsel who do want to have earlier discussions about their case may have difficulty contacting police investigators and prosecutors, because of leave, shift hours, the higher priority accorded to investigation over prosecution, or because prosecutors are fully occupied in court. This wastes out of court preparation time, and therefore may make it uneconomic: for counsel funded by legal aid, preparation time is capped.

- Particularly in the Auckland region, the so-called “car-boot” lawyers (who operate without an office by means of a laptop computer and mobile phone) as a matter of regular practice only meet their client at court, and therefore never receive instructions or progress matters between court hearings.
 - Some defendants are not anxious to see their cases brought to a speedy conclusion. In particular, defendants facing a custodial sentence, if bailed, often want to postpone conclusion of the case as long as possible, to buy time on the outside for a variety of reasons (for example, to complete a pregnancy, have Christmas with their family, or avoid telling their employer). Even when they are aware of the availability of a sentencing discount for a prompt guilty plea, there will inevitably be some cases where the offending is minor, and the maximum sentence low, and therefore the margin of the discount is insufficient incentive, relative to what can be gained by delay.
 - Even where counsel are not deliberately postponing matters at the request of their clients, they may find it difficult to engage with them between court hearings, and therefore to obtain timely instructions as to the course of action to be followed: defendants are often transient and therefore difficult to contact, and they may neither comprehend nor care about what is needed from them to progress matters.
- 11 In relation to prosecutors, the drivers for delay are less apparent. Most prosecutions (and at the outset, all of them) are handled by prosecutors employed by the police or other government agencies, who operate within a supervisory structure, and are salaried rather than remunerated per appearance. There is also the spectre, albeit rarely used, of dismissal of cases for abuse of process for unduly long delay; although delay must be extreme, and has no immediate personal impact on the individual staff member, it will be politically difficult for the agency concerned. All of this suggests that, superficially, incentives for prosecutors to deliberately delay or otherwise misconduct themselves in pursuing prosecutions are small.
- 12 There are nonetheless obstacles to optimal prosecution performance:
- On minor charges, or where timeframes between charge and first appearance are short, prosecutors may be reluctant or indeed unable to allocate scarce resources to a degree of preparation that goes beyond what is needed for the next court appearance and may prove excessive in the particular case. This means that, for first call of a case, material pertaining to bail and name suppression will be prepared, but the substance of the case or the appropriateness of the charges is unlikely to be considered.
 - Responsibility for case and file management within the Police Prosecution Service is divided between the investigating officer and the prosecutor. The prosecutor, in a sense, initially approaches the case from the same position as defence counsel, with no direct knowledge of the circumstances, and reliant on information provided by the staff on the ground. Practice

varies, but not infrequently the investigating officer will be primarily responsible for disclosure (because he or she knows what is on the file and is in the best position to decide what material is relevant and sensitive). There is also an expectation that the investigator will be consulted, and sometimes have considerable say, about the withdrawal or amendment of the charges initially laid. All of this has implications for the degree to which a prosecutor can operate decisively, independently, and quickly in the early stages of a case.

- These things, in turn, affect the timeliness of initial disclosure (that is, the provision of information to defendants by prosecutors about the evidence that forms the basis for the charges). Without initial disclosure, adjournments are inevitable: defence counsel will rarely, if ever, advise their clients to plead guilty without it.
- 13 For judges faced with overloaded lists, there are short-term benefits in agreeing to delays: adjournments offer a simple means of clearing the list for that day. There are also subtle social pressures: judges do not want to be perceived by counsel as unfairly inflexible or different from other judges in their approach to adjournments, and having been in practice themselves, they are sympathetic to the exigencies of it. They may also be unaware of the scheduling consequences for courts of repeatedly adjourning cases.
- 14 Adjournments are sometimes a by-product of insufficient court registry capability, or dissonance between registrars and judges. Some court staff are inexperienced, poorly trained as to the extent of their powers, or simply lack the confidence in the face of belligerent counsel to exercise them; it was also said to us that registrars' attempts to (quite properly) exert authority sometimes are undermined by judges.
- 15 Management of courts in metropolitan areas has proven more difficult than provincially, for reasons that are slightly more complex than the large volume of cases to which the problem is often attributed. Because of the volume, there is also anonymity, meaning that one is unlikely to have to take personal responsibility for failure in the way that would occur in a smaller centre. This applies to both counsel and judicial behaviour. For example:
- In the Auckland region, where an under-performing counsel is interacting with multiple prosecutors, and appearing before lots of different judges, perhaps in more than one court, it takes longer for that person's pattern of poor behaviour to be identified, and it is difficult if not impossible to coordinate a consistent response to it.
 - In a provincial court with only one or two judges, a judge who contributes to an inefficient practice experiences the consequences of that directly; in a metropolitan court the consequences are shared amongst many judges, and responsibility for them is difficult to pin down. If one judge in the city attempts to change his or her practice with a view to efficiency it is unlikely to produce benefits without collective action by the rest: it simply encourages judge-shopping by counsel to avoid the inconvenience for themselves and their clients of having to change behaviour.

CURRENT PROBLEM-SOLVING INITIATIVES: STATUS HEARINGS AND CALLOVERS

Status hearings in the summary jurisdiction

- 16 Status hearings were initiated by Judge Buckton in the Auckland District Court in 1995 as a means of addressing these issues, particularly large numbers of defended hearings in the summary jurisdiction being adjourned or cancelled at the last minute.⁴
- 17 The original aims of status hearings were:⁵
- to reduce the number of adjournments to a minimum;
 - to ensure an appropriate plea is entered at the first opportunity;
 - to reduce the time taken to hear each case by limiting the evidence to facts in issue.
- 18 Status hearings are now held at most District Courts for many offences tried summarily where a defendant has pleaded “not guilty”.⁶ They have no express statutory basis: they operate under the District Courts’ power to regulate the conduct of court business in any way that is consistent with statutory requirements.⁷

Process before and during status hearing

- 19 Criminal proceedings are initiated by the filing of an information in the court.⁸ A defendant arrested and charged with one or more offences must be brought before the court as soon as reasonably possible if held in custody, or may be bailed or summoned to appear at a later date.
- 20 On first and sometimes subsequent appearances at what is often called the “list court”, the defendant or his or her counsel is formally advised of the nature of the charge, and provided with initial disclosure of some

⁴ Judge Buckton “Submission for the National Caseflow Committee” (13 June 1995). 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 one of the parties obtained an adjournment.

⁵ 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.

⁶ They are not held in all courts (for example, there are none in Napier, Hastings, Papakura or Pukekohe), nor for all offences in courts that do have status hearings. In Hamilton there are no status hearings for Domestic Violence Act 1995 offences. Their usefulness has been questioned in Manukau in relation to finable-only matters including dog control, fisheries, tax, and also drink drive and driving while disqualified where there are no previous convictions. Similarly, the Inland Revenue Department (IRD) advised us that some courts allocate status hearings only for police matters, thereby excluding other departmental criminal proceedings (an approach that the IRD does not support).

⁷ See *Haskett v Thames District Court* (1999) 16 CRNZ 376 with reference to *McMenamin v Attorney-General* [1985] 2 NZLR 274, 276 (CA). 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* as part of the three-stage “hearing of an information”.

⁸ Summary Proceedings Act 1957, ss 12–18. The information must “fairly inform the defendant of the substance of the offence with which he is charged”: s 17.

of the information upon which it is based. If the charge is laid on indictment, or if the defendant is entitled to elect jury trial (offences with a maximum penalty of more than 3 months' imprisonment) and does so, the defendant will be remanded for a preliminary hearing.⁹ In all other cases (that is, summary proceedings), the defendant is asked to plead.¹⁰ Cases in which a not guilty plea is entered are listed for status hearing.¹¹ Before the status hearing, as a consequence of the not guilty plea, the prosecution must disclose the rest of the evidence upon which the case is based.

- 21 At a status hearing a District Court judge hears, on average, 30–40 cases in open court.¹² The prosecutor, defendant, and his or her counsel (if any) are present. Victim advisers are employed in all courts and may address the judge on behalf of the complainant, although in our observation this only rarely occurs (because submissions have often been filed in writing, in the form of the victim impact statement or a complainant input memorandum). The complainant may also attend, to observe from the public seats. Sometimes complainants or other persons with an interest in proceedings (for example, a forensic nurse where there are mental health issues, or a defendant's support person) address the court at the invitation of the judge, but again this is uncommon.
- 22 The prosecutor hands a copy of the police summary of facts to the judge. Defence counsel indicates his or her instructions as to how the case should proceed. The prosecutor may seek leave to withdraw or amend some charges.¹³ The judge may ask defence counsel if he or she wishes to disclose or talk about contested matters.
- 23 Status hearings guidelines contemplate that judges will proactively try to resolve cases. They might do this by inquiring about plea and charge discussions if these have occurred, and encouraging them to occur where they have not, by asking questions and making observations: "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"; "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". Judges vary in the extent to which they do this, and how much pressure they bring

⁹ Or, in some courts, to a pre-depositions (that is, a pre-preliminary hearing) hearing.

¹⁰ Summary Proceedings Act 1957, s 67.

¹¹ The following description of status hearings draws heavily on Judge Buckton's unpublished papers on status hearings (1995–2000), supplemented by our own in-court observations. See appendix A of Preliminary Paper 55, above n 3 for the 1998 version. Practice may vary slightly from court to court, but is largely consistent in the essentials. Some courts have developed their own practice notes, in particular Christchurch: see Judge TM Abbott "Practice Note – Christchurch District Court Status Hearings" (July 2001) incorporating and replacing practice notes dated 29 April 1998, 28 September 1998, and draft of 8 November 1999.

¹² During one notable fortnight in Auckland, which many submitters commented on and termed the "Auckland blitz", an average 120 cases per day were listed and disposed of.

¹³ Buckton, above n 11 (1995, 1998 and 2000 versions). It was agreed that the prosecutor should have discretion to apply for amendments or withdrawals of informations, rather than having to apply to the officer in charge of the case each time.

to bear if dissatisfied with the answers: not all of them are comfortable departing from the adversarial role of impartial adjudicator at trial, who traditionally had no involvement in pre-trial matters.

- 24 Defence counsel (or the defendant if unrepresented) may request a sentence indication (that is, the likely sentence if the defendant were to plead guilty now, rather than taking the case to trial). Current guidelines permit a judge to give an indication on request if he or she has sufficient information to do so. They require that the indication be limited to the type of sentence that the judge thinks appropriate (for example, imprisonment, community service, fine, costs, discharge without conviction).¹⁴ For this purpose, the judge would view the defendant's criminal record.
- 25 A defended hearing date will be set if these discussions do not result in a guilty plea. If the case is proceeding, the judge may discuss some trial management matters with the parties.

Callovers in the indictable jurisdiction

- 26 The status hearing process described above applies only in respect of charges being dealt with summarily. Where charges are laid on indictment or the defendant elects jury trial, the defendant is remanded for a preliminary hearing. If the evidence at that hearing establishes a case to answer, the defendant is committed for trial and the case is handed to the Crown Solicitor for prosecution. It is only at that stage that a process equivalent to the status hearing system (termed "callovers") operates. That process differs between High and District Court and from centre to centre. The description that follows relates to the Auckland District Court.¹⁵
- 27 In the Auckland District Court, there are three callovers following committal for trial. They are presided over by a judge and attended by Crown prosecutors, court staff, and 25–30 accused persons with their counsel.
- 28 The first callover shares some of the features of status hearings. It occurs about 6 weeks after committal, on a Thursday afternoon. Following the preliminary hearing, as part of the process of framing the indictment (the indictable jurisdiction charging document), there may have been plea and charge discussions. As with status hearings, some judges take a proactive role. For example, where the evidence is superficially very strong against an accused (such as an unchallenged admission in interview) the judge may question counsel about the defence. Defence counsel may request a sentence indication. If the case is proceeding, there is also discussion of matters such as availability for trial, pre-trial applications, witness numbers, and whether there are particular resource requirements (such as interpreters, or closed-circuit television for child witnesses).

¹⁴ Buckton, above n 11. Some judges indicate approximate quantum as well.

¹⁵ Because this was the court chosen as the subject of research into the operation of status hearings and callovers, conducted as background work to inform this report: see Ministry of Justice and New Zealand Law Commission *Status Hearings Evaluation: A New Zealand Study of Pre-Trial Hearings in Criminal Cases* (Wellington, 2004), hereafter referred to as the 2004 Evaluation. In the Christchurch District Court, there are two callovers: the first between 5 and 9 weeks after committal, and the second a week before trial.

- 29 Second callover occurs at 9.00 am on the Tuesday of the week before trial. Accused and counsel whose trials have a firm fixture in the following week attend, as well as those listed for “standby” trials.¹⁶ The purpose is to make sure the trial is ready to go ahead, and if not, to schedule one of the standby trials. Third callover, at 8.45 am on the Monday of the week in which a case is set down, provides last-minute confirmation of which cases will proceed.
- 30 The callovers’ nominal number reflects the stage of proceedings at which they occur, not necessarily how many there have actually been in any given case. Some cases, particularly multi-accused or multi-count trials, will often require more callovers.¹⁷

2004 EVALUATION OF STATUS HEARINGS AND CALLOVERS

- 31 With a view to providing background information for this project, the Ministry of Justice and the Law Commission jointly conducted empirical research into the operation of status hearings and callovers. The results have been published in what will be termed here the 2004 Evaluation.¹⁸ The reason for including callovers was to find out if there are common themes in case management between the summary and indictable jurisdictions, and therefore the feasibility of extending status hearings to both (one aspect of our terms of reference). Defendants, complainants, and other “key informants” (judges, defence counsel, prosecutors, victim advisers, court staff, and probation officers) were asked about their experience of these pre-trial hearings, particularly the aspects covered by the terms of reference.
- 32 The 2004 Evaluation findings were equivocal as to whether status hearings are working effectively, in the sense of achieving their intended efficiency objectives (reducing adjournment numbers, and ensuring guilty pleas are entered at the earliest opportunity). They showed that an average of 40 per cent of cases listed at the observed status hearings were resolved, either by the withdrawal of charges, or guilty plea (sometimes on amended charges).¹⁹ The fact that a case listed for a status hearing is not resolved does not necessarily mean that this has been wasted time (for example, where charges are amended to something more appropriate to the alleged conduct, or issue identification and timetabling occurs), but it is not a good use of courtroom time.

¹⁶ Standby trials are necessary because of the number of trials that at very late notice do not proceed. A standby trial will take place only if a firm fixture collapses. The standby system requires counsel to reserve the date and prepare for a trial (for example, organising witness attendance) that may not take place. They also need to attend second and third callovers for the week in which their standby trial is scheduled. Counsel must be ready to start on any day of the week of the standby trial. If, for example, a firm fixture collapses at midday on Tuesday the court expects a back-up trial to be ready by no later than 10.00 am the following morning: 2004 Evaluation, above n 15, 7.1.2.

¹⁷ In one recent case of which we were anecdotally advised, there had been 22 callovers, which was the subject of an application for dismissal on abuse of process grounds.

¹⁸ See above n 15. Status hearings were observed in five District Courts (Whangarei, Manukau, Hamilton, Masterton, Christchurch), and also pre-trial callovers in the Auckland District Court indictable jurisdiction.

¹⁹ Ministry of Justice and New Zealand Law Commission, above n 15, table 3.19.

- 33 The cases that were resolved at status hearing were not necessarily being dealt with more efficiently. The proportion of total cases in the District Court disposed of at status hearing between July 1997 and June 2001 increased from 10 per cent to 16 per cent. However, guilty pleas at list court declined by roughly the same amount (from 64 per cent down to 59 per cent). It therefore appears possible that many of the guilty pleas that formerly occurred at earlier appearances are now being deferred to a status hearing, thus increasing the time and resources spent on those cases prior to guilty plea. We were told that in submitters' experience, status hearings encourage delay of guilty pleas for tactical reasons that include: triggering further disclosure; the shorter lists on status hearing days, which allow more time for submissions on behalf of clients; uneven sentencing discount practice, whereby greater discounts are given at status hearing than on list appearances, because the judge is resolution-focused; time for the accused to complete counselling or other intervention with a view to more favourable sentence; or just a further opportunity for procrastination.
- 34 On average across the five courts studied, about 18 per cent of status hearings were adjourned, usually to another status hearing.²⁰ Many of the adjournments appeared to be unnecessary and were the result of lack of preparedness by the parties (although such adjournments are preferable to the case proceeding straight to trial if they do eventually produce a resolution). It was not possible to find out whether since the advent of status hearings, more cases are resolved without adjournment, or how many adjournments a case typically takes (that is, whether it is fewer than previously).
- 35 Data available on finalised summary cases from July 1997 to June 2001 does not indicate that status hearings encourage earlier resolution in the sense of decreasing the number of cases taken to trial (either defended hearing, or last-minute pleas and withdrawals). However, many submitters strongly believed that status hearings had been effective in this regard. Some support for their view can be found in a 1981–1982 study of police prosecution files in three District Courts over periods of 6, 3 and 1 months respectively.²¹ In that study, the proportion of all cases proceeding to defended hearing was 16 per cent, whereas in 2000–2001 the comparable figure was 5 per cent.
- 36 Status hearings do appear to have some benefits other than efficiency, which are in the overall interests of justice. Although working imperfectly, they do provide a focal point and incentive for early case preparation (relative to when it would previously have occurred, which was immediately before trial). They encourage parties to discuss the case informally, by providing a forum for giving effect to the outcome of such discussions. Discussions that have not been held or have failed to reach a resolution can be progressed through judicial facilitation. There is scope for complainant input to a status hearing that is court-sanctioned but less formal than a trial, and likewise a chance for defendants to have their say in court if they choose, without prejudice.

²⁰ Ministry of Justice and New Zealand Law Commission, above n 15, table 3.19. This does not include those set down for defended hearing, or where there was a guilty plea and the case adjourned for later disposition.

²¹ M Stace "The Police as Prosecutors" in N Cameron and W Young (eds) *Policing at the Crossroads* (Allen & Unwin/Port Nicholson Press, Wellington, 1986).

All of this means that charges and pleas can be determined on a more informed basis than if the system proceeded in a purely adversarial way. This all tends to promote satisfaction with the outcome.

- 37 However, there are also concerns that status hearings have the potential to operate unfairly and to produce unjust outcomes. These concerns derive from the fact that judges may take a very active role in proceedings, depart from their traditional role of impartial observer by encouraging parties to discuss the case, express views about the responses while relatively uninformed about the evidence, and offer sentencing “deals” that may have the effect (actual or perceived) of putting pressure on defendants to plead guilty for pragmatic reasons.

Similar experience in other jurisdictions

- 38 The limitations of status hearings as they currently operate appear also to exist with the equivalent processes of intermediate diets in Scotland, and contest mention hearings in Victoria. In those jurisdictions, as in New Zealand with status hearings, these innovations were add-ons to the existing process. While the balance of opinion about them is positive, there are reservations about whether their efficiency gains are optimal, or even enough to justify their continuance; there is also what might be described as a sense of fatalism about ongoing non-compliance by counsel.
- 39 However, this is not to suggest that there is no merit in such processes; we share the view of all the key stakeholder groups we consulted, that they should be built on, not abandoned. The key lies in addressing the whole pre-trial process and, in addition, the underlying behavioural motivators: legislative amendments that merely tweak discrete parts of the process will not suffice.
- 40 In the late stages of drafting this report, we were alerted to a similar big picture review of pre-trial criminal justice processes that is occurring in the United Kingdom, known as the Case Preparation Project. There is a striking similarity between a number of the Case Preparation Project initiatives and the recommendations in this report, although they were entirely independently developed.²² There is also a striking similarity between the

²² For example, a new case progression function within courts, whereby an individual officer will be assigned to every case and responsible for informing the court of progress, warning of impending delay, and requesting more time if necessary; an expectation that defence and prosecution will come to their hearings fully prepared; reviewing fee structures for counsel to reward early and proper preparation; requiring the Legal Services Commission to monitor and take action in relation to legal firms who are repeatedly failing, including the threat of docking fees; asking judges to insist as a condition of bail on regular contact between defendants and their lawyers, breach of such conditions to be punished by a spell in custody or community service; a requirement on counsel to advise the court of bail breaches or other procedural non-compliance; an active and, where necessary, interventionist approach to judicial case management; graduated sentence discounts to encourage earlier guilty pleas by defendants; provision for wasted costs orders against barristers; use of league tables to name and shame criminal justice providers. See Professor Michael Zander QC “Can the Criminal Justice System Be Licked Into Shape?” (11 July 2003) New LJ 1049; Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor “National Launch of the Case Preparation Project” (30 June 2003) <http://www.dca.gov.uk/speeches/2003/lc300603.htm> (last accessed 16 April 2005). See also Philip Plowden “Case Management and the Criminal Procedure Rules” (18 March 2005) New LJ 416.

Lord Chancellor's statement of the United Kingdom problem and our own analysis of the issues in New Zealand:²³

... the ineffective trial, the badly prepared case, the game playing ... the lack of urgency about the system, the inefficiencies. These are the issues we are addressing ... Not in a way that compromises justice. But in a way which recognises that the [criminal justice system] must stand out as an outstandingly well run public service in which the public have faith ... All too often I am told these problems are "intractable". It is said "This is just the way the system works, and the public has to accept them". The system doesn't have to be like that. The public shouldn't have to put up with it. There are areas in the country where the discontinuance rate is very low, where the speed within which cases are brought on is good, where the level of ineffective trials is low. We all know, and accept that the problems which bedevil the system, and which so exasperate the citizen when he or she gets involved in the criminal justice system can only be solved if there is deep-seated, sustainable genuine cross-agency working.

- 41 The Case Preparation Project was launched in mid-2003; in the 2 years since, there have been pilot projects running in seven regions,²⁴ to identify best practice with a view to possible national implementation from mid-2005. Unfortunately, in the limited time available, we were unable to obtain any evaluative material as to the success of these pilots.

²³ Lord Falconer, above n 22.

²⁴ Bedfordshire, Essex, Greater Manchester, London, North Wales, West Midlands, and West Yorkshire: http://www.cjsonline.org.uk/news/2003/june/effective_trial_management_conference.html (last accessed 16 April 2005).

2

Doing justice efficiently in the summary jurisdiction

THE SCOPE OF THIS REPORT

- 42 **T**HE TERMS of reference for this project focused solely on status hearings. However, we do not believe that status hearings can be reformed in isolation from the rest of pre-trial process; this kind of approach has been tested in the 10 years since their implementation, and has clearly failed. We have therefore found it necessary to go much further than was envisaged by the terms of reference, and to examine the whole summary jurisdiction pre-trial process, as well as the culture that drives it.
- 43 All cases in the criminal justice system proceed summarily from the outset. Summary charges (non-imprisonable matters, or those with a maximum prison term of 3 months or less) remain summary throughout: that is, they are tried by a judge sitting alone. Electable charges (with a maximum prison term of more than 3 months) may be tried summarily; alternatively, if the defendant elects jury trial, these cases are transferred to the indictable jurisdiction at the point of committal, when a ruling is made that the defendant has a case to answer and he or she is committed to the District Court for trial. Purely indictable cases are always tried by jury, either in the High Court, or sometimes in the District Court if (for middle band cases) the High Court considers that appropriate.²⁵ Like electable cases, purely indictable cases proceed summarily up to the point of committal. However, none of the case management recommendations in this report are intended to apply to them (although there are some recommendations of general application, such as defence disclosure and sentence indications). The reasons for this are discussed in chapter 9.

REFORMING THE WHOLE SUMMARY JURISDICTION PRE-TRIAL PROCESS

- 44 Status hearings cannot be reformed in isolation because, in short, one thing leads to another: early guilty pleas are unlikely if charges have not been well-scrutinised and the evidence that supports them disclosed; the culture

²⁵ Schedule 3 Criminal Procedure Bill 2004 substitutes a new Schedule 1A District Courts Act 1947, which will list all purely indictable cases (that is, middle band and High Court only cases). The Bill repeals the category of “purely indictable offences triable in the District Court”, and instead includes some of those offences in the middle band. There are also, at present, “indictable offences triable summarily” on the initiative of the prosecution. The government has agreed that, as part of the *Simplification of Criminal Procedure* project discussed in ch 12, this prosecution choice of forum should be removed. Because, in our view, that project is a necessary precursor to implementing the recommendations in this report, we make no mention of that category of offences.

of adjournments in the list court perpetuates that culture throughout; matters are brought into court because there is no provision for administrative intervention, or because registrars are inadequately utilising their powers; case management discussions may be limited in their efficacy if counsel are unwilling to disclose their defence or are poorly prepared or otherwise uncooperative. It is impossible for status hearings to function optimally if deficiencies in other parts of the process that precede and support them are not first addressed.

- 45 Criminal justice resources will be optimally used if administrative matters are dealt with outside the courtroom, and non-judicial matters are not the responsibility of judges, thereby reserving court and judicial time for cases that really require it.²⁶ The judicial intervention that currently occurs in status hearings is only required because otherwise nothing would happen: there are no levers on parties other than the exercise of judicial authority. More appropriate use of this relatively expensive and expert resource therefore necessitates consideration of what changes are required to other parts of the pre-trial process (such as disclosure, counsel discussions, registrars' powers), to ensure that these things will happen out of court as a matter of course, with minimal judicial input.
- 46 The problem is not just legal and operational: it is also cultural. Entrenched habits will not change without robust incentives and sanctions to drive the change. Without proper backing judges not only have to do more at status hearings; they cannot be optimally effective as enforcers, because they are unsupported in sanctioning those who prefer to evade the process, or manipulate it to their advantage. We therefore recommend more robust mechanisms for enforcing summary jurisdiction pre-trial processes, in the form of a national legislative mandate, and sanctions for non-compliance. However, the sanctions are discretionary (which is essential if they are to operate fairly). This means that the efficacy of the proposed process will continue largely to be driven by judges.
- 47 Views were several times expressed to us, in consultation on the penultimate draft of this report, that much of what we are recommending could occur within the existing legislative framework, voluntarily or by the exercise of judicial discretion; in some regions or with some individuals, the things that we are recommending already do occur. It is true that many of the individual components of this report are not fresh thinking on our part: they are in large part a collation of best practices and processes that are in some places or from time to time operating informally. However, they do not occur often enough. What is fresh and critical about this report is its recommendation for a summary jurisdiction pre-trial process that is nationally consistent; equally allocates and regularly enforces responsibilities; and (most importantly) is an integrated process.
- 48 For all of these reasons, it is essential that the numerous legislative and operational recommendations in this report be regarded and implemented as a package. If isolated aspects are implemented, and the rest ignored, we cannot emphasise too strongly that they will not be effective.

²⁶ This kind of approach was signalled in relation to the criminal list court process in *Delivering Justice for All*, above n 1, 138–146.

- 49 It will no doubt be said by some, in response to this report, that justice is playing hostage to expediency. However, it is our intention to achieve both efficiency and justice: up to a point, efficiency gains will be justice gains. The remainder of this chapter outlines the key components of our recommended pre-trial process that will pay dividends for both efficiency and justice.

THE PURSUIT OF EFFICIENCY AND JUSTICE

- 50 Our proposals, which are intended to optimally achieve both efficiency and justice in the pre-trial process, are underpinned by the following general propositions.
- 51 The Police Prosecution Service must be structured to ensure the early scrutiny of alleged offending, in order to determine what charges are warranted on the evidence before they are laid or as soon as practicable thereafter. This is because:
- internal scrutiny of charges will minimise any public perception of mistakes and unfairness by investigating officers; and
 - it is clumsy and wasteful when charges are laid and court processes initiated, then terminated by withdrawal of the charge.
- 52 Police prosecutors need to consider, and have options available for, alternative methods of addressing minor offending where criminal charges are legally proper (in the sense of evidential sufficiency), but court prosecution would be unduly heavy-handed. This is because:
- a range of options allows state intervention to be better tailored to fit the crime, to avoid bringing justice into disrepute in the eyes of observers (for example, by prosecuting charges that only warrant a sentence of discharge without conviction); and
 - if court proceedings are a last resort, it will lighten the load on court resources.
- 53 Pre-trial processes should occur in a logical sequence (for example, committal for trial should only occur after plea and charge discussions, and full disclosure only after eliminating the cases that are capable of resolution on a smaller quantity of information). This is so that:
- the criminal justice system is comprehensible to laypersons, including complainants and defendants, and therefore more transparent; and
 - parties do not waste their resources by committing them to developing the whole or parts of cases that then do not proceed.
- 54 Mechanisms are needed for monitoring and managing cases out of court. An example is providing for agreed matters to be dealt with on the papers, or by intervention of a court registrar or case officer, so that cases are set down for a court event only when they are ready to progress, and may not need to be set down at all. This is so that:
- judges spend their time judging rather than rubber-stamping or engaging in quick-fire disposal, both of which have the potential to undermine judicial authority, integrity and justice; and

- where court intervention is required, it is minimised, to appropriately target resources and expertise.
- 55 Prosecutors and defence counsel must reciprocally communicate, and the same applies to counsel and defendants; prosecutors and complainants; parties and the court. This includes two-way disclosure (by the prosecution as required by the Criminal Procedure Bill 2004, and by defence of the issues in dispute); a requirement on parties to discuss the case and file in court a memorandum recording the outcome of their discussions; and sentence indications for defendants (including a clearly articulated sentencing discount that is greater the earlier the plea). This is so that:
- what is happening and why is transparent to both participants and observers;
 - everyone can make informed choices about whether and how the case should proceed; and
 - resources are not misdirected to irrelevant matters.
- 56 Judges should continue to have some oversight of pre-trial processes, both in and out of court. This is because:
- there needs to be independent scrutiny and assurance that what is occurring is in the overall interests of justice; and
 - it is widely recognised that the exercise of judicial authority is the most effective way to maximise pre-trial process compliance with minimal additional complexity.
- 57 Judges presiding over a pre-trial hearing need to be properly informed in advance about the cases before them (for example, by the prior filing of a case management memorandum, with a copy of initial disclosure). This is because:
- if judges presiding over pre-trial appearances make recommendations or bring pressure to bear ad hoc, they are as likely as anyone else thinking on their feet to make mistakes, resulting in the determination of a case one way or the other that may not adequately address the merits; and
 - it will enable cases that do not require judicial intervention to be identified and dealt with administratively, and for the cases that are heard, judges can focus solely on the issues that remain unresolved.
- 58 Pre-trial processes must be nationally consistent, because:
- justice should be dispensed equally, with differences in process and outcome justified only by the different circumstances of each case; and
 - if there is one common procedure, there will be fewer unnecessary adjournments due to mistake or judge-shopping, thus reducing the number of events that courts must manage.
- 59 The pre-trial process should not only be efficient in itself, but should also promote efficient trials (for example, by informing the prosecution on the essential issues, and likewise telling the judge or jury what those issues are at the outset of the trial). This will:

- lessen the possibility of confusion and error by the fact finder, and therefore increase the likelihood that they reach the right result; and
- reduce the length of proceedings, or ensure that they can be accurately scheduled.

60 The system needs to maximise opportunities for early acceptance of responsibility, and discourage not guilty pleas unless there is a genuine rather than pro forma denial. An example is issue identification by the defence; another is the point at which the alleged offender is asked to formally plead. This is because:

- even an adversarial system should not condone conducting proceedings and possibly winning them in ways that have more to do with tactics than the merits;
 - delayed resolutions disadvantage victims' interest in timely justice, the offender's interest in a sentence discount, and the court and state resources involved in supporting the delay; and
 - both of the above undermine community confidence and the perception of justice.
-

3

Police Prosecution Service: structure and processes

- 61 **T**HE INFORMATION (the document that initiates criminal proceedings) contains the charge faced by the defendant, and dictates what follows. Two things are vital for the effectiveness of any reform of the pre-trial process: first, that the charges have been properly scrutinised to ensure that they are based on sufficient evidence and are appropriate in the public interest; and secondly, that the charges are supported by a fair and accurate summary of alleged facts and disclosure of information upon which they are based. Proper attention to these matters at the outset enables an early and informed decision by the accused as to plea; inadequate attention invites not guilty pleas, causes unnecessary adjournments and delays, and may result in the late withdrawal or amendment of charges.
- 62 It clearly emerged from consultations on Preliminary Paper 55 that these matters are seldom properly attended to; that the presently limited role played by police prosecutions in the initial stages of a case militates against its early resolution; and that this has a number of structural and operational causes that must be addressed if our proposed reforms are to achieve significant efficiencies. That is the subject of this chapter.
- 63 Although the police are the principal prosecution agency, responsible for approximately 90 per cent of all criminal prosecutions, a number of other government agencies have a prosecution function. Some have a centralised prosecution decision-making structure that enables scrutiny of the charges proposed by enforcement officers before they are laid. Others leave initial prosecution decisions in the hands of individual enforcement officers and undertake little or no initial independent review of the appropriateness of the charges. We have consulted with a number of these other agencies and are satisfied that the procedures we recommend are generally workable and desirable.²⁷ However, we have not undertaken a detailed analysis of the way in which each agency operates and are not in a position to recommend the extent to which they should change their operational methods. Moreover, there are likely to be particular factors associated with prosecutions in some of those agencies that require modification of the Police Prosecution Service recommendations. For example, the proposal that all charges be the subject

²⁷ In addition to police, we consulted the five highest-frequency prosecution agencies, based on 2003 figures obtained from the Ministry of Justice: Department of Corrections (Community Probation Service); Inland Revenue Department; Department of Work and Income; Accident Compensation Corporation and the Ministry of Fisheries. We also consulted the Serious Fraud Office, the Crown Law Office, and all Crown Solicitors. However, because the last two generally operate only in the indictable jurisdiction, they will be largely unaffected by the recommendations in this report.

of review by the prosecutor before or during the administrative phase of the case may not be appropriate in an agency, such as the Inland Revenue Department, where the bulk of charges are for absolute liability, non-imprisonable offences. Thus, although our proposed pre-trial process elsewhere in this report is intended to be of generic application, the recommendations in this chapter are confined to police prosecutions.

CURRENT POLICE PROSECUTION PRACTICE

- 64 Most prosecutions follow an arrest arising from the police investigation of a complaint, or attendance at an incident. There are local variations to the standard pattern, but a description of typical police practice in preparing the prosecution case follows.
- 65 The charge a defendant faces is initially determined by an investigator and almost invariably reflects the offence for which the defendant was arrested. The investigator prepares the information, which he or she then forwards to the court orderly (a constable located at the court) who swears the information before a registrar.
- 66 The investigator also prepares a prosecution file, which at a minimum should include:
- a copy of the information;
 - a summary of facts;
 - a printout of the defendant's criminal history;
 - an "opposition to bail" form if bail is to be opposed;
 - any recommendation as to police diversion in respect of a potentially eligible defendant;
 - an "initial disclosure pack" consisting of a copy of the information, a copy of the summary of facts, the defendant's criminal history, and any notebook entry or other record of the investigator's interview of the defendant.
- 67 The file is sent through a supervisor to the prosecutor before the defendant's first court appearance. Because of the relatively short time between arrest and that first appearance (a matter about which we make more comment below), not all of the minimum matters may be on the file at that stage, and the information contained on the file in most cases is quite sparse. At the defendant's first appearance or as soon as practicable thereafter, the defendant or his or her counsel is provided with the initial disclosure pack. Although this is supposed to facilitate advice in relation to plea, in reality counsel often find it insufficient for this purpose as to either content, or timeliness.
- 68 In summary proceedings, unless the defendant enters a guilty plea, most cases are adjourned to a status hearing.²⁸ The prosecutor usually sends the file back to the investigator to prepare the case for status hearing, and for the full disclosure to which defendants are entitled as a consequence of the

²⁸ Cases in which the charge has been laid on indictment or the defendant elects trial by jury proceed differently: see further ch 1.

not guilty plea. This includes the completion of job sheets of witness interviews, sometimes briefs of evidence, and any further material that has been requested by counsel. Once the file is completed it is returned to the prosecutor.

- 69 There are two key points in this process at which discussions may or may not occur, between counsel and the prosecutor or investigator, about matters such as disclosure or the appropriateness of the charge or fact summary, with a view to an early guilty plea. The first is at the initial “list court” appearance; the second before the status hearing. However, as a general rule, in the absence of a forum or requirement for such discussions, one or both parties tend to be insufficiently organised to make sensible progress with them.
- 70 In the police side to that equation, while there are minor variations in the standard process from district to district and from case to case, its deficiencies are more or less universal. They comprise:
- a lack of early scrutiny of the evidential basis for the charges;
 - inadequate scrutiny of whether prosecution is appropriate in the public interest;
 - the requirement that charges, once laid, can only be withdrawn with the leave of the court;
 - problems of inadequate or untimely disclosure.

