



**May 2009**

## **Discussion Document: Development of a formalised sentence indication scheme**

### **Purpose**

1. The purpose of this paper is to seek views on what the key features of a formal sentence indication scheme should be. The Court of Appeal in a recent decision<sup>1</sup> has suggested sentence indications should be authorised by legislation.
2. Before developing legislative authority there needs to be consideration of how a more formalised sentence indication scheme should operate in New Zealand, and what the key features should be.
3. We seek your input on this matter. At the end of this paper there are some consultation questions and information about how to provide feedback.

### **Definition and purpose of sentence indication**

4. The term “sentence indication”, has no legislative definition. As used in this paper it refers to an indication by a Judge prior to the commencement of a hearing or trial of the likely sentence an accused might receive if he or she pleads guilty at that point in time. The indication can relate to sentence type only, sentence type and the likely range of the penalty, or the specific quantum of the sentence<sup>2</sup>.
5. The primary purpose of a sentence indication is to ensure that a defendant is in a position to make an informed decision as to plea. An early guilty plea is regarded as meriting a sentence discount and is

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<sup>1</sup> R v Smail [2008] 2 NZLR 448 at para 67

<sup>2</sup> Above note 1 – this case also stated that sentence indications are not confined to formal sentence indication hearings and that less formal indications can also create an expectation on the part of the accused.

reflected in section 9(2) (b) of the Sentencing Act 2002 which codified pre-existing case law.

## Background

6. The practice of giving sentence indications has been a growing part of the criminal justice system for some time both in New Zealand and in other similar jurisdictions<sup>3</sup>.
7. In New Zealand sentence indications are now an established practice in the District Court<sup>4</sup>. In the 2004 evaluation of status hearings<sup>5</sup> it was found that in the summary jurisdiction sentence indications were requested in 17% of cases (ranging from 30% in Manukau to 4% in Christchurch) and in the indictable jurisdiction in the Auckland District Court sentence indications were requested in 13% of cases.
8. As a result of the growth of this practice, the District Court has developed practice guidelines for the judiciary to provide safeguards and ensure uniformity of approach (these are set out in paragraph 35 below).
9. It is generally acknowledged that the willingness of District Court Judges to give sentence indications when requested has led to more early guilty pleas and a consequent reduction of defended matters. At Manukau District Court, during testing of a new process in the criminal summary jurisdiction, 76% (121) of the cases that requested a sentence indication on a case management memorandum resulted in a change of plea to one or more charges at a status hearing or at a subsequent event. At Tauranga District Court, the proportion was 58% (14 cases).
10. It is less common for the High Court to give sentence indications (although not unknown<sup>6</sup>). The High Court is reluctant to engage in this practice without authorising legislation<sup>7</sup>.
11. The Court of Appeal<sup>8</sup>, as mentioned above, has expressed support for the development of authorising legislation for sentence indications in New Zealand, given their widespread incidence in the District Court jurisdiction.

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<sup>3</sup> Australian Law Reform Commission Report 103 (2006) 'Same Crime, Same Time: Sentencing of Federal Offenders', para 15.8

<sup>4</sup> This normally takes place at status hearings

<sup>5</sup> This evaluation was conducted by the Ministry of Justice and the Law Commission

<sup>6</sup> R v Smail above note 1 is an example of an appeal concerning a sentence indication given in Chambers in the High Court.

<sup>7</sup> Memorandum from Randerson J, Chief High Court Judge, to Criminal Practice Committee 4 November 2008

<sup>8</sup> Above note 1

12. The Law Commission discussed the practice of giving sentence indications in its report entitled *Pre-Trial Processes: Justice Through Efficiency*<sup>9</sup> (the Law Commission Report). The Law Commission was generally supportive of the practice, provided there were safeguards in place. It noted that sentence indications were generally well received and were regarded as helpful by both defendants and counsel<sup>10</sup>. It recommended the making of some specific court rules to apply to sentence indications, as discussed in paragraph 43.
13. The Government response to the Law Commission Report concluded that there was significant utility in providing formally for sentence indications and discounts in the court process. To date there has been no progress on this matter.

## **Pros and cons of sentencing indications**

### **Advantages**

14. The advantages of sentence indications are that they can result in an earlier guilty plea, which allows for a:
  - a) Quicker resolution of cases – meaning valuable court time is freed up for other matters.
  - b) Reduction in the trauma to victims because victims do not have to go through a trial.
  - c) Reduction in the anxiety of the accused by reducing the time between charge and disposition.
  - d) Savings in costs from the reduction of the number of trials.