LACK OF EARLY SCRUTINY OF THE EVIDENTIAL BASIS FOR THE CHARGES

- 71 In theory, both the investigator’s supervisor and the prosecutor should oversee the process of laying charges to ensure that there is a sufficient evidential basis for them. However, in practice that oversight is often inadequate or non-existent.²⁹
- 72 Where serious charges are laid following a long investigation, there may well be detailed oversight by a supervising officer (for example, a detective sergeant or detective inspector), and in some instances the supervisor will personally determine the nature of the charges to be brought. However, in other cases where less serious charges are brought following police attendance at an incident and a subsequent arrest, scrutiny by a supervising officer is often cursory.
- 73 In addition to any oversight exercised by the supervisor, the criteria to guide prosecutors in making decisions about initiating or continuing a prosecution, which are presently found in the *Solicitor-General’s Prosecution Guidelines*,³⁰ require the prosecutor to assess evidential sufficiency: that is, whether there

²⁹ In the discussion that follows, by “oversight” and “scrutiny” we mean review of the charging decision, as opposed to making that decision. In this respect, our recommendations differ from the United Kingdom approach. We acknowledge that sometimes the line between the two will be fine.

³⁰ *Solicitor-General’s Prosecution Guidelines* (1992) reproduced in New Zealand Law Commission *Criminal Prosecution* (NZLC R66, Wellington, 2000) Appendix C.

is admissible and reliable evidence that an offence has been committed by an identifiable person and whether that evidence is sufficiently strong to establish a prima facie case.³¹

- 74 Under current prosecution practice, this requirement is generally not met until well after the initiation of proceedings. If the charges are laid on indictment or jury trial is elected by the accused at first appearance, the prosecutor does not scrutinise the evidential basis for the charges until he or she is reviewing the case for a committal hearing; and where the charges are laid summarily, the prosecutor does not do so until shortly before a status hearing following a not guilty plea, which is approximately 6 weeks after first appearance.
- 75 The lack of systematic independent scrutiny of the case for evidential sufficiency at the outset of the court process has two structural causes: responsibility for file management; and the process by which arrested offenders are brought before the court.

Responsibility for file management

- 76 Current police practice is that ownership of the case rests with the investigator: he or she is responsible for determining the appropriate charges; preparing the file to support it; meeting requests for disclosure; and preparing briefs of evidence. As noted by the Law Commission in *Criminal Prosecution*,³² the Police Prosecution Service is structurally and functionally separate from police investigators, and decisions as to the appropriateness of charges should be made independently of investigators and in accordance with standard prosecution criteria. However, in practice, the prosecutor does not effectively take control of the prosecution file until shortly before the committal hearing or a status hearing; even then, he or she is often reluctant to amend or withdraw charges without seeking the views or even the consent of the investigator as officer in charge of the case.
- 77 In the initial stages, therefore, the investigator is inclined to see the prosecutor's role as being largely confined to taking the case through court. There is no expectation that the prosecutor will wish to scrutinise the file or take an independent view of the case. Hence the initial prosecution file often lacks the documentation necessary for an independent assessment of the appropriateness of the charges by the prosecutor. Instead, it tends to provide only the information that the investigator deems necessary for the initial stage of the proceedings (that is, to arrange administrative matters such as bail).
- 78 In our view, it is critical to the efficient functioning of the pre-trial process that there is consistent independent scrutiny of the charges so far as possible before the initial court hearing, or otherwise before the end of the administrative phase of the case. This can only be achieved if the prosecutor has overall responsibility for the file as soon as possible after the charges are

³¹ A prima facie case is defined in para 3.1 of the *Solicitor-General's Prosecution Guidelines*, above n 30 as follows: "if the evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt".

³² New Zealand Law Commission, above n 30.

formulated (and preferably before the information is laid in court), and receives sufficient information from the investigator at that time to enable the required scrutiny to occur.

79 We understand that the police intend to initiate changes to ensure that both the investigator's supervisor and the prosecutor generally discharge these functions by the time of the initial hearing. The type of changes envisaged include:

- formalising the supervisor's role in assuring evidential sufficiency before a charge is laid;
- establishing a uniform standard for material required to comprise a prosecution file, which should be comprehensive enough to allow proper screening to occur; and
- giving prosecutors responsibility for the file from the outset and requiring them to assess cases for sufficiency of evidence as early as possible in the proceedings.

80 We recommend that these changes be implemented as an integral part of the package of reforms recommended in this report.³³

81 The proposal that prosecutors have responsibility for the file does not mean that they must always retain physical control of it. In most cases, after the laying of charges the investigator does not need to undertake any further work on the case until the preparation of briefs of evidence, so that it is both workable and desirable that the prosecutor retain physical control. However, in a minority of cases (generally the more serious and more complex ones), ongoing investigations make it impracticable for the prosecutor to retain physical control unless the investigator creates a parallel working file, which carries its own risks. In these cases, it may be preferable for the file to be transferred back to the investigator, and for close liaison between the prosecutor and the investigator to be maintained. We note that the police are intending to trial file evaluation processes as one means of addressing some of the issues associated with internal file movements. Thus, apart from the general recommendation that ultimate responsibility for the file should rest with the prosecutor, we make no proposals in this respect.

³³ See Ian D Brownlee "The Statutory Charging Scheme in England and Wales: Towards A Unified Prosecution System?" [2004] Crim LR 896 for a discussion of recent United Kingdom developments in relation to charging decisions. Section 28 and Schedule 2 Criminal Justice Act 2003 consequentially amend the Police and Criminal Evidence Act 1984. Most charging decisions will rest with the Crown Prosecution Service: once a police custody officer reaches the view that there is sufficient evidence on which a person could be charged, the case will be referred to a prosecutor for a decision about whether they should in fact be charged. The goals of this reform are similar to ours, and are summarised as follows by Brownlee: "the elimination at the earliest opportunity of hopeless cases, the production of more robust prosecution cases, the elimination of unnecessary or unwarranted delays in the period between charge and disposal, and the reduction of the number of trials that 'crack' through the offering and acceptance of guilty pleas to reduced charges at a late stage in the process". The Auld report had identified police overcharging and Crown Prosecution Service failure to thoroughly review charging decisions at an early stage as significant contributors to unduly prolonged criminal proceedings: Auld LJ *Review of the Criminal Courts of England and Wales* (HMSO, London, 2002).

The process for bringing arrested offenders to court

- 82 The problems caused by diverse responsibility for case management are exacerbated by the process for taking arrested offenders to court. More often than not, the process does not allow sufficient time for independent scrutiny of the file, even if prosecutors had enough information to do so.
- 83 The legislative structure governing that process stipulates that:
- every person who is arrested on a charge of any offence must be brought before a court as soon as possible, whether or not they continue to be held in police custody (section 316(5) Crimes Act 1961);
 - a person who has been arrested without warrant and charged with an offence that can be dealt with summarily, and who cannot practicably be brought immediately before a court, may be released on the issue of a summons to appear in court on a specified date within the next 2 months (section 19A Summary Proceedings Act 1957);
 - a person who has been arrested without warrant and charged with an offence that can be dealt with summarily, and who cannot practicably be brought immediately before a court, may be granted police bail on condition that they appear in court on a specified date within the next 7 days (section 21 Bail Act 2000).
- 84 These provisions were drafted at different times and there is an apparent contradiction between them. Section 316(5) Crimes Act 1961 is not made subject to either section 19A Summary Proceedings Act 1957 or section 21 Bail Act 2000, and each of the latter provisions presents release on summons and bail respectively as an alternative to immediate appearance without reference to the other. Although this legislative scheme is not entirely transparent as to when the respective provisions are intended to apply, it does not cause any significant difficulties of interpretation in practice. The effect of it is that:
- Arrested persons who are held in police custody must be brought before a court as soon as “reasonably possible”.³⁴ Generally that means the next sitting day, although in the event that no court sitting is scheduled within the next day or two, a special sitting needs to be arranged. A substantial minority of offenders (at least in metropolitan areas) fall into this category, comprising those in respect of whom the police intend to oppose bail and those who are arrested late at night or in the morning and can more easily be taken to court than bailed. The short time between arrest and court appearance generally precludes a proper scrutiny of the file for evidential sufficiency.
 - Arrested persons who are released on police bail must appear on the date specified in the bail bond within the next 7 days. Often the date specified will be no more than a day or two from the time of arrest, and again there is little opportunity for a proper review of the evidential basis for the case.
 - Arrested persons who are released on summons must appear on a specified date within 2 months. Our impression is that, while this procedure does allow sufficient time for independent scrutiny of the case, it is not often

³⁴ *R v Alexander* [1989] 3 NZLR 395; (1989) 4 CRNZ 317 (CA).

used in metropolitan areas. In provincial and rural areas, where list courts may be held only once a fortnight or even less frequently, it is commonly relied upon in order to avoid the need for a special court sitting. However, because such courts are often serviced by police prosecutors from another city or town, the files may not reach them, and in any case tend not to be examined, until shortly before the date of the court hearing.

- 85 It is not simply a matter of timing that impedes police scrutiny of the case. While the requirement in section 316(5) is arguably a provision directed to the *timing* of a court appearance, it has often been interpreted by the police as dictating the *need* for a court appearance following arrest: that is, that the court rather than the police must determine the outcome once an arrest has taken place. As a result, the expectation that a court appearance will routinely and unquestioningly follow arrest is embedded in police culture.
- 86 The police are also inclined to the view that taking an arrested offender to court lessens the risk of a civil claim arising from the arrest. They argue that a decision by a prosecutor to discontinue a prosecution on the grounds that it is not appropriate to proceed with the charge seems, at first sight, to contradict the investigator's belief that there is good cause to suspect the defendant had committed that very offence. A discontinuance before court proceedings have commenced thus invites the conclusion the arrest was invalid and increases the potential for a civil claim of false imprisonment.
- 87 In our view, both arguments are misconceived. The discretion not to prosecute is not inconsistent with the requirements of the section. The threshold for arrest (that there is good cause to suspect that a person has committed an imprisonable offence) is lower than the threshold for prosecution (a *prima facie* case), and the former does not necessitate the latter. Indeed, there is a positive duty to discontinue a prosecution where the prosecutor is of the view that there is no basis for it and the validity of the arrest is unaffected by that decision.³⁵ In effect, two quite separate discretionary decisions are made: the first by the investigator with respect to the arrest and charge of the defendant; the second by the prosecutor with respect to the prosecution of that charge. Each rests on its own considerations. There may be ample evidence to support a reasonable suspicion that the defendant has committed an offence, yet subsequent investigations or independent screening suggests that the prosecution should not continue. That is entirely proper.
- 88 We therefore recommend that:
- sections 316(5) Crimes Act 1961, 19A Summary Proceedings Act 1957 and 21 Bail Act 2000 be redrafted to ensure consistency and transparency in the legislative framework for bringing arrested offenders to court;
 - the redrafting of section 316(5) makes clear that:
 - arrested persons may be released without charge if there is insufficient evidence to justify a prosecution; and

³⁵ See *Wiltshire v Barrett* [1965] 2 All ER 271, and also (implicitly) section 23(2) New Zealand Bill of Rights Act 1990, which provides that an arrested person must be charged promptly or released.

- the requirement that arrested offenders be brought before the court as soon as possible applies only to those offenders held in police custody.
- the 7-day time period within which offenders released on police bail under section 21 Bail Act 2000 may be required to appear in court is extended to 14 days, thus allowing more time for the prosecution file to be properly prepared with the requisite information, and independently scrutinised by the supervisor and then the prosecutor;
- the Bail Act 2000 is amended to allow the defendant to apply for review of any conditions of police bail imposed under section 23(4);
- the police ensure that, so far as is practicable, arrested persons who are released on police bail or a summons are required to appear in court on a date that allows sufficient time for the preparation and review of the prosecution file;
- where there is insufficient time to scrutinise the file before the initial hearing, the prosecutor (in the absence of an immediate guilty plea) ensures that such scrutiny occurs during the administrative phase of the case.³⁶

89 The Police Prosecution Service expressed reservations about whether the staggering of the first appearances of bailed defendants over a 14-day period would necessarily facilitate independent prosecution scrutiny of the file, because investigators would continue to give priority to investigative rather than paper work, and would simply take longer to prepare the file. Like most of the recommendations in this chapter, this one will be effective only if the independent role of the Police Prosecution Service is accepted and supported within the police as a whole, which is likely to require new attitudes and new practices by management as well as front-line staff.

INADEQUATE SCRUTINY OF THE APPROPRIATENESS OF A PROSECUTION IN THE PUBLIC INTEREST

- 90 Even if there is sufficient evidence to justify the prosecution, the *Solicitor-General's Prosecution Guidelines* require the prosecutor to consider whether "the public interest requires the prosecution to proceed".³⁷
- 91 However, based on our own observation of status hearings, and anecdotal feedback, it appears that the police do sometimes persevere with minor cases where the evidential sufficiency criterion is met, but no public interest is being served in pursuing the matter before the court.
- 92 The structural and legislative factors already discussed, which impede early scrutiny of the evidential basis for the charge, also impede consideration by the prosecutor of whether the prosecution is appropriate in the public interest. However, there are two other significant obstacles as well: the nature of the *Guidelines* themselves, which limit their usefulness as a guide to prosecution practice in this respect; and the paucity of alternative informal disposition options in the event that prosecution does not proceed.

³⁶ See ch 4.

³⁷ *Solicitor-General's Prosecution Guidelines*, above n 30.

The nature of the guidelines

- 93 In its report *Criminal Prosecution*,³⁸ the Law Commission recommended that the *Solicitor-General's Prosecution Guidelines* should be reviewed to increase their utility and relevance.³⁹ Although we understand that some work has been undertaken by the Crown Law Office, revised guidelines have not yet been issued.
- 94 We remain of the view that the *Guidelines* are unsatisfactory in respect of the matters previously identified by the Commission, and also the following matters.
- 95 First, the *Guidelines* note that “a dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not it will result in a conviction”, which is a higher threshold than the prima facie case threshold required for the evidential sufficiency test in the *Guidelines*. We accept that, while the absence of a prima facie case should always preclude the continuance of a prosecution, the fact that a prosecutor puts the prospects of a conviction at less than 50 per cent should not always lead to discontinuance, although it will generally do so. However, in contrast to the view expressed by the Law Commission in *Criminal Prosecution*, we do not think that this is dictated by the nature of the offence. Rather, it depends upon the nature of the evidence upon which the case is based. For example, where the case hinges on the credibility of witnesses (as in many sexual offence trials) or requires an assessment of the reasonableness of the accused’s actions (as in charges of assault where self-defence is in issue), it may not be appropriate for the prosecutor to attempt to second-guess the judge or jury. We recommend that the *Guidelines* be revised to clarify the sorts of cases where the prosecutor is justified in proceeding notwithstanding an assessment that acquittal is more likely than conviction. We are also inclined to the view that this should be incorporated within the evidential sufficiency limb (as is the case in the United Kingdom Code for Crown Prosecutors), so that all matters relating to the sufficiency and cogency of the evidence are incorporated within one integrated guideline.
- 96 Secondly, the *Guidelines* include 16 factors that are relevant to the assessment of the public interest, the first of which is “the seriousness or, conversely, the triviality of the alleged offence; ie. whether the conduct really warrants the intervention of the criminal law”. We recommend the inclusion in the *Guidelines* of an additional, related factor: if the intervention of the criminal law is warranted, whether proceeding by alternative means, such as caution, would equally or better address the needs at stake (that is, that court prosecution should be regarded as the ultimate sanction and a last resort).
- 97 Thirdly, the 15 remaining public interest factors provide insufficient guidance to prosecutors, because they do not attempt to prioritise the factors or indicate how they should be balanced. We recommend that the list of factors be revised to that end, and that the two matters discussed in the previous paragraph should be the paramount consideration.

³⁸ New Zealand Law Commission, above n 30.

³⁹ Specific recommended changes were that the grounds of prohibited discrimination in para 3.3.4 of the *Guidelines* should include the complainant; and the prohibited grounds of discrimination should be the same as those in section 21 Human Rights Act 1993 (and therefore include such matters as sexual orientation).

Police interpretation of the legislative framework

98 For the reasons we noted in relation to evidential sufficiency, the common police interpretation of section 316(5) Crimes Act 1961, which discourages them from discontinuing prosecutions before court proceedings, is misconceived. The same arguments are equally applicable in relation to the public interest limb of the prosecution test. There are many instances where arrest is both lawful and is required to deal with the immediate situation (for example, to defuse a street confrontation and prevent further disorder), but there is no public interest in taking the matter to court. In that event, the decision not to prosecute should be taken as soon as practicable, and the charges should be withdrawn at that point. If the prosecution proceeds to court and is then subsequently withdrawn for public interest reasons, the judge is generally reluctant to exercise oversight to ensure that the decision is appropriate and, as discussed later in the chapter, in practice usually has insufficient information to do so without further enquiry; any benefit of court proceedings in such circumstances (for example, the transparency of having decisions not to prosecute aired in open court) is therefore outweighed by the costs, inconvenience and overall impact on the efficiency of the system. Another possible advantage, the salutary effect of a court appearance on a first offender, is a factor to be considered in making the public interest assessment and otherwise can be compensated for by a sufficiently robust system of alternative dispositions.⁴⁰ We therefore recommend that, in addition to the evidential insufficiency amendments already discussed, section 316(5) Crimes Act 1961 should provide that an arrested person need not be brought before the court where a decision is made, in accordance with the *Solicitor-General's Prosecution Guidelines*,⁴¹ that court proceedings are not required and:

- the arrested person is advised that no prosecution action will be taken;
- no information is laid, or if an information has been laid it is withdrawn;
- where the prosecution is discontinued on public interest rather than evidential sufficiency grounds, the arrested person is cautioned (with or without a requirement to fulfil specified conditions); and
- the arrested person consents to information withdrawal (if applicable) and the terms of the caution.⁴²

The paucity of alternative options

99 Prosecutors may be hampered in screening cases against public interest criteria because of the absence of suitable alternatives. The alternative dispositions available to them if they decide that a case does not require the formal intervention of the court are often too limited in scope to be appropriate to the case. Thus, if they determine that the circumstances warrant more than the mere withdrawal of the charge and that some form of sanction is desirable, they may proceed with a prosecution because it is the only means of imposing that sanction.

⁴⁰ See paras 99–104.

⁴¹ *Solicitor-General's Prosecution Guidelines*, above n 30.

⁴² See also para 109.

- 100 The police diversion scheme, currently the primary method of dealing informally with offenders, deals with about 10,000 offenders per year. In each case an information is laid and the defendant appears in court, where the case is adjourned, usually by the registrar, for diversion to be attended to. Upon the defendant's completion of the conditions of the diversion, the prosecutor either offers no evidence on the charge, or seeks the leave of the court to withdraw the information.
- 101 There are a number of deficiencies with this scheme:
- It has no formal status or statutory recognition; while it is subject to guidelines produced by the Police Prosecution Service, its operation is largely left in the hands of local prosecution "diversion coordinators".
 - It is largely confined to first offenders charged with relatively minor offences, and thus fails to capture a number of cases in which prosecution might not be necessary.
 - It is initiated by court proceedings, and requires a court appearance and remand. However, in reality there is no judicial oversight of the police decision. Whilst there is the appearance of a court-sanctioned outcome, in substance there is no effective judicial supervision of the process or its result. The consequence is that court resources are expended in disposing of diversion cases, even though control remains entirely in the hands of the prosecutor and the offender, and no judicial intervention occurs or is required.
- 102 A number of community diversion schemes also operate in various parts of the country. Their relationship to police diversion, and to police prosecution decision making, is determined at the local level. However, broadly speaking, they suffer from the same deficiencies as police diversion.
- 103 We propose that the present diversion scheme be discontinued and that there be statutory recognition of alternative dispositions that can operate independently of the court process where the commencement or continuation of a prosecution is not warranted in the public interest.
- 104 We also recommend that a formal cautioning procedure be instituted, similar to that recommended by the Law Commission in *Delivering Justice for All*.⁴³ This should subsume the existing police diversion and community diversion schemes and, in broad terms, should operate as follows:
- The officer in charge of the case would prepare the file for prosecution in the usual way; the prosecutor requires the same quality and quantity of information on the file to make decisions regarding caution. It would be open to the officer in charge to recommend that a caution be given.
 - Upon receipt of the file, the prosecutor would assess whether prosecution was required in the public interest (where possible before the laying of the information, but otherwise as soon as possible thereafter). Where appropriate, this would involve consultation with the officer in charge of the case.

⁴³ New Zealand Law Commission, above n 1, 73–76.

- If the prosecutor determined that a formal caution was appropriate, with or without conditions, a proposal to that effect would be put to the offender for consideration and consent.
- Examples of conditions could include those currently used in police diversion (such as the payment of reparation, a donation to charity, or community work), or participation in a community diversion or restorative justice scheme.
- If the offender accepted the terms of the formal caution and its conditions, a notice containing a summary of the offence, the caution and its conditions, would be completed and signed.
- If an information had been laid, it would be withdrawn with the consent of the offender. This withdrawal could be delayed until the fulfilment of any diversion conditions, and in the meantime the defendant could be remanded at large by the registrar without the need for any court appearance.
- A record of the formal caution would be kept for 2 years and could be referred to by the police in the event of further offending within that period (although it would not form part of the criminal history submitted to the court).
- Where the offender did not accept the formal caution, or wanted the matter dealt with by the court, or if the offender having accepted the caution failed to fulfil any condition associated with it, the prosecutor would determine whether proceedings in court should commence or continue.

105 Currently, when offenders fail to comply with diversion conditions, their case can continue in court without the need for further prosecution action: they already have a scheduled court appearance (from which their attendance is excused only if they have complied with conditions), and when they have not complied they do usually appear as required. The Police Prosecution Service was concerned that our recommendations would be more resource-intensive, because non-complying defendants would need to be located and arrested or summoned to return to court. However, this is not a sufficient reason to take all diverted offenders, including the compliant ones, to court. The prosecution and court resources expended in that process far outweigh the resources involved in arresting or serving summons on the small proportion of offenders who will fail to comply with the caution conditions.

106 A further option raised by police prosecutors to deal with minor offending that did not require the formal processes of the court was for the infringement procedure to be extended to a wider range of offences, and available as an alternative in cases where the offender had been arrested. A recent overseas example is the “penalty offence” provisions of the Criminal Justice and Police Act 2001 (UK), which permit certain minor street offences to be dealt with on that basis. Because the proper scope of infringement offences falls within the terms of a separate reference the Law Commission is presently considering, it is more appropriate that we deal with any extension of the infringement notice process in that context. Accordingly, we make no recommendation on that proposal here.

THE REQUIREMENT THAT CHARGES BE WITHDRAWN ONLY WITH THE LEAVE OF THE COURT

- 107 Section 36 Summary Proceedings Act 1957 stipulates that charges, once laid, may only be withdrawn with the leave of the judge. Some submitters suggested that this is an important safeguard to ensure that the rights and interests of the parties are protected and that any alternative response to the offending is justified and proportionate. It gives the court's stamp of approval to the outcome and ensures some oversight and scrutiny of the discretion exercised by prosecution agencies.
- 108 This safeguard is of doubtful value. Where the decision to withdraw is based upon evidential insufficiency, the court is rarely in a position to assess the appropriateness of that decision, because it is not privy to the evidence upon which the case is based or cannot assess the credibility of those providing that evidence. Where the decision to withdraw is based upon the public interest, the court is in theory better placed to assess the appropriateness of the decision, because it can explore the reasons for it and the nature of any alternative action proposed. However, in practice judges are reluctant to question the exercise of prosecutorial discretion, and in any event find it difficult to do so on a principled basis without substantial information about the nature of and background to the case and the details of the alternative action. Obtaining that information would in many cases be sufficiently time consuming to largely remove the benefits of proceeding informally. Moreover, any safeguard against inappropriate discontinuance on public interest grounds is largely illusory, because the prosecution can simply discontinue proceedings at any point without judicial leave by offering no evidence. It is important that decisions to discontinue are made on a principled and consistent basis, but we think that is better achieved by the *Solicitor-General's Prosecution Guidelines* and robust internal police supervision, than by a legislative requirement of court oversight that is more notional than real.⁴⁴
- 109 However, we acknowledge the concern that an ability by the prosecutor to withdraw charges, without leave and without a requirement to give reasons, may provide insufficient protection for the accused in some circumstances (for example, where the information has been laid negligently, or as a means of harassment, or otherwise amounts to an abuse of process). In such cases the accused may wish, with the assistance of a judge, to find out the reasons for the withdrawal and have them on the court record as the basis for a costs application. We think that this is an important safeguard, which can largely be preserved by permitting withdrawal without leave only with the consent of the accused.
- 110 We therefore recommend that section 36 Summary Proceedings Act 1957 be amended so that charges may be withdrawn, upon notice to the court by the prosecution and with the consent of the accused, at any time before the trial commences, without the leave of the court.⁴⁵

⁴⁴ *Solicitor-General's Prosecution Guidelines*, above n 30.

⁴⁵ The requirement for judicial leave should remain for charge withdrawals or amendments during trial, so that judicial consideration can be given to the question of whether the defendant would be unduly prejudiced by the withdrawal, by denying that person the opportunity for a plea of *autrefois acquit*.

PROBLEMS OF INADEQUATE OR UNTIMELY DISCLOSURE

- 111 The 2004 Evaluation identified inconsistent and incomplete police disclosure as an issue that often impeded the early resolution of cases by way of a guilty plea.⁴⁶ Although the prosecution's disclosure obligations were formalised more than 15 years ago,⁴⁷ timely discharge of the responsibility seems to be uneven in practice. That was confirmed by defence counsel during consultations on Preliminary Paper 55. Sometimes the initial disclosure pack is complete and the prosecutor or the investigator provides any other information promptly on request. In other cases, the initial disclosure pack has missing from it important information; the investigator may be difficult to contact to fill in the gaps; and counsel may advise the defendant to plead not guilty merely as a holding device to obtain the information necessary to make informed decisions.
- 112 We were told that variability in disclosure practices sometimes derives from the quality of the relationship between prosecutors and particular defence counsel. More often, it is caused by the bifurcated responsibility within the police for this task, with the officer in charge of the case and the prosecutor both having a role. Requests by counsel for additional information are commonly referred to the officer in charge of the case, for whom investigation files are usually a greater priority.
- 113 Even when the prosecution provides initial disclosure in a timely way, the material provided is insufficient to enable an informed decision as to plea. Defendants plead not guilty simply because they will then receive the full disclosure to which they are entitled following such a plea. This is wasteful of prosecution resources and results in adjournments that could have been avoided with the provision of more comprehensive prosecution information at the outset.
- 114 The solution is to broaden the scope of initial disclosure so that it is full enough to enable informed discussions between the parties; full disclosure should only occur when the defendant intends to defend the charge at trial. The Criminal Procedure Bill 2004 (presently before Parliament), which would place statutory disclosure obligations on the prosecution, will necessitate a strengthening of police internal procedures for the management of disclosure obligations; it provides a vehicle to achieve what we are proposing.
- 115 As introduced, clauses 27 and 28 of the Bill draw a distinction between "initial disclosure" and "full disclosure". Initial disclosure, which would occur at the commencement of criminal proceedings or as soon as practicable thereafter, would comprise automatic disclosure of the summary of the facts, the maximum and minimum penalty for the offence and the defendant's criminal history; and disclosure on request of a list of prosecution witnesses, a list of exhibits, and copies or records of interviews with defendants and co-defendants. Full disclosure, which would occur following election of jury

⁴⁶ Ministry of Justice and New Zealand Law Commission, above n 15, 6.4.

⁴⁷ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

trial or the entry of a not guilty plea, would comprise all other relevant information (unless specifically withheld on the grounds set out in clause 31), including briefs of evidence.

116 We do not think that this goes far enough to achieve the necessary outcome. We propose in chapter 7 that election of trial and the entry of a not guilty plea should occur at the end of the case management process. Full disclosure would not be required until that point, and would therefore occur much less frequently than at present. In return, initial disclosure should be more comprehensive than is currently provided for in the Bill. It should include, on request, the following material if it is relevant to the allegation of an offence, including material both favourable and unfavourable to the prosecution case:

- copies of job sheets or other records (such as notebook entries) of interviews with witnesses;
- copies of records of evidence produced by a testing device (for example, breath alcohol);
- copies of diagrams and photographs (for example, of the crime or motor accident scene);
- copies of records concerning procedural compliance (for example, advice of the right to consult a lawyer under the New Zealand Bill of Rights Act 1990, breath alcohol procedures).

117 This information will need to be on the prosecution file from an early stage to enable the prosecution to assess the evidential basis for the charge; it therefore will not need to be collated, only copied.

118 There would be significant advantages in placing responsibility for disclosure solely on the prosecutor. It would simplify the process, lessen communication difficulties experienced by counsel, and lighten the load on investigators. While investigators would need to ensure the prosecutor had all disclosable material (or was at least aware of its existence), they would no longer have the distraction of attending to disclosure and responding to counsel requests. For the court and counsel, having a single point of contact for disclosure would doubtless increase the likelihood of timely and consistent meeting of the prosecution's obligations. For prosecutors, this would be another means of enhancing their familiarity with the file, and of satisfying themselves that procedural obligations have been met.⁴⁸

119 We therefore recommend that:

- the mandatory disclosure regime proposed in the Criminal Procedure Bill 2004 be amended in relation to initial disclosure on request, to include the material described above;
- the prosecutor rather than the investigator should have formal responsibility for meeting disclosure obligations.

⁴⁸ For a brief discussion of the file management implications of this recommendation, see para 81. Resource implications are discussed in ch 13.

SUMMARY OF RECOMMENDATIONS

- R1** Sections 316(5) Crimes Act 1961, 19A Summary Proceedings Act 1957 and 21 Bail Act 2000 should be redrafted to ensure consistency and transparency in the legislative framework for bringing arrested offenders to court.
- R2** The redrafting of section 316(5) should clarify that:
- the requirement that arrested offenders be brought before the court as soon as possible applies only to those offenders held in police custody;
 - arrested offenders may be released without being brought before the court if there is insufficient evidence to justify a prosecution;
 - if there is sufficient evidence to justify a prosecution, arrested offenders need not be brought before the court in cases that meet the requirements of the recommended caution scheme.
- R3** Police operational practices should be changed as required, so that two essential things can occur before the initial hearing. First, evidence relevant to the allegation should be collated on the prosecution file. Secondly, the file needs to be independently scrutinised by both the investigator's supervisor and the prosecutor, to ensure that there is sufficient evidence to prosecute, and that prosecution is in the public interest.
- R4** The 7-day time period within which defendants released on police bail under section 21 Bail Act 2000 must appear in court should be extended to 14 days. This will allow police more flexibility to manage appearance dates, and thereby give themselves time for file preparation and independent scrutiny of the charges.
- R5** The Bail Act 2000 should be amended to allow the defendant to apply for review of any conditions of police bail imposed under section 21(4).
- R6** Where there is insufficient time to scrutinise the file before the initial hearing, the police prosecutor (in the absence of an immediate guilty plea) should ensure that such scrutiny occurs before the end of the administrative phase.
- R7** There should be statutory recognition of alternative disposition options, broadly comprising a police caution scheme. This would operate by consent, and might include conditions. As a minimum, the legislation should include the following criteria for the operation of the scheme:
- a decision is made, in accordance with the *Solicitor-General's Prosecution Guidelines*, that court proceedings are not required in the public interest;

- the alleged offender is advised of the caution option, and any conditions, and consents to this course of action instead of a court prosecution;
- no information is laid, or if an information has been laid, it is withdrawn;
- the person is formally cautioned (with or without a requirement to fulfil specified conditions);
- a record of the caution is kept for 2 years, so that it can be referred to by the police in the event of further offending within that period.

R8 The present diversion scheme should be discontinued.

R9 Section 36 Summary Proceedings Act 1957 should be amended so that charges may be withdrawn at any time on notice to the court by the prosecution, with the consent of the accused and without the leave of the court.

R10 The criminal disclosure code in the Criminal Procedure Bill 2004 (presently before Parliament) should be amended in relation to initial disclosure on request, to include the following material, both favourable and unfavourable to the prosecution case, if it is relevant to the allegation of an offence:

- copies of job sheets or other records (such as notebook entries) of interviews with witnesses;
- copies of records of evidence produced by a testing device (for example, breath alcohol);
- copies of diagrams and photographs (for example, of the crime or motor accident scene);
- copies of records concerning procedural compliance (for example, advice of the lawyer right under the New Zealand Bill of Rights Act 1990).

R11 Formal responsibility for meeting disclosure obligations should rest with the police prosecutor rather than the investigator.

4

The administrative phase: the list court and other matters

DEFENDANT'S FIRST APPEARANCE

120 **F**OLLOWING the laying of an information, the defendant's first appearance in court is at what has become colloquially known as the "list court". At that point, the defendant may be asked to make an election as to the form of trial (if applicable) or to enter a plea. If the offence is minor and the defendant pleads guilty, he or she may be convicted and sentenced on that day. However, this occurs in only about one quarter of all cases.⁴⁹ In general, the case is adjourned to enable administrative matters (in particular, the granting of legal aid and the assignment of counsel or, less often, the private retention of counsel) to be attended to. For that reason, we have termed the initial stages of the case "the administrative phase".

121 The problems with the list court have been extensively canvassed in previous Law Commission reports,⁵⁰ and related documents;⁵¹ we do not repeat that material here. In summary:

- Defendants generally arrive at court ill-prepared for what will happen. They are often confused and uncertain as to their options; they find the courthouse large, crowded and intimidating; and it is uncommon for them to have arranged legal representation in advance.
- The list of cases is often long and courtrooms are filled with large numbers of people, creating pressure for judges to deal with cases quickly in order to dispose of the list by the end of the day. Thus, cases may be dealt with in a shorthand manner without a full explanation to the defendant as to what has happened or what is expected before the next appearance, and adjournments may be too readily agreed to as a method of immediate disposal of the case.
- For the most part, judges in the criminal list are dealing with administrative matters that are routine and do not require adjudication. Where a judicial decision is required, the significance may get lost in the morass of quick administrative rulings surrounding it. By the same token, those whose

⁴⁹ In the Wellington District Court list court pilot, between 20 per cent and 25 per cent of cases were disposed of at first appearance during 2004. For the whole of New Zealand during the same period, the figure was 29.1 per cent.

⁵⁰ New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, Wellington, 2002); New Zealand Law Commission, above n 1.

⁵¹ Above n 2.

cases are to be dealt with by a quick adjournment may find that they are waiting around for significant periods while the court is occupied in dealing with a single case that does require a significant decision.

- Timetables for the progress of the case are flexible and expectations of the parties unclear, with the result that there are sometimes several adjournments before administrative matters are finalised and a plea is taken.

122 These widely recognised problems with the operation of the list court have immediate consequences in terms of unnecessary adjournments, delays in taking pleas and elections, and poor delivery of justice. But they also have a wider significance: they shape the parties' perceptions of the way in which the system operates and what it expects of them. If the system appears to allow the parties to dictate the pace at which the case progresses, they will work to a timetable that suits their own interests. If the system has a culture of tolerating adjournments and agreeing to them readily and without sanction, they will become the norm. If the courtroom becomes the focal point for all activity, significant or trivial, in relation to a case, little or no effort will be made to progress matters between hearings.

123 As it has traditionally operated, the list court has fostered all of these perceptions and expectations. If there is to be the fundamental change in culture that our proposed reforms require, there must be a fundamental change to the way in which all list courts operate.

CURRENT INITIATIVES

124 In response to these concerns, a number of recent initiatives have been taken to improve the operation of the list court. It is commonplace for registrars to have a "callover court" at 9.00 am, so that administrative matters with which registrars have the power to deal can be addressed before the case is called in the main list court from 10.00 am. More significantly, a pilot scheme, instigated by work previously undertaken by the Law Commission,⁵² was launched in the Wellington District Court on 30 January 2004 and is still operating. This pilot is trialling a new approach to the defendant's first appearance with a view to:

- ensuring that administrative matters are dealt with by the registrar outside the courtroom, so that the list court itself is reserved for matters that require a judicial decision (contested applications for bail or name suppression, or conviction and sentence);
- improving the nature and extent of the information provided to a defendant when he or she first arrives at court, so that there is a greater understanding of what is happening in the process;
- reducing the amount of waiting time before each case is disposed of; and
- enabling administrative matters to be disposed of as quickly as possible, so that the number of adjournments before a plea is taken and the case progresses to the next stage is reduced.

⁵² New Zealand Law Commission, above n 50.