### **Disadvantages**

15. Despite the growing incidence of the practice of giving sentence indications there has been criticism of the practice over the years. The main disadvantages cited are that the sentence indication process:
  - a) Can amount to a form of plea bargaining which may be regarded as objectionable in itself.
  - b) May put inappropriate pressure on defendants to plead guilty – it is argued that a Judge explicitly explaining the significant discount for an early guilty plea is inescapably coercive in nature.

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<sup>9</sup> Report 89 (June 2005)

<sup>10</sup> Above note 9 at para 305

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- c) May encourage Judges to offer excessively lenient sentences in order to encourage guilty pleas.
  - d) May be undertaken with insufficient information available to the Judge (especially in the summary jurisdiction).
  - e) May pay insufficient regard to victims' concerns.
  - f) May be a problem with later inconsistent sentences (this raises the question of the status to be accorded to a sentence indication).
  - g) May cause difficulties when there is a later appeal by the prosecution against sentence.
16. Case law and rules have been developed over time to respond to these concerns, with the aim of putting in place a fair process to safeguard the interests of the accused and victims. In our view most, if not all, of the above concerns can be addressed by developing robust procedures. We discuss below what these procedures ought to be. If they are adopted, we believe that the advantages of a sentence indication process clearly outweigh the disadvantages.

## Relevant Case Law and Reports

17. There have been a number of significant cases in New Zealand, and in other commonwealth jurisdictions, that have dealt with issues arising from sentence indications. The earlier cases took a cautious approach and often an unfavourable view of the practice. More recently, however, the courts have accepted that sentence indications can serve a useful function in helping courts cope with growing workloads, and can be beneficial for defendants and victims. The courts have therefore laid down rules and guidelines for the process.
18. There have also been a number of reports that discuss issues relating to the use of sentence indications and which make recommendations, including the Law Commission Report.
19. In considering whether a more formal scheme should be developed, and what such a regime should include, examining the existing case law and major reports is a useful place to start.

## England

20. In the case of *R v Turner*<sup>11</sup> the English Court of Appeal was opposed to the idea of a Judge stating that they would impose a more severe sentence on conviction following a not guilty plea, than they would for a guilty plea. This was regarded as putting pressure on the accused,

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<sup>11</sup> [1970] 2 All ER 281

thus depriving them of “that complete freedom of choice which is essential”<sup>12</sup> to an accused choice of plea. In effect the *Turner* case prohibited the giving of sentence indications.

21. Some 35 years later, the English Court of Appeal indicated in *R v Goodyear*<sup>13</sup> that the rule set down in *Turner* no longer needed to be followed. It then proceeded to set down some guidelines on giving sentence indications to ensure uniformity of process and safeguard against the creation or appearance of judicial pressure on the defendant. The guidelines set down by the English Court of Appeal in the *Goodyear* case include the following:
- a) A Judge should not give an advance indication of sentence unless one has been sought by the defendant (that is, the process should be initiated by the defendant).
  - b) A Judge may remind defence counsel that the defendant is entitled to seek an advance indication of sentence.
  - c) A Judge may refuse altogether to give an indication, or may postpone doing so, with or without giving reasons.
  - d) If a Judge refuses to give an indication it remains open to the defendant to seek a further indication at a later stage.
  - e) Once an indication has been given it is binding and remains binding on the Judge who has given it, and it also binds any other Judge who becomes responsible for the case.
  - f) If the defendant does not plead guilty after having a reasonable opportunity to consider his or her position in light of the indication, the indication will cease to have effect.
  - g) Defence counsel should not seek an indication without written authority signed by his or her client.
  - h) Defence counsel are personally responsible for ensuring that their clients fully appreciate the following matters:
    - i That the defendant should not plead guilty unless he or she is guilty;
    - ii That the prosecution remains entitled to appeal any unduly lenient sentence given pursuant to a sentence indication by the Judge;

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<sup>12</sup> Above note 11 page 286