- 125 A final report on the evaluation of the Wellington pilot is not yet available, and it would be premature to say that this particular model, which has continually evolved during the first year of its operation to address problems as they have arisen, represents best practice. In any case, some variation from court to court is inevitable, given differences in the volume of cases, the frequency of list courts and the physical layout of the courthouse. It would therefore be unwise to provide a detailed blueprint as to how the administrative phase of the case should be handled.

PROPOSED KEY FEATURES

- 126 However, there are some key features around which the administrative phase of the case needs to be structured in every court:
- the processes need to allow for and encourage early resolution of the case where appropriate;
 - the processes need to ensure that, if the offender is eligible for legal aid, this is generally arranged either before or at the first court appearance, and contact with assigned counsel established;
 - administrative matters should be handled as far as possible by the registrar outside the courtroom, with cases going before a judge only when the exercise of judicial discretion is required; and
 - there must be limits on the number of court appearances that will generally be permitted for the completion of administrative matters before the case progresses to its next stage.

Early resolution of the case

- 127 In chapter 6 we recommend a standard practice and protocols for prosecution and defence discussions following the administrative phase of the case, in the course of which the parties will be required to consider whether the case can be resolved. However, it would be undesirable if such a process were seen as a substitute for an earlier guilty plea. There is some evidence that this may have already been a consequence of the introduction of status hearings: anecdotal as well as statistical evidence suggests that some defendants who would otherwise have pleaded guilty at first appearance are now entering a not guilty plea and proceeding to a status hearing for purely pragmatic reasons (for example, to buy time, or in the hope of obtaining a bigger discount on sentence).⁵³
- 128 It is imperative that the administrative phase of the case allows for and encourages immediate guilty pleas, at least in those cases where that is going to be the eventual result. We make four recommendations to facilitate this outcome:
- As recommended in chapter 3, there needs to be prosecution screening of the case for evidential sufficiency and the need for prosecution in the public interest, if practicable before the information is laid and in every

⁵³ See further ch 1. In relation to sentence discount, this seems illogical, but at present is often rewarding, because of irregular discounting practice.

other case before the conclusion of the administrative phase. This will ensure that the defendant's choice as to an early guilty plea is based on robust charging.

- There should be timely initial disclosure by the prosecution of the material recommended in chapter 3.
- There should be facilities to allow initial discussion of the case between prosecution and defence before the defendant's first appearance in court. We note that this is a component of the Wellington list court pilot: after receiving initial disclosure, the duty solicitor or defendant's counsel may request a meeting with the prosecutor to discuss any aspect of the case; a room in the foyer of the court is made available for that purpose; and negotiations around tangential aspects of the case (for example, amendments to the wording of the summary of facts) can sometimes result in an immediate guilty plea.
- When judges are sentencing offenders following a guilty plea during the administrative phase, they should always make explicit the discount that has been given as a result of that plea. This is consistent with the requirement that judges give reasons under section 31 Sentencing Act 2002; it ensures that defendants receive consistent messages about the impact of guilty pleas at various stages of the process; and it assists appellate courts reviewing sentences.

129 It is also desirable that, where there is a guilty plea at first appearance, the defendant be sentenced immediately wherever practicable. To that end, we recommend that the police should make available to the Community Probation Service (CPS) the list of overnight arrests, and the dates on which those arrested are to appear. This will enable the CPS in advance of the appearance to determine whether, in the event of a guilty plea, there is a recently prepared pre-sentence report that can be made available or updated by way of a "stand-down report" on the same day.

A streamlined process for granting legal aid

130 Defendants appearing in the list court who may be eligible for legal aid usually complete a legal aid application form with the assistance of the duty solicitor. That application is then forwarded to the regional office of the Legal Services Agency (LSA); a decision is made on it (in most cases within 24 hours); counsel is assigned; and the defendant and counsel are notified of that assignment. The defendant may nominate preferred counsel, but in the absence of such a nomination, it is common for one of the duty solicitors rostered on the day of the defendant's appearance to be assigned.⁵⁴

⁵⁴ According to the LSA, it has experienced considerable opposition to this approach from counsel in the Auckland region. It is said to spread work unevenly across the bar (because not everybody does duty solicitor work); it pre-empts what is termed "seagulling" (that is, counsel obtaining work by waiting at court and accosting defendants); it also causes problems for the LSA when duty solicitors concentrate on assisting their newly assigned legally aided clients, at the expense of their duty solicitor obligations (for which they are contractually bound, but paid less). In our view, pre-empting seagulling may be no bad thing: the alternative is a triumph of opportunism over quality assurance.

- 131 This process frequently contributes to delays and unnecessary adjournments. Decisions are not made on the application for legal aid until after defendants have appeared in court and been bailed to appear at a future date. Defendants may give a wrong or incomplete address on their legal aid application form and do not receive the letter advising them of the counsel assigned to them; even if notified, they in general are not motivated to initiate contact with counsel. Equally, counsel who receive notice of the assignment often perceive that too much effort will be required to contact the defendant between hearings, and that it will be easier to make first contact at court on the day of the next appearance. The result is that counsel and the defendant may meet each other for the first time on the day of the defendant's second appearance and will then seek a further adjournment so that full instructions can be given.
- 132 In order for adjournments to be reduced to a minimum, we recommend that, to the extent possible, legal aid applications should be completed and processed before or during the defendant's first appearance, and contact between the defendant and assigned counsel established before the defendant is bailed and permitted to leave the court.
- 133 There are obvious difficulties in having legal aid applications completed and dealt with before a defendant's first court appearance. Those who are held in police custody and taken to court the next morning will generally have had no opportunity to make an application; many other defendants, even if supplied with appropriate information, will not have the ability or willingness to apply, or be motivated enough to contact court or LSA staff who might assist them. Nevertheless, we think that there is potential for increasing the proportion of cases in which this occurs. For example, a merger of the police detention legal assistance scheme and the duty solicitor scheme would enable some legal aid applications to be completed at the police station, or following release on police bail, with the assistance of the lawyer providing initial advice. We recommend that the LSA consider strategies to enable consideration of legal aid applications before the defendant's first court appearance as part of its recently initiated review of initial criminal legal services.
- 134 For the remaining cases, we recommend that the LSA should consider, also as part of its review of initial criminal legal services, how all legal aid decisions can be made, and contact established between defendant and counsel, before the defendant leaves court at his or her first appearance.

Efficient processes for handling administrative matters outside the courtroom

- 135 Defendants should appear before a judge during the administrative phase only when:
- the defendant has intimated that he or she wishes to enter a guilty plea;
 - there is an opposed application for name suppression or bail (including a dispute as to bail conditions); or
 - the registrar is satisfied that the defendant's behaviour or circumstances (for example, a history of non-cooperation) indicates a risk of non-

compliance with his or her obligations that is likely to be reduced by appearance before a judge.

- 136 In all other cases, where the defendant is being remanded on bail or in custody with the consent of both parties and there is no real exercise of judicial discretion, alternative mechanisms for making the necessary orders should be put in place. It is neither necessary nor desirable for this to occur through a registrar's court. Registrars are employed by the executive to manage the administration of the court. Where orders may be made through the exercise of a purely administrative function, it is appropriate and indeed highly desirable that this should be handled by the registrar and his or her staff. However, that should occur outside the context of a court hearing, which should be used only to fulfil a truly judicial function.
- 137 We favour instead the sort of model adopted in the Wellington pilot. Following the finalisation of arrangements for legal representation and any discussions between prosecution and defence, cases that need to go before the judge should be called in the court as they are ready. All other remands on bail or in custody by consent should be arranged by registry staff by way of an over-the-counter transaction.
- 138 In the larger urban courts, where more than one prosecutor can be made available for the list court, we envisage that the administrative processing of cases and the court hearing would operate concurrently. In small courts, where only one prosecutor can be present, a different process may be necessary: either administrative decisions could be made between 9.00 am and 10.00 am in advance of the commencement of court at 10.00 am (mirroring the way in which registrar's courts currently operate); or, where this is not possible, the prosecutor could provide court registry staff with written instructions as to his or her approach to the case (for example, any required bail conditions). We understand that the latter practice already occurs in some small courts.
- 139 Some of those we consulted on Preliminary Paper 55 argued that it was preferable for all transactions to be conducted in court, so that everyone involved could hear what was said and be informed as to the outcome. We do not agree. Court hearings (and the inevitable inefficiencies that they entail) should not be held simply as a means of information sharing; there are other ways in which that can be achieved.
- 140 However, all decisions should still be public. To that end, as in the Wellington pilot, the media should have access to the full list of defendants appearing on the day and the decisions or orders made in respect of them. There should be no diminution in the amount of information to which the media have access.

Limits on the number of adjournments during the administrative phase

- 141 It is clearly desirable that the administrative phase be completed as expeditiously as possible. Indeed, if the processes for granting legal aid are improved as we recommend, administrative matters in minor and straightforward cases could be arranged at first appearance. However, we accept that often this will not be possible: the prosecutor may not have had

the time to screen the case for evidential sufficiency and the need for prosecution in the public interest; additional information may have been requested by the defence as part of initial disclosure; or defence counsel may not have had the opportunity to take proper instructions from the defendant. Adequate time needs to be allowed for these matters to be attended to before the case progresses further. Some adjournments during the administrative phase are therefore inevitable.

- 142 However, the delays promoted by the present permissive system of multiple adjournments will only be effectively addressed if clear restrictions on the period allowed for the completion of preliminary administrative issues are imposed. If parties are left to progress matters on the basis of a loose expectation that they will be attended to by the next court appearance, the continuation of multiple adjournments is inevitable. If judges are left to control the number of adjournments in an unregulated environment, they are likely to do so only sporadically and inconsistently, because of variations in their own temperament and approach to the task, as well as the pressure to get through a busy list.
- 143 It would be impracticable to set a time limit within which the administrative phase of the case must be completed, for two reasons. First, the frequency with which list courts operate varies significantly between urban and provincial areas. In the former, which have list courts daily, a remand within a week should be the norm; in the latter, it will frequently need to be a fortnight or even a month. Secondly, the time required by the parties to conclude administrative matters will vary from case to case, depending upon the complexity of the issues and whether there are ongoing investigations. A homicide, kidnapping or aggravated robbery should not necessarily be expected to proceed at the same pace as a minor theft or a charge of disorderly behaviour.
- 144 Instead, we recommend a requirement in rules that the administrative phase of the case be completed by the time of the defendant's second appearance. In the event that this requirement is not met, the case should be listed for judicial consideration. A further adjournment should be granted only when it is clearly required in the interests of justice. The reason for the adjournment should be recorded on the court file, so that there is sufficient information available to the judge dealing with the matter on the next appearance to know what was expected of the parties. Sanctions on the defaulting party should also be considered.⁵⁵
- 145 If a further adjournment is not granted, the case should normally progress to the next stage of the process.⁵⁶ In the case of a failure by the defendant to arrange legal representation (which will almost invariably relate to those who are not eligible for legal aid), the defendant should be treated as unrepresented, and remanded straight to a status hearing.⁵⁷ In the case of a

⁵⁵ See ch 11.

⁵⁶ In an extreme case of prosecution failure, dismissal of the charge on the grounds of an abuse of process might be warranted, but we anticipate that this would be rare.

⁵⁷ The reasons why we consider that unrepresented defendants cannot realistically be required to complete case management discussions are explained in ch 10.

failure by the defendant to provide instructions to counsel, the defendant should be remanded to a provisional status hearing date, with an interim requirement for case management to occur.⁵⁸

- 146 The effect of the requirement that the case always be referred to a judge if the administrative phase is not completed by the second appearance, is that a registrar on first appearance should always adjourn the case to a day on which a judge is presiding. The current practice in small courts, whereby the case may be adjourned to the registrar's list on a day when a judge will not be presiding (because the judge may be present as rarely as once a month), should be discontinued.

CHANGES TO THE POWERS OF REGISTRARS AND JUDGES

- 147 We propose a number of changes to the powers of registrars and judges in order to ensure that judges only deal with matters requiring a judicial decision and that unnecessary appearances are kept to a minimum.
- 148 First, under section 28(2) Bail Act 2000, a registrar may grant bail by consent only when the offence is non-imprisonable or is punishable by imprisonment of not more than 10 years. We see no good reason for this restriction; the requirement that the prosecution must consent to any grant of bail by a registrar should be sufficient to ensure that public safety concerns in relation to more serious offenders are properly addressed. We therefore recommend that section 28(2) be amended to remove the restriction.
- 149 Secondly, although under section 41A Summary Proceedings Act 1957 the registrar may receive and record a not guilty plea, there is no equivalent power to do so in respect of a guilty plea. We understand that the absence of such a power derives, at least in part, from a belief that there is nothing to be gained by it; the entry of a guilty plea is almost always followed by immediate sentencing or the ordering of a pre-sentence report, both of which must be done by a judge. However, this overlooks the fact that, under section 26 Sentencing Act 2002, a pre-sentence report may be ordered by the court outside the context of a court hearing. For example, in a small court where there is a registrar's list court once a week but a court presided over by a judge only once a month, the registrar could record a guilty plea; identify cases where a pre-sentence report might be required; and forward copies of the relevant information from the file to the judge next rostered to sit, so that he or she could order a report where appropriate. The case could then be ready for sentencing at the next court appearance before a judge, thus reducing the number of appearances and case resolution time. We therefore recommend an amendment to section 41A so that the registrar may receive and record a guilty plea as well as a not guilty plea.
- 150 Some might argue that this carries a risk of injustice, because the entry of a guilty plea before a judge enables the judge to ensure that the defendant understands the nature and implications of that plea. However, we do not think that the judge can exercise an effective oversight role in this respect.⁵⁹

⁵⁸ See chs 6 and 7, and also ch 4 in relation to the requirement on defendants to instruct counsel about case management matters as a condition of bail.

⁵⁹ See para 256.

The safeguards in section 41A, requiring that the defendant be legally represented or that the registrar be satisfied that he or she has been informed of and fully understands the right to legal representation, should suffice.

- 151 Thirdly, unnecessary adjournments, during not only the administrative phase of the case but the whole pre-trial process, are caused by current limits on the length of remands in custody. The Summary Proceedings Act 1957 empowers a registrar to remand a defendant in custody only if both parties consent, and the remand is for no more than 8 days; they can do this only twice.⁶⁰ A judge can remand in custody without consent for a maximum period of 8 days, or longer with the consent of both parties.⁶¹
- 152 These limits are intended to ensure that the need for a custodial remand is kept constantly under review. However, we consider that they are unnecessary and impose significant additional burdens on the system: they generate unnecessary appearances; they clog up court lists; and they impose significant administrative costs, not only for courts but also for custodial escort services, without providing any significant benefit.
- 153 Where the defendant is consenting to a remand in custody, that is invariably in recognition of the fact that bail will not be granted if it is applied for. Registrars should accordingly have the power to remand a defendant in custody for any adjournment period to which the defendant consents.
- 154 Where a judge is remanding in custody without consent, that decision is made on the basis of the statutory criteria laid down in section 8 Bail Act 2000: principally whether there is a risk that the defendant may fail to appear, or may interfere with witnesses or other evidence, or may offend while on bail. While it is possible that a change in the defendant's circumstances will alter the assessment of these risks, the defendant has the opportunity to appeal against a refusal to grant bail, to apply for bail again at any time, or even to bring a habeas corpus application. These are sufficient safeguards to enable regular review of remands in custody. An arbitrary limit on the length of remands without consent provides little or no additional benefit. Judges should accordingly have a general power, without time limit, to remand in custody whether or not the parties consent.
- 155 We note that both of these changes will be effected by the Criminal Procedure Bill 2004, if enacted, and we therefore make no further recommendations in this respect.⁶²
- 156 The expansion of registrars' powers will carry with it the need for enhanced training regarding the scope and exercise of the powers. We understand that the Ministry of Justice has already identified a need for such training.

⁶⁰ Summary Proceedings Act 1957, s 46(2)(a) and (3).

⁶¹ Summary Proceedings Act 1957, s 45(3).

⁶² Criminal Procedure Bill 2004, cls 86 and 87.

THE OUTCOME OF THE ADMINISTRATIVE PHASE OF THE CASE

- 157 Once administrative matters have been attended to, then in the absence of a guilty plea the case should be adjourned to a provisional status hearing date, that allows time for the case management processes recommended in chapters 6 and 7 to occur.
- 158 For the reasons outlined in chapter 7, we propose that not guilty pleas and elections as to mode of trial should only be entered at the end of the case management process: that is, when the defendant has made a definite decision to proceed to a defended summary hearing or a jury trial.
- 159 In all cases where a defendant is remanded on bail to the provisional status hearing date, it should be a standard condition of bail that he or she provide counsel with instructions about case management matters, so that counsel is in a position to have those discussions and answer the defence questions in the case management memorandum.⁶³ The time within which this must occur should be specified in the bail notice; it will vary from case to case, depending on the length of the remand. Section 31(3) Bail Act 2000 enables the imposition of any condition other than a police reporting condition only when the court or registrar considers that reasonably necessary to ensure the defendant's appearance, to prevent interference with witnesses or evidence, or to prevent further offending. It will therefore need amendment.⁶⁴
- 160 Many of those with whom we consulted were of the view that a standard condition of bail of this type would be unworkable: it would be difficult to prove that a breach was attributable to defendant fault rather than (for example) counsel unavailability; breach proceedings would therefore be uncommon and, if they occurred, resource-intensive; and if the resource demands led to a reluctance by courts and prosecutors to engage in breach proceedings, this would bring the bail system into disrepute. Some also argued that it is wrong in principle to use the bail system for case management purposes (that is, for justice system expediency rather than defendant risk).
- 161 We recognise the force of these arguments. However, on balance, we believe that it is worth trialling the use of such a condition. A lever to encourage counsel and defendants to talk to each other between hearings is critical to the efficient processing of cases. In the absence of other effective enforcement mechanisms, a bail condition will at least draw to the attention of defendants their obligation in this respect; it will encourage counsel to chase defendants who have failed to comply with that obligation (that being in their client's best interests); and, in the event of blatant recalcitrance by the defendant, it will give the judge greater ability to take action (even if that simply involves keeping the defendant in the court cells for the day so that instructions can be given and the case management memorandum

⁶³ See ch 6 and appendix A.

⁶⁴ It may be desirable for this amendment to be more generally worded so that (for example) a bail condition can be imposed that the defendant attend a probation office for the purposes of a pre-sentence report.

completed). We note that the District Court judges we consulted supported the imposition of such a bail condition, and that it is one of the ideas being trialled as part of the Case Preparation Project in the United Kingdom.⁶⁵

A standard adjournment period?

- 162 In Preliminary Paper 55, we proposed that, apart from in exceptional cases, the adjournment period to enable the parties to attend to the matters set out in chapters 6 and 7 should be a standard 6 weeks. Almost invariably, those with whom we consulted submitted that this would be too inflexible and would itself cause inefficiency and delay. In minor cases, where an adjournment is required to discuss simple and well-defined issues (such as the wording of the summary of facts, or the withdrawal of one of multiple charges), an adjournment of no more than a fortnight may be appropriate. In other cases, it may be desirable to accelerate the progress of case management because of the nature of the case, or because parties have requested it. Where the defendant is unrepresented and the case is proceeding straight to a status hearing without case management discussions, a shorter period may likewise suffice.⁶⁶ On the other hand, in some serious cases involving several co-accused, possible issues of severance of trial and questions regarding the admissibility of evidence, 6 weeks will often be insufficient. Differences between courts in the volume and backlog of cases will also produce unavoidable variations in the scheduling of cases.
- 163 We agree with those submissions and recommend that no standard remand period should be specified. Rather, the period should be as short as is required to complete whatever case management processes are relevant, having regard to the nature of the offence, the number of co-accused, the number or complexity of any issues that need to be addressed by the parties, and the court's own scheduling pressures. If the parties cannot reach agreement as to the appropriate period, or the registrar believes that the agreed period is too long or too short, it should be referred to the judge for resolution.

Exemption of classes of case from standard process

- 164 The remaining question is whether any particular category of case should be exempted from the normal requirements of case management discussions, status hearing, or both: that is, whether some should proceed immediately to a trial fixture. This is the present practice in some District Courts. For example, in Manukau a number of offences that are punishable only by a fine or would normally be dealt with by a fine (including driving with excess breath alcohol or driving while disqualified without previous convictions of that type, and matters dealt with by local authorities or non-police agencies such as dog control offences, income tax offences, or fisheries offences) are believed to derive little benefit from a status hearing and are simply set down for trial. In Hamilton, domestic violence offences (male assaults female

⁶⁵ See further para 40 and above n 22. We note also that for many non-police prosecutions, defendants will be remanded at large. Our recommendation for the imposition of bail conditions, where the defendant is in fact bailed, is not intended to limit that practice.

⁶⁶ See ch 10.

and breaches of protection orders) are set down for trial immediately; defendants often plead not guilty in the hope that, with the passage of time, the complainant will withdraw her complaint, and a status hearing in such cases only adds to the delay and increases the risk that the prosecution will fall over at the last minute.⁶⁷

- 165 While it is thought that status hearings may be unsatisfactory in some types of cases, there is no consensus about this, or about the extent to which such cases should be exempt from other case management requirements, such as our recommended memorandum.
- 166 We are therefore not in a position to recommend the exclusion of any class of case from either case management or status hearing. However, the rules prescribing our procedure should make provision for the Chief District Court Judge by practice note to make such an exemption, either nationally or in a particular district, where that is considered to be in the interests of justice.

SUMMARY OF RECOMMENDATIONS

R12 The administrative phase of the case should allow for and encourage immediate guilty pleas in appropriate cases, by:

- ensuring initial disclosure occurs at the optimum time (that is, a time that facilitates the possibility of a guilty plea at first appearance);
- providing facilities at court to allow initial discussion between prosecution and defence (particularly in cases where a compromise on minor matters may produce a guilty plea); and
- always making explicit, in a sentence imposed following a guilty plea during the administrative phase, the amount of the discount given as a result of that plea.

R13 The police should make available to the Community Probation Service (CPS) the list of overnight arrests, and the dates on which those arrested are to appear. The CPS should, in advance of the appearance, determine whether a recently prepared pre-sentence report is available in the event of a guilty plea.

R14 The LSA, as part of its current review of initial criminal legal services, should consider changes to current practice to facilitate:

- the completion and processing of legal aid applications before or at the time of the defendant's first court appearance; and
- contact between the defendant and assigned counsel before the defendant is bailed and permitted to leave court.

⁶⁷ A nationally applicable practice note has recently been issued by the Chief District Court Judge, with a view to expediting the progress of domestic violence cases: Judge DJ Carruthers "Practice Note – Domestic Violence Prosecutions" (22 December 2004). Whether status hearings should be held in such cases is left to the discretion of the individual court.

- R15** Defendants should appear before a judge during the administrative phase only when:
- they have intimated that they wish to enter a guilty plea;
 - there is an opposed application for name suppression or bail (including a dispute as to bail conditions); or
 - the registrar is satisfied that the defendant's behaviour or circumstances (for example, a history of non-cooperation) indicate a risk of non-compliance with his or her obligations that is likely to be reduced by appearance before a judge.
- R16** All other matters should be dealt with by registry staff over the counter.
- R17** The media should have access to the full list of defendants appearing on the day and the decisions or orders made in respect of them.
- R18** There should be only one adjournment (that is, two appearances) during the administrative phase of the case. A further adjournment should be granted only after judicial consideration, and when it is clearly in the interests of justice. The reason for the adjournment should be recorded on the court file. Sanctions on the defaulting party should also be considered.
- R19** Section 28(2) Bail Act 2000 should be amended so that the registrar can grant bail with the consent of the prosecution in respect of any offence.
- R20** Section 41A Summary Proceedings Act 1957 should be amended to enable a registrar to receive and record a guilty plea as well as a not guilty plea.
- R21** At the end of the administrative phase, if there has not been a guilty plea, the case should be adjourned to a provisional status hearing date.
- R22** This adjournment period should be as short as is required to complete any applicable case management processes, having regard to:
- the nature of the offence;
 - the number of co-accused;
 - the number or complexity of the issues to be addressed by the parties;
 - the court's own scheduling pressures.
- R23** If the parties cannot reach agreement as to the appropriate adjournment period, or the registrar believes that the agreed period is too long or too short, it should be referred to the judge for resolution.

R24 Where a defendant is remanded to a status hearing date, it should be a standard condition of bail that he or she provides instructions to counsel within a specified time about case management matters. Section 31(3) Bail Act 2000 should be amended to enable the imposition of such a condition.

R25 There should be provision for the Chief District Court Judge by practice note to exempt any category of case from case management, status hearing, or both, either nationally or in a particular district.

5

Requirement on defendants to state the nature of their case

167 THIS CHAPTER explains the policy reasons for our recommendation that defendants who are proceeding to trial should be required by statute to disclose pre-trial the issues in dispute. This means that, in addition to identifying what (if any) facts are agreed, and what (if any) evidence can be admitted by consent, they must say what issues are contested: for example, identity of the offender, an element of the offence, a positive defence, procedural error. This is a form of defence disclosure.⁶⁸

CURRENT PRACTICE IN NEW ZEALAND

168 There are currently two statutory provisions that are designed to identify the issues in dispute and thus provide more focus at trial:

- Under section 369 Crimes Act 1961 (which under section 3(1)(k) Summary Proceedings Act 1957 applies also to summary proceedings), the defendant may formally admit alleged facts without the need for the prosecution to call evidence as to those facts. Such admissions are usually initiated by the prosecution, who will prepare the documentation and send it to the defence for consideration before the pre-trial hearing.⁶⁹

⁶⁸ This issue has been touched on in three previous New Zealand Law Commission reports: *Criminal Prosecution*, above n 30; *Juries in Criminal Trials* (NZLC R69, Wellington, 2001); and *Delivering Justice for All*, above n 1. *Criminal Prosecution*, and the Criminal Procedure Bill 2004 that implements it, recommend two defence disclosure exceptions (notice of alibi, and briefs of expert witnesses); in *Juries in Criminal Trials* the Commission did not recommend mandatory defence opening statements, preferring to first attempt voluntary measures; and *Delivering Justice for All* noted that overseas precedents go “further than the Commission had previously contemplated” but preferred to defer consideration of the issue for the current reference. Defence disclosure requirements similar to those we are proposing were also mooted by the Ministry of Justice, in the development of the Criminal Procedure Bill (which includes a disclosure code); the NZLS opposed this development and it was therefore abandoned.

⁶⁹ Law Commission research into jury decision making supported the desirability of having evidence admitted by consent in writing. It demonstrated that juries have great difficulty in assimilating large volumes of oral testimony, particularly in longer trials, and that this could be mitigated by an increase in the proportion of written evidence. Indeed, even when some of the evidence of a witness is contentious and needs to be tested through cross-examination, it may be that the witness’ evidence in chief could be much more effectively introduced in written form and read by the jury before the appearance of the witness. In our case management memorandum, the focus is on identifying what is admitted by consent, and whose evidence in chief can be read, rather than suggesting that these things should necessarily occur more often. However, the practice could be encouraged by active judicial enquiry at status hearing and callover, as recommended in New Zealand Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP37, Vol 2, Wellington, 1999).

- Under section 367(1A) Crimes Act 1961, inserted in 2000, the defence may, with the leave of a court, make an opening statement in a jury trial for the purposes of clarifying for the jury the issues in dispute.

169 There is no comprehensive statistical information on the extent to which these provisions have been used. Feedback from judges and counsel suggests that usage is growing and that experienced counsel in particular see the value of admitting non-contentious evidence by consent and making opening statements, especially when the defendant is running a positive defence. However, practice from one counsel to another and, we suspect, from one area to another is highly variable.

170 In recent years, voluntary changes to both judicial and defence counsel practice have supplemented these statutory provisions. Some judges who preside over status hearings (in the summary jurisdiction) and callovers (in the indictable jurisdiction) routinely question counsel about the issues in dispute, and counsel have become accustomed to orally responding to those questions. Indeed, our observation in some provincial courts was that almost all counsel at status hearings were prepared to indicate the nature of their defence, some in quite detailed terms.

171 In some courts, there are emerging processes to further formalise this dialogue. For example:

- Some counsel employed by the Public Defence Service, established under a pilot scheme in Auckland and South Auckland, hand up to the judge and opposing counsel a memorandum of trial management issues, which includes agreement as to facts and evidence by consent, and an optional statement of the issues in dispute. Similar memoranda are used for status hearings in Christchurch, and New Plymouth callovers.
- In the Auckland District Court, for Serious Fraud Office cases, a judge with particular expertise in the area meets with prosecution and defence counsel before trial to discuss how the case can be refined and concisely presented.
- A Christchurch District Court jury trial case management memorandum timetables the following requirements on parties. Before the first callover of a case that has been committed for trial, the Crown must file a memorandum of pre-trial and trial issues, and the defence then has a week to file a response. The stated purpose of this is “to ensure that both parties confront the issues in the trial at an early stage” with a view to avoiding last-minute guilty pleas and pre-trial applications. As to the content of the memorandum, for the Crown it should include:⁷⁰
 - whether pleas to alternative charges in the indictment would be accepted;
 - whether any pre-trial issues have been identified (e.g. admissibility, editing of transcripts, section 23D, venue, etc);
 - how the evidence of the Crown witnesses could be given (e.g. viva voce, by consent, etc – in tabulated form, as presently done);

⁷⁰ Judge TM Abbott “Christchurch District Court Management of Jury Trials” (25 June 2004) 2–3.

- whether expert evidence is to be called (and consequential issues, e.g. disclosure of experts' reports or briefs of evidence);
- whether further investigations are being or to be made (e.g. by ESR);
- whether there are any other logistical issues (e.g. interpreters, videotapes, audiotapes, unavailability of witnesses, etc);

...

The defence certificate or memorandum should address the issues which are covered in the Crown memorandum and any other issues which are to be raised by the defence which should be disclosed to the Court or the Crown prior to trial (e.g. unavailability of counsel, expert evidence).

For the avoidance of doubt, the absence of a reference in a defence certificate or memorandum to an issue which is mentioned in the Crown memorandum will be taken as assent to the Crown's position regarding that issue.

DEFENCE DISCLOSURE PRECEDENTS OVERSEAS⁷¹

United Kingdom

- 172 In the United Kingdom there are long-standing provisions requiring defence disclosure of alibi and expert evidence, and in serious fraud cases.⁷² Moreover, under section 5(6) Criminal Procedure and Investigations Act 1996 (UK), in force since 1 April 1997, the accused must provide a written statement to the court and the prosecutor setting out the nature of the accused's defence (that is, the matters on which he or she takes issue with the prosecution, as well as the reasons why).⁷³
- 173 The Criminal Justice Act 2003 (UK) goes further.⁷⁴ It amends the Criminal Procedure and Investigations Act to require, in addition, disclosure of:
- any particular defences on which the accused intends to rely;
 - any point of law that he or she wishes to take, and supporting authorities;
 - names, addresses, and dates of birth of witnesses that the defence proposes to call; and
 - names and addresses of consulted experts, whether or not they will be called.

⁷¹ We are not suggesting that defence disclosure is a common feature of all, or even a majority of Commonwealth jurisdictions. The only comparable examples we have found are the ones discussed in this chapter. We nonetheless consider that this development in New Zealand is both necessary and justified.

⁷² Criminal Justice Act 1967 (alibi); Police and Criminal Evidence Act 1984 (expert evidence); Criminal Justice Act 1987 (serious fraud cases).

⁷³ The disclosure requirement applies to both summary and indictable proceedings: Criminal Procedure and Investigations Act 1996 (UK), s 1.

⁷⁴ Part 5, which relates to defence disclosure, is not yet in force. It will commence "in accordance with provision made by the Secretary of State by order": Criminal Justice Act 2003 (UK), s 336(3).

Victoria (Australia)

- 174 Victorian procedure in indictable cases is provided for in the Crimes (Criminal Trials) Act 1999. There are two types of pre-trial hearing: case conferences, and directions hearings.
- 175 A practice note issued under the Act provides for case conferences, which are held approximately 10 weeks after committal.⁷⁵ The prosecution is required, not less than 14 days before the case conference, to file with the court a prosecution summary of the evidential basis for offences charged (similar to a summary of facts in New Zealand). Depositions should also be available at this stage. The defence is then required, not less than 7 days before the case conference, to serve on the prosecution and file with the court a response to the prosecution summary.
- 176 A similar process occurs again, closer to trial. Not less than 28 days before trial (at around the time of the directions hearing), the prosecutor must provide the court and the defence with a summary of its opening address to the jury, which outlines the manner in which the prosecution will put the case against the accused, and the evidence being relied upon to support a finding of guilt.⁷⁶ A notice of pre-trial admissions must also be provided, attaching witness statements that in the opinion of the prosecution should be admitted as evidence without further proof. The defence must then respond to the prosecution and the court not less than 14 days before trial, setting out the matters with which it takes issue, the basis for doing so, and what evidence in the notice of pre-trial admissions is agreed. The defence response need not state the identity of any defence witness other than an expert witness, or whether the accused will give evidence.⁷⁷ In practice, what is filed before trial draws heavily on the material already prepared for the case conference.
- 177 Under section 13 of the Act, defence opening statements are mandatory in jury trials.

STATING THE NATURE OF THE DEFENCE CASE: OBJECTIONS IN PRINCIPLE

- 178 During the 2004 Evaluation research jointly conducted on status hearings by the Ministry of Justice and the Law Commission, a medley of objections were raised in response to the proposition that the defence should be required to state the nature of its case in the course of a status hearing or other pre-trial case management discussions:

Privilege against self-incrimination is a real concern. I have yet to see it tested and I have been in court at times where, in the process of communication, the judge has addressed the defendant directly, and the defendant has uttered something which is quite damning.⁷⁸

⁷⁵ Chief Judge, County Court of Victoria Criminal Jurisdiction “Case List Management System Crimes (Criminal Trials) Act 1999 Practice Note No 1 of 1999 PNCRI-99” (13 October 1999).

⁷⁶ Crimes (Criminal Trials) Act 1999 (Vic), s 6.

⁷⁷ Crimes (Criminal Trials) Act 1999 (Vic), s 7.

⁷⁸ Above n 15, 6.7.1 (defence counsel).

... 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.⁷⁹

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.⁸⁰

... you know you just turn it up slowly until you have no protections against the things that one would never assume could be eroded.⁸¹

179 These were reiterated in consultation on Preliminary Paper 55, along with other issues. The objections can all be summarised as follows:

- Any defence disclosure requirement would be contrary to the right to silence and the privilege against self-incrimination.
- It would undermine the onus of proof (and therefore the criminal law principle known as “the golden thread”) by giving a degree of assistance to the prosecution.
- New Zealand is committed to an adversarial justice system. One of the rationales said to justify an adversarial rather than cooperative approach by defendants to criminal proceedings is that it compensates for the imbalance of resources between the parties. To this end, it is said that the defence is entitled not to commit itself pending an assessment of whether the prosecution has established a prima facie case; if it transpires that there are gaps in that case, it may exploit them by the advantage of surprise.
- This is just one of a series of reforms, that when occurring piecemeal may seem individually justified, but cumulatively have the effect of significantly eroding fundamental criminal justice principles by shifting the balance of interests in favour of the prosecution.

Right to silence (including the privilege against self-incrimination)

180 The right to silence in criminal investigations and proceedings, of which the privilege against self-incrimination forms part, is embodied in statute in section 23(4) New Zealand Bill of Rights Act 1990 (anyone arrested or detained shall have the right to refrain from making any statement), and section 25(d) of the same Act (right not to be compelled to be a witness or to confess guilt), which in turn reflects article 14(3)(g) International Covenant on Civil and Political Rights. The right has been described as a “right to hold one's tongue” in the face of criminal allegations made by the state,⁸² to which there are two aspects:

⁷⁹ Above n 15, 6.7.1 (judge).

⁸⁰ Above n 15, 6.7.1 (judge).

⁸¹ Above n 15, 6.11 (defence counsel).

⁸² Hon Justice EW Thomas “The So-Called Right to Silence” (1990–91) 14 NZULR 299, 315. The description reflects the fact that the right does not apply to physical evidence that is obtained rather than communicated, such as breath and body samples.

- a right not to answer the questions of law enforcement officers in the course of their criminal investigations; and
- the right to elect not to give evidence at trial.

181 There is nothing in any of the authorities that we have reviewed to suggest that the right to silence can or should be any more broadly interpreted, notwithstanding assumptions that it justifies literal and continuous silence, and is a right not to answer any questions by anybody about anything defence-related.⁸³

182 Arguments relating to the privilege against self-incrimination are equally unpersuasive. The privilege is not engaged in this context, because what is proposed does not assist criminal prosecution in the sense of requiring information that the prosecuting authority may rely on in deciding whether to prosecute, or to establish guilt.⁸⁴ It simply asks: given that the exposure to criminal liability already exists, how do you propose to defend it?⁸⁵

The “golden thread”

183 The onus of proof in criminal proceedings requires the prosecution to prove its case to the required standard without assistance from the defence. That onus, often called the “golden thread” in the criminal law, is encapsulated in section 25(c) New Zealand Bill of Rights Act 1990 (the right to be presumed innocent until proved guilty according to law), article 14(2) International Covenant on Civil and Political Rights, and the following well-known extract from *Woolmington v DPP*:⁸⁶

⁸³ New Zealand and international jurisprudence in relation to these rights is reviewed in: JB Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 1992); Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990: An Introduction to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (Wellington, 2004); P Rishworth “The Right to Silence and the Right Against Self-Incrimination” in Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Oxford and New York, 2003); New Zealand Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington, 1996). See also Thomas, above n 82.

⁸⁴ *Burke v The Superintendent Wellington Prison* [2003] 3 NZLR 206, paras 26–27.

⁸⁵ Similarly, in the American context, defence disclosure requirements have been upheld as constitutional on the basis that they merely alert the prosecution earlier to matters that the defendant intends to raise at trial; they accelerate timing, but do not require anything additional or incriminating. The leading decision is *Williams v Florida* (1970) 399 US 78, 85, in which the United States Supreme Court held that the Fifth Amendment cannot be used to support the view that there is a right for prosecution to show its full hand before the defence is obliged to respond: “Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state’s case before announcing the nature of his defense, any more than it entitles him to await the jury’s verdict on the state’s case-in-chief before deciding whether or not to take the stand himself.” For a review of United States defence disclosure requirements, which differ between states but are in general much broader than we are proposing for New Zealand, see RP Mosteller “Discovery Against the Defense: Tilting the Adversarial Balance” (1986) 74 Cal LR 1567, 1579–1584, 1651–1652; Suzanne Costom “Disclosure By the Defence: Why Should I Tell You?” 1 Can Crim LR 73, 79–81. For a contrary view about the legitimacy of requiring defence disclosure before a “case to meet” has been determined, see Costom, 84–86.

⁸⁶ [1935] AC 462, 481 (HL).

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained.

- 184 A requirement that defendants state the nature of their case is said to undermine this traditional onus of proof, by requiring a measure of assistance to the prosecution; it is also arguably contrary to the presumption of innocence, in the sense that the defendant must decide on and assert a defence before it has been established that there is a case to meet.
- 185 In one sense, a requirement on defendants to state the nature of their case is akin to a not guilty plea. 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 all elements charged. A requirement that the defendant indicates whether he or she contests all aspects of the prosecution case or merely some aspects is not materially different from a requirement that the defendant say whether the charge is defended; it merely makes more explicit what is being denied.
- 186 A requirement that the defence be more explicit about the issues on which the case turns does have potential to assist the prosecution in any or all of the following ways:
- it may alert the prosecution to weaknesses in its case that it can then shore up;
 - there will sometimes be implicit admissions (for example, to the *actus reus* where the defence is self-defence); and
 - even if neither of these occurs, disclosing the defence nonetheless indirectly assists the prosecution by allowing it to focus its efforts on the evidence on which the outcome of the case is likely to turn.
- 187 However, none of this changes the fact that the onus remains on the prosecution to find and present the evidence required to establish the elements of the offence, or negate defences, beyond reasonable doubt; this is undiluted by any requirement that defendants state the nature of their case, because defence disclosures will be inadmissible as evidence.
- 188 Moreover, forcing the parties to turn their minds to, and facilitating judicial questioning about, the defence is not an entirely one-way exercise. It can also work to the benefit of the defence, if it leads to amendment or withdrawal of charges, or if the defendant realises the futility of his or her position, and by pleading guilty earlier than would have otherwise occurred, is able to take advantage of the sentencing discount.⁸⁷
- 189 We agree that with a requirement for defence disclosure before the prosecution has closed its case, there is an unavoidable risk that in some cases, it may be open to prosecutors to plug evidential holes that emerge in discussions, or amend a charge from one that cannot be proven to a lesser charge that can. This is a risk that only arises where the defence (in essence)

⁸⁷ It would be an additional incentive for defendants if concessions about issues or evidence in the case that have the effect of focusing the trial were explicitly recognised as a mitigating factor on sentence under section 9(2) Sentencing Act 2002 by the legislature, judges, or both.

is that there was a degree of factual criminality, but legally the prosecution has pitched it wrong. In such circumstances, we believe that it will be in the wider interests of truth and justice to allow the prosecution an opportunity to rectify its approach if that can occur without misconduct or abuse of process, *even where notification of the mistake comes from the defendant* (thereby indirectly causing that person to put his or her own neck in the noose). The alternative is an endorsement of game-playing over truth-finding, which we discuss below. Defence counsel will ultimately retain the discretion to determine the degree of frankness that best assists their client's case. In chapter 6, we have also recommended that in such circumstances prosecutors must have regard to public interest considerations in making these decisions: especially where the alleged criminality is minor, the merits of pursuing it must be weighed against the likelihood that taking advantage of defence disclosures may adversely affect the willingness of defendants generally to cooperate with the case management process.

The adversarial approach (and justifications for it)

- 190 Although on one view it is justifiable for defence counsel, in the interests of their clients, to make the prosecution jump through as many hoops as possible in as many cases as possible, we consider that even in an adversarial criminal justice system, the greater societal interest in efficiently processing criminal cases demands a degree of mutual cooperation.
- 191 An adversarial criminal justice system is one in which evidence is collected and presented by parties, according to the rules of evidence, to an impartial fact finder. In an inquisitorial system, the fact finder decides on the direction of the inquiry and calls for evidence as he or she sees fit.⁸⁸ The assumption is often made that the inquisitorial system is a search for truth, whereas the adversarial system justifies an approach that might be described as “tactical” or, less charitably, game-playing. However, it does not follow from the fact that more power is in the hands of the fact finder in an inquisitorial system that such a system is more likely than the adversarial to elicit the truth, or that only the inquisitorial system has truth as its goal. Both inquisitorial and adversarial systems are different means of trying to achieve the same ends: the conviction of the guilty and acquittal of the innocent.
- 192 Truth-finding is not absolute in the criminal justice system, nor are we suggesting that it should be: the presumption of innocence, and the requirement for proof beyond reasonable doubt, inevitably from time to time will produce outcomes that are inconsistent with the truth. However, if without weakening these standards, the system can strive for greater efficiency and accuracy, it should do so. Conducting trials with precision is one way of getting closer to the truth more often.⁸⁹

⁸⁸ Another aspect of the perceived shift in emphasis from adversarial to inquisitorial is the level of judicial input and control that is possible and permissible under pre-trial case management processes such as those we are proposing for the summary jurisdiction, and that already informally occur to some extent in the indictable jurisdiction by way of callovers. For brief (and not entirely favourable) comment on this, see ATH Smith “Criminal Law: The Future” [2004] Crim LR 971, 972–973.

⁸⁹ For a contrary view about truth-finding and efficiency as justifications for defence disclosure, see Costom, above n 85, 76–78.

193 In discussing the rationale for full discovery in civil cases, the Supreme Court of Canada has said:⁹⁰

This change resulted from acceptance of the principles that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of the complete information of the case to be met.

194 Civil cases are of course distinguishable on the basis that the parties come to them on an equal footing, whereas in criminal cases, with the prosecutor acting as proxy for the state, there is a significant imbalance of resources. However, this disparity does not justify putting random obstacles in the path of the prosecution in a no-win attempt to even things up:⁹¹

The feeling persists today that the contest between the prosecution and the accused is basically unfair. Confronted with the full power and might of the state in the person of the prosecutor the accused is perceived to be at a disadvantage. To provide a fairer balance principles have been devised, such as the ideal that the accused is entitled to legal representation, and rules developed such as, it is claimed, the right to silence, to make the contest more evenly matched.

... However, there is no logic in manufacturing a balance between prosecution and accused for its own sake, simply because there is no sound reason why the full resources of the state should not be directed to the task of preventing and arresting criminal activity. What is important is that those who are accused in that process receive a fair trial, and this may require that they be provided with resources to counter those available to the Crown. What it does not mean is that the accused, because he or she is at a disadvantage in relation to the state, should obtain a compensating “boost” unrelated to the imbalance in those resources.

195 Moreover, we are not recommending reciprocal disclosure obligations: the prosecution has a mandatory evidential disclosure requirement of everything that is relevant; the defence need say only what issues are in dispute.

Erosion of fundamental criminal justice principles

196 Recent law reforms in response to overseas developments (most notably, the Criminal Procedure Bill 2004) have arguably significantly changed the criminal justice landscape in New Zealand. For example, the Criminal Procedure Bill includes provision for majority jury verdicts, exceptions to the double jeopardy rule, and automatic written committal. However, it does not follow that the criminal justice system is the worse for such changes. There may, of course, be a cumulative effect on the integrity of the criminal justice system if in fact one or more safeguards are eroded. However, that is only true to the extent that the practice being changed was in fact a safeguard. We do not believe that to be true of all of the Criminal Procedure Bill matters; nor do we accept that the absence of any defence disclosure requirement falls into that category. It should not be assumed that because something has been a certain way for a long time, it is necessarily one of the fundamental pillars of our justice system; that the criminal justice system is maximally robust in the balance it strikes between protection of the innocent

⁹⁰ *R v Stinchcombe* [1991] 3 SCR 326; 68 CCC (3d) 1 (SCC).

⁹¹ Thomas, above n 82, 308–309.

and other considerations, and therefore only damage can result from further tinkering; or that the adversarial system must be maintained as a package and will be undermined by any proposed change.

THE PRACTICAL PROBLEM OF IMPLEMENTATION

- 197 The effectiveness of the recommendation for defence disclosure depends entirely on finding incentives and sanctions that are principled, yet robust enough to produce compliance. Otherwise, the defence bar will simply ignore the requirement, or give responses that have the effect of subverting its purpose. For example, the defendant may respond that “everything is in dispute”, as a form of notional compliance with the new requirement that is uninformative and yet difficult to challenge; he or she may notify defences for which there does not appear to be an objectively sound argument, including contradictory defences; or he or she may take an approach at trial that diverges from the statement of defence.
- 198 In overseas jurisdictions that have attempted to require defence disclosure, the ideal mechanism for discouraging these sorts of defence practices has not yet been found: the incentives and sanctions legislated for overseas have been sporadically used, partly because some of them have the potential to produce injustice.
- 199 For example, under the 1996 and 2003 United Kingdom legislation,⁹² failure to make defence disclosure as required before trial, or departure from the defence statement at trial, can be sanctioned by comment from the court, or another party, in most instances without leave of the court,⁹³ and it is open to the judge or jury to draw adverse inferences from the disclosure failure in deciding whether the accused is guilty.⁹⁴
- 200 There are similar provisions to support the disclosure requirements introduced in Victoria under the Crimes (Criminal Trials) Act 1999.⁹⁵ The trial judge, or either party with the leave of the court, may comment on departures from agreed matters or failures to comply with the requirements of the Act, although limited use can be made of such comment in drawing adverse inferences of guilt.⁹⁶ Moreover, during the trial, evidence from either

⁹² See paras 172 and 173.

⁹³ Leave of the court is still required for comment on an undisclosed point of law or witness identification details.

⁹⁴ Criminal Procedure and Investigations Act 1996 (UK), s 11(3). In theory, there is a further sanction. Initially under the Act, the prosecution must disclose material that “might undermine the case for the prosecution against the accused”: s 3. There is then a secondary disclosure requirement, triggered by the filing of the defence statement, of matters “which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement”: s 7. However, the distinction between primary and secondary disclosure has not worked in practice: David Corker “Disclosure Stripped Bare” (11 November 2004) 9 *Archbold News* 6–7. Prosecutors, concerned not to prejudice their cases, and to minimise the resource devoted to decision making around disclosure, tend to disclose everything non-sensitive, rather than using the provisions as intended, as a reward for compliant defence behaviour. Under the Criminal Justice Act 2003 (UK), secondary disclosure is abolished in favour of a single ongoing prosecution disclosure duty: to disclose everything that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused.

⁹⁵ See paras 174 to 176.

⁹⁶ Crimes (Criminal Trials) Act 1999 (Vic), s 16.

party that is a substantial departure from matters previously disclosed can be introduced only with the leave of the court,⁹⁷ so that in theory a new defence that has not earlier been disclosed can be disallowed.

- 201 Provisions such as these are self-evidently problematic. Courts have been understandably reluctant to draw adverse inferences from a failure of defence disclosure, because there may be a variety of reasons for that failure, not all of which detract from the credibility of the defence argument. For example, whereas failure to make any mention of self-defence until the trial itself may be surprising and possibly suspicious, the same cannot be said of making a disclosure a few days later than statutorily required. A statutory regime that allows adverse inferences to be drawn from any failure inadequately distinguishes minor procedural non-compliance from failures that undermine credibility. It also fails to distinguish defendant from counsel fault.⁹⁸ Indeed, there may be few occasions on which a failure to disclose is truly indicative of guilt or adds much to the weight of other evidence.
- 202 In the United Kingdom, the 2003 legislation attempted to alleviate judicial disquiet at possible prejudice to the defendant from the drawing of adverse inferences from failures that may be due to counsel fault, by providing that defence statements under the new legislation are deemed to be given with the authority of the accused. However, this provision does little or nothing to address the substance of the judicial concern: what the defendant is deemed to have known or done says nothing about his or her moral (as opposed to legal) responsibility for it and it says even less about the likelihood of his or her guilt in respect of the offence charged.
- 203 For these reasons, the efficacy of the 1996 United Kingdom sanctions for failure to comply with the defence disclosure requirements has been questioned, and described as a “long and effective game of attrition”, in the face of “endemic” defence prejudice to the reforms. There is similar scepticism about the Criminal Justice Act 2003 amendments.⁹⁹
- 204 The efficacy of a provision allowing the court to decline leave to introduce evidence that substantially departs from matters previously disclosed between the parties is equally questionable. We understand that the provision to this effect in Victoria is never used, because judges take the view that defendants would be unfairly prejudiced by a refusal to allow them to introduce matters that might assist them in their defence. The judge may also use the absence

⁹⁷ Crimes (Criminal Trials) Act 1999 (Vic), s 15.

⁹⁸ Similarly, in the United States context, it has been argued that the constitutionality of impeachment for discovery failures may differ, depending on whether it is implicit in the failure that there has been perjury at either deposition or trial, as opposed to unfairly penalising defendants for mistake or uncertainty: “it would destroy the legitimacy of the discovery procedure if the state used such statements to help convict the defendant since they may include misstatements occurring solely because the defendant was required to speak at an early moment”. The author notes that determining mistake from deception will not always be easy, thereby re-expressing the problem encountered in practice in the United Kingdom: Mosteller, above n 85, 1638–1645.

⁹⁹ M Redmayne “Criminal Justice Act 2003: (1) Disclosure and Its Discontents” [2004] Crim LR 441; Corker, above n 94, 6–7.

of prior disclosure as a basis for granting leave for the prosecution to re-open its case and call evidence in rebuttal. We agree with this latter approach. However, because it could already occur in New Zealand as a matter of judicial discretion, no further reform to achieve it is required.

- 205 We therefore do not recommend any of the overseas approaches; however, it does not follow that no suitable incentives and sanctions can be found. Our recommendations in this regard are mostly discussed in chapter 11, and are to the effect that, where there has been a failure of disclosure that is attributable to counsel, courts should be empowered to impose sanctions directly on counsel, rather than using the defendant as a lever. There is some risk that, where prosecutors have acted in good faith on a statement of defence, trials may from time to time be aborted if the defence comes out of left field with an unnotified approach that the prosecutor is unprepared to meet; alternatively, prosecutors who prepare for any eventuality will not save many resources. The judicial use of sanctions will need to be sufficiently robust and readily applied to outweigh the advantages of this kind of game-playing.
- 206 There are some other informal drivers that we anticipate will produce a high measure of compliance over time:
- Legislative endorsement that defence disclosure should occur pre-trial, notwithstanding the rights-based objections to it, will give judges a greater lever than they have previously had to encourage counsel to discuss their case at status hearings and callovers.
 - We have been told that high-calibre counsel do routinely identify the issues in dispute to juries or opposing counsel or both, and that the claim that “everything is in dispute” is often the resort of the disorganised or incompetent, as a way of avoiding focusing on the issues. The same is true of running contradictory defences. There is an inbuilt disincentive to doing these things, because a muddled approach, when it persists through to trial, is not favourably received by either juries or judges.¹⁰⁰ This means that it is usually not in the client’s best interests and counsel who recognise this will regulate themselves. Even for those who do not, no specific provision regarding adverse inferences is necessary: judges and juries will draw the conclusion that is appropriate in the circumstances.
 - Newly admitted counsel who have not known any other system are highly likely to accept it and comply.
 - Compliance will self-perpetuate, because those who remain opposed will not wish themselves (and thereby their clients) to be seen as un-cooperative.

OTHER DEFENCE DISCLOSURE, INCLUDING NOTICE OF ALIBI, AND EXPERT WITNESS BRIEFS

- 207 A distinction needs to be drawn between disclosure of the nature of the defence case, and disclosure of the evidence upon which that case will be based. While early disclosure of defence evidence may sometimes facilitate

¹⁰⁰ As to juries, see New Zealand Law Commission, above n 69.

resolution of the case and benefit the defendant (for example, by resulting in the withdrawal or amendment of charges), this should remain discretionary rather than enforced.

- 208 The justification for the defence disclosure exceptions that will be codified by the Criminal Procedure Bill 2004 (defence expert briefs and notice of alibi) is largely pragmatic. The prosecution cannot be expected to reliably predict whether and how such defences will be run. If it is to have a fair opportunity to investigate and respond, it needs time to prepare. The alternative would almost inevitably be (and with expert briefs frequently to date has been) adjournment immediately before or during the trial, with its associated inefficiencies and inconvenience for everyone, including Crown experts and jurors.
- 209 These exceptions relate to the substance of the defence (that is, how it is proposed to prove certain matters), and therefore are different in kind to a requirement merely to state what is in dispute. However, it is difficult to find a principled basis for objecting to them: the rights-based arguments canvassed above, and the responses to them, all equally apply. It might therefore be feared that our position on these issues lends itself to a slippery slope. That is, if defence disclosure of notice of alibi and expert briefs is not unprincipled, and justifiable pragmatically, further exceptions, possibly defence disclosure generally, might later also be considered justified.
- 210 However, we do not recommend going further. Disclosure of the evidence upon which the defence case is to be based could only sensibly occur by requiring the filing of briefs by both prosecution and defence, and such a requirement could only be fairly imposed following full prosecution disclosure. It would therefore require a whole separate disclosure procedure to be established, relatively close to trial, with the attendant potential for delay. Unlike the two exceptions in the Criminal Procedure Bill 2004, the costs of such a procedure would outweigh the benefits.

MANDATORY DEFENCE OPENING STATEMENTS IN JURY TRIALS

- 211 As a corollary to the defence requirement to identify issues in dispute for administrative purposes prior to trial, it follows that they should likewise be required to identify them for the jury at the commencement of the trial, as opposed to the current position, which merely allows this to occur, because:
- It makes no sense that this should be considered essential information for all players except the jury (the fact finder). Research undertaken on behalf of the Law Commission into jury decision making demonstrated that identifying issues in dispute at the start of a trial enhances the jury's ability to comprehend, assimilate and evaluate the evidence, by giving jurors a contextual frame.¹⁰¹ As a matter of common sense, this should increase the likelihood of accurate (and therefore just) decisions.
 - In the absence of such a requirement, there will be a disjunction between the position of juries and judges in their fact-finding role; a judge sitting

¹⁰¹ New Zealand Law Commission, above n 69.

alone will know what is in dispute because of the memorandum on the file, whereas a jury will not. At its worst, this may distort mode of trial elections.

- 212 Defence counsel are, from time to time, happy to make such statements voluntarily; some counsel do this as a matter of course. However, they are opposed to being compelled, believing that sometimes this will be adverse to their client's interests. At the start of a trial, the defence does not know how prosecution evidence will play out in the courtroom: if witnesses do not come up to brief there may not be a case to answer; alternatively, different angles on their evidence may emerge during cross-examination. Decisions therefore cannot be made about which defence it is in the best interests of the defendant to run, or whether there is a need to run one at all. However, in our view, the potential risk to defendants is negligible because it should always be possible to couch the defence in a way that does not prejudice the defendant.¹⁰²
- 213 We therefore recommend that defence opening statements in jury trials should be mandatory.¹⁰³ If there are sound reasons for a change of defence approach in light of what emerges at trial, that can be subsequently explained to the jury by the judge, with a direction that they should regard it without prejudice.
- 214 Opening statements may be useful, but are not necessary, where the fact finder is a judge sitting alone, because he or she will have access to the papers, including the case management memorandum with its statement of defence.

EFFICIENCY BENEFITS OF THE NEW REQUIREMENTS ON THE DEFENCE

- 215 Requiring the defence to state the nature of its case is one mechanism for getting counsel to turn their minds to the file at an early stage. There may be some cases in which forcing counsel to do this results in the realisation that objectively the defence is not sound, and that the best advice to the client is to plead guilty and obtain the sentencing discount for doing so. Sometimes disclosing a robust defence (and possibly the evidential basis for it) may result in charge withdrawal.
- 216 Even if issue identification does not produce more early resolutions, it should at least ensure that in the cases that do proceed, the trials are more focused. If uncontroversial matters are eliminated, more evidence may be admitted

¹⁰² For example, by making a high level statement such as "the issue is consent" without specifying whether the defence case is that the complainant actually consented, or the defendant only reasonably believed that she did; or saying what is agreed and leaving the jury to infer what is not agreed. Even where the defence is no more than putting the prosecution to the proof (that is, saying nothing in the hope that the key witness does not turn up, or cross-examining aimlessly in the belief that it may raise doubt), it will be open to counsel to say so. It would be remarkable if this last was often perceived as being in the defendant's best interests: where there is no sound basis for a defence either factually or legally, this approach gambles a sentence discount against the long odds of complete acquittal.

¹⁰³ Compare Crimes (Criminal Trials) Act 1999 (Vic), s 13.

by consent; and even if this does not occur, prosecution and defence will be able to concentrate on preparing and presenting the relevant issues. This in turn will have widespread benefits for:

- prosecution and defence resources, by ensuring they are not misdirected to irrelevant matters;
- the length and complexity of hearings;
- court administration, including accurate scheduling;
- inconvenience to witnesses, by ensuring that those who appear really need to appear; and
- clarity for the finder of fact (either judge or jury) about the issues it needs to decide.

SUMMARY OF RECOMMENDATIONS

R26 Defendants who are proceeding to trial should be required by statute to disclose pre-trial the issues in dispute (for example, identity of the offender, an element of the offence, a positive defence, procedural error).

R27 Section 367(1A) Crimes Act 1961 should be amended, to provide that defence opening statements are mandatory in jury trials.

6

Case management
memorandum and discussions

- 217 **O**NE REASON for the current limited effectiveness of status hearings is an absence of communication between parties before arriving at court: their focus is entirely on court appearances, and they tend not to turn their minds to the file, and therefore matters that may need to be discussed with the other party, until very shortly beforehand. This means that court and judicial time is often taken, or cases are stood down or further adjourned, to address matters that prosecution and defence counsel should have negotiated and resolved between themselves (such as disclosure disputes, or minor charge or fact summary amendments).
- 218 This chapter and chapter 7 recommend mechanisms to ensure that in summary and electable cases, parties interact to progress matters independently from courts.

OUT OF COURT CASE MANAGEMENT DISCUSSIONS

History and rationale of plea and charge discussions in New Zealand

- 219 In New Zealand, it has long been standard practice for the prosecution and the defence to attempt to come to an agreement about the charges to which the defendant would plead guilty, by way of plea and charge discussions. In return for a guilty plea, 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 to something that accords more closely with the defendant's account of events. The practice has occurred in both the summary and indictable jurisdictions.¹⁰⁴
- 220 Discussions of this kind can produce outcomes that are in the overall interests of justice, and we support their continuance and further development as a regular part of the pre-trial process, because:
- Charge amendment or withdrawal, and early guilty pleas, can produce significant economies and quicker justice. Without them, there would almost certainly be a significant increase in the number of defended

¹⁰⁴ Stace, above n 21. The New Zealand practice differs from the layperson's understanding of "plea bargaining", which tends to reflect the North American model, where there is significant prosecutorial influence over the type or length of sentence, and inter-party discussions therefore incorporate sentence negotiations.

hearings, or length and complexity of trials, with increased costs for the criminal justice system, and adverse impact on the complainants and other witnesses who would then be required to testify.

- An outcome that is agreed upon rather than imposed can be beneficial for both victims and offenders: it provides an avenue for offenders to acknowledge their offending; they are more likely to accept the sentence imposed as a just and proportionate response (particularly if it is discounted); and it offers victims an opportunity for timely justice.
- 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 properly lay a number of charges relating to the same core incident (for example, excess breath alcohol, failure to stop, resisting arrest, assaulting a police officer); alternatively, they may lay a large number of charges (for example, in relation to fraud) that cover a connected course of conduct. In either instance, it may be in no one's interest to seek convictions on every charge when a focus on the most serious charge or a sample of charges is likely to produce only a change in the number of convictions or, perhaps, a small reduction in the punishment.

Taking case management discussions out of the status hearing

- 221 Although we support in principle the current practice of plea and charge discussions, modification is required to the way in which they occur in the summary jurisdiction, in three respects.
- 222 First, they need to be a formally recognised part of the process, rather than occurring ad hoc, as they do currently. We recommend recognition of, and provision for, case management discussions in all summary and electable cases, by way of legislation and rules.¹⁰⁵
- 223 Secondly, they should have broader scope than charge and plea. In addition to the appropriateness of the charges and whether the defendant will plead guilty, there will be case management matters such as resource requirements and the likely shape of the trial that should be discussed by the parties in the event of a not guilty plea.
- 224 Thirdly, the discussions in the first instance should involve only the parties, so that they draw to the smallest possible extent on court and judicial resources. Otherwise, instead of saving court resources, they merely substitute one use of such resources (status hearings) for another (more or longer trials). At present, judges use status hearings as a tool to initiate or become involved in case management discussions, chiefly because that is the only way to ensure that such discussions occur, and that the issues are properly explored. There need to be other incentives for prosecution and defence to take the initiative to have their own discussions before, and sometimes instead of, the status hearing.

¹⁰⁵ Reasons for excluding purely indictable cases are explained in ch 9.

- 225 Accordingly, we recommend that, if a case has proceeded past the administrative phase and a provisional status hearing has been scheduled,¹⁰⁶ prosecution and defence should be required to meet or otherwise arrange to discuss the case out of court. This can occur between the parties at a time and place and in a manner that they think appropriate: there may be no need for them to meet physically, if email correspondence or a telephone conversation would suffice. A record of the discussions and any agreement reached must be filed in court, in the form of a completed case management memorandum.¹⁰⁷
- 226 To remove one potential excuse for counsel non-compliance with the new case management requirements, we recommend that it should be a condition of bail that the defendant provide instructions to counsel about case management matters, and that if this bail condition is breached, counsel should notify the court.¹⁰⁸

The case management memorandum

- 227 The proposed case management memorandum will require the parties to work through the issues in the case and document the outcome. It will therefore also put on the record and make transparent the outcome of discussions, notwithstanding that they have occurred out of court. In addition to plea and charge negotiations, parties must turn their minds to trial management issues if there is to be a not guilty plea, and indicate whether they consider there are unresolved matters that require a status hearing.
- 228 This recommendation is modelled on the United Kingdom “plea and directions hearing” questionnaire,¹⁰⁹ and on other similar forms that are already informally in use in some New Zealand courts.
- 229 We recommend that the memorandum should be filed by the prosecution no later than 10 working days before the scheduled status hearing, so that court staff and the status hearing judge have time to review the memorandum and its attachments.¹¹⁰

¹⁰⁶ See ch 4.

¹⁰⁷ See appendix A. “Completed” means, completed to the extent required by the draft memorandum. It will not be necessary to answer all questions in all cases: if the case is going to status hearing, except for indicating that fact and the reason for it, the memorandum can be completed there; and the entire second page of the memorandum need only be completed in the event of a not guilty plea.

¹⁰⁸ See ch 4.

¹⁰⁹ Plea and Directions Hearings in the Crown Court Practice Rules 1995. The questionnaire, completed as far as possible with the agreement of both advocates, must be handed in to the court prior to the commencement of the plea and directions hearing. It requires counsel to work through and answer a series of questions about the substance and management of the case, if it has not been possible to negotiate a plea. It was used by New Zealand counsel and judges for the Pitcairn trials. Judge Blackie (the presiding judge of the Pitcairn Supreme Court) has modelled a form on it for his personal use in managing cases in the Manukau District Court.

¹¹⁰ See ch 7.

230 The memorandum should have attached to it a copy of material initially disclosed,¹¹¹ and any further relevant information (for example, supporting material for sentence indication, defendant’s instructions in relation to guilty plea).¹¹² This is for the benefit of the status hearing judge, so that he or she is fully aware of the evidence in the case and other relevant matters. This is important for two reasons. First, the judge can independently scrutinise the basis for going forward that has been agreed between the parties, to ensure that in his or her view it is optimally efficient; alternatively, if the case is not proceeding, the information attached will facilitate the entry of a plea and the request of pre-sentence reports. Secondly, if a status hearing is required, it allows the judge to prepare in advance, and thereby conduct the hearing both efficiently and fairly.¹¹³

Onus on prosecution to initiate case management discussions

231 In *Criminal Prosecution*, the Law Commission noted that the current *Solicitor-General’s Prosecution Guidelines* prohibit prosecutors from initiating plea and charge discussions in indictable matters, and recommended that this prohibition be extended to summary cases.¹¹⁴

232 In consultation on Preliminary Paper 55, prosecutors submitted that a requirement on them to initiate case management discussions is inappropriate, for two reasons:

- Under the *Solicitor-General’s Prosecution Guidelines*, prosecutors must only lay charges that are established by the evidence, and otherwise in the interests of justice. This means that, if prosecutors have made an early assessment of the appropriateness of the charges as we are recommending in chapter 3, and in accordance with the *Guidelines*, they would have no room to move. Expecting them to initiate discussions either leaves them looking silly (because there is nothing left to negotiate about), or calls into question the propriety of their initial charging choice.
- By laying the information, the prosecution has taken the first step; the onus should then be on the defence to identify if there is a problem with the charges.

233 We are not persuaded by these submissions. The case management discussions that we propose should be initiated by the prosecution (except where the defendant is unrepresented),¹¹⁵ and the *Solicitor-General’s Prosecution Guidelines* amended to provide for this, because:

- The contrary submissions may have arisen from the way that Preliminary Paper 55 was framed, which put all of the emphasis on “plea and charge” discussions without making it sufficiently clear that even where the prosecution does not consider that charges can properly be amended,

¹¹¹ See ch 3.

¹¹² As to the latter, see para 253.

¹¹³ See ch 7 for further discussion of these matters.

¹¹⁴ New Zealand Law Commission, above n 30; *Solicitor-General’s Prosecution Guidelines*, above n 30.

¹¹⁵ See further ch 10.

there will be many other matters that the parties should discuss. There is no inference, in requiring the prosecution to initiate case management discussions of the scope that we recommend, that the charges are somehow inappropriate.

- Moreover, prosecutors typically have a selection of charges available to reflect the alleged criminal conduct. There is in many cases room in the choice of the charges to accommodate whatever defence perspective or further information is teased out by the discussions, again without implying that the charges initially laid were incorrect on the evidence as it was at that time understood.
- As to its being the defence's "turn", it is implicit in not having pleaded guilty at first call that the defence does not accept some or all aspects of the prosecution case, which puts the ball back in the prosecutor's court.
- The recommendation is consistent with current practice in the indictable jurisdiction in relation to, for example, evidence by consent under section 369 Crimes Act 1961. The Crown Law Office advised that it is standard Crown counsel practice to write to defence counsel seeking their agreement under this section on facts and on the admission of written depositions. The Crown Law Office also advised that Crown counsel very often receive no response to letters seeking agreement under section 369. They attributed this to the prevailing defence bar view that discussing the case can undermine the defendant's rights.¹¹⁶
- Given the entrenched defence attitude that they need not and should not participate in pre-trial dialogue, the only effective lever pragmatically is to put the onus on the prosecution to initiate case management discussions.
- Unlike the defence, the prosecution has the resources and the motivation to bring cases promptly to trial (to minimise the risk that undue delay will amount to an abuse of process that aborts the trial).

SAFEGUARDING STAKEHOLDERS' INTERESTS IN DISCUSSIONS

- 234 The focus of the first half of this chapter is on ensuring that case management discussions are conducted in a way that is optimally efficient: that is, out of court, so far as possible. However, it is equally important that the rights of defendants and complainants are properly preserved, and that the broader interests of justice are not overlooked in striving for a resolution.
- 235 Much of the following discussion relates to the *Solicitor-General's Prosecution Guidelines*,¹¹⁷ and some amendments to those *Guidelines* are proposed. Although the case management process is only recommended for summary and electable cases,¹¹⁸ there is no reason in principle why the prosecution approach in the indictable jurisdiction should differ. We therefore recommend that the *Guidelines* should be amended more generally.

¹¹⁶ For discussion of our very different view, see ch 5.

¹¹⁷ Above n 30.

¹¹⁸ In ch 9 we recommend further consultation about purely indictable case management.

Prosecution duties in relation to case management discussions

Perceptions of overcharging

- 236 In an environment where case management discussions are encouraged, but that is also still an adversarial environment, some defence counsel perceive a risk of overcharging, whereby the prosecution has the power to create for itself a bartering tool by (as it were) starting the bidding high.
- 237 Those who allege overcharging use the term in two senses: first, 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; and secondly, the laying of multiple charges in respect of a single incident or a connected course of conduct, which, although they can be legally sustained, appear unduly heavy-handed.
- 238 In Preliminary Paper 55, we suggested that there was a need for a prohibition on the first kind of deliberate overcharging; but in relation to the second, that it was a discretionary matter that could not and should not be regulated. It noted that the *Solicitor-General's Prosecution Guidelines* implicitly frown upon the second form of overcharging (by requiring consideration not only of the sufficiency of the evidence, but the overall justice of the case).¹¹⁹
- 239 After further consideration, we have concluded that the dual requirement already in the *Guidelines* implicitly prohibits overcharging of both kinds: there is no need for and would be no benefit gained by any additional provision. We note also that nothing we have heard or seen supports the degree of prosecutorial bad faith that is inherent in the above allegations. If overcharging occurs, it is in our view more likely to be the result of inadequate prosecutorial review of charges initially laid (which is discussed in chapter 3).

Prosecution discretion to lay lesser charges than the evidence supports

- 240 In *Criminal Prosecution*, the Law Commission noted and supported the prohibition in the *Solicitor-General's Prosecution Guidelines* against laying lesser charges, or agreeing to lesser charges, than the evidence supports.¹²⁰ This was because:
- 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; and
 - 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.

¹¹⁹ *Solicitor-General's Prosecution Guidelines*, above n 30.

¹²⁰ New Zealand Law Commission, above n 30; *Solicitor-General's Prosecution Guidelines*, above n 30.

241 There is a fine line between what is open to negotiation in the interests of justice and what might pejoratively be described as resolution-directed (as opposed to justice-directed) horse-trading. The prohibition might be seen as an effective counter against the latter, and also a protection for prosecutors, when faced with what may from time to time be utterly unreasonable expectations on the part of defendants or their counsel. Notwithstanding this, we have concluded that the prohibition is not soundly based, for the following reasons:

- 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 may not sometimes warrant lesser charges.
- A prohibition of this kind would imply that on the evidence available to the prosecution in any given case, there is one non-negotiable version of the truth that irrefutably dictates certain charges. The reality is that police officers or other investigators confronted with offending behaviour have the choice amongst a number of available charges, and considerable discretion as to which one or how many they choose to lay. It cannot easily be asserted that preferring one charge over another, or choosing to lay fewer charges, is factually wrong; any such prohibition would therefore be impossible to enforce.
- An amended lesser charge or a reduction in the number of charges, if it produces an acknowledgement of offending and a speedy resolution, may be in everybody's best interests, and preferable to proceeding to trial, when the whole range of factors is taken into account such as the nature of the sentence that is likely to be imposed, the interests and needs of complainants, and the costs for the community.