<sup>13</sup> [2005] 3 All ER 117

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- iii That any indication given by the Judge reflects the situation at the time when it is given and if a guilty plea is not tendered in the light of that indication, the indication ceases to have effect.
- i) An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea. Any agreed basis should be put in writing before an indication is sought.
- j) Where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision the difference should be recorded so that the Judge can make up his own mind.
- k) The Judge should never be invited to indicate levels of sentence which he or she may have in mind depending on possible different pleas.
- l) An unrepresented defendant is entitled to seek a sentence indication of his own initiative, but for either the Judge or prosecuting counsel to take any initiative and inform an unrepresented defendant of this right may too readily be interpreted as, or subsequently argued to have been, improper pressure.
- m) If an indication is sought the prosecution should normally inquire whether the Judge is in possession of, or has had access to, all the evidence relied on by the prosecution, including any victim impact statement as well as any information of relevant previous convictions recorded against the defendant.
- n) Rights of appeal against sentence for both prosecution and defence are wholly unaffected by the advance sentence indication process.
- o) At least seven days notice of an intention to seek an indication should normally be given in writing to the prosecution and the court.
- p) The hearing should normally take place in open court with a full recording of the entire proceedings, and both sides represented, in the defendant's presence.
- q) The fact that notice to the Crown has been given, and any reference to a request for a sentence indication, or the circumstances in which it was sought, will be inadmissible in any subsequent trial.

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- r) It is not envisaged that there will be an opening by the Crown or a mitigation plea by the defence.
  - s) Reporting restrictions should normally be imposed to be lifted if and when the defendant pleads or is found guilty.
22. The above guidelines show the English Court of Appeal was intent on putting in place a comprehensive common law scheme to govern the practice of sentence indications. It also shows an acceptance of the place of sentence indications in the criminal justice system.
23. An interesting feature of the judgment is that the Court of Appeal said that sentence indications should only be given in the Crown Court – not in the summary jurisdiction of the Magistrates Court. In New Zealand sentence indications are most common in the summary jurisdiction. The High Court has been more cautious in adopting this practice.

## Australia

24. The New Zealand Court of Appeal in *R v Smail* describes *R v Marshall*<sup>14</sup> (a decision of the Victoria Court of Criminal Appeal) as “perhaps the leading Australian case” on sentence indications.<sup>15</sup>
25. In *Marshall*, the Court strongly discouraged the giving of sentence indications in chambers because it undermined the principle that justice must be open and transparent. The judgment stated<sup>16</sup>:

Anything which suggests an arrangement in private between a Judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and puts the Judge in a false position which can only serve to weaken public confidence in the administration of justice.

26. Sentence indications have been available in certain summary jurisdictions (e.g. the Magistrates Court of Victoria) for some time but until recently it seems there was only one instance of a formal sentence indication regime operating in an indictable jurisdiction. That was a pilot scheme begun in 1993 in the New South Wales District Court. The scheme was abandoned in 1995 due to concerns about sentencing disparities, and a failure to deliver promised gains in efficiency.<sup>17</sup> Very recently, as discussed in paragraph 30, Victoria has

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<sup>14</sup> [1981] VR 725

<sup>15</sup> Above note 1 at para [41].

<sup>16</sup> Above note 14 at page 732

<sup>17</sup> New South Wales Bureau of Crime Statistics and Research, “Sentence Indication Scheme Evaluation”, 1995; Victoria Sentencing Advisory Council, “Sentence Indication and Specified Sentence Discounts: Final Report” (September 2007) at viii.

legislated for sentence indications to apply in the indictable jurisdiction of the County Court.

27. In 2006, the Australian Law Reform Commission recommended that a federal sentence indication regime be introduced through federal sentencing legislation.<sup>18</sup> The Commission proposed that the essential elements of such a scheme should include the following:
- a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;
  - b) the timing of a sentence indication should be flexible, and Rules of Court or Practice Directions should specify the earliest point at which an indication can be sought;
  - c) the defendant should be entitled to one sentence indication only;
  - d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt;
  - e) the indication should occur in the presence of the defendant and in open court, but if the indicated sentence is not accepted, those proceedings must not be reported until the conclusion of the matter;
  - f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;
  - g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply to the passing of sentence;
  - h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;
  - i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;
  - j) in giving the indication, the court must take into account but must not specify the quantum of any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;

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<sup>18</sup> Above note 3

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- k) the defendant should be given a reasonable opportunity to consult with his or her legal representative before deciding whether to enter a guilty plea on the basis of the indicative sentence;
  - l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;
  - m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer, who should have no regard to the indicative sentence in passing any subsequent sentence; and
  - n) the sentence indication should not be appellable but the rights of the prosecution and the defence to appeal against sentence, if one is imposed, should be retained.<sup>19</sup>
28. In September 2008, the Minister for Home Affairs indicated that the ALRC Report was under active consideration.<sup>20</sup>
29. The Victorian Sentencing Advisory Council similarly recommended the introduction of a sentence indication regime in Victoria, and in its report specifically considers the implementation of such a regime in the indictable jurisdiction.<sup>21</sup> Subsequent to this report, the Victorian Government amended the Magistrates' Court Act 1989 and passed the Criminal Procedure Act 2009 to give statutory authorisation for sentence indications in the summary jurisdiction.<sup>22</sup>
30. Victoria has also amended the Crimes (Criminal Trials) Act 1999<sup>23</sup> to authorise sentence indications in the indictable jurisdiction of the County Courts.