242 We recommend modification of the *Solicitor-General's Prosecution Guidelines*, to make it clear that without undermining the interests of justice, which must remain the paramount consideration, discussions may sometimes result in amendments to charges, or a reduction in the number of charges, notwithstanding evidence that would support more serious charges.

The enforceability of agreements

243 In *Fox v Attorney-General*,¹²¹ some charges had been withdrawn, and others amended, in the District Court following an agreement between the police and defence counsel. The appellant pleaded guilty to the amended charges. The Crown Solicitor who appeared at sentencing was of the view that some aspects of the alleged offending were not captured by the amended charges and, acting on the Crown's advice, the police re-laid one charge that had been withdrawn. This was challenged by the defendant as an abuse of process.

244 In the District Court the outcome of the plea and charge discussions was treated as binding on the prosecution, the judge observing:¹²²

¹²¹ [2002] 3 NZLR 62; (2002) 19 CRNZ 378.

¹²² *Fox*, above n 121, para 15.

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.

- 245 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. It 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 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* and to direction if the prosecutor's actions or decision fell outside the *Guidelines*.
- 246 However, the Court of Appeal also commented that it is plainly desirable that the prosecution gives effect to undertakings or agreements arising from case management discussions. We share this view. It will be rare that the public interest would require any departure from agreed matters, and we recommend that the *Solicitor-General's Prosecution Guidelines* should say so. Any other approach is likely to undermine the rationale for, and general confidence in, case management discussions, which is a critical public interest consideration.¹²³ However, we note that the *Fox* scenario is likely to occur only rarely: in the situation where guilty pleas have been entered on amended charges pertaining to the same conduct as the original charge, the plea of *autrefois* convict would operate as a bar to a subsequent prosecution change of approach.
- 247 Preliminary Paper 55 proposed different burdens on prosecution and defence as to the enforceability of plea and charge agreements:¹²⁴
- 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.
- 248 However, in light of the requirement on defence counsel to get instructions from their client before concluding case management discussions,¹²⁵ it is just as important for the integrity of case management discussions that the defence, as well as the prosecution, not be able to lightly resile from agreed matters.
- 249 Given the early stage at which the case management memorandum will be prepared and filed, it is not practicable for it to be binding. We recommend, in relation to both parties, that subsequent changes of approach need to be rigorously judicially scrutinised, to ensure that they are not occurring in bad faith or just on a whim. Where judges are satisfied that the latter is the case, it will be necessary and appropriate for them to impose sanctions.¹²⁶

¹²³ R Lithgow "Fox – The Final Chapter" [2002] NZLJ 287, 288.

¹²⁴ New Zealand Law Commission, above n 3, para 144.

¹²⁵ "Charge Negotiations and Defence Counsel" (18 June 2001) 563 Law Talk 12.

¹²⁶ See ch 11.

Protecting defendants' rights and interests

Instructing defence counsel

- 250 Defendants are frequently young, poorly educated, unemployed or in lower income brackets, all of which makes them vulnerable in the pre-trial process.¹²⁷ Consistent with research conducted overseas,¹²⁸ the 2004 Evaluation found that defendants rely heavily on their lawyers when making choices about how to proceed, and whether or when to plead.
- 251 Given this heavy reliance, and the potential for defendants to be exploited by it (or, conversely, to claim they have been exploited when counsel took all possible care), in *Criminal Prosecution* the Law Commission recommended guidelines for defence counsel who are undertaking charge negotiations.¹²⁹ These have since been compiled by the Criminal Law Committee of the New Zealand Law Society as follows:¹³⁰
- 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.
- 252 We largely agree with these guidelines. They reflect the fact that it is not always possible to obtain full instructions from the defendant or determine a negotiating position, before contact is made with the prosecution. What is important is that the defendant is informed of the progress of discussions and the issues canvassed in them, and has a meaningful opportunity to provide instructions.
- 253 However, although the guidelines state a preference that instructions be taken in writing, they do not make it a requirement. In one respect, we do not think that this goes far enough. When the agreed outcome of case management discussions is a guilty plea, written and signed instructions to this effect should always be obtained, and should be attached to the case management memorandum. This is because, in these circumstances, the case management memorandum will constitute the guilty plea,¹³¹ and there needs to be an incontrovertible record that the defendant has directed the entry

¹²⁷ 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 conducted for the Legal Services Board in November 1999: CM Research Ltd "Eligibility for Legal Aid Discussion Document" (December 2002). The profile of defendants in the 2004 Evaluation, above n 15, shows that they were mainly male (85 per cent), aged between 20 and 39 years; 39 per cent were classified as Māori.

¹²⁸ J Baldwin and M McConville *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson & Co, London, 1977); RD Seifman and A Freiberg "Plea Bargaining in Victoria: the Role of Counsel" (2001) 25 Crim LJ 64.

¹²⁹ New Zealand Law Commission, above n 30.

¹³⁰ Above n 125. The NZLS guidelines are drafted on the basis that defence counsel may initiate discussions. Although it is our recommendation that discussions should be initiated by the prosecution, and that the *Solicitor-General's Prosecution Guidelines* should say so, we do not consider that the NZLS guidelines are necessarily at odds with this: defence counsel may choose to initiate discussions, but if they do not do so in a timely way, the ultimate responsibility is a prosecution one.

¹³¹ See ch 7.

of that plea. We considered the option of requiring defendants to sign the case management memorandum itself, and thereby endorse all of it in all cases, which would have some other advantages.¹³² However, this would have required a physical meeting between counsel and client after the completion of the memorandum but before its filing, which would have been logistically difficult and significantly increased the risk that the memorandum would not be filed by the due date. Signed instructions can be provided in advance on a conditional basis and are therefore more flexible; they also require nothing further to what is already considered good practice.

Judicial oversight

- 254 Many defendants report that they change a plea to guilty for largely pragmatic reasons: for example, because they “won’t be believed” or want to “get it over and done with”, or because the temptations of an amended charge or sentence discount outweigh the inconvenience of continuing to protest their innocence.¹³³
- 255 Preliminary Paper 55 therefore suggested that, at the status hearing, it should be the responsibility of the judge to ensure that a defendant’s plea is voluntary, and made with full understanding of the charges and the consequences of the plea (bearing in mind that, notwithstanding the difficulties it poses for perceptions of justice, they are entitled to choose to plead guilty for pragmatic reasons if that honestly seems to them the best option).
- 256 We have decided not to recommend this kind of judicial oversight, for three reasons. First, we are recommending that some, perhaps many, cases should be dealt with on the papers, meaning that there will be no opportunity to ask questions of the defendant.¹³⁴ Secondly, in the opinion of some submitters, it would be an inappropriate and impossible inquisitorial exercise for a judge to assess in a relatively brief space of time the myriad of factors that might motivate a guilty plea. Thirdly, it is a facet of the duty on defence counsel to act in the best interests of their client, that it should be their responsibility rather than the judge’s to endeavour to make sure that any instructions received to plead guilty are indeed in those best interests.

Discussions “without prejudice”

- 257 Where case management 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 specifically agreed they were to be without prejudice.¹³⁵ However, if information provided in the

¹³² For example, in cases subsequently appealed on the ground of counsel incompetence, or where there are pre-trial changes of counsel purportedly on the same ground (sometimes a further tactic for delay).

¹³³ Ministry of Justice and New Zealand Law Commission, 2004 Evaluation, above n 15, 4.5.

¹³⁴ See ch 7.

¹³⁵ *Police v Cresswell* (16 May 2003) DC Nelson Walker DCJ. See also “Case Comment Status Hearings – Confidentiality of Information” (1 October 2001) 570 Law Talk 8, which advises counsel intending to reveal their client’s defence in out of court discussions to obtain an undertaking of confidentiality.

course of such discussions can be used against a defendant in subsequent proceedings, their effectiveness is likely to be fatally undermined, because defendants (or counsel on their behalf) will be reluctant to engage.

- 258 Material that would be prejudicial to the defendant in the event of a trial may arise in case management discussions in two ways. First, they may produce admissions from the defendant in relation to, for example, issue identification (thereby implicitly or explicitly acknowledging responsibility for some elements of an offence), or discussions about charge amendment (for example, that the defendant would be prepared to plead guilty on a lesser charge). Secondly, the defendant prior to a sentence indication may make submissions as to mitigating factors relating to the offence, which might include an acknowledgement that the defendant is responsible for its core elements. In either case, if the defendant's admissions could be used at a subsequent trial, either as proof of the prosecution case or as a prior inconsistent statement for impeachment, that would significantly prejudice the defendant's ability to mount a defence.
- 259 We recommend legislative provision to ensure that information provided in the course of pre-trial discussions between the parties, both out of court and at status hearing, is not admissible in any subsequent proceedings. This would prevent the defendant's own statements being used directly against that person in a subsequent trial.
- 260 Such a provision may prove controversial where admissions by the defendant become publicly known (because they have occurred in open court at a status hearing, or via the prosecutor in the course of complainant consultation or media interviews), but cannot be acted on. At its worst, this could produce a trial outcome that conflicts with a defendant's own admissions at an earlier stage in the proceedings. Particularly where the charges are serious, that can be expected to provoke criticism from complainants and the media. However, such a risk is the price that must be paid to ensure that the pre-trial process is optimally effective and fair. Ultimately that will be in the interests of complainants (as a class, rather than in the individual case) and in the overall interests of justice, even if it does provoke consternation from time to time. It is not dissimilar from the situation where a confessional statement is ruled to be inadmissible for wider public interest reasons.
- 261 We do not propose that the prosecution should be prevented from further investigating with a view to eliciting other evidence, either to bolster the current charge or lay alternative or additional charges, if such evidence can be sourced independently (that is, there should be no "derived use" immunity). In *Mellon v Attorney-General*,¹³⁶ defence counsel's explanation at a status hearing about why the evidence did not support a cannabis cultivation charge, alerted police to the fact that the defendant had been an accessory after the fact to cultivation by another offender. Although the subsequent laying of the accessory charge (which on the facts was more serious than the original charge) was found to be an abuse of process, the charge was not stayed, because it was possible that the police would

¹³⁶ (11 October 2004) HC Dunedin CIV2002/412/000330 Chisholm J.

independently have discovered the discrepancy. The Otago District and New Zealand Law Societies have since issued the following advice to their members:¹³⁷

When the concept of status hearings was sold to the profession we were assured by the late Judge Buckton that the judges would not permit the police to use disclosures made by the defence at the status hearing. This meant difficulties in the prosecution case could be disclosed without fear that the police would use the status hearing disclosures to patch up the case against the defendant if it went to trial.

...

[In light of the *Mellon* decision, practitioners] should remember that their client has a right of silence and be very careful before making disclosures as to the defence at a status hearing. If it is considered to be for the benefit of the client to make such disclosures then it is suggested that the practitioner should first obtain a written authorisation from the client permitting the disclosure to be made and also acknowledging that the court may not prevent the prosecution making use of that disclosure in respect of the evidence it calls for the current charge or in deciding to lay a new or different charge.

- 262 In our view, prosecutors must carefully consider, before taking indirect advantage of admissions obtained in the course of pre-trial discussions, whether in the long run it will undermine the effectiveness of such discussions and be contrary to the wider public interest. We recommend a provision to this effect in the *Solicitor-General's Prosecution Guidelines*.¹³⁸ As with the similar recommendation above, in relation to departure from agreed matters, we acknowledge that there is a danger that the demands of the instant case will be regarded as more pressing than the long-term ramifications; and also that the *Guidelines* are discretionary in nature, not binding. We nonetheless consider that there is value in such provisions, for educative purposes.

Complainants' involvement in case management decisions

- 263 Complainants cannot dictate whether a prosecution is brought or a charge withdrawn or reduced. However, they have a right to be informed. Section 12(1) Victims' Rights Act 2002 requires that a victim must, as soon as practicable, be given information about all charges laid or the 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 victims be treated with courtesy and that their dignity be respected should be given practical effect by ensuring that they are consulted, and that the reasons for decisions taken are adequately communicated to them.
- 264 The effects of this are twofold. First, while the views and wishes of complainants should not determine the outcome of case management discussions (just as a victim impact statement should not determine the sentence), they are nevertheless relevant. Prosecutors should always consider

¹³⁷ Otago District Law Society "Cur Adv Vult" (December 2004); subsequently reprinted by permission in (18 April 2005) 643 Law Talk 17.

¹³⁸ Above n 30.

the interests of complainants and consult them before concluding and filing the case management memorandum wherever that is feasible.¹³⁹ Generally, this appears to be the practice already in both summary and indictable jurisdictions. Crown prosecutors interviewed for the callover study in the 2004 Evaluation said that complainants were consulted about charge withdrawals and amendments.¹⁴⁰ Most status hearings complainants interviewed also reported being impressed with the contact they had and the information they received from the police and victim advisers.¹⁴¹

- 265 Secondly, the reasons for any amendments to the charges that lead to case resolution need to be clearly communicated to the complainant before the case comes back to court. Amendments to charges as a result of informal discussion may be perceived by complainants as trivialising their experience. Any dissatisfaction or grievance may 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 significant difference to the sentencing outcome).
- 266 We recommend that for completeness, the *Solicitor-General's Prosecution Guidelines* should reiterate the Victims' Rights Act requirements, and make explicit best practice for complainant consultation.¹⁴²

SUMMARY OF RECOMMENDATIONS

R28 Out of court case management discussions should occur in all summary and electable cases, unless they fall within any category of case exempted by the Chief District Court Judge.

R29 Case management discussions should be a formally recognised part of the criminal justice process, provided for in legislation and rules.

R30 Case management discussions should have broader scope than charge and plea: if the case is proceeding, there will be case management matters such as resource requirements and the likely shape of the trial that can usefully be discussed.

R31 The discussions ought at first instance to involve only the parties. This will require prosecution and defence counsel to meet or otherwise arrange to discuss the case out of court (for example, by email correspondence or a telephone conversation).

R32 The prosecution should always initiate case management discussions (except where the defendant is unrepresented). The *Solicitor-General's Prosecution Guidelines* should be amended accordingly.

¹³⁹ It is not always practicable to contact every complainant, for example in multi-count burglary or fraud trials, or where they are busy or transient.

¹⁴⁰ Ministry of Justice and New Zealand Law Commission, above n 15, 7.3.9.

¹⁴¹ Ministry of Justice and New Zealand Law Commission, above n 15, 5.8.

¹⁴² *Solicitor-General's Prosecution Guidelines*, above n 30.

- R33** Parties should be statutorily required to jointly complete a case management memorandum, a draft of which appears in appendix A (and which, in summary and electable cases, will be the vehicle for the defence statement of issues in dispute).
- R34** The memorandum should be filed by the prosecution no later than 10 working days before the scheduled status hearing.
- R35** The memorandum should have attached to it a copy of the material initially disclosed by the prosecution to the defence, and any further relevant information (for example, supporting material for sentence indication, defendant's instructions in relation to guilty plea).
- R36** The *Solicitor-General's Prosecution Guidelines* should be amended, to provide that:
- if it is necessary in the overall interests of justice, lesser or fewer charges can be laid than there is evidence to support;
 - it will be rare that the public interest will require any departure from matters that have been agreed between the parties in case management discussions;
 - prosecutors should carefully consider, before taking advantage of pre-trial admissions, whether this is in fact in the wider public interest, if in the long run it will undermine the effectiveness of case management discussions; and
 - as they are already required to do under the Victims' Rights Act 2002, prosecutors must consult with complainants about the outcome of case management discussions.
- R37** It is important for the integrity of case management discussions that the defence, as well as the prosecution, not be able to lightly resile from agreed matters. Subsequent changes of approach by either party should be rigorously judicially scrutinised, to ensure that they are not occurring in bad faith, or just on a whim. Where judges are satisfied that the latter is the case, it will be necessary and appropriate to impose sanctions.
- R38** When the agreed outcome of case management discussions is a guilty plea, written and signed instructions to this effect should always be obtained from the defendant, and should be attached to the case management memorandum.
- R39** There should be legislative provision to ensure that information provided in the course of case management discussions, both out of court and at status hearing, is not admissible in any subsequent proceedings.

7

Out of court processes for bringing cases to trial

- 267 CHAPTER 6 RECOMMENDED a requirement on parties in summary and electable cases to complete and file a case management memorandum, recording the outcome of their out of court discussions. It recommended that the memorandum be filed 10 working days in advance of the provisional status hearing date (that date having been scheduled during the administrative phase of the case: as to which, see chapter 4).
- 268 This and the following chapter describe what should happen next. Chapter 7 deals with the out of court management of cases; chapter 8 with what should happen at status hearing, for the cases that do in fact proceed to such a hearing. Consistent with the general thrust of this report that matters should be managed out of court as much as possible, a status hearing should be a last resort rather than an automatic event. Although a status hearing will be scheduled in virtually all summary and electable cases,¹⁴³ if it transpires from the case management memorandum that parties have satisfactorily resolved matters between themselves (as to either charge and guilty plea agreement, or, if the defendant pleads not guilty, how the case should proceed), the status hearing should be abandoned.¹⁴⁴
- 269 We recommend three mechanisms for managing summary and electable cases out of court following case management discussions:
- legislative amendments so that plea and jury trial election (if applicable) can be entered on the papers;
 - administrative and judicial scrutiny of the outcome of case management discussions, before the status hearing, by way of the case management memorandum and its attachments;
 - a new role of case officer in each District Court registry, to monitor and, if necessary, take steps to enforce the ongoing progress of criminal cases.

¹⁴³ There may be some kinds of cases that operational experience shows do not benefit from case management (for example, because that would unduly delay the trial). We are recommending a discretion for the Chief District Court Judge to identify certain categories of case and exclude them from case management discussions, the status hearing, or both: see ch 4.

¹⁴⁴ It is expected that courts will ascertain relatively quickly the average proportion of cases for which a status hearing turns out to be unnecessary, and will be able to manage their scheduling accordingly. What is required will be similar, but preferable, to the over-scheduling that currently occurs for trial, in two respects: witnesses will not be inconvenienced by over-scheduling, and the court will have advance notice of which status hearings will in fact proceed.

ENTRY OF PLEA AND MODE OF TRIAL ELECTION

Deferral of entry of plea and election

- 270 Section 66 Summary Proceedings Act 1957 requires that in electable cases (where the maximum penalty is greater than 3 months' imprisonment), *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 is no legislative basis for the current practice of requiring that the accused make an election as to jury trial *at first appearance before pleading*. On one level, an election of a jury trial at this point makes sense, because it triggers the preliminary hearing and committal process and means that electable cases that will be tried indictably follow the same procedure as cases where the charges are indictably laid. However, in other respects it is not logical, for two reasons. First, it requires the allocation of resources to the committal process before the parties have explored whether the case is capable of resolution. Secondly, although the right to a jury trial is only relevant in the event of a not guilty plea, the defendant is asked to make the election before he or she is asked to plead.
- 271 There is a similar illogicality in summary cases, in relation to the entry of a plea. A plea must be entered during the administrative phase of the case, on the charges as they have then been laid, and the summary of facts that supports them. Defendants who dispute any aspect of these or want to know more about the evidence against them must plead not guilty to receive full disclosure, and progress their case to a status hearing where there can be further dialogue with the prosecution. It does not follow that they always consider themselves innocent of the charges and wish to defend them; many not guilty pleas are initially entered for purely pragmatic reasons. This undermines the gravitas that ought to attach to the plea, and is unnecessarily traumatic for complainants, because it suggests to them, sometimes incorrectly, that the offending is denied and that the case will proceed to trial.
- 272 We recommend that only guilty pleas should be taken during the administrative phase of the case. In both summary and electable cases, the entry of a not guilty plea should be deferred to the end of the case management process. Election of summary or jury trial in electable cases should also be deferred, so that the defendant is asked to elect only upon the entry of a not guilty plea.

Entry of plea and election on the papers

- 273 We recommend that the case management memorandum should sometimes be the vehicle by which plea and election occur. Whether plea and election are required on the papers will depend on the outcome of case management discussions, as follows:
- There will be no requirement to plead (and therefore no requirement to elect) if parties are requesting a status hearing: those actions will occur at status hearing, at the conclusion of the case management discussions, including sentence indication if requested.

- If as a result of case management discussions the defendant wishes to plead guilty (for example, in response to amended charges), that will be recorded in the case management memorandum and entered on the papers.
- If the parties agree that the case should proceed to trial, the not guilty plea and election (if applicable) will be entered on the papers, with one proviso.
- The proviso is that if the judge who subsequently reviews the case management memorandum considers that there is a need for a status hearing, the plea and election previously entered will be vacated, and the defendant will be asked to plead and elect again at the end of the status hearing.

274 The point of plea (and mode of trial election if applicable), when it occurs on the papers, will be the date on which the case management memorandum is filed. This needs to be a clearly identifiable point, because other procedural matters follow from it.¹⁴⁵

Change of election to occur only by judicial leave

275 At present the right to re-elect jury trial exists up to the time of trial. Defendants may change their election immediately before a summary defended hearing to prolong disposition of the case (because the case then needs to proceed through committal before it can be set down for jury trial). It is also open to defendants, and not unknown, to change their election repeatedly. The right to elect is not a right that persists beyond the point at which it is initially exercised. We therefore recommend that change of mode of trial election should require judicial leave.

Progressing cases pleaded on the papers

276 For the cases where a plea (and mode of trial election if applicable) is entered on the papers, the status hearing will be abandoned and the case administratively adjourned to a sentencing hearing in the event of a guilty plea, or to the next court event if the plea is not guilty.

277 In relation to guilty pleas, we recommend that judges should order pre-sentence reports out of court, based on their review of the filed papers, so that these will be available at the sentencing hearing.¹⁴⁶

278 Under section 45A Summary Proceedings Act 1957, a registrar may only grant an out of court adjournment when the defendant is not in custody. Where defendants are in custody, our case management memorandum includes a question about whether they consent to an extension of custodial remand pending the next court event.¹⁴⁷ We recommend that section 45A

¹⁴⁵ For example, as proposed by the Criminal Procedure Bill 2004, the 42-day period for filing briefs for committal, and full disclosure as soon as reasonably practicable.

¹⁴⁶ This can already occur under section 26 Sentencing Act 2002, or at least the section does not prohibit it. For our recommendation that the registrar should be able to take guilty pleas, see ch 4.

¹⁴⁷ See appendix A.

be amended so that, if in these circumstances they do consent, registrars can adjourn the fixture.¹⁴⁸ Alternatively, if they do not consent, they can be brought back to court for consideration of the issue of bail and judicial adjournment of the case.

- 279 Finally, there needs to be a mechanism for advising defendants of the altered date of their next court appearance in cases where the status hearing is abandoned (because they will have been bailed or remanded to the provisional status hearing date). We note this for completeness, but do not consider that a recommendation in relation to it is required: it should be possible for courts to manage this by the same means as the out of court adjournments that already occur under section 45A.

JUDICIAL OVERSIGHT OF THE CASE MANAGEMENT MEMORANDUM

- 280 We propose that, prior to a status hearing, the judge rostered for that hearing should review the case management memorandum.¹⁴⁹ This has two purposes. First, where a not guilty plea is entered and neither party requests a status hearing, it enables the judge to scrutinise the position that has been reached between the parties, to determine whether in his or her view a status hearing should occur. Secondly, if a status hearing is required, it allows the judge to prepare and thereby conduct the hearing both efficiently and fairly: fewer or shorter submissions from the parties will be required; and the chance of judicial misunderstanding and error will be reduced.
- 281 Arguably, judicial oversight allays concerns about the non-transparent nature of “behind closed doors” discussions between prosecution and defence. This is in part addressed by the existence of the case management memorandum: to some extent discussions and their outcome will be on the record in a way that they have not previously been. However, we do not propose that the judge should be able to review a decision by the prosecution to amend or withdraw charges, or by the defence to plead guilty. The reality is that the judge is not in a position to make a meaningful inquiry about what has happened “behind closed doors” and why; there needs to be a degree of faith that the prosecution has acted in the public interests of justice (after meaningful consultation with the complainant), and defence counsel in their client’s interests. This is not in substance different from the current situation: judges presiding over status hearings tend not to explore the reasons for a charge amendment or plea change.

¹⁴⁸ For discussion of the other changes proposed by the Criminal Procedure Bill 2004 to adjournments when the defendant is in custody, see ch 4.

¹⁴⁹ Small courts, such as the Tokoroa District Court, are serviced by circuit, not resident, judges. With the judge offsite, consideration will need to be given to how to manage their prior review of case management memoranda in a way that is both timely and secure. It probably will be desirable, for security reasons, to retain the original filed memoranda and attachments at the court. Options that we discussed with the Tokoroa District Court registrar included scanning and emailing image files, faxing, or transmitting photocopies by DX. We make no recommendation in this regard, because courts are not one size fits all, and this is an operational issue.

Resource implications

- 282 In consultation on this proposal, some concerns were expressed that review of the case management memorandum could become (or be perceived as) more time consuming for judges than the current arrangements. For example, judges may want to take a thorough approach and scrutinise the quality and appropriateness of everything that has been done (not just the matters identified for their input). When judges are reviewing case management matters on the papers, unlike court, they cannot direct questions to the parties and it may take some time for them to find the answers on the file for themselves.
- 283 The various case management memorandum outcomes each have different resource implications, in terms of the level of input required from the reviewing judge:
- *Cases where a guilty plea is entered.* Requesting pre-sentence reports is all that is required from the judge at this stage, and the case officer may be able to make a tentative recommendation in this regard. In terms of judicial resources, there is therefore nothing additional to what currently occurs when a plea is conventionally entered. In terms of overall resources, there is a saving because the case will not need to be called and adjourned.
 - *One or both parties have requested a status hearing.* The reasons why a status hearing might be sought include a request for sentence indication, or because one party is perceived by the other as unreasonably uncooperative. Parties who request a status hearing will be entitled to it as of right: the judge does not need to assess the merits of the request. The reason will also be stated on the case management memorandum, so that the judge is able to focus his or her preparation on that issue. The degree of preparation required will be supplementary to the submissions that parties can be expected to make at the status hearing.
 - *Cases where a not guilty plea has been entered, that turn on credibility issues or community standards.* For example, the case may involve one witness' word against another's; a claim of lack of intent or reasonable belief; or reasonable use of force in self defence. If parties are in dispute about such issues, the case almost certainly needs to proceed to trial; it would never be appropriate for a judge to intervene on those matters at a status hearing in the absence of hearing witness testimony, so unless the parties have requested it, there is no point in having one. It should be relatively easy for judges to identify such cases and confirm the parties' assessment that they need to go to trial.
 - *The remaining cases involving the entry of a not guilty plea.* These are the cases where parties think that they have done what they need to, and that the case should proceed to trial, but the judge has doubts about whether it is proceeding properly to trial. The judge may have questions about whether the case could in fact be resolved, or whether further refinement of the issues is required. This is essentially a qualitative assessment of how closely the proposed shape of the trial (as indicated

by the case management memorandum) matches the judge's view of what should occur.

- 284 The effects of the new process on court and judicial time will require assessment, but that needs to occur bearing in mind two factors.
- 285 First, the extent to which judges find themselves over-committed (if at all) by the new requirement to review case management memoranda will depend on the extent to which there is acceptance of a new culture that judges should focus on judicial work. We cannot emphasise too strongly our approach that administrative work should largely be done administratively, by the parties at first instance, and then (as required) by court staff such as the registrar and the case officer; the goal is ultimately to ensure that judicial attention is drawn to the matters that require their involvement, and that they are involved only (or primarily) with those matters.¹⁵⁰
- 286 Secondly, extra time spent by judges reviewing the progress of cases on the papers is to some extent (and perhaps wholly) a transfer of the court time saved by fewer cases proceeding through a status hearing, and less wasted sitting time on those cases that are called. At present, most summary cases that proceed past the administrative phase are listed for a status hearing;¹⁵¹ they are called in court by rote, regardless of whether there is any possibility of resolution or need for judicial intervention; the judge must be brought up to speed with the issues orally (and often not particularly thoroughly) in court; often the parties are unprepared (meaning that the case then needs to be adjourned); and many of the resolutions that do result turn on judicial leave for charge amendment or withdrawal (which is often little more than a rubber-stamping exercise).¹⁵² The potential to manage all of these things better needs to be borne in mind when assessing the relative merits of prior preparation on the papers.

NEW ROLE OF CASE OFFICER

- 287 Preliminary Paper 55 said little about how to ensure management and oversight of the case, in light of its recommendations to minimise court and judicial involvement in pre-trial processes. Stakeholders widely endorsed the view that there is much to be gained from more active case management

¹⁵⁰ Depending on the preference of the individual judge, some preliminary sorting of case management memoranda (into the above, or any other useful categories) could be done by the case officer. That person could also undertake preparatory work with a view to making it easy for the judge to access the relevant parts of each file (for example, by completing a cover sheet).

¹⁵¹ According to Ministry of Justice estimates for 2004, about five out of every six cases.

¹⁵² We are recommending provision for charge amendment or withdrawal by consent without judicial leave: see ch 3.

by courts; they suggested that personnel could be allocated to monitor the out of court progress of each criminal case, with a view to early intervention if required.¹⁵³

288 We agree, and recommend that the registry staff of each District Court should include a case officer, who is in general responsible for liaising between prosecution and defence; establishing what progress has been made with the case; ascertaining whether anything further is required; and assisting to ensure that those things occur.¹⁵⁴ More specifically, this might include:

- following up bailed defendants who have not given case management instructions to counsel, and reminding them of this condition of bail;¹⁵⁵
- reminding defendants about their trial or any other hearing dates, and should they fail to appear, trying to contact them to ascertain the reason;¹⁵⁶
- assisting unrepresented defendants;¹⁵⁷
- monitoring compliance with timetabling obligations, such as the requirement to file the case management memorandum, and reminding counsel if necessary;

¹⁵³ For example, the following personal communication dated 17 September 2004 from Meredith Connell (Auckland Crown Solicitors). For obvious reasons, this discusses the problem in the context of the indictable jurisdiction; at the time we were considering the applicability of our proposed processes to both summary and indictable cases. However, similar comments were made to us in relation to summary matters. "Presently the court at callover frequently directs that certain things are done, and orders a timetable for their completion. For example, defence are ordered to advise the Crown 'within 21 days' of any objections to the admissibility of evidence; or the defence are directed to file a s 347 application 'within 14 days'. There is not usually any follow-up by the Court to ensure that timetable orders are complied with. Inevitably there are often major defaults. The prosecution has a role to play, but enquiries by the Crown of defence counsel often go unanswered or fail to produce any increase in the priority given to the matter. A fruitful area of inquiry for the Commission might be to consider how to achieve a more effective mechanism to follow up on timetable orders. Even a mechanism as basic as a court registrar telephoning/emailing counsel to obtain confirmation that the timetable has been complied with could make a major difference. Presently 6 months can go by between a timetable being ordered and the next court hearing. Obviously it should be unnecessary for the court to have to follow up on its orders, because counsel should be competent, organised and efficient enough to comply. But in reality that doesn't happen. If someone in the court had the job of telephoning counsel to follow up on promises made at callover, this could produce results. If the result of a registrar's telephone enquiry was unsatisfactory, the matter could be re-called before a judge to sort out the problems. In most cases, this could be done sufficiently before the trial date to ensure fixtures weren't put in jeopardy. The advantage of such a mechanism is that it could act as an 'early intervention' to prompt action by counsel – rather than the system needing to rely on punitive sanctions."

¹⁵⁴ There are some precedents for this kind of thing beginning in a small way in some courts, but only a fraction of what in our opinion could usefully occur: for example, in Manukau District Court ringing parties to confirm they are ready to proceed; in the Auckland High Court emailing reminders to counsel about requirements on them such as timetabling orders; a process in Christchurch whereby parties can avoid the pre-depositions appearance by filing a certificate to say that the case is ready for preliminary hearing.

¹⁵⁵ See ch 4.

¹⁵⁶ See further ch 11, which recommends proceeding in the absence of the defendant in some circumstances.

¹⁵⁷ See ch 10.

- processing filed case management memoranda to make them readily accessible to the judge;
- interacting with the parties in relation to full disclosure, to ensure that it has occurred and identify whether it alters anything previously agreed to in the case management memorandum;
- for cases where a not guilty plea is entered on the papers, liaising with counsel about the availability for trial of themselves and their witnesses;
- avoiding or minimising the need for pre-trial callovers (for example, by checking with counsel that the case is ready to proceed); and
- referring issues arising from any of the above to the registrar or the judge for further action.

289 Whether this is a dedicated function (for possibly more than one staff member in the high demand criminal courts), or combined with an existing role, will depend on the demands of the particular court. However, we envisage that it would be a relatively senior position. The person will need to be able to understand and cope with the varying requirements of the whole range of cases, have meaningful discussions with counsel about case progress, and identify relevant matters for judicial attention. Legal training, criminal practice experience, or as a minimum significant court experience may assist. In consultation, we received positive comments about the potential for this to provide a career path in court registries that is currently lacking, which has a detrimental effect on retention and recruitment. Although we envisage that specific recruitment will be necessary to ensure the right mix of skills, it should not be inferred that there are no existing court staff with the capability to fill this role: part of the problem is simply that registries are not at present resourced and structured for it. The pay-off, in resourcing terms, is that hearings will not need to occur purely or primarily for timetabling and monitoring purposes, thereby removing these matters from judges and the courtroom, while still ensuring they occur in a timely way.

SUMMARY OF RECOMMENDATIONS

- R40** Only guilty pleas should be taken during the administrative phase of the case. In all summary and electable cases, the entry of a not guilty plea should be deferred to the end of the case management process.
- R41** Election of summary or jury trial in electable cases should also be deferred, so that the defendant is asked to elect only upon the entry of a not guilty plea.
- R42** The case management memorandum should sometimes be the vehicle by which plea and election occur:
- There will be no requirement to plead (and therefore no requirement to elect) if the parties are requesting a status hearing: those things will occur at status hearing, at the conclusion of the case management discussions.

- If as a result of case management discussions the defendant wishes to plead guilty, that will be recorded in the case management memorandum and entered on the papers.
- If the parties agree that the case should proceed to trial, the not guilty plea and election (if applicable) will be entered on the papers, with one proviso.
- The proviso is that if the judge who subsequently reviews the case management memorandum considers that there is a need for a status hearing, the plea and election previously entered is vacated, and the defendant will be asked to plead and elect again at the end of the status hearing.

R43 The point of plea (and mode of trial election if applicable), when it occurs on the papers, should be the date on which the case management memorandum is filed.

R44 Change of election of mode of trial should require judicial leave.

R45 For the cases where a plea (and mode of trial election if applicable) is entered on the papers, the status hearing should be abandoned and the case administratively adjourned, to a sentencing hearing in the event of a guilty plea, or the next court event if the plea is not guilty. To facilitate progressing these cases on the papers:

- Judges should order pre-sentence reports based on their review of the filed papers, so that these will be available at the sentencing hearing.
- Section 45A Summary Proceedings Act 1957 should be amended so that, if defendants consent to an extension of custodial remand (by responding in the affirmative to that question in the case management memorandum), registrars can adjourn the fixture. Alternatively, if defendants do not consent, they can be brought back to court for consideration of the issue of bail and judicial adjournment of the case.

R46 Judges should have access to, and make time to review, filed case management memoranda and their attachments before the status hearing. They will need to do three things:

- request pre-sentence reports where guilty pleas are entered;
- where a not guilty plea is entered and neither party has requested a status hearing, assess whether the case is proceeding properly to trial (that is, could it be resolved or managed better);
- if a status hearing is required, prepare in advance for that hearing and thereby conduct it more efficiently and fairly.

R47 The registry staff of each District Court should include a case officer, who is responsible for monitoring the out of court progress of each criminal case, and may assist judges in their review of case management memoranda.

8 Status hearings

- 290 **T**HE STATUS HEARING has become both the catalyst and the vehicle for the case to progress. Matters that should be dealt with by the parties between themselves (that is, for which there is no need to involve the court) are not being attended to before the hearing. In chapters 6 and 7 alternative processes have been proposed to ensure that case management issues are dealt with in a way that captures the efficiency gains originally intended.
- 291 Those proposals do not dispense with the need for pre-trial hearings. Status hearings should still form a central element of pre-trial processes. However, all case management matters should have been attended to and the case should have reached the point where a judicial decision or intervention is required.
- 292 The case management memorandum filed 10 days prior to status hearing will indicate to the judge that:
- the defendant has pleaded guilty to the charge or charges; or
 - the defendant has pleaded not guilty, and (where applicable) has elected a summary hearing or trial by jury, and the case is proceeding to a defended hearing; or
 - the defendant has not entered a plea, but has sought an indication from the judge as to the likely sentencing range or outcome should he or she plead guilty at that stage; or
 - at least one of the parties has for other reasons requested judicial facilitation of plea and charge discussions.
- 293 Additionally, after perusing the memorandum, the judge may determine that although the parties have indicated that the case requires a defended hearing, judicial intervention is desirable either to provide a further opportunity to resolve the case, or to ensure that all issues concerning the management of the trial have been identified and are receiving appropriate attention.
- 294 Thus, the status hearing should serve two primary functions: first, to provide an opportunity for judicial intervention, for the purpose of case resolution or better management; and secondly, to give a sentence indication at either party's request.