## New Zealand

31. As in England the Court of Appeal in New Zealand has become more accepting over time of the practice of giving sentence indications, and legal rules applying to sentence indications have been developed. The 2008 Court of Appeal case of *Smail*<sup>24</sup> noted the growing acceptance of sentence indications, and quoted Hampel J of the Victoria Supreme Court who said that "sentence indications, given responsibly in open court with the rights of the accused and the public carefully observed,

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<sup>19</sup> Above note 3, at pages 428-429.

<sup>20</sup> Hon Bob Debus MP, Federal and Criminal Justice Forum (28-29 September 2008, Canberra): <http://www.alrc.gov.au/inquiries/title/alrc103/implementation.html>.

<sup>21</sup> Victorian Sentencing Advisory Council, "Sentence Indication and Specified Sentence Discounts: Final Report" (September 2007).

<sup>22</sup> Magistrates' Court Act 1989, section 50A; Criminal Procedure Act 2009, sections 60-61.

<sup>23</sup> Section 23A

<sup>24</sup> Above note 1

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would not bring the criminal justice system into disrepute. They would enhance it.”<sup>25</sup>

32. In two cases in 2000<sup>26</sup>, the Court of Appeal noted that judicial sentence indications had the potential to cause difficulties if they are given before a Judge is in possession of all relevant material and has had the advantage of full submissions. The Court also commented<sup>27</sup> that one Judge giving a sentence indication may have a markedly different view as to the appropriate sentence to be imposed from another Judge who is in full possession of all the relevant material.
33. In *R v Gemmell*, a sentence indication of 9-12 months was initially given, subject to a pre-sentence report, an updated victim impact statement, and submissions from counsel as to tariff authorities. After receiving this information, the Judge imposed a higher sentence of two years. In *R v Edwards* a sentence indication was given by one Judge and then a different Judge imposed a more severe sentence following the guilty plea.
34. In both cases, the Court of Appeal set aside the convictions of the appellants and remitted the cases back to the District Court for the appellants to make their pleas again.
35. In 2006 in *R v Edwards and Sipa*<sup>28</sup> the Court of Appeal referred (with apparent approval) to the District Court Bench Book standards on sentence indications and noted that the District Court Judge in the particular case had not complied with them (non-compliance with the guidelines was given as one of the reasons why the sentences under appeal in that case could not be supported). In particular the Court of Appeal was critical of the fact that the Judge had entirely excluded the Crown from the process<sup>29</sup>. The District Court Bench Book provides that sentence indications at status hearings are to be given under the following structured guidelines:
  - a) A sentence indication will be given only if asked for by the defendant.
  - b) An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a victim impact statement, along with any other information necessary to enable the Judge to assess the proper sentence, having regard to the provisions of the Sentencing Act 2002.

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<sup>25</sup> “Plea Bargaining - a Judge’s involvement” (1985) 59 Law Inst J; above at note 1 at para [67].

<sup>26</sup> *R v Gemmell* [2000] 1 NZLR 695; *R v Edwards* 17 CRNZ 604.

<sup>27</sup> *Edwards* at page 606

<sup>28</sup> [2006] 3 NZLR 180

<sup>29</sup> The District Court Bench Book standards state that it is essential that there is consultation with all parties.

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- c) The defence cannot be compelled to disclose anything, but can give the Judge such material as it wishes.
  - d) The Judge is bound by the indication unless, after it is given, fresh evidence shows that the indication is inappropriate. However, should that arise, the Judge must inform the defendant of the now intended type of sentence. He or she must allow the defendant to reconsider his or her plea and, if he or she wishes, vacate it, plead not guilty and proceed to a defended hearing.
  - e) A Judge who considers he or she lacks sufficient information should decline to give a sentence indication.
  - f) Any sentence indication must accord with the principles and aims of the Sentencing Act 2002.
  - g) The indication will be limited to the type of sentence that the Judge thinks appropriate, that is, imprisonment or a community-based sentence.
  - h) When a sentence indication is accepted but sentencing is delayed and comes before another Judge, that Judge must follow the indication already given or indicate the sentence he or she intends to impose and afford the defendant an opportunity to reconsider his or her position and withdraw or confirm the guilty plea.<sup>30</sup>
  - i) When the indication is not accepted, no record of it will be put on the file. If the defendant is later convicted of that offence, any indication given at status hearing shall have no bearing on the sentence. Sentencing Judges will not be told by Counsel of the Judge's indication and, if told, will ignore the sentence indication.
  - j) Consultation with all parties, Police, victims and the defendant is essential.
36. In *Smail*<sup>31</sup>, the Court of Appeal expressed the view that a defendant should always be present when a sentencing indication is given<sup>32</sup>. Importantly, the Court of Appeal observed that the accused should have been present at the Chambers conference. It cited with approval a quote from a Victorian Supreme Court case, *Marshall*<sup>33</sup>, which emphasised the importance of sentence indications being given in public and in the presence of the defendant<sup>34</sup>. On this point it also

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<sup>30</sup> See Gemmell and Edwards above note 26; Deighton v Police, unreported, HC Whangarei, [CRI 2005-488-24] 20 May 2005, per Baragwanath J.

<sup>31</sup> Above note 1

<sup>32</sup> Above note 1 at para 58 - 66

<sup>33</sup> Above note 14

<sup>34</sup> Above note 1 at page 455

cited the *Goodyear* decision and the New Zealand Law Commission Report – both of which agreed on this point.

37. Further principles are also established by the case law:
- a) Sentence indications should not be given unless the parties have agreed to the factual basis on which the sentence is to proceed, or a sufficient evidential foundation has been established.<sup>35</sup> Where the parties are not agreed as to culpability or legal responsibility, that issue must first be resolved before a sentence indication is given, if necessary through evidence being called.
  - b) Where the Crown appeals against a sentence following a sentence indication, the defendant should have the opportunity to swear an affidavit, firstly attesting to his or her reliance upon the sentence indication in electing to enter a guilty plea, and secondly confirming that if the appeal court considers the sentence should be increased, he or she would seek to have the convictions quashed and the matter remitted to the sentencing court for the guilty plea to be vacated and a plea of not guilty entered.<sup>36</sup>

*Law Commission recommendations relating to sentence indications*

38. In 2005 the Law Commission Report<sup>37</sup> discussed sentence indications at some length, and made a number of recommendations related to the making of court rules.
39. This Report drew on the results of an earlier consultation document which sought feedback on a number of pre trial processes, including the use of sentence indications, as well as the 2004 evaluation of status hearings in the District Court<sup>38</sup> (where most sentence indications occur).
40. As noted in paragraph 12 the overall conclusion of the Law Commission Report was that sentence indications are generally well received and regarded as helpful by both defendants and their counsel.<sup>39</sup>
41. The Report noted the use of the standards set out in the District Court Bench Book and commented that there were no equivalent written guidelines in the indictable jurisdiction (see paragraph 36 above).
42. The Law Commission recommended a number of rules to better regulate sentence indications, covering the following matters:

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<sup>35</sup> R v Palmer [2007] 3 NZLR 313 at para [26], [30] - [31] (CA).

<sup>36</sup> Above note 28 at para [8].

<sup>37</sup> Above note 9

<sup>38</sup> Above note 5

<sup>39</sup> Above note 9 para 305

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- a) 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.
  - b) Complainant information upon which a sentence indication is based should be derived from a properly prepared victim impact statement.
  - c) 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.
  - d) An indication should generally specify:
    - i 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
    - ii The type and quantum of penalty that will be imposed if the defendant pleads guilty now.
  - e) 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.
  - f) An indication should also include advice that it does not detract from the defendant's right to require the prosecution to prove its case.
  - g) 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.
  - h) The sentencing Judge on a guilty plea should, wherever possible, be the Judge who provided the sentence indication.
  - i) 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.
43. Another matter that is related to sentence indications, but does not come within the scope of this consultation exercise was the recommendation that section 9(2)(b) of the Sentencing Act should be

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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. While this would affect the sentence indication, it is a more general sentencing issue, and therefore outside the scope of this paper.

44. Most of the recommended rules set out above accord with case law guidelines, but a few are at variance with them. When determining what a formal scheme should include these differences of opinion are important to consider.