JUDICIAL FACILITATION OF CASE RESOLUTION AND MANAGEMENT

Reasons for recommending continued judicial involvement

- 295 Case management discussions that are conducted exclusively on the informal basis proposed in chapter 6 have limitations. They depend on goodwill between the parties, and their ability or willingness to appreciate and weigh

the options available in a realistic way. 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. Other case management issues, too, may have been inadequately addressed. For example, the defence may not have properly identified the issues in dispute; consent to admit evidence that is apparently non-contentious may have been declined; or the summary of facts may not be an accurate reflection of the offence as recorded in police job sheets of witness interviews. In such circumstances, an objective facilitator may be in a better position than the parties themselves to suggest a way forward, and it should be open to either of the parties to request, or the judge to direct, a status hearing for that purpose.

296 In Preliminary Paper 55, we expressed doubts that this facilitation was properly a judicial function.¹⁵⁸ There were three principal reasons for this. First, the fact that judges are conscious of the need to avoid the appearance of undue judicial activism by “descending into the arena” may inhibit their ability to successfully act 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, there is a danger that comments judges make or views they express, carrying the authority that necessarily attaches to their office, may be seen as judicial pressure to obtain a guilty plea or to encroach on the prosecutor’s discretion as to the choice of charges. Thirdly, judicial facilitation runs counter to our general principle that judges should not be involved in matters that do not require a judicial decision. We proposed instead facilitation outside the context of court proceedings, with independent facilitators assisting the parties and any agreement reached by the parties being subject to the oversight of the court.

297 Stakeholders universally opposed this suggestion and favoured the continuance of judicial facilitation, for reasons that included:

- The authority of the judge provides a valuable catalyst to the parties to assess and reassess the merits of the position they take; a judicial “reality check” or perspective often assists the parties to resolve plea and charge issues.
- Parties often gain assistance from hearing what the judge has to say about the case. The defendant may not have been willing to accept the advice of counsel that there is no defence to run, but will be persuaded of the wisdom of that advice when confronted with a judicial view that the prosecution case appears particularly strong. The prosecution may have been reluctant to amend or withdraw particular charges but will be persuaded to do so when the judge points out potential weaknesses in the case.
- Legal knowledge and experience is often essential to grapple with legal issues that the prosecution or defence may raise, or to deal with a claim as to prosecution overcharging. Those with the necessary skills for the

¹⁵⁸ New Zealand Law Commission, above n 3, paras 156–158.

task (for example, retired barristers) would not necessarily come more cheaply than a judge.

- When discussions are facilitated by a judge, that has the effect of promoting confidence and a perception by defendants and victims that justice is being done; they feel there has been a judicial hearing.
- Concerns about possible judicial “coercion” can be largely ameliorated by the standard judicial comment that parties (in particular the defendant) always retain the right for the case to go to a defended hearing. In most cases the defendant also has the advice of counsel.

- 298 There was a general consensus amongst judges, prosecutors, defence counsel and court staff that, notwithstanding the inherent risk that judicially facilitated plea and charge discussions may occasionally be seen as involving judicial “coercion”, this had to be balanced against the advantages of judicial involvement and the efficiency gains that accrued from it.
- 299 We accept this view and agree that the risks in departing from the conventional non-interventionist judicial role can be minimised with appropriate safeguards. We further note that judicially facilitated discussions between the parties in open court, if undertaken by a focused and rigorous judge, will be a critical driver for the necessary cultural change.¹⁵⁹
- 300 Status hearings will no longer be a “marshalling yard” where the judge is checking on the wishes of the parties and determining readiness for trial. They will occur only when judicial intervention is required, and that intervention must be real and meaningful. When a case is brought to court for possible resolution on the initiative of either the parties or the judge, it makes no sense for the judge to remain impassive in the face of patently nonsensical or untenable positions. Rather, the judge should play an active role in questioning the parties.
- 301 This intervention should not necessarily be expected to produce a resolution and it should not be assessed in those terms. The 2004 Evaluation, which attempted to assess the degree and impact of judicial intervention at status hearings, found that there appeared to be no relationship between a more interventionist judge style as assessed and the number of resolutions.¹⁶⁰ However, this finding is of limited value: it says nothing about what other benefits may flow from rigorous judicial questioning at status hearings. If a judicially facilitated process of teasing out the merits of the case crystallises the issues for trial, this will be in the broader interests of justice, and the outcome should be judged a success.

¹⁵⁹ See further ch 11.

¹⁶⁰ Ministry of Justice and New Zealand Law Commission, above n 15, tables 3.19 and 3.24–31. “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 in issue, discussing the prosecution or defence case, or “moving things along”. However, in our observation, a better measure of interventionism is not the fact that these questions are asked, but the way in which they are asked. This may be one reason why the research failed to find a correlation.

Rostering judges for status hearings and subsequent trials

- 302 Inevitably, some judges will be better suited than others to the role that we propose they should play at status hearings. However, it does not follow that only specialist judges should conduct such hearings. In our opinion, the selection of judges can sensibly be left to the courts' rostering practice.
- 303 To avoid actual or perceived prejudice, it is desirable that, if a defended hearing follows status hearing, a different judge should preside. In metropolitan areas, there should generally be no difficulty in ensuring that the trial judge is different from the judge who presided at the status hearing. However, in provincial courts with very small numbers of resident judges, it will be difficult or impossible to arrange rosters that allocate different judges to the defended hearing. We do not regard this as a significant problem. As some consulted judges observed, the number of cases coming before a judge at status hearing, and the speed that they are dealt with, means that often a judge will not remember the precise details of a case when it returns to a defended hearing a couple of months later. In the rare cases where a judge's prior involvement at status hearing might lead to a perception of bias at the defended hearing, recusal remains an option.

SENTENCE INDICATIONS AND DISCOUNTS

- 304 The second function of a status hearing should be to give a sentence indication to a defendant who is considering whether or not to plead guilty. A sentence indication comprises judicial advice as to the probable sentence, or type or range of sentence, to be expected if the defendant were to plead guilty. Its primary purpose is to ensure that the defendant is 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, there will be an increase in the proportion of guilty pleas at a relatively early stage of proceedings.
- 305 As we reported in Preliminary Paper 55, the number of sentence indications has been increasing in both summary and indictable jurisdictions, and when they are given they are generally well received and regarded as helpful by both defendants and their counsel.¹⁶¹ 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 sometimes unrequested indications were given as well; and that, in the indictable jurisdiction in the Auckland District Court, indications were given in 13 per cent of callovers.¹⁶²
- 306 Sentence indications in the summary jurisdiction are broadly governed by guidelines that appear in the District Court Bench Book. These state:
- A sentence indication will be given only if asked for by the Defendant.
 - 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 Statement.
 - The defence cannot be compelled to disclose anything, but can give the judge such material as it wishes.

¹⁶¹ New Zealand Law Commission, above n 3, para 222.

¹⁶² Ministry of Justice and New Zealand Law Commission, above n 15, table 3.17 and 7.2.2.

- The judge is not bound by the indication if, after it is given, fresh evidence shows that the indication is inappropriate.
- The indication will be limited to the type of sentence that the judge thinks appropriate, that is imprisonment or a community-based sentence.
- If the indication is not accepted, no record of it will be kept on the file to come before the trial or sentencing judge. Sentencing judges will not be told by counsel of the judge's indication and, if told, will ignore the indication.

307 There are no equivalent written guidelines in the indictable jurisdiction, but sentence indications generally conform to the same approach. However, there are three major differences. First, in the indictable jurisdiction sentence indications at callover are provided following committal, so that the judge has the full briefs of evidence; in contrast, sentence indications at status hearings are frequently based on only brief statements of fact provided orally by prosecution and defence. Secondly, sentence indications in the indictable jurisdiction are often provided on the basis of detailed written submissions from both prosecution and defence and are likely to be based on a full victim impact statement and information as to required reparation; in contrast, status hearings rarely involve submissions by either party as to the appropriate sentence, and where such submissions are given they are oral and off the cuff. Thirdly, because in the indictable jurisdiction imprisonment is often inevitable, indications are more likely than in the summary jurisdiction to address quantum as well as type; in particular, they may indicate whether the offender will receive not more than 2 years' imprisonment, thus making them potentially eligible to apply to serve the sentence by way of home detention.

The sentencing discount principle

- 308 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 codified 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.¹⁶³
- 309 An early guilty plea is regarded as meriting a sentence discount because it indicates remorse or contrition,¹⁶⁴ or spares witnesses the stress and trauma of a trial, especially in sexual cases,¹⁶⁵ or avoids the costs of a trial.¹⁶⁶ Sentence discounts for early guilty pleas in the public interest are common

¹⁶³ *R v Taylor* [1968] NZLR 981, 987 referring to *R v de Haan* [1967] 3 All ER 618.

¹⁶⁴ See, for example, *R v Lynn* (20 June 2001) CA90/01.

¹⁶⁵ See *R v Palmer* [2000] 1 NZLR 546, 556; *R v Accused* (1997) 14 CRNZ 645, 647–648; *R v Edwards* (25 February 1998) CA362/97; *R v Strickland* [1989] 3 NZLR 47, 51.

¹⁶⁶ See, for example, *Lynn*, above n 164.

throughout common law jurisdictions,¹⁶⁷ and are statutorily endorsed, even mandated, in some jurisdictions, although not always in clear terms.¹⁶⁸

- 310 There is no “hard and fast formula” or specific quantum for a discount.¹⁶⁹ 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 per cent to 33 per cent,¹⁷⁰ but this is not a fixed average or band. Moreover, the range derives from prison sentences imposed for fairly serious offences and may not reflect the average discount in a summary case.
- 311 It is generally accepted that the most important factor in determining the quantum of discount to be given is the timing of the plea: the earlier the plea, the more generous the discount.¹⁷¹ However, it is not merely a question of timing. The maximum credit may be given where the plea is entered at the first reasonably available opportunity. This is not necessarily the defendant’s first appearance. There may be good reasons for a delay in entering a guilty plea (for example, because the charge at first appearance was excessive and is subsequently amended by the prosecution, or because the prosecution failed to provide initial disclosure of information necessary to make an informed plea).

Criticisms of sentence indications

- 312 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 in the summary jurisdiction to judges giving the indication;
 - the problem of subsequent inconsistent sentences; and
 - the status of a sentence indication on a Crown appeal against sentence.

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

- 313 Some respondents in the 2004 Evaluation had concerns that sentence indications could place undue pressure on defendants to plead guilty. Some thought they were philosophically wrong: a type of judicial plea bargaining. However, the giving of a sentence indication cannot in itself be criticised as

¹⁶⁷ *De Haan*, above n 163; *R v Shannon* (1979) 21 SASR 442, 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, 153, 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.

¹⁶⁸ For example, Sentencing Act 1991 (Vic), s 5(2)(e); Criminal Justice Act 2003 (UK), s 144.

¹⁶⁹ *R v Mako* [2000] 2 NZLR 170; (2000) 17 CRNZ 272 (CA), para 14.

¹⁷⁰ *R v Tryselaar* (2003) 20 CRNZ 57. See also *R v Woolley* (23 July 2001) CA02/01.

¹⁷¹ Robertson, above n 83, SA9.20; *R v Mako*, above n 169.

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 consequences.

- 314 In fact, the real concern relates not to the sentence indication in itself, but rather to the sentencing discount that is integral to 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. Certainly it has been reported to us that sentence indications at status hearings often incorporate the full discount that would have been available upon a guilty plea at first appearance, and that this provides a perverse incentive for defendants to delay entering a guilty plea. Secondly, it is argued that a sentence indication 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.¹⁷² It may be for this reason that many judges at status hearings do not mention a discount when they give an indication.
- 315 The sentencing discount principle is embedded in the sentencing jurisdiction not only of New Zealand, but of other comparable jurisdictions. It is beyond the scope of this report to review its merits. However, given its existence, it is essential that it should be fairly and transparently acknowledged when a sentence indication is given. Indeed, a sentence indication is useful partly because it has a discount built into it; that fact and its significance should not be concealed.
- 316 We consider that a defendant should be entitled to all relevant information as to the consequences of his or her plea option. Moreover, contrary to the current guidelines in the summary jurisdiction, the indication should not simply be confined to the type or range of sentence that might be imposed. It should where appropriate indicate the following, in the absence of which the defendant is liable to be misled:
- the specific penalty that will be available in the event of a guilty plea;
 - the discount included within that indicated sentence; and
 - the likely type and quantum of penalty if the defendant were to be convicted following a defended hearing or trial, at least on the basis of the information currently available about the offence and the offender.
- 317 We realise 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.

¹⁷² AW Alschuler "The Trial Judge's Role in Plea Bargaining" (1976) 76 *Columb L Rev* 1059, 1103–1107.

- 318 There is the risk that, if the quantum as well as type of penalty is indicated, that may prove to be inaccurate when the pre-sentence report or victim impact statement is received. For this reason, where indications are likely to be affected by pre-sentence reports or victim impact statements, they ought to be confined to the type of penalty or not given at all. However, in more serious cases where imprisonment is inevitable, the defendant will only be interested in quantum or at least the range within which it will fall. If the indication is to have real utility, it needs to be expressed in those terms. Where a specific quantum or the range within which it will fall can be reliably indicated, that should occur.
- 319 Safeguards should be introduced to protect the rights and interests of defendants and to lessen the risk that they will be unduly influenced by a sentence indication. Those safeguards can be provided in three ways.
- 320 First, judges should give a sentence indication only when requested to do so by either the prosecution or the defence, although this should not preclude the judge from enquiring whether a sentence indication is sought. The request will usually come from the defendant. However, there may be occasions when it will be appropriate for the prosecution to seek an indication. For example, the prosecutor may indicate that he or she would be willing to amend a charge of careless driving causing injury to careless driving if some disqualification period was still included in the penalty, but less than the mandatory period that would apply in relation to the more serious charge. An indication in that circumstance would seem to be appropriate to ensure that decisions as to charge and plea are being made on an informed basis.
- 321 Secondly, there should be a standard and explicit approach to the way in which a defendant is provided with the sentence indication by the court, so that the chances for misunderstanding as to its nature and purpose are reduced. In addition to the matters already discussed, this should include advice that a sentence indication does not detract from the defendant's right to require the prosecution to prove its case.
- 322 Thirdly, there should be more explicit recognition of a graduated discount principle: that is, that the discount will be greatest when the plea is entered at the first reasonably available opportunity and will progressively diminish with each subsequent court appearance. Thus, all other things being equal, a defendant pleading guilty at first appearance should receive a greater discount than a defendant pleading guilty at a status hearing. Similarly, a defendant pleading guilty at a status hearing should receive a discount that would not be available following a finding of guilt at a defended hearing or trial, or even a guilty plea at the commencement of a trial.
- 323 This principle should be formalised in legislation for reasons of transparency and notice. It is 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 subsequently.
- 324 We recommend that section 9(2)(b) Sentencing Act 2002 be amended to make explicit that the sentencing discount available for an early guilty plea will be greatest when that plea is entered at the first reasonably available opportunity, and will be progressively reduced thereafter. That provision should be supplemented by more detailed guidance in rules as to the way in which the discounts should operate, such as:

- what is the first “reasonably available opportunity”;
- the maximum discount normally available and the way in which it will be progressively reduced;
- the relevance (if at all) of the strength of the evidence in determining the quantum of the discount;
- the effect of any discount on minimum terms of imprisonment under section 86 Sentencing Act 2002; and
- the impact on the quantum of discount of the defendant requiring a disputed facts hearing under section 24 Sentencing Act 2002.

325 Guidance of this sort has been provided by the Sentencing Guidelines Council in the United Kingdom, and we suggest that this would provide a good starting point for the development of guidance in New Zealand. It would be the responsibility of the rule-making body discussed in chapter 12 to develop this sort of guidance.¹⁷³

Lack of information

326 The second concern is that judges giving a sentence indication do not have full information about the case. As the Court of Appeal said in *R v Gemmell*:¹⁷⁴

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.

327 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 is likely to 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 *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”. If information in a pre-sentence report is likely to have a significant impact on the appropriate sentence, the indication should be confined to a sentence range or not given at all.

328 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

¹⁷³ Although it is beyond the scope of this report, we suggest that government should also consider whether the rule-making body should have a wider responsibility to provide sentencing guidance generally.

¹⁷⁴ *R v Gemmell* [2000] NZLR 695 (CA), para 13.

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 status or other pre-trial hearing.

- 329 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 a “complainant input memorandum” in conjunction with the complainant if they 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.
- 330 We consider that victim input into the case, 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.¹⁷⁵ 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; this is 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 (which will be indicated on the case management memorandum as one reason for requesting status hearing), it should normally be able to ensure that a victim impact statement is prepared. As noted above in relation to pre-sentence reports, if a statement is not available and the sentence is likely to be significantly affected by it, the indication should be confined to a sentence range or not given at all.¹⁷⁶
- 331 Judges at status hearings also lack detailed information about the circumstances in which the offence was committed. Unlike judges in the indictable jurisdiction giving an indication at first callover (who have the briefs of evidence and depositions arising from the committal process), they are currently reliant on the summary of facts and any oral statements as to the nature of and background to the offence provided by the prosecution and defence orally during the course of the status hearing itself. That may often be insufficient to provide a reliable sentence indication. It is for this reason that the Serious Fraud Office habitually makes full submissions on sentence indications in the same way as on sentence; and at contest mention hearings in Victoria defence counsel provide a full plea in mitigation prior to a sentence indication.

¹⁷⁵ Robertson, above n 83, SA8.10(3).

¹⁷⁶ See para 327.

332 We do not recommend anything as elaborate as this; we think that the plea in mitigation, particularly, poses difficulties of principle prior to the entry of a guilty plea.¹⁷⁷ However, judges must have adequate information as to the nature of the offence. Chapter 7 recommends that the case management memorandum filed in court prior to the status hearing should have appended to it the information initially disclosed by the prosecution to the defence,¹⁷⁸ and any other material relevant to the status hearing. This may include submissions (or authorities to support oral submissions) by either party in support of a sentence indication.

The problem of subsequent inconsistent sentences

333 The third concern is that the actual sentence imposed may be inconsistent with the basis upon which the sentence indication was given, and therefore give rise to at least a perception of injustice. This problem may arise in two ways.

334 First, the sentencing judge may take a different view of the appropriate sentence from the judge who gave the indication at the status hearing and may 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.

335 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.¹⁷⁹ The High Court has followed the same approach where a defendant pleaded guilty in reliance on a sentence indication at a status hearing, and said the sentencing judge is not free to depart from the earlier indication without offering an opportunity for the defendant to withdraw the plea or returning the matter to the status hearing judge.¹⁸⁰

336 The risk that a sentencing judge may not adhere to a sentence indication can be mitigated in two ways:

- In principle, the judge who gives the indication should also sentence the defendant (although, in practice, this may cause scheduling difficulties, and therefore be unworkable).
- Where a judge is contemplating imposing a different sentence from that indicated (for example, because information provided in a pre-sentence report or victim impact statement leads to a materially different view of the offence or the offender from that upon which the indication was based), the defendant should be given the opportunity to withdraw his or her guilty plea.

¹⁷⁷ See also para 258.

¹⁷⁸ That is, the evidential basis for the case: see further ch 3.

¹⁷⁹ *R v Gemmell*, above n 174. See also *R v Edwards* (2000) 17 CRNZ 604 (CA), in which the Court of Appeal confirmed that its observations in *Gemmell* are of general application.

¹⁸⁰ *Ferguson v Police* (14 July 2000) HC Auckland A99/00, para 6 Fisher J.

- 337 Secondly, in the event that a sentence indication does not lead to a guilty plea and a conviction is entered following a defended hearing or trial, the judge may impose a sentence that is entirely inconsistent with the earlier indicated sentence, even though no new information as to the offence or the offender has emerged. For example, the eventual sentence may be the same as or even more lenient than the indicated sentence, thus undermining the sentencing discount principle and giving rise to the perception that something has gone wrong with the administration of justice.
- 338 The risk of inconsistency in this sense can be mitigated by providing more transparency in sentence indications. We have already recommended that the indication should specify not only the type and quantum of penalty that will be imposed if the defendant pleads guilty now, but also the likely type and quantum of penalty if the defendant were to be convicted following a defended hearing or trial. Given that, the current practice (whereby sentence indications that do not result in a guilty plea are not retained on the court file) is undesirable. In order to ensure both consistency and transparency in the administration of justice, indications as to sentence in the event of both a guilty and a not guilty plea ought to be retained on the court file and available to judges subsequently dealing with the case. That does not mean that a judge imposing sentence after a defended hearing or trial will be bound by the earlier sentence indication, because different information about the offence or the offender may well have emerged by that stage. However, if a judge does substantially depart from the indication earlier given, the sentencing judge should be expected to provide reasons for that departure. This will require the recording of sentence indications in all cases, and their transcription in the cases that proceed.¹⁸¹

Appeals

- 339 Finally, there is concern about the injustice that might result if a defendant pleads guilty on the basis of a sentence indication, and the sentence is then overturned following a Crown appeal on the grounds that it is manifestly inadequate. The injustice arises from the fact that the defendant has altered his or her position in the expectation of a sentence that is different from the one eventually imposed.
- 340 We are again of the view that this concern can be managed in practice. If a sentence indication is in line with a prosecution submission (it is increasingly common for prosecutors to be asked for their view as to the appropriate sentence before an indication is given, especially in the indictable jurisdiction), it would likely be in only exceptional circumstances that a court would look favourably on a subsequent Crown appeal. If a Crown appeal is upheld, we agree with the approach of the New South Wales Supreme Court: the defendant should have the right to file an appeal against conviction, have his or her guilty plea vacated, and the case remitted back to the District Court for trial.¹⁸²

¹⁸¹ This will have resource implications.

¹⁸² *R v Glass* (1994) 73 A Crim R 299.

Sentencing jurisdiction

- 341 A judge who is giving a sentence indication at status hearing needs also to have jurisdiction to sentence in the event that the indication is accepted (given our recommendation that, ideally, the indicating judge should also be the sentencing judge). Not all status hearing judges are jury-trial warranted judges; there is no need for them to be, given that status hearings occur in the summary jurisdiction. However, judges who are not trial judges can sentence only up to a maximum of 5 years: if the maximum term is greater and they consider that the circumstances of the case warrant more, they must decline jurisdiction and remit the case to the High Court for sentence.¹⁸³
- 342 This poses difficulties in terms of efficiently administering sentence indications at status hearing. However, it would be rectified by the *Simplification of Criminal Procedure* project currently being undertaken by the Ministry of Justice: the government has agreed to implement the Law Commission's previous recommendation that all judges should be able to sentence up to the maximum provided by law for an offence that they would otherwise have jurisdiction to hear.¹⁸⁴

COMPLETION OF THE CASE MANAGEMENT MEMORANDUM

- 343 In the majority of cases that proceed to status hearing, the case management memorandum will be incomplete when filed, except for indicating that a status hearing is required.¹⁸⁵ This is because the defence will often request a status hearing to obtain a sentence indication, and many of these will be accepted. It would be a poor use of prosecutor and counsel time, and one that would detrimentally affect their acceptance of the process, to require them in all such cases to answer trial management questions that will become redundant in a high proportion of cases. Where the indication is not accepted, counsel will then need to complete the memorandum. This can be facilitated by the judge in court or (preferably, depending on prosecutor availability) between the parties out of court by having the case stood down.

MEDIA COVERAGE OF STATUS HEARINGS

- 344 The current practice is that status hearings occur 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 Criminal Justice Act 1985. Both the 2001 Christchurch practice note and an earlier draft note for Wellington state:¹⁸⁶

¹⁸³ District Courts Act 1947, s 28F; Summary Proceedings Act 1957, s 7.

¹⁸⁴ See further ch 12. This is another reason why, in that chapter, we recommend that the *Simplification of Criminal Procedure* project should progress simultaneously with the implementation of this report.

¹⁸⁵ See ch 6 and appendix A.

¹⁸⁶ Abbott, above n 11.

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.

- 345 The Christchurch practice note makes it 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.
- 346 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.
- 347 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 would be situations where it was appropriate to close the court, and in the opinion of a few, status hearings should generally not be open at all; in the words of one counsel, they should be regarded as "a little private discussion".¹⁸⁷
- 348 Calls for closed hearings are based on the fact that the hearing may involve the free and frank exchange of views between the parties, which would be inhibited by the presence of the media or the general public.¹⁸⁸ Similarly, calls for restrictions on publication are based on the fact that hearings may lead to sentence indications or the disclosure of other material which, if it were in the public domain, would prejudice the chances of a subsequent fair trial or, if taken out of context or misunderstood, would bring the administration of justice into disrepute.
- 349 We do not accept that either of these is a reason to depart from the normal rule that hearings should be in public and open to the media. There will from time to time be matters that should not be published. Existing provisions enabling the suppression of prejudicial material are sufficient to provide whatever protection the accused requires.

SUMMARY OF RECOMMENDATIONS

R48 Status hearings should only be held:

- where either party or the judge thinks that judicial intervention would be in the interests of justice, to facilitate a resolution of the case or to manage it better; or
- to provide a sentence indication on the request of either party.

¹⁸⁷ Ministry of Justice and New Zealand Law Commission, above n 15, 6.8 (defence counsel).

¹⁸⁸ Baldwin, above n 128.

R49 While some judges are better suited to conducting status hearings than others, specialist judges should not be appointed for this purpose. The selection of judges should be a matter for courts' rostering practice.

R50 Rules should provide for the giving of sentence indications as follows:

- There should be judicial discretion to give a sentence indication when requested by either prosecution or defence counsel. The judge may ask counsel whether a sentence indication is sought.
- Complainant information upon which a sentence indication is based should be derived from a properly prepared victim impact statement.
- An indication may be given subject to information still to be provided by way of a pre-sentence report or victim impact statement. However, it should be confined to a sentence range or not given at all if the sentence is likely to be significantly affected by such a report or statement, or there is otherwise insufficient information.
- An indication should generally specify:
 - the likely type and quantum of penalty if the defendant were to be convicted following a defended hearing or trial (on the basis of the information currently available about the offence and the offender); and
 - the type and quantum of penalty that will be imposed if the defendant pleads guilty now.
- A record of both components of the sentence indication should be retained on the court file and should be available to the sentencing judge following either a guilty plea or the entry of a conviction as a result of a defended hearing or trial.
- An indication should also include advice that it does not detract from the defendant's right to require the prosecution to prove its case.
- Where an indication is given and results in a guilty plea, and subsequent information leads to a different view as to the appropriate sentence, the defendant should always be given the opportunity to withdraw his or her plea.
- The sentencing judge on a guilty plea should, wherever possible, be the judge who provided the sentence indication.
- If a defendant pleads guilty on the basis of a sentence indication, and a subsequent Crown appeal against the sentence is upheld, the defendant ought to be given the

opportunity to file an appeal against conviction, vacate his or her guilty plea and have the case remitted back to the District Court for trial.

- R51** Section 9(2)(b) Sentencing Act 2002 should be amended to make explicit that the sentencing discount available for an early guilty plea should be greatest when that plea is entered at the first reasonably available opportunity, and should be progressively reduced thereafter.
- R52** More detailed guidance as to the way in which the sentencing discount should operate should be developed in rules.
- R53** In the majority of cases that proceed to status hearing, the case management memorandum will be incomplete when filed. If the case is not resolved at status hearing, counsel will then need to complete the memorandum. This can be facilitated by the judge in court; alternatively (and preferably, depending on prosecutor availability) the case can be briefly stood down for an out of court discussion.
- R54** Status hearings should be held in public and open to the media.
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9

The indictable jurisdiction

- 350 **T**WO KINDS of cases proceed indictably following committal for trial: electable cases in which jury trial is the defendant's preference, and purely indictable cases.¹⁸⁹
- 351 At present, neither case category has a status hearing. If (in purely indictable cases) the information is laid indictably, or (in electable cases) the defendant elects jury trial, he or she is immediately remanded for a preliminary hearing, to determine if the evidence is sufficient to commit that person for trial. After committal, when the Crown takes over the case, there are likely to be discussions about trial management and the framing of the indictment; this typically occurs at what is termed "first callover".¹⁹⁰
- 352 Although committal for trial may occur on written depositions by agreement of both counsel, it frequently requires a preliminary hearing: that is, a testing of witnesses' evidence by cross-examination in court. The Criminal Procedure Bill 2004 will change this, to provide for a more streamlined procedure. The committal provisions in Part 5 of the Bill create a presumption that committal will occur on the papers, and moreover will automatically occur (that is, without consideration of the papers). On application, a District Court judge may grant leave for the parties to hear and cross-examine witnesses orally if this is in the interests of justice.
- 353 Notwithstanding the Criminal Procedure Bill changes, requiring committal and full disclosure to occur early in all indictable cases has greater resource implications than first filtering the cases, to determine if any are capable of resolution by simpler means. It was said to us that many such cases get on to the committal track, and gather their own momentum, without consideration being given to whether the case if adjusted might be resolved. We are therefore proposing that this should change in electable cases.

ELECTABLE CASES THAT PROCEED TO JURY TRIAL

- 354 It follows from our recommendation in chapter 7, to defer the point at which the defendant is asked to elect mode of trial, that the current process for

¹⁸⁹ This report has been drafted in anticipation of legislative changes to the current categories of offences, including repeal of the list of indictable charges that may, on the election of the prosecution, sometimes be tried summarily: see above n 25.

¹⁹⁰ See ch 1 for a fuller description of the process.

managing electable cases will change: before committal, they will proceed through case management discussions, and if required a status hearing, in the same way as we propose for summary cases.

- 355 It would be undesirable if this insertion of early case management into the process for electable cases resulted in delays to committal proceedings and therefore total case disposal times. However, in some cases that currently proceed through the committal process, the outcome of case management may be an early guilty plea, thereby avoiding the need for full disclosure and committal and resolving those cases more quickly and less resource intensively. Moreover, even if there were delays in completing committal in some cases relative to the time that it currently takes, our proposals should result in a shorter time between committal and trial. More effective allocation of court and judicial time, by virtue of more activity between court hearings, ought to significantly reduce the queues of pending cases, meaning trials can be scheduled more quickly, with at worst a neutral effect on electable case disposal time.
- 356 Electable cases that are committed for jury trial are prosecuted by the Crown. This includes filing an indictment post-committal (which frequently involves removing or amending charges, or recasting some as representative). First callover, which occurs approximately 6 weeks after committal, is largely an exchange about how the case will proceed, including charge amendment and trial management. These are the points at which the Crown first substantively engages with the case. The summary jurisdiction prosecutor (usually police) may not be able to accurately second-guess the answers in the case management memorandum on behalf of the Crown; there is therefore some risk that the subsequent input of Crown counsel will provide an avenue for relitigating, and rendering futile, the previous case management discussions. However, electable cases constitute a significant proportion of total cases, and it is not sensible to expect the Crown to contribute to them all at status hearing stage in the event of possible jury trial. In the bulk of electable cases, where the number of charges is small or the conduct relatively minor, it is likely that there will not be a significant difference of approach between the prosecutors in the respective jurisdictions.
- 357 A robust pre-committal case management process in electable cases will have benefits for Crown counsel when they take over the case after committal:
- more robust scrutiny of the appropriateness of the charges by police prosecutors at the outset of the case should reduce the proportion of cases in which charges presented in the indictment by Crown counsel differ from those originally laid;
 - the case management memorandum will provide an “entry point” to the file for the Crown in terms of identifying the key charge and trial management issues; and
 - the Crown and the police are likely to agree on most charge and trial management issues, so that even if Crown counsel resile from some previously agreed matters in the case management memorandum, there should be an overall reduction in their work.

EXCLUSION FROM CASE MANAGEMENT OF PURELY INDICTABLE CASES

- 358 This report includes some recommendations of general application:
- defence disclosure (**R26, R27**);¹⁹¹
 - legislative provision for sentence indication and discounts (**R50, R51**);¹⁹²
 - other initiatives to promote and support culture change such as costs on counsel, and proceeding in defendants' absence (**R60–R64**);
 - the need for comprehensive criminal rules and an appropriately constituted rule-making body (**R66–R68**); and
 - review of the *Solicitor-General's Prosecution Guidelines* (**R70**).
- 359 The recommendations in chapters 3 and 4, for better charge scrutiny and a list court process that minimises the occurrence and expectation of adjournments, can also be expected to indirectly benefit the indictable jurisdiction.
- 360 However, the new case management process (requiring out of court discussions, the filing of a memorandum, and sometimes a status hearing; see chapters 6 to 8) will only apply to summary and electable cases. This will target the cases that constitute the overwhelming majority of criminal work, notwithstanding that the public perception of the relative importance of the two jurisdictions is of course the reverse, by virtue of the fact that high-profile trials are almost invariably purely indictable cases (rape, other sex crimes, drugs, homicide) and often High Court trials.
- 361 It should not be inferred from this that there are no case management problems in purely indictable cases or the indictable jurisdiction. For example, comments bordering on complaints were repeatedly made to us about the resource demands of callovers in the indictable jurisdiction. We are dubious about whether the overall benefits that result from callovers are justified, in light of the huge amount of court time and resource taken to run the callover system; the demands on counsel and defendants who must attend, on multiple occasions, sometimes for a couple of hours at a time; and the further inconvenience to counsel, defendants, and witnesses of being on call for standby trials.¹⁹³ We accept that, up to a point, there are benefits to be had. For example, as noted above, first callover is the first opportunity for the Crown to signal the direction in which it is likely to take the case. We also had positive feedback about the merits of a callover in the week prior to trial: this is said to be useful in triggering pleas with more notice than the morning of trial, from those defendants who have been refusing to face facts, and who may be finally persuaded by the inevitability of a trial and the last opportunity for any sentence discount. However, in general, the increasingly unwieldy callover system reflects the same tendency to bring

¹⁹¹ In summary and electable cases, the vehicle for achieving this will be the case management memorandum. In purely indictable cases, in the absence of the case management memorandum, it will be a matter for judicial discretion to enforce the legislative requirement at callover.

¹⁹² Under our proposals, sentence indications will generally occur at status hearing, but legislation will nonetheless codify good practice generally.

¹⁹³ As described in ch 1.

everything into court, in the absence of mechanisms to make things happen efficiently and reliably out of it, and an apparent lack of concern about repeated court appearances for purely administrative purposes. Even with first callover, for example, in principle counsel should in the first instance take responsibility for having their own dialogue independent of the court, in the way we have proposed for status hearings. In our view, callover arrangements would benefit from some fresh thinking taking into account the principles in this report.

362 If the case management process that we propose for summary and electable cases were to be extended to purely indictable cases, a number of issues would need to be considered and resolved, including:

- the interaction between the committal process and the case management process (that is, would a longer interim period be necessary for case management to occur);
- resource implications for Crown Law (because Crown counsel would need to have some involvement in case management discussions and status hearings in every purely indictable case);¹⁹⁴
- the ability of District Court judges to give sentence indications in respect of High Court only and middle band cases (particularly High Court only, because they do not have jurisdiction to pass sentence in such cases); and
- District Court trial management, at status hearing, of cases that will be heard in the High Court (because District Court judges are not familiar with trying the particular offences or with High Court business demands).

363 We do not think that these issues are incapable of resolution; notwithstanding the greater complexities, we believe that our proposed procedure could be satisfactorily applied to purely indictable cases with quite minor modifications. However, although we have consulted extensively with the Crown Law Office and Crown Solicitors, we have not sufficiently canvassed the views of the High Court and District Court judiciary on resolution options for the above and any other issues. Hence the exclusion of purely indictable cases from our case management recommendations at this stage.

364 If the government agrees to implement our recommendations, with a view to addressing with some urgency the District Court imperatives, we propose that the opportunity should then be taken to consult with High Court judiciary, counsel, and officials about the merits and workability of our proposals for purely indictable cases.

¹⁹⁴ Any additional expense would in our view be small: Crown counsel are already consulted at an early stage in respect of the more serious purely indictable matters (homicide, drugs particularly methamphetamine conspiracy, high-end sex and other violent crime); for everything else, the case management process would be largely a substitute for what currently occurs at or around first callover.