## Options

45. There are two options for approaching the regulation of the use of sentence indications. These are:
  - a) to stay with the status quo and to allow common law and court rules (such as the District Court Bench Book standards) guide the use of sentence indications; or
  - b) to develop a formal sentence indication scheme with the more fundamental aspects authorised by legislation.

## Status Quo

46. One advantage of retaining the status quo is that it would allow more flexibility in the future development of the use of sentence indications. It would allow a more innovative approach to be taken over time, and for guidelines and rules to change easily as circumstances dictated.
47. On the other hand, some Judges feel discomfort with the practice of giving sentence indications without legislative authorisation. There is legal uncertainty because of tension between the giving of sentence indications and the general requirements of the Victims' Rights Act and the Sentencing Act in relation to sentencing. It is undesirable to leave this tension unresolved.

## Formalised Scheme

48. The advantage of developing a formalised scheme for the use of sentence indications underpinned by legislative authority is that it would provide certainty and clarity in the law - thus avoiding some of the appeals that have occurred in the past. The judiciary, the legal profession and those charged with criminal offences would all benefit from more certainty, and the knowledge that there was uniformity of approach across the criminal justice system.

49. Particular problems that have arisen in relation to the use of sentence indications in the past could be addressed by way of a formalised scheme. This would also rebut criticism about the potential unfairness of the use of sentence indications.
50. A significant advantage of developing a formalised scheme is that it is likely to encourage the use of sentence indications in more cases, where appropriate. This could help resolve a greater number of cases than is currently the case.
51. In the light of these considerations, we propose that a formalised scheme with legislative underpinning should be put in place. In devising such a scheme, it is first necessary to determine how it should operate and what its key features should be. Its basic elements should be in legislation so that the relationship with the Victims' Rights Act and the Sentencing Act is clarified, but the detail of what should be contained in primary legislation and what should be contained in secondary or tertiary legislation is a second order question to be decided at a later date.

### **Recommended Features of a Sentence indication Scheme**

52. The recommended features of a sentence indication scheme are set out below. The matters we think should be included are:

*The sentence indication scheme should be generic - applying to all jurisdictions*

53. It is recommended that a sentence indication scheme should apply across all jurisdictions. Given the particular New Zealand experience to date in the District Court jurisdiction, there seems no reason that sentence indications should not be available in both the summary and indictable jurisdictions, and that the same general rules should apply across the board.
54. There is no international consistency on the question of whether sentence indications should be available in all courts and for all offences, and whether the rules should differ between courts. In England the Court of Appeal has taken the view that sentence indications should be given only in the Crown Court and are not appropriate in the Magistrates' Court. However, that is likely to derive from the fact that most Magistrate' Courts are presided over by lay magistrates with relatively limited sentencing jurisdiction. In contrast, the Victorian Sentencing Advisory Council recommended that the use of sentence indications should be extended from the summary jurisdiction to the indictable jurisdiction (although it did confine its proposed scheme to the County Courts which hear the less serious indictable offences and excluded the Supreme Court from its ambit). That recommendation has now been adopted in statute.

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55. There is no depth of experience of the use of sentence indications in the High Court yet, but there seems no good reason to exclude the application of a sentence indication scheme from that court. The discretion to give a sentence indication remains with the Judge and in inappropriate cases the Judge can decline to give a sentence indication.

### *Only a defendant can apply for a sentence indication*

56. We recommend that the making of an application for a sentence indication be restricted to the defendant. The application is restricted to the defendant in other jurisdictions and also in the current District Court Bench Book standards.
57. The Law Commission did recommend in its earlier Report that the prosecution should be able to apply for a sentence indication in certain circumstances – for example where the prosecutor indicated 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.
58. However, we do not think that this is appropriate. It would explicitly link prosecution decisions about the appropriate charge to a specific penalty, and would therefore introduce a “Plea and sentence” bargaining regime that would change the nature of discussions between prosecution and defence. It would also give the Judge too great an involvement in the plea bargaining process. The prosecutor is not able to ask for a sentence indication in any other jurisdiction that we considered.

### *Charges do not need to be settled before sentence indication is given*

59. While we do not think that the prosecutor should be able to make a decision on an amended charge contingent on a particular type of sentence, we do recommend that there should be room for the defence to obtain a sentence indication on a proposed reduced charge before making a decision whether to accept that charge and plead guilty. It is commonplace for prosecutors to offer to amend charges in return for a guilty plea, or