Unrepresented defendants

365 **T**HE 2004 Evaluation found that approximately a quarter of defendants are unrepresented at status hearing. Reasons that they gave for not having a lawyer varied, but in essence there were two: legal aid eligibility and personal choice.¹⁹⁵

I didn't have a lawyer with me ... I wasn't allowed to seek legal aid ... we were hoping we could just speak to a lawyer today ... and ah we weren't allowed to speak to a lawyer this morning to seek legal aid for just this little matter here.

To be honest I couldn't really afford a lawyer and I wouldn't get legal aid. And it's such a little charge that I just sort of get a bit of advice and go along with it.

I thought that both my husband and I could do a better job as somebody we were paying, and when I read the information it said you can talk yourself.

I just don't use lawyers ... they don't say what I have asked them to say.

366 Under section 8 Legal Services Act 2000, criminal legal aid may be granted when the applicant does not have sufficient means to obtain legal assistance, and the interests of justice require the grant of legal aid. Essentially, this amounts to consideration of the seriousness of the charge, and whether the applicant is working. However, inevitably there are some borderline cases, where the charges are relatively serious and the defendant, although working, cannot afford a lawyer.¹⁹⁶

367 In an ideal world, everyone who wanted a lawyer would have one. However, the extent to which the status quo is a problem depends very much on the circumstances. There are some defendants who are cooperative and, with a bit of help and understanding, are capable of acting for themselves, particularly on minor charges. At the other end of the spectrum, there are defendants who do not understand the legal process and their rights and obligations within it; are incapable of communicating effectively in court; or are simply disruptive and difficult to control if left to run their case themselves. Any or all of these things may prolong the proceedings (with resource implications for courts) and disadvantage the defendant (with implications for ensuring that justice is done).

¹⁹⁵ Ministry of Justice and New Zealand Law Commission, above n 15, 4.6.2 and 4.8.1 (unrepresented defendants).

¹⁹⁶ Changes to the legal aid eligibility criteria are proposed in the recently introduced Legal Services Amendment Bill (No 2) 2005.

MANAGING UNREPRESENTED DEFENDANTS OUT OF COURT

- 368 The 2004 Evaluation findings suggested that unrepresented defendants cause particular tensions in relation to disclosure and case management discussions. There can be an adversarial dynamic between defendants and prosecutors (particularly the police) as a result of the perceived circumstances of their arrest and charge:¹⁹⁷

... they threw me out of jail at four in the morning and I had to walk home through the park. You know, no I can't use a telephone and no they won't ring my boyfriend. My boyfriend had been waiting out there for hours and the police would not ring them when I got released. And I had no money on me.

... they smashed my ribs, my two bottom ribs and they are saying that there was one policeman but there was two policemen ...

But we were put in jail for the night and taken to court in the clothes we were wearing, and the police refused to give me my shoes. I was made to look like they picked me up without any shoes on.

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.¹⁹⁸

- 369 For this reason, prosecutors interviewed for the 2004 Evaluation said that they were wary of engaging with defendants without the security of independent oversight:¹⁹⁹

... it would generally really only happen at the status hearing because ... it's very hard to have a reasonable discussion with the defendant. In a court room in a formal situation where you've got a judge who's overseeing, the opportunity exists to have a discussion with the defendant as to what they may plead if a charge was substituted for another one.

If I am going to offer a reduced charge I will wait until the status hearing, and I will say to the judge "look, to resolve this I am prepared to offer this charge". That way it is being overseen by someone who can comment on whether or not there was unfair pressure put on them.

- 370 This tends to suggest that it is not a realistic or fair expectation on either unrepresented defendants or prosecutors to require them to engage in the out of court case management discussions envisaged in chapter 6. We recommend that unrepresented defendants should instead proceed straight to status hearing.

- 371 The functions that, in Preliminary Paper 55, we had suggested could be undertaken by the registrar, we now recommend should be performed by the case officer: as to which, see chapter 7. Examples may include explaining the court process to unrepresented defendants, or mediating to resolve disclosure problems. However, it will be important to try to convey to such defendants that the case officer should not be regarded as a surrogate legal adviser: their role in this regard is to inform and assist if reasonably practicable, not to provide legal advice.

¹⁹⁷ Ministry of Justice and New Zealand Law Commission, above n 15, 4.8.3 (unrepresented defendants).

¹⁹⁸ Ministry of Justice and New Zealand Law Commission, above n 15, 4.8.4 (police prosecutor).

¹⁹⁹ Ministry of Justice and New Zealand Law Commission, above n 15, 6.9.2 (police prosecutors).

IN COURT ASSISTANCE FOR UNREPRESENTED DEFENDANTS

- 372 Preliminary Paper 55 proposed increased duty solicitor involvement for unrepresented defendants. Although the instructions from the Legal Services Agency (LSA) are silent as to whether status hearing representation is permitted, in practice the duty solicitor scheme does not generally cover advice and representation for anything other than first call of a case. When representation is informally provided, it has limitations. It may be a matter of coincidence who has this service available to them, depending whether list and status courts are rostered together. Unless by chance a defendant encounters the same duty solicitor at both list court and status appearances, a new person coming fresh to the file is unlikely to have sufficient grasp of the case in the short time available to properly advise on options and prepare an effective submission.
- 373 In *Delivering Justice for All* the Law Commission recommended a revamped duty solicitor scheme to ensure advice and representation for unrepresented defendants through the whole pre-trial process.²⁰⁰ However, while it may be that duty solicitors are not being ideally utilised and there might be room to expand their role, to extend this government-funded assistance to everyone unable to be privately represented for the whole pre-trial process has significant implications for the legal aid eligibility criteria: in effect it proposes universal eligibility before trial.
- 374 The government has stated that it is considering the role of duty solicitors in the pre-trial criminal process as part of the LSA review of initial criminal legal services, which has recently commenced.²⁰¹
- 375 This report recommends that, as a minimum, a duty solicitor should be available when unrepresented defendants are called at a status hearing. Their role would be to provide on the spot advice to the defendant, or act as a mouthpiece if necessary (for example, by providing a plain English explanation of legal issues to the defendant, or articulating the defendant's position if they are nervous or otherwise incapable of talking to the judge themselves). However, they would not be acting for the defendant in the usual sense.
- 376 Unrepresented defendants are likely also to require more facilitation by judges, to ensure that they understand what is happening, have a reasonable opportunity to articulate their position, and are not acting under duress. Status hearing judges reported in the 2004 Evaluation that they already recognise and cater for this need, although there are some tensions in doing so, which again greater duty solicitor involvement may ameliorate:²⁰²

I will frequently try and push them towards a lawyer ... Probably spending a bit more time with them ... You just have to explain things a little bit more.

²⁰⁰ New Zealand Law Commission, above n 1.

²⁰¹ Ministry of Justice "Government Response to Law Commission Report on Delivering Justice for All" (2004) <http://www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/delivering-justice-for-all.pdf> (last accessed 16 May 2005).

²⁰² Ministry of Justice and New Zealand Law Commission, above n 15, 4.8.4 (judges).

It's just a matter of being very careful, how you deal with them to make sure that they have in fact got disclosure ... often I will indicate exactly what I have, I tell them what's happening.

You have to be careful not to bend over backwards and be seen as kind of their unpaid official legal adviser ... And sometimes you have to say look I am not here to give you legal advice.

I haven't yet seen a defendant pressurised to enter a plea agreeing to something he hasn't already agreed he did do. I think unrepresented defendants get a very fair crack of the whip, the judges all bend over backwards.²⁰³

- 377 In particular, it will be necessary for the judge to facilitate the completion of case management memoranda at unrepresented defendants' status hearings.²⁰⁴ In relation to defence disclosure, this is likely to require more careful and specific questioning about why the defendant is proceeding to trial than will be necessary when a defendant has counsel to advise and speak for them (for example, "do you deny that you hit him", "did you believe you were in danger"). The challenge is to identify the issues in the case, without implying that defendants must articulate at any length their evidence, or calling into question the presumption of innocence.
- 378 Some courts have a practice, which appears to work well, of setting down unrepresented defendants in a separate session at the end of the day, so counsel attending for other listed cases are not delayed, and the judge is more relaxed. Court registry staff may wish to consider the merits of scheduling unrepresented defendants in this way.

SUMMARY OF RECOMMENDATIONS

R55 It is not feasible to require out of court case management discussions between prosecutors and unrepresented defendants. Unrepresented defendants should proceed straight to a status hearing.

R56 The role of the case officer should include responsibility for informing and assisting (without legally advising) unrepresented defendants.

R57 There should be a duty solicitor available when unrepresented defendants are called at a status hearing.

R58 The judge should facilitate the completion of the case management memorandum at the status hearing. In relation to defence disclosure, this is likely to require more careful and specific questioning about why the defendant is proceeding to trial than will be necessary when a defendant has counsel (for example, "do you deny that you hit him", "did you believe you were in danger").

²⁰³ Ministry of Justice and New Zealand Law Commission, above n 15, 4.8.4 (defence counsel).

²⁰⁴ It does not follow that judges will always themselves fill in the memorandum, although some may wish to; this can be done by the duty solicitor, or with other administrative support.

R59 Court registry staff should consider the merits of scheduling unrepresented defendants in a separate session at the end of the day.

11

Changing the culture of non-compliance

379 **U**LTIMATELY, the success of our recommendations depends on two things: the appropriate allocation of resources (which is discussed in chapter 13); and capturing the hearts and minds of criminal justice system participants (or at least ensuring that non-compliance is no longer worth their while). The latter is the subject of this chapter. Legislative change in itself does not guarantee the buy-in of those who must implement the processes: to motivate all participants to depart from entrenched practices and accept a significantly altered approach to the process, other drivers are required.

ENCOURAGING CHANGE

380 As a general rule, our preference is for carrots rather than sticks: sanctions are an important part of our reform package, and we recommend their more regular use, but they should also be regarded as a last resort. The initiatives recommended elsewhere in this report, which we believe will prompt more effective participation in the pre-trial process, include:

- legislative provision for timely and comprehensive initial disclosure of the case against defendants;²⁰⁵
- police cases better prepared at an earlier stage, which will in turn mean that defendants have no reason (and no excuse) to delay making decisions about whether or how to proceed;²⁰⁶
- a legislative presumption of a limited number of appearances (two) to complete administrative matters, which can be departed from only by a judge in the interests of justice;²⁰⁷
- a requirement for prosecution and defence counsel to discuss the case, and record the outcome of their discussions by filing a completed case management memorandum, with a corresponding requirement on defendants to instruct their counsel about case management matters;²⁰⁸

²⁰⁵ This will largely be achieved by the proposed Criminal Disclosure Act (a component of the Criminal Procedure Bill 2004); see also ch 3.

²⁰⁶ See ch 3.

²⁰⁷ See ch 4.

²⁰⁸ See chs 6 (case management discussions) and 4 (condition of bail).

- a policy that judges should articulate in both indicating and passing sentence the amount of any discount given for an early guilty plea, so that defendants are fully informed in making their plea decisions;²⁰⁹
- a consistent national approach in legislation and rules, rather than an approach that depends on individual judicial discretion and local innovation.²¹⁰

381 Except for New Zealand Law Society (NZLS) disciplinary action, which is rare, the defence bar has traditionally operated in a fairly unregulated way. We received a lot of positive feedback about the Public Defence Service (PDS) that is currently being piloted in the Auckland region: various judges, court staff, and prosecutors commented that counsel employed by the PDS are noticeably professional in their approach, and that this innovation has the potential to indirectly encourage under-performing defence counsel to develop higher standards.²¹¹ The findings of the pilot are yet to be determined and we are aware that there are mixed views about it within the defence bar. Its potential to operate as an incentive for better performance, and its other positive and negative impacts on the provision of legal services, will need to be assessed as part of that exercise.

SANCTIONS ON COUNSEL FOR NON-COMPLIANCE: COSTS ORDERS AND DISCIPLINARY PROCEEDINGS

382 Arguably the Legal Services Agency (LSA) pre-trial payment structure is one existing disincentive for managing cases in a less than timely way: preparation time is capped; and with the exception of the Auckland region, this includes pre-trial appearances (meaning that repeated appearances, with their associated travelling and waiting time, will quickly become unprofitable). However, it is instructive that this seems to have little, if any, effect; clearly something more is required.

383 In addition to encouraging and requiring compliance with the proposed new processes, there need to be sanctions available for non-compliance; this temptation will remain, given the numerous drivers for delay outlined in chapter 1, and the difficulty of breaking entrenched habits. We propose two sanctions: more robust monitoring and enforcement of professional standards; and provision for costs orders on counsel.

Monitoring and enforcing professional standards

384 As described in chapter 1, there are more incentives for defence counsel than for prosecutors to delay, and fewer levers to discourage this practice, in the sense of accountability structures. We propose that this should be

²⁰⁹ See ch 8.

²¹⁰ See ch 12.

²¹¹ We do not mean to suggest that counsel who are listed as legal aid providers are in general under-performing counsel. Some of the highest calibre counsel do lots of legal aid work. However, there is a small cadre of sub-optimal performers who survive in the profession primarily by reason of receiving legal aid assignments, and who are not well-serving the needs of their clients: the LSA acknowledges this.

rectified by increased LSA and NZLS intervention, in relation both to counsel funded by legal aid and the privately retained (although the problem primarily exists in relation to a subgroup of the former).²¹²

Responding to counsel under-performance: the roles respectively of the LSA and the NZLS

- 385 The disciplinary processes of the NZLS potentially apply to all practising counsel, in the event of alleged professional misconduct. However, at present, there is a lack of clarity about the interaction between that function, and the role of the LSA in monitoring and enforcing its contracts with legal aid providers.
- 386 The LSA has, as one of its priorities, ensuring high standards of professional conduct amongst legal aid providers (counsel). It may undertake special audits when it has concerns about the performance of a legal aid provider triggered by receipt of a complaint. In most cases matters are informally resolved by discussion between the provider and the LSA; the remainder require an investigation and action under the Legal Services Act 2000. The provider has a right of reply, and may also seek judicial review of any decision that has been taken.²¹³
- 387 The LSA advised us that only two counsel have ever been suspended from the legal aid list, with action against a third pending. There are several reasons for this. First, the LSA is not resourced for performance review: the administrative difficulty and expense of pursuing these matters tends to outweigh the benefit, particularly if they are minor. Secondly, the LSA suffers from a lack of reliable and attributable information on which to take action of this kind without exposure to challenge by way of judicial review. There is a connection between these two issues: with more robust information on which to act, LSA decisions would be less susceptible to judicial review (although that may not prevent counsel from taking such proceedings). Thirdly, the options available to the LSA for taking action against counsel under the Legal Services Act 2000 are limited. Finally, the LSA is reluctant to be seen to be requiring and enforcing higher performance standards than those explicitly or implicitly accepted by the official professional regulatory body (the NZLS).
- 388 In consultation on this issue, we received divided views about where responsibility should chiefly rest for taking action against under-performing legal aid providers: some favoured the LSA, and others the NZLS. Those who preferred the NZLS argued that experience has shown that the LSA finds performance review difficult to manage, for the reasons canvassed above. The Lawyers' and Conveyancers' Bill, which is currently awaiting its third reading, will establish a new complaints and disciplinary framework that is more comprehensive than the current arrangements, particularly in the area of inadequate client service, as opposed to serious misconduct.²¹⁴

²¹² See above n 211.

²¹³ "Listed provider management" (August 2004) 4(3) LSA News.

²¹⁴ Part 7 of the Bill provides for Standards Committees, a new and independent Legal Complaints Review Officer, and a Disciplinary Tribunal; there is a requirement to publish details of the complaints service and how to access it; and a greater range of sanctions.

This should be the forum for all discipline; when counsel is a legal aid provider, the NZLS may choose to recommend LSA intervention in some cases as part of its assessment of the overall penalty.

- 389 However, on balance, we have concluded that primary responsibility for reviewing and enforcing the performance of legal aid providers should rest with the LSA, with appropriate resourcing for that function, and legislative amendments to support it. The alternative fails to recognise what, in our opinion, are properly different thresholds at which the interests of the NZLS and the LSA are engaged. The former is concerned with disciplinary action, the latter with whom the state should choose to contract because they provide a good standard of service. The NZLS will only be concerned with a small subset of the cases that should be of interest to the LSA: what might be described as sub-standard performance, as opposed to sub-optimal.
- 390 However, we do recommend closer liaison between the LSA and the NZLS, because it may sometimes be appropriate for the NZLS to take the lead in disciplinary action. Where counsel is not a legal aid provider, the NZLS should of course be notified and take responsibility.
- 391 Section 73(1)(d) Legal Services Act 2000 provides for the suspension of legal aid providers on the basis that “the person is not providing the service for which he or she is approved to a standard that is acceptable to the Agency”. Under section 69(2), the LSA may impose conditions on an approval for services. However, it is thought that this power only arises at the time of the approval, and that conditions cannot be imposed on a previously approved provider unless that person is first suspended. Suspension is an extreme sanction, which may potentially deprive a person of their livelihood. The legislative scheme therefore encourages an all or nothing approach to counsel misconduct. We recommend that the Act be amended to explicitly provide for a range of other options (for example, suspension for short periods, the imposition of conditions, supervision of counsel, the withholding of payment, reassignment of the case).
- 392 While some of these lesser measures might likewise have the indirect effect of depriving counsel of all or some of their livelihood, in our opinion this is reducible to a single policy question: does the government believe that legal professionals have a right to be state-funded, no matter how poor their performance? Channelling state funds to counsel who are not serving the interests of the state in respect of either efficiency (by failing to properly progress proceedings) or fairness (because where the failures are due to incompetence, the interests of defendants without means suffer) is contrary to the interests of justice. The Legal Services Act 2000 needs to clearly stipulate that these are contractual arrangements conditional on performance.

Judicial involvement in assessing and reporting counsel misconduct

- 393 The judiciary is the best source of information for the LSA to act upon. In the absence of any other quality assurance or peer review system, judges have the necessary overview of counsel performance to do this the most effectively. With approximately 3,000 legal aid providers nationally, for the LSA to meaningfully and fairly monitor them by other means would be an exercise with significant logistical and budgetary implications. While it would

be inappropriate for judges to become involved in assessing counsel performance in the sense of formally pronouncing on their quality, they can properly document and report on factual matters (for example, that counsel did not turn up, or failed to comply with legislative requirements or judicial orders).

394 At present, judges are all individually aware of specific instances of misconduct or procedural failure by particular counsel, and they are likely to be anecdotally aware of that person's poor reputation generally amongst the judiciary. However, there is no mechanism for collating a cumulative record. Unless one specific instance is bad enough to warrant action,²¹⁵ the information required to take action as a result of an ongoing pattern of sub-standard performance is not available.

395 During consultation on Preliminary Paper 55, we therefore mooted two ideas: a systematic judicial approach to documenting under-performance; and closer liaison between the judiciary and the LSA about major or persistent performance failures. Proposals of this kind had been discussed in the past, but not put into practice. In principle, many judges agree that there is a need for this kind of initiative, but in practice they are cautious:

- While accepting that they are ultimately responsible for the conduct of their courts, judges have reservations about being cast in the role of enforcers. It carries with it the risk that both the counsel concerned, and the client in any given case, will perceive any reprimand or adverse report on counsel as judicial bias. Counsel appearing in subsequent cases before the same judge may feel resentful, or on the back foot. In short, it was described as adding an "extra edge" to proceedings that makes the task of judging fairly, and being seen to do so, more difficult.
- As a matter of natural justice, allegations must be put to counsel, with a fair opportunity to respond, and accurate records made if the judge is not satisfied with any explanation that is given. This is a resource-intensive and potentially confrontational process; it also has the potential to delay the remainder of the court list on any given day. It was therefore thought that the ongoing recording of minor misdemeanours is both undesirable and unrealistic: the natural judicial reluctance to engage will only be overcome when they are sufficiently annoyed or inconvenienced by something that is itself quite major misconduct.

396 We acknowledge that these are sensitive issues, and that a degree of judicial caution is appropriate. However, none of the objections is sufficient to justify the current degree of judicial inertia in addressing manifest failures by counsel to discharge their duty as an officer of the court. As to perceived judicial bias, some judges do already frankly express their disapproval in open court, and will occasionally make a file note; the key difference under our proposals is a recommendation for a more systematic approach. Judges need not generate and collate the file notes themselves: this should always be judicially directed, but will require administrative support.

²¹⁵ See *R v Shirtcliff* (17 November 2004) DC Christchurch CRI2003-009-4702 Judge Erber, for an example of a case where in addition to notification to the LSA, judicial disapproval of counsel conduct was put on the record in open court.

397 We therefore recommend the following process:

- As a matter of natural justice, allegations of misconduct or compliance failure by counsel must be put to the person concerned, with a fair opportunity to respond. The process for achieving this should be a matter for judicial discretion; a brief dialogue in court may suffice in many cases.
- Where the judge is not satisfied with any response that is given (that is, there appears to be no reasonable excuse for the failure), counsel should be advised that the incident and a brief summary of the discussion about it will be recorded and reported to the executive judge in that district.
- This may include matters brought to judicial attention by registry staff: there are some forms of misconduct, such as disrespect or bullying of registry staff, of which only those staff will be aware.
- The executive judge should collate such reports. Where he or she believes, either individually or cumulatively, that further action is required, a complaint should be lodged with the LSA and copied to the NZLS (or, where counsel is not a legal aid provider, only with the NZLS).
- There should be protocols for closer liaison between the LSA and the NZLS about disciplinary matters (for example, whether in relation to a particular matter it is more appropriate for the latter to take the lead).
- Any decision to suspend counsel from the legal aid provider list, or impose other conditions, should be subject to review under the Legal Services Act 2000.

Costs orders on counsel or prosecution agencies

398 Even if these proposals for improvements in the complaint notification and disciplinary process are adopted, disciplinary proceedings are likely to be undertaken only in the worst cases. In addition, we therefore recommend provision for costs orders, for failures without reasonable excuse to comply with procedural obligations. Costs orders can be tailored case by case, and can be expected to have an immediate impact.

399 This will require legislative provision for costs orders against either defence counsel or the prosecutor.²¹⁶ Costs against defendants may also be appropriate when the failure to comply with obligations is attributable to them; however, this can already occur.²¹⁷ Many defendants will have no ability to pay costs, but there will be value in the symbolism of even a small costs order where that is feasible.²¹⁸

²¹⁶ This would be a civil costs order, recoverable as a debt due to the consolidated fund from the agency or counsel concerned: compare Costs in Criminal Cases Act 1967, s 7.

²¹⁷ Costs in Criminal Cases Act 1967, s 4: any costs order made under this section is recoverable in the same manner as a fine.

²¹⁸ Alternatively, in extreme cases, the threat of contempt may do the same thing. According to Robertson, above n 83, CA401.06: "Counsel or a litigant who disobeys an instruction from the Court as to the conduct of the case, or continues to dispute matters or make submissions after a ruling, may disrupt proceedings so as to be guilty of contempt: *Van Der Kaap v Police* 20/4/98, Salmon J, HC Auckland A21/97 ... affirmed *R v Van Der Kaap* 1/10/98, CA155/98". However, as the 2003 *Burrett* kidnapping case showed, this would have to be extreme, particularly in the case of an unrepresented defendant, given that the court will be reluctant to be seen to prejudice that person in the conduct of their defence.

400 A costs order on a prosecutor, who is employed by a state agency, might be colloquially described as a money-go-round: money given by the government with one hand (in the budget process) is then taken with the other (a costs order to the benefit of the consolidated fund).²¹⁹ The agency is a trustee of money on behalf of the state and ultimately the taxpayer. If the agency is fined to the detriment of whatever other service it is supposed to be providing, it is embarrassing for the agency and its responsible Minister, but the taxpayer rather than the agency is the ultimate loser. However, costs orders on government agencies are still salutary and we consider that they should be imposed if appropriate. Not only do they promote accountability by making performance failure explicit and public, but their impact on the budget of the agency concerned is likely to be sheeted home to the individual in their performance assessment, and therefore modify their behaviour, and the behaviour of their colleagues, in the future.

PROCEEDING WITH HEARINGS IN THE ABSENCE OF THE ACCUSED

- 401 Defendants commonly cause delay by failing to appear at a pre-trial or defended hearing. The result is generally an adjournment (sometimes indefinitely, in cases where the accused has absconded) and the issue of an arrest warrant. Sometimes there is a valid reason for this (such as illness or transport problems); more often it is deliberate or habitual non-cooperation.
- 402 Courts across the country vary in their approaches to these cases; however, in general terms, it has become increasingly common for defendants to make a voluntary appearance before the execution of the warrant and ask for their case to be called. This may not be feasible, if the appearance is random and therefore the prosecutor is unavailable or unprepared, or if it is late in the day. Often the existence of the arrest warrant is overlooked, and the defendant is bailed again without any adverse consequences; when the new hearing or fixture date arrives, he or she may simply repeat the cycle. Some courts list these cases at the end of the day (if there is a judge sitting that day, which is not the case in all courts); and some judges direct that the defendant should be arrested and kept in the court cells in the meantime.

²¹⁹ Arguably, it is the defendant's right to be promptly tried that has been affected: the defendant, not the consolidated fund, should therefore be remunerated for delays. However, whether those who are found guilty should benefit financially from a failure of the criminal justice system, when they have only been exposed to that system by virtue of proven criminal offending, is likely to be a matter for some debate, and regarded as a last resort, if appropriate at all. For recent consideration of a similar issue, see the Prisoners' and Victims' Compensation Bill first reading debate (16 December 2004) 622 NZPD 17986 <http://www.clerk.parliament.govt.nz/Hansard/Hansard.aspx> (last accessed 12 May 2005); Hon Phil Goff, Minister of Justice "Compensation For Inmates" (4 October 2004) media statement. See also, in relation to an acquitted person, *R v Brown* (3 March 2005) CA39/03 in which the majority of the five member bench of the Court of Appeal declined to express a view on the availability of compensation for breach of fair trial rights, but acknowledged the strength of the views expressed (obiter dicta) by William Young J in a separate judgment. Young J stated that he would regret such a development; it was not one that had found favour overseas; and there were better remedies within the jurisdiction of trial and appellate courts, which would be consistent with evidentiary exclusion for investigative breaches of the Bill of Rights.

However, this practice is insufficiently regular to act as a disincentive, relative to what can be gained: indefinite postponement, or a different judge (as to which, see below).

403 The Ministry of Justice reported a perception that the practice of voluntary appearances is being used by some defendants, with or without the knowledge of their counsel, as a means of “judge shopping”. If the judge rostered on the day of their appearance is not to their liking, they fail to appear and then put in a voluntary appearance when another judge, perceived as likely to be more sympathetic to their interests, is sitting. We have no evidence as to the extent of this practice. However, if it is happening at all, it is clearly undesirable.

404 One means of targeting this problem (in addition to more robust operational approaches to voluntary appearances, which are being considered by the Ministry of Justice), is by proceeding in some circumstances in the absence of the accused. Where there appears to have been overt manipulation of the system, we consider this to be a valid response. There are several statutory provisions that appear to weigh against proceeding in the absence of the accused:

- section 376 Crimes Act 1961 provides that an accused person is entitled to be present in court except where they disrupt proceedings by misconduct;
- section 61 Summary Proceedings Act 1957 permits proceedings to commence in the defendant’s absence only in respect of non-electable offences;
- section 25(e) New Zealand Bill of Rights Act 1990 provides a right to be present at a criminal trial and present a defence; relevant also are the right to consult and instruct a lawyer in section 24(c) of the same Act; and the right to natural justice in section 27.

405 These provisions are not absolute. Both overseas and, more recently, New Zealand courts have ruled that trials can either commence or continue in the absence of the accused, albeit in limited circumstances.

406 In *R v Jones*²²⁰ the House of Lords concluded that conducting a trial in the accused’s absence did not breach the right to be present, if the accused was notified of the trial and voluntarily chose not to attend:²²¹

[10] ... if a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended.

[11] ... one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. If a defendant rejects an offer of legal aid and insists on defending himself, he cannot impugn the fairness of his trial on the ground that he was defended with less

²²⁰ *R v Jones (Anthony)* [2003] 1 AC 1 (HL).

²²¹ *R v Jones (Anthony)*, above n 220, paras 10–12 per Lord Bingham of Cornhill.

skill than a professional lawyer would have shown. If, after full professional advice, he chooses not to exercise his right to give sworn evidence at the trial, he cannot impugn the fairness of his trial on the ground that the jury never heard his account of the facts. If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented.

[12] Considerations of practical justice in my opinion support the existence of the discretion which the Court of Appeal held to exist. To appreciate this, it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and jointly tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant ... a system of criminal justice should not be open to manipulation in such a way.

- 407 This likewise seems to be the position in other jurisdictions and international rights jurisprudence.²²²
- 408 The Court of Appeal in *Jones* had set out criteria for the exercise of the discretion in “rare and exceptional” cases, which were upheld by the House of Lords on the basis that it should be exercised with “the utmost care and caution”:²²³

The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant’s behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant’s legal representatives are able to receive instructions from him during the trial and the extent to which they are able to represent his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury

²²² S Joseph et al *The International Covenant on Civil and Political Rights*, para 14.77, cited in *R v Sthmer* (17 June 2003) HC Wellington T1064/01, para 17 Ellen France J: “criminal trials in absentia will only be tolerated when the defendant has been given ample notice, and adequate opportunity, to attend the proceedings”, referring to article 14(3)(d) International Covenant on Civil and Political Rights on which our Bill of Rights Act provision is based. See *R v Jones (Anthony)*, above n 220, paras 8–9, for a summary of European Court of Human Rights jurisprudence, and the conclusion that “There is nothing in the Strasbourg jurisprudence to suggest that a trial of a criminal defendant held in his absence is inconsistent with the Convention”. See also *Astwood v Ministry of Agriculture and Fisheries* (11 May 1992) CA355/91: “Thus an accused who absconds has been held to have waived his right to be present at his trial: *R v Czuczman* (1986) 27 DLR (4th) 694; *R v Tzimopoulos* (1987) 54 CR 1 ... there are other Canadian cases in which it has been held that an accused who without good excuse fails to attend and to avail himself of the right to be present at his trial cannot be heard to say he has been deprived of that right if the trial proceeds in his absence: *R v Tarrant* (1984) 10 DLR (4th) 751; *R v Rogers* [1984] 6 WWR 89”.

²²³ [2002] 1 All ER 141 (CA), para 22.

reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

- 409 The ability under section 376 Crimes Act 1961 to either commence or continue a trial when the accused appears to have wilfully absented themselves has recently been confirmed in New Zealand; and the discretion has been exercised in several cases.²²⁴
- 410 In *R v Williams*,²²⁵ where the defendant was one of 13 co-accused facing trial on charges of manufacturing and supplying methamphetamine, Heath J allowed the trial to commence in the absence of the accused, holding that there was no principled distinction between the long-recognised ability to continue a trial in the absence of an accused, and allowing a trial to commence, and also that section 61 Summary Proceedings Act 1957 was an insufficient basis on which to conclude that the legislature intended a different approach in summary from other proceedings. Similarly, in *R v McFall*,²²⁶ the commencement of trial was ordered in the absence of four out of 13 co-accused, again on methamphetamine conspiracy charges. After reviewing all of the other relevant factors, Priestley J commented that in addition to those prescribed in *Jones*:

... the court is entitled to throw on to the scales the desirability of sending a firm message to alleged drug offenders in particular, and to the public at large, that the High Court will not tolerate (unless there is some good reason) accused disrupting trials by not attending and thereby forcing an adjournment. It is not fantasy on my part to hypothesise

²²⁴ *R v Hika* (1986) 2 CRNZ 245 (trial permitted to continue after accused absconded, because he had not been intending to give evidence); *R v van Yzendoorn* [2002] NZLR 758 (CA) (successful appeal against sentence, on the basis that the accused had been absent due to illness and therefore unable to make submissions; however, the Court of Appeal confirmed at para 18 the discretion to continue a trial in the absence of an accused where that is in the interests of justice); *R v Paraku* [2002] DCR 699 (trial commenced in accused's apparently deliberate absence; multiple accused and 29 witnesses, two of whom had come from overseas; trial judge commented at para 12 "the court system must work round a foolish, negligent, or wilful accused"); *R v Williams* (8 September 2004) HC Auckland CRI2003-404-025445 Heath J; *R v McFall* (7 April 2005) HC Hamilton Priestley J.

²²⁵ *R v Williams*, above n 224. The accused knew when the trial was to commence because it had been stated in open court at a pre-trial hearing; he had been informed in a telephone message from counsel of the risk that the trial might proceed in his absence; and the trial was scheduled to take 8 weeks, with 12 other co-accused, and if it did not commence that week would be considerably delayed with resulting disruption to all concerned.

²²⁶ *R v McFall*, above n 224. Three out of the four absconding accused had counsel available to represent them, who had received some instructions; they had all repeatedly been advised of the start date in open court; there were considerable logistical difficulties in rescheduling the approximately 4 month trial; if the trial was adjourned it would be a lengthy adjournment, perhaps 18 months; it had already taken 21 months and considerable planning to bring the case to trial; one co-accused was being held in custody; the wasted resources involved in either adjourning, or severing the trial of the nine accused in attendance (meaning there would need to be two trials, probably equally long, and that the Crown would have to rearrange its evidence to exclude all reference to the four absent accused); others with an interest in proceedings included 2000 summoned jurors and 146 witnesses.

the situation ... whereby a number of accused (say eight to ten) jointly facing charges, could devise a plan of rolling absconding, thus delaying a trial indefinitely if the court were prepared to countenance the situation that every absconding accused would be entitled to force the court to adjourn the trial to another date.

- 411 *Williams* and *McFall* are recent decisions, and the effect that they may have on future judicial practice is as yet unknown. However, the view expressed in *Jones* that the discretion to proceed with the hearing should be exercised only in “clear and exceptional” cases, coupled with the rights and legislative framework summarised above, is likely to continue to ensure that the discretion is exercised infrequently.²²⁷
- 412 It is important that the decision to proceed in the absence of the accused be taken cautiously, because there is always a risk of injustice when the defence voice is not able to be heard. However, the risk is smaller in relation to pre-trial matters than the trial itself; one of the *Jones* considerations is whether counsel has been instructed and is able to meaningfully act; and in the event that any injustice occurs, defendants will have recourse to the usual rights of appeal. In light of the need to conduct its business fairly and efficiently to all concerned, we believe that judges should be willing to proceed with hearings when confronted with an absent accused more frequently than has previously occurred, and that courts should be backed by legislation in their exercise of such decisions.
- 413 We recommend that there be a legislative provision as follows. When an accused fails to appear at a pre-trial hearing or the trial itself, having been notified of the fixture, the judge should consider whether to commence or to continue the hearing. This discretion should be exercised taking into account the factors set out by the English Court of Appeal in *Jones* and endorsed by the House of Lords. This recommendation was universally supported by those we consulted, including members of the defence bar.

THE NEED FOR JUDICIAL BUY-IN

- 414 Some of the current acceptance of the inevitability of delays and adjournments is attributable to a relaxed judicial approach to adjournments or performance. Sometimes judicial disapproval is expressed when parties arrive unprepared and seek an adjournment, but even that is not standard practice. Whether or not judicial disapproval is expressed, it is generally relatively easy to convince a judge to adjourn the case; indeed, as it has been reported to us, it is often easier to convince a judge than a registrar. Conversely, in the courts where status hearings and callovers are perceived as effective, this invariably is said to turn on the no-nonsense and proactive approach of the particular presiding judge.

²²⁷ For example, in *R v Sthmer*, above n 222, it was held that the trial on class A and B drug dealing charges should not proceed, even though the accused had deliberately absconded, because notwithstanding the inconvenience to everybody, there was not an immediate need by victims for closure as had been the case in *Jones* (but note that this decision predated *Williams* and *McFall*).

- 415 Notwithstanding the numerous recommendations in this report, change will only occur if judges are committed to reform. The provision of sanctions of course does not guarantee their application; for obvious reasons, these are discretionary. For example, whilst in Victoria there is provision for costs orders against counsel, they are rarely if ever imposed: judges, who have been counsel themselves, are sympathetic to the habits and exigencies of that working environment. Similarly, the efficacy of other initiatives such as articulation of the sentencing discount, and a limited number of pre-trial adjournments, will depend entirely on regular and consistent adherence to the new provisions.
- 416 It is therefore essential that judges collectively accept the need for these reforms and work consistently to implement them. In three respects, things will be very different from the current environment: they will be supported by procedures to facilitate more effective use of their time; they will be backed by a legislative framework; and they will have teeth in the form of sanctions. But it will be for them to use this new potential if real change is to occur.

SUMMARY OF RECOMMENDATIONS

R60 Primary responsibility for reviewing and enforcing the performance of legal aid providers should rest with the LSA. Where counsel is not a legal aid provider, the NZLS should be notified and take responsibility. Judges will need to record and collate evidence of counsel misconduct or performance failures. We recommend the following process:

- As a matter of natural justice, allegations of misconduct or other failures by counsel must be put to the person concerned, with a fair opportunity to respond. The process for achieving this should be a matter for judicial discretion; a brief dialogue in court may suffice in many cases.
- Where the judge is not satisfied with any response that is given (that is, there appears to be no reasonable excuse for the failure), counsel should be advised that the incident and a brief summary of the discussion about it will be recorded and reported to the executive judge in that district.
- This may include matters brought to judicial attention by registry staff: there are some forms of misconduct, such as disrespect or bullying of registry staff, of which only those staff will be aware.
- The executive judge should collate such reports. Where he or she believes, either individually or cumulatively, that further action is required, a complaint should be lodged with the LSA and copied to the NZLS (or, where counsel is not a legal aid provider, only with the NZLS).
- There should be protocols for closer liaison between the LSA and the NZLS about disciplinary matters (because it may sometimes be appropriate for the latter to take the lead).

- Any decision to suspend counsel from the legal aid provider list, or impose other conditions, should be subject to review under the Legal Services Act 2000.

R61 The Legal Services Act 2000 should be amended to allow a range of sanctions short of suspension from the legal aid list (for example, suspension for short periods, the imposition of conditions, supervision of counsel, the withholding of payment, reassignment of the case).

R62 The Legal Services Act 2000 needs to clearly stipulate that LSA contracts with counsel are conditional on satisfactory performance.

R63 Legislative provision should be made for costs orders against either defence counsel or prosecution agencies, if they fail without reasonable excuse to comply with procedural obligations.

R64 There should be a legislative provision that, when an accused fails to appear at a pre-trial hearing or trial of which he or she has been notified, the judge should consider whether to commence or to continue the hearing, taking into account the factors set out by the English Court of Appeal in *Jones* and endorsed by the House of Lords.

12

Legislative vehicle

417 **S**TATUS HEARINGS are currently unregulated, except by judges exercising the general power of the District Court to regulate its own procedure. This chapter considers options for legislating for, and administering, pre-trial processes.

LEGISLATION OR ADMINISTRATIVE GUIDANCE?

Arguments in favour of primary legislation: transparency and consistency

418 Legislation is transparent. It is publicly consulted on and available; provides legislative backing for the exercise of judicial authority, making it less open to challenge; and puts on the record the expectations on all parties. Some judges in particular in the 2004 Evaluation supported statutory authorisation for status hearings, instead of their relatively ad hoc nature:²²⁸

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.

419 In contrast, one responder to the 2004 Evaluation said:²²⁹

It [legislation] might confine us really. Status hearings are pretty free wheeling. We can do practically anything.

420 It is questionable whether this is necessarily an advantage. Because legislation makes clear the requirements on all parties, and provides a vehicle for challenging non-compliance, it promotes consistent practice. The usual form of administrative guidance, practice notes, have the problem that they are not widely known, are easily forgotten, and have no central repository; their effectiveness lies in the rigour with which they are applied by individual judges. Where practice notes are the only, or primary, source of authority, there is a risk that judges, court staff and counsel will continue with existing practices, or develop new practices, as a result of inertia, resistance, or personal idiosyncrasy. The local results may be at odds with elsewhere in the country, which has implications for equality of justice, and may be inefficient or contrary to principle.

²²⁸ Ministry of Justice and New Zealand Law Commission, above n 15, 6.10.3 (judge).

²²⁹ Ministry of Justice and New Zealand Law Commission, above n 15, 6.10.4 (defence counsel).

Arguments in favour of administrative guidance: flexibility and efficiency

- 421 Notwithstanding the advantages of primary legislation, it can also be counter-productive.
- 422 Legislation may be perceived as unduly heavy-handed, in an area that has hitherto been run entirely operationally, with some success (albeit equivocal, and variable between courts). Imposing uniformity for its own sake might have a detrimental impact on what has been described as the “pre-existing substratum of working rules”;²³⁰ that is, the informal networks and conventions that, particularly provincially, have evolved around status hearings. It might also inhibit or prevent experimenting with operational procedures. While there is a need to minimise idiosyncratic practices that might subvert the goals of our proposed reform, it is also important to recognise and cater for the variability of local conditions, from time to time and between regions, and leave room for some creativity (which is after all the origin of status hearings). Responders to the 2004 Evaluation said:
- ... there would need, in my view, to be a high degree of flexibility ... to take account of the different areas within New Zealand. Auckland has got a huge volume of work going through for callovers. Yet you take a smaller centre and it is quite different.²³¹
- I don't really see why it does need statutory intervention. It seems to work perfectly well without any at the moment. I think the trouble is once Parliament elects legislation, it does sort of box people in rather. It becomes a bit inflexible.²³²
- I know everyone likes to have all the rules and regulations. “Oh it is very important to have it set out. This is what we are going to do.” Sometimes you can make a rope for your own back.²³³
- We're over regulated, over legislated at present. Why bring in legislation to give effect to something which is already working ... no point whatsoever legislating on something which started off informally and is running very well in most instances.²³⁴
- 423 Because of the cumbersome nature of the law reform process, a detailed procedural statutory scheme would reduce the ability to respond in a timely way to changing conditions or evidence about what works.
- 424 Finally, legislation might promote rather than curb inefficiency. The drive for certainty might result in an unduly prescriptive and intricate product, in turn creating scope for disputes as to compliance, and the associated hearings, appeals, and delay:²³⁵
- I currently trust the system ... If you start legislating, things get harder and you provide something which people can use to gain purchase to maybe unfairly use the system.

²³⁰ 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 L J* 109, 122.

²³¹ Ministry of Justice and New Zealand Law Commission, above n 15, 7.3.11 (Crown prosecutor).

²³² Ministry of Justice and New Zealand Law Commission, above n 15, 7.3.11 (defence counsel).

²³³ Ministry of Justice and New Zealand Law Commission, above n 15, 7.3.11 (judge).

²³⁴ Ministry of Justice and New Zealand Law Commission, above n 15, 6.10.4 (defence counsel).

²³⁵ Ministry of Justice and New Zealand Law Commission, above n 15, 7.3.11 (defence counsel).

Finding the middle ground

425 In this highly operational area we consider that legislative intervention should be kept to a minimum; however, in the interests of consistency, a wholly administrative scheme (as status hearings have been to date) is equally problematic. We therefore recommend a three-tier regime: the core pre-trial process rights and obligations stated in legislation; most of the procedural detail in rules; and provision for operational guidance (such as practice notes) as required.

Legislative matters

426 Although in our view most of the package is best delivered by rules, core rights and obligations must be asserted in statute. Further consideration will need to be given, in the course of the *Simplification* project (discussed below), to the appropriate scope of both rules and legislation. Examples of what we consider should properly be legislative matters include:

- alternatives to court prosecution;²³⁶
- the exercise and extent of powers that affect personal liberties, such as arrest and bail;²³⁷
- the extent of registrars' powers (that is, what are administrative matters, as opposed to judicial);²³⁸
- disclosure requirements on the prosecution;²³⁹
- a requirement on defendants whose cases are proceeding to trial to state pre-trial the nature of their case;²⁴⁰
- timing of not guilty pleas, and election of mode of trial;²⁴¹
- the sentencing discount principle;²⁴²
- power to proceed when a defendant is wilfully absent.²⁴³

²³⁶ See ch 3.

²³⁷ See chs 3 and 4.

²³⁸ See ch 4.

²³⁹ See the Criminal Procedure Bill 2004; see also ch 3.

²⁴⁰ See ch 5.

²⁴¹ See ch 7.

²⁴² See ch 8, which recommends an amendment to section 9(2) Sentencing Act 2002 to achieve this.

²⁴³ See ch 11.

Rules and their promulgation

- 427 We further recommend rules appended to a Criminal Procedure Act (analogous to the High Court Rules).²⁴⁴ The rules should set out the generally applicable operational detail of the criminal pre-trial process, with provision for administrative guidance, such as practice notes, as required on particular matters.
- 428 The rules should initially be drafted by the Parliamentary Counsel Office and appended to the new Act, to ensure that they are developed through the usual legislative process with full consultation and public input. They should thereafter be amended in the usual way, on the recommendation of a rule-making body.
- 429 The Rules Committee, established under section 51B Judicature Act 1908, which has traditionally confined itself to the development of rules of civil procedure, has recently established a sub-committee for the purpose of drafting criminal procedure rules.²⁴⁵ The Committee largely comprises senior judges and lawyers, although there is some representation from the Ministry of Justice and the Crown Law Office (usually officials nominated to attend on behalf of the chief executives of those agencies). In terms of expertise in operational matters, as the Law Commission noted in *Delivering Justice for All*, its composition is entirely appropriate.²⁴⁶ However, there are wider perspectives that, in our opinion, the Committee as presently constituted is not able to fully reflect. For that reason, in the context of civil procedure, *Delivering Justice for All* recommended a revamped body “that includes all parties with a legitimate interest and that consults widely”. We reiterate that view.
- 430 Accordingly, if the Rules Committee was to be the vehicle for the ongoing development and amendment of criminal procedure rules, we suggest that two matters would need to be addressed.
- First, there would need to be adequate representation by those accountable for implementing legislative policy and managing government resources; both of these things will be directly and significantly affected by the rules. A better balance would therefore be essential on the Rules Committee between the judiciary and profession on the one hand, and the executive on the other.

²⁴⁴ For a comparable initiative, see the Criminal Procedure Rules 2005 (UK) http://www.dca.gov.uk/criminal/procrules_fin/rulesmenu.htm (last accessed 12 May 2005), noted in (14 March 2005) 10 *Criminal Law Week* as follows: “The rules are intended to represent a first step towards a code of criminal procedure. The parts are in groups which are ordered so as to coincide broadly with the sequence of events in a normal criminal process.” They consolidate and update dozens of existing rules, and codify procedures for which no rules currently exist.

²⁴⁵ It may be desirable, in the interests of transparency, to clarify the jurisdiction of the Rules Committee under the Judicature Act 1908 to deal with both criminal and District Court matters.

²⁴⁶ New Zealand Law Commission, above n 1, 197–198.

- Secondly, everybody with a legitimate interest in the daily operation of courts needs to be democratically and meaningfully involved in the rule-making process. There should be a statutory requirement on the rule-making body to consult with stakeholders on any draft amendments to the rules before they are finalised, which would be facilitated by the increased executive involvement proposed above. The Rules Committee does currently consult with bodies that it considers to be stakeholders but its focus has traditionally been narrower than we are persuaded is necessary in this area.

MINISTRY OF JUSTICE SIMPLIFICATION OF CRIMINAL PROCEDURE PROJECT

431 In response to the Law Commission advisory paper *Simplification of Criminal Procedure Legislation*,²⁴⁷ the government in 2001 agreed:²⁴⁸

- To amend the existing seven categories of criminal offences to five: High Court only; middle band; electable (punishable by imprisonment for more than 3 months); District Court only (lesser prison terms and non-imprisonable offences); and infringements.²⁴⁹
- That the “distinction between summary and indictable offences be eliminated”. What this would mean in practice was not articulated in the Cabinet paper, but the Law Commission had envisaged that it would include a single charging document, abandoning summary and indictable terminology,²⁵⁰ and changes to the sentencing jurisdiction of District Court judges.
- To repeal the Summary Proceedings Act 1957.
- To introduce a comprehensive plain-language Criminal Procedure Bill, incorporating procedure provisions from the Crimes Act 1961, District Courts Act 1947, and Summary Proceedings Act 1957, and thus comprising a single New Zealand criminal procedure code.²⁵¹

²⁴⁷ New Zealand Law Commission *Simplification of Criminal Procedure Legislation: An Advisory Report to the Ministry of Justice* (NZLC SP7, Wellington, 2001).

²⁴⁸ Cabinet Social Equity Committee paper “Criminal Procedure Bill” (26 November 2001) SEQ (01) 152; Cabinet Social Equity Committee minute “Criminal Procedure Bill” (28 November 2001) SEQ Min (01) 28/2.

²⁴⁹ This would have the effect of removing the prosecution choice to try some indictable offences summarily, which is currently provided for in section 6(2) and the First Schedule to the Summary Proceedings Act 1957.

²⁵⁰ It may be possible to address problematic aspects of the distinction between summary and indictable offences, as identified by the Law Commission, without abandoning that terminology. While, from a plain English point of view, abandoning the terminology might be desirable, it is debatable whether the benefit outweighs the cost: the Parliamentary Counsel Office has previously estimated approximately 6,000 consequential amendments. There is perhaps no great harm in the terminology, if it is merely descriptive of mode of trial, rather than prescriptive of different powers and processes.

²⁵¹ In consultation on this report, there appeared to be considerable support for an approach slightly different from that envisaged by the Cabinet approvals for the *Simplification* project: that is, shifting some of the procedural provisions that are currently in primary legislation into rules, rather than a consolidated Act. The new Act would still be essential; however, the rules (appended to it) would be the comprehensive code on operational matters.

- 432 Officials have subsequently also been directed, as part of the same project, to consider the merits (or otherwise) of retaining the middle band.²⁵²
- 433 The primary focus of the *Simplification* project has been to make the law more user-friendly. However, it also has important efficiency implications. The legislative amendments described above would facilitate implementing the recommendations in this project and give a vehicle for the rules, and would therefore avoid the need for further piecemeal amendments to the inter-related provisions of the Crimes, Summary Proceedings, and District Court Acts, and other criminal procedure legislation that turns on them. The investment of resources and legislative time to progress this report's recommendations in isolation (for example, ensuring that existing summary provisions are consistent with the proposed new process) is not worthwhile for what would only be a temporary measure pending the *Simplification* project. It would be preferable for that project instead to be given high priority. Other benefits of that course of action include responding to the repeated judicial calls for reform,²⁵³ and removing problems that individually are quite small, but cumulatively have an impact on the efficiency of the system. These include misfiled appeals; District Courts having to decline sentencing jurisdiction and transfer the case to the High Court when they could properly have dealt with it themselves; and the administrative inefficiencies of transferring middle band case files between District and High Courts.

SOLICITOR-GENERAL'S PROSECUTION GUIDELINES

- 434 There have, over a considerable period, been recommendations made for reform of the *Solicitor-General's Prosecution Guidelines*. At present, they do not wholly cater for the needs and knowledge of police prosecutors, and since the last version was produced in 1992, a number of other matters requiring amendment have been identified. These include the Law Commission's *Criminal Prosecution* recommendations, which we have revised and expanded on in this report. The passage of the Criminal Procedure Bill 2004 (currently before Parliament) would in any event require substantial

²⁵² Ministry of Justice, above n 201. In developing its *Simplification* recommendations, the Law Commission was specifically asked to proceed on the basis that the middle band should be retained. However, it noted that "Almost everyone who commented on the draft paper expressed regret that the middle band was 'out of bounds' for the purposes of this project" and "To move files from the District Courts to the High Court and then back to the District Courts as a matter of routine is less conducive to efficient case management than making applications to shift cases from the District Courts to the High Court": New Zealand Law Commission, above n 247, 8–9.

²⁵³ For example:

- "we record our continuing strong concern that unnecessarily complex and confusing procedural provisions of the criminal legislation are causing difficulties for those engaged in the busy work of the criminal courts. We recommend very early legislative consideration": *R v Webber* [1999] 1 NZLR 656, 662.
- "the legislation is Byzantine in its complexity": *CAA v Halliwell* [1999] 3 NZLR 353.
- "unnecessary confusion caused by the complex provisions divided between the District Courts Act 1947 and its schedules, the Summary Proceedings Act 1957 and its schedules and the Crimes Act 1961 ... We call attention once again to the need to set out the law in an accessible form": *R v Binnie* (6 September 1999) CA261/99.
- "legislative morass": *R v Hoe* (2 April 2001) CA453/00.

revision of the disclosure material in the *Guidelines: Official Information Act 1982* requirements, and the common law relating to them, will be codified by a new Criminal Disclosure Act.

- 435 This work has so far not been given high priority. We recommend that it should now proceed as a matter of some urgency, and that the Solicitor-General should convene an inter-agency working group for the purpose of reviewing the *Guidelines* and developing draft amendments for his consideration. This will ensure that the resource demands of the work are spread, and that the interests and concerns of other key justice sector agencies can be taken into account.

SUMMARY OF RECOMMENDATIONS

R65 Core criminal pre-trial process rights and obligations should be asserted in legislation, for example:

- alternatives to court prosecution;
- the exercise and extent of powers that affect personal liberties, such as arrest and bail;
- the extent of registrars' powers (that is, what are administrative matters, as opposed to judicial);
- disclosure requirements on the prosecution;
- a requirement on defendants whose cases are proceeding to trial to state pre-trial the nature of their case;
- timing of not guilty pleas, and election of mode of trial;
- the sentencing discount principle;
- power to proceed when a defendant is wilfully absent.

R66 A comprehensive set of rules is required to provide for the operational detail of criminal trial and pre-trial processes. The rules should not exclude the possibility of further administrative guidance (such as practice notes) as required.

R67 The rules should initially be drafted by the Parliamentary Counsel Office, and appended to the new Criminal Procedure Act. They should thereafter be amended on the recommendation of a rule-making body.

R68 In *Delivering Justice for All*, the Law Commission recommended a rule-making body "that includes all parties with a legitimate interest and that consults widely". We reiterate that view. If the Rules Committee is to undertake this work:

- there needs to be a better balance of representation on the Committee between legal professionals and the executive;
- the Committee should be required by statute to consult with stakeholders on any draft amendments to the rules.

R69 The *Simplification of Criminal Procedure* project previously recommended by the Law Commission and already on the Ministry of Justice work programme should be given high priority with a view to providing a vehicle for this further work.

R70 The Solicitor-General should convene an inter-agency working group for the purpose of reviewing the *Solicitor-General's Prosecution Guidelines* and developing draft amendments for his consideration.

Resource implications

436 **T**HE implementation of our recommendations will optimise the efficient management of criminal cases before trial. This chapter summarises at a high level the sorts of gains that are likely to be made, and identifies where resources will need to be supplied or reallocated to achieve this.²⁵⁴

INTANGIBLE BENEFITS

437 Our recommendations are directed to criminal justice system efficiency, and thereby the quality of justice. We have expanded on the problems and our goals at some length in chapters 1 and 2.

438 In brief terms, the problem can be summarised as follows: cases come repeatedly back to court and yet fail to make progress. This puts strain on court resources, because of the number of cases “churning” in the system, and the number of times that they each return to court. It also delays resolution of the 95 per cent of cases that are determined pre-trial, and the trials of the remaining 5 per cent of fully defended cases. It is from reducing these delays that intangible benefits for the quality of justice will arise. Delay sometimes results in case withdrawal or dismissal that would otherwise not have occurred (for example, through the unavailability of witnesses, or by reason of abuse of process); it decreases the accuracy of evidence and therefore of verdicts; it imposes unnecessary stress and inconvenience on complainants, witnesses and defendants by lengthening the process and requiring their repeated attendance; and ultimately it affects the confidence of participants and the wider public in the integrity of the system.

439 It cannot be over-emphasised that these are the crucial drivers for criminal justice system reform: this report is first and foremost about better justice, not cheaper justice.

TANGIBLE BENEFITS

440 However, the implementation of our recommendations will also have tangible benefits for criminal justice system resources, which can be measured in four ways:

- more cases disposed of without court proceedings;
- the earlier resolution of cases;
- fewer court events; and
- some shorter trials.

²⁵⁴ We have not attempted to quantify the resources that will be needed by particular agencies.

441 The discussion that follows is subject to several qualifications:

- These efficiencies represent substantial ongoing cost savings for the justice sector, but in the first instance they will be absorbed in clearing the existing queues of cases (that is, resolving cases that have been in the system too long). Once cases are being dealt with as expeditiously as is appropriate in the interests of justice, the anticipated savings can be fully realised.
- Only some of the efficiency gains have been quantified, to illustrate the size of the potential gains when translated into court time.²⁵⁵ It was not possible in the time available for the Ministry of Justice to extract and analyse all available data. For the remainder, we have only indicated the areas in which we believe savings can be made, and why. The Ministry of Justice will therefore need to undertake more work to fully assess the impact of our proposals.
- The extent to which there will be efficiencies to meet or exceed the predictions depends almost entirely on the extent to which judicial, prosecution, defence and court culture change, and also on different resourcing (as discussed at the end of the chapter).
- Analysing the potential for efficiency gains is complex. The resource demands of case disposal need to be cumulatively assessed, by reference to several variables: courtroom time; judicial time; administrative resources; and impacts on other parts of the justice sector such as police prosecutors and the Legal Services Agency (LSA). Our key proposition is that resources will be most effectively allocated by reducing the number of court appearances, and establishing other mechanisms to deal with administrative matters. However, this means that the savings in courtroom time are not absolute: they will usually closely correspond to savings in judicial time, because a significant proportion of judicial work occurs in court, but they may sometimes have adverse or neutral effects on some of the other variables. The net effect on the criminal justice sector will be beneficial, by a significant margin, but closer analysis will be needed of the impact on the individual parts.

More cases disposed of without court proceedings

442 Our recommendations will remove some cases from court altogether, in two ways.

443 *Early charge scrutiny.* Of the cases that currently go to a status hearing,²⁵⁶ approximately 9 per cent have all charges withdrawn because there is an insufficient evidential basis for the prosecution case. These could be largely screened out if the prosecution better scrutinised the file, ideally before the information is filed in court, or at worst in the very early stages of court proceedings (termed in chapter 4 “the administrative phase”). This will result

²⁵⁵ All of the figures provided are annual and national estimates, provided by the Ministry of Justice for the period January to December 2004.

²⁵⁶ In courts that do not have status hearings, the equivalent point in proceedings has been estimated, signified by the entry of a not guilty plea. According to the Ministry of Justice, 34 per cent of all summary cases go to a status hearing or equivalent.

in a substantial saving in court caseload. For example, if half of the current 9 per cent of late-stage withdrawals are screened out before an information is laid, there will be 2,312 fewer cases for the Ministry of Justice to manage. Based on the average number of appearances per case, this will result in a reduction of 4,855 list court appearances and 2,312 appearances at status hearing. Screening out another 25 per cent during the administrative phase would result in a further reduction of 1,156 status hearing appearances. At an estimated average of 3 minutes per list court appearance, and 7 minutes per status hearing, this will save 648 hours of court time (123 hearing days).²⁵⁷

- 444 *Independent police caution scheme.* All cases of police diversion, and the vast majority of those subject to community panel diversion, are currently prosecuted and appear in court; they are dealt with in a registrar's list and adjourned to a further date, at which compliance (or not) with conditions is confirmed. This does not involve judge time, but it consumes court resources. We are proposing a caution scheme that can operate out of court. However, it may not be possible to identify all such cases before they enter the court system. Police diversion cases number approximately 10,000 per annum; if half of these are diverted before an information is laid, this will result in at least 10,000 fewer appearances before a registrar.²⁵⁸
- 445 Disposing of cases without court proceedings will have other unquantifiable administrative benefits by saving the resources currently used to monitor the additional cases and support them through the system (for example, updating courts' electronic case management system to record case progress and disposal, and managing the hard copy court files).

Earlier resolution of cases

- 446 Our recommendations will result in the earlier resolution of cases, which will pay dividends for both timeliness of justice and allocation of resources. This will occur in three ways.
- 447 *Effective communication with defendants during the administrative phase.* The increased scope and timeliness of initial disclosure, accurate charging from the outset, and more explicit sentencing discounts for early guilty pleas will result in an increase in the number of pre-status hearing guilty pleas. The proportion of cases resulting in a guilty plea during the administrative phase of the case is currently 62 per cent.²⁵⁹ Even a minimal increase of 1 per cent would result in 942 fewer cases proceeding through the case management process to a status hearing. At an estimated 7 minutes per status hearing, that will save 110 hours in court time (21 hearing days).

²⁵⁷ Based on an estimated hearing time per day of 5 hours 15 minutes.

²⁵⁸ On the current basis of a typical two appearances per case.

²⁵⁹ For the purposes of this exercise, we defined the "administrative phase" as the period that precedes the entry of an election or a not guilty plea, which are currently the first significant court events. While 62 per cent looks like quite a high number, it includes the guilty pleas entered in high volume, low seriousness, absolute or strict liability matters such as traffic offences, liquor bans, failing to file a tax return: these offences by their nature tend not to be defended, and their volume skews the figures.

- 448 *Formalised case management.* The introduction of a case management requirement, backed by rigorous judicial scrutiny and a requirement that the defendant identify the issues in dispute, may slightly reduce the number of cases proceeding towards a fully defended hearing. It is not realistic to expect that this new process will significantly reduce the number of trials (if at all) or prevent all last-minute guilty pleas: some defendants will continue to refuse to face facts.²⁶⁰ However, some late guilty pleas occur simply because parties have not previously turned their minds to the issues; achieving these earlier will save the judicial and court resources currently expended in scheduling and preparing these cases for trial.
- 449 *Mode of trial election after case management.* The shifting of the point of election in electable cases (where the defendant is entitled to choose either jury or judge-alone trial) to the end of the case management process will elicit some guilty pleas in cases that are presently remanded for the committal process. At present, 217 cases where jury trial has been elected result in a guilty plea after a preliminary hearing. If some defendants in such cases were to plead guilty earlier by reason of case management, that would reduce the resource demands of committal (including full disclosure, the preparation and filing by the prosecution of written briefs of evidence, and sometimes a court hearing).²⁶¹

Fewer court events

- 450 In addition to promoting case disposition out of court, and earlier guilty pleas, our recommendations will reduce court events in the cases that do proceed in three other ways.
- 451 *Limit on administrative phase adjournments.* The requirement that administrative matters should normally be arranged within two appearances (except where additional appearances are considered by a judge to be in the interests of justice) will result in a significant reduction in the number of court appearances at this stage of the process. The average number of court appearances per case will reduce to approximately two,²⁶² and those appearances will be in court before a judge only when a judicial decision is

²⁶⁰ To the extent that this continues, a guilty plea at a late-stage pre-trial callover is preferable to the day of trial, and for this purpose we agree that a callover may have value: see further chapter 9.

²⁶¹ The savings in preliminary hearing time attributable to this reform, as opposed to other pending reforms, are not quantifiable for three reasons. First, the number of preliminary hearings, and their length when they do occur, will substantially alter with the passage of the Criminal Procedure Bill 2004, which provides for automatic written committal, with the hearing of the evidence of particular witnesses only by leave. Secondly, this report has been drafted in accordance with a prior government decision to abolish the category of “indictable offences triable summarily”: see above n 25. At present, for those offences, the prosecution largely decides whether there will be trial by jury or by judge alone (if they prefer the latter, the defendant may elect jury trial). It is impossible to know whether defendants will elect jury trial in future to the same extent that the prosecution currently elects to proceed in that forum; this in turn will determine whether the resource demands of committal are positively, negatively or neutrally affected. Thirdly, regardless of case management, some guilty pleas will inevitably continue to occur after committal, because some defendants will want to test the strength of the case (although the committal changes, in conjunction with articulated sentence discounting, will reduce the value of this exercise).

²⁶² Depending on how frequently the interests of justice discretion is exercised.

necessary; this will reduce the demand on court and judicial time. While court registry resources will still be needed to manage administrative appearances, the total number of court contacts will be fewer.

- 452 *Entry of pleas on the papers.* Our case management memorandum, and the recommendation for provision for plea and election on the papers, will significantly reduce the number of status hearings. If parties have agreed on a guilty plea and a pre-sentence report can be requested on the papers this eliminates the need for a status hearing;²⁶³ not guilty pleas will also not require a status hearing unless a judge considers that necessary. A status hearing will generally only occur where one or both parties have a specific reason for requesting it, such as a sentence indication.
- 453 However, we note that in this instance court time saved will not directly correspond to judicial time: additional out of court work will be required from judges to produce the reduction in court appearances (by scrutinising case management memoranda, and ordering pre-sentence reports). We predict that the out of court judge time will be less than the time currently taken to deal with those cases by way of status hearing alone. Even if the effect on judge time is neutral, this process can be expected to result in better justice.
- 454 *Custodial remand changes.* Our proposed changes to the powers of registrars (to remand a person in custody with consent for any adjournment period), and to the powers of judges (to remand a non-consenting person in custody for any adjournment period), will reduce the need for court appearances purely for the purpose of continuing custodial remands. This has implications for court and judicial time, and associated costs such as custodial escort services.

Shorter trials

- 455 The requirement in every case that the issues in dispute, and the evidence that may be read or that is admitted by consent, be identified in the case management memorandum will achieve two things. At the very least, it will facilitate accurate scheduling, which is essential because of the significant costs associated with trials that run over.²⁶⁴ In some cases it may also assist in focusing the trial, with all of the benefits listed in chapter 5, including shorter trial time and a better quality of justice.

²⁶³ The case will need to return to court for sentencing, but this still means one fewer appearance: many cases resolved at status hearing are not sentenced on the same day if a pre-sentence report is required.

²⁶⁴ For recent comment see Philip Morgan QC, Convener NZLS Criminal Law Committee (2 May 2005) 644 Law Talk 11: "When a trial runs over, it is not always possible to re-allocate the work scheduled for the judge required to stay at the jury trial, resulting in significant disruption not only to the court's rosters, but also to the parties and counsel engaged in the work the judge was to have commenced. Counsel are reminded of the difficulties caused by trials over-running their scheduled time and are urged to do what they can to minimise the prospect of any trial exceeding its allocated time by the efficient conduct of the case and by accurate trial estimates."

RESOURCE REQUIREMENTS

456 The following agencies will require ongoing investment, so that they are sufficiently resourced to make the necessary structural and process changes and sustain them long term.²⁶⁵

Police Prosecution Service

457 Opinions were widely expressed to us, and we agree, that the Police Prosecution Service will require a substantial investment of resources. It was reported by many whom we consulted (including members of the judiciary, court staff, defence counsel and Crown counsel) that police prosecutors already struggle to meet existing demands upon them. Without the injection of resources, we are of the view that their existing workload, coupled with the additional demands of this report, will stymie our reforms.

458 The additional demands include:

- prosecutors will be expected to scrutinise the file at the outset of the case, for evidential sufficiency and the appropriateness of prosecution in the public interest;
- in cases where the information has already been laid but a defendant is then cautioned by consent, or all charges are withdrawn because of evidential insufficiency, they will need to prepare and file in court a notice of withdrawal;
- if there is greater use of informal dispositions than is currently the case under existing diversion schemes, prosecutors will need additional resources to develop an appropriate programme or set of conditions, liaise with the defendant about it, and monitor their compliance;
- they will have overall responsibility for ensuring that disclosure obligations are properly met, which will include liaising with defence counsel or unrepresented defendants and responding to their requests;
- more consultation with investigating officers may be required on matters such as disclosure and diversion;
- there may be more prosecution resources required at court during the administrative phase of the case (for example, so that discussions with defence counsel do not inhibit queue processing, or when the administrative counter and the list court are operating in tandem); and
- for cases that are remanded to a provisional status hearing date (which will be fewer cases than currently), prosecutors will have responsibility for initiating discussions with the defence, and filing the case management memorandum.²⁶⁶

²⁶⁵ Because the savings in court time and other variables will not be realised immediately, an assessment will also need to be made of the transitional resource demands on all agencies.

²⁶⁶ Regarding actually answering the questions, the prosecutor will need to answer only those that relate to prosecution aspects of the case; defence counsel will have an equal responsibility to answer defence-related questions. The whole second page of the case management memorandum deals with trial management matters; these questions need only be answered in the event of a not guilty plea.

459 To some extent, these will be offset by the reduction in the number of court appearances, and therefore of the time that police prosecutors must spend in court. In other words, our proposals will result in a significant amount of current work being transferred out of the courtroom, to the court registry or the prosecutor's office. Nevertheless, it is clear to us that the effect will not be neutral.

District Court registries

460 *District Court registry staff.* The general principle that cases should be handled administratively, and only go before a judge when judicial intervention is required, is expected to have resource implications for administrative matters. This needs to be weighed against the registry resource saved by fewer cases coming to court; in addition, cases that do come to court will do so fewer times. How the demanding roles and responsibilities of the proposed new "case officer" positions in District Courts will be resourced will also require close analysis.

461 The net effect of these proposals, the financial and staff resourcing requirements to support them, and organisational design will all need to be assessed by the Ministry of Justice when it considers the implementation impacts and transitional operational requirements of our recommendations.

462 *Court facilities.* Our recommendations require registry staff to interact with prosecution and defence counsel outside the courtroom to arrange administrative matters. The ease with which this can occur, and the efficacy of it, largely depend upon the court's physical layout and facilities. The Wellington list court pilot required some modifications to the area around the courtroom in which the list court operates. That is likely to be required in most other courthouses around the country, thus entailing capital expenditure.

Legal Services Agency

463 Our chapter 11 recommendations for effective responses to counsel under-performance, including counsel funded by the LSA, will have resource implications for the LSA. At present, it is not resourced to receive and act on complaints; because of the potential for judicial review, this can be a resource-intensive exercise. We also recommend that the LSA should do a lot more performance-based intervention than the New Zealand Law Society, because its threshold for intervening should be lower, and because the majority of counsel working in the criminal area are largely or wholly funded by legal aid. Without funding for performance review, the LSA is unlikely to be able to adopt a sufficiently robust and regularly used procedure to achieve the intent of the recommendations.

464 If cases are proceeding more efficiently, there may be some reduction in payments for legal aid (although the payments for pre-trial preparation time, as a general rule, are already capped at quite low levels and therefore may not significantly change).

CONCLUSION

465 The investments canvassed above will be crucial to the success of our recommended reforms. Over time, in our estimation, the cost incurred will be substantially outweighed by the benefits.

APPENDIX A
Case management memorandum

- 1a. Is a status hearing required? (YES/NO)
 b. If yes, why (eg, sentence indication)?

If you are going to status hearing, the prior completion of the rest of this form is voluntary. If it is not completed prior, that will need to occur at status hearing.

Questions relating to charge and plea

2. List charges, including any amended charges. Strike through the options not applicable. ONLY ENTER PLEAS IN THE SHADED BOX IF YOU ARE NOT GOING TO STATUS HEARING.

(information no)

.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY
.....	WITHDRAWN /	GUILTY / NOT GUILTY

(information no)

(amended charges)

.....	GUILTY / NOT GUILTY
.....	GUILTY / NOT GUILTY
.....	GUILTY / NOT GUILTY
.....	GUILTY / NOT GUILTY

3. **If pleading not guilty on electable charges (max penalty more than 3 months' imprisonment),** does the defendant elect jury trial? (YES/NO)

4. **If pleading guilty on all or some charges,** is the summary of facts agreed for sentencing purposes? (YES/NO)

If yes, attach agreed summary. Please also attach the defendant's signed instructions regarding guilty plea.

5. **If the defendant is in custody,** does he or she consent to further custodial remand, until the next court event? (YES/NO)

If the defendant is pleading guilty on all charges, you need not answer any further questions.

If there are any not guilty pleas, you must complete and file the rest of this form.

Trial management questions for not guilty pleas

6. When (approximately) will the prosecution provide full disclosure?
.....

7a. The attached facts are admitted by the defence and proof of them will not be required.

b. The evidence of the following witnesses will be admitted by consent.
.....
.....
.....

c. The evidence in chief of the following witnesses may be read, but they must be available for cross-examination.
.....
.....
.....

8a. State what will be in issue at the hearing.
.....
.....
.....

b. Notice of alibi? (YES/NO)
c. Intention to call expert witnesses? (YES/NO)
d. If there are expert witnesses, when (approximately) will the defence provide expert briefs?

9. Expected number of witnesses: (prosecution)
(defence)

10. Estimated trial duration:

11. Any special facilities required (eg, closed circuit television, interpreter)?
.....
.....

12a. Will there be any pre-trial applications? (YES/NO)
b. If yes, specify their nature (eg, admissibility, 347 discharge, trial by judge alone) and likely duration.
.....
.....

13. Is there any other matter relevant to proper and convenient trial (eg, other charges outstanding against defendant)?
.....

14a. Require priority listing for either pre-trial applications or trial? (YES/NO)
b. If yes, why (eg, defendant in custody, type of charge)?
.....

Signed: (prosecutor) (defence counsel)

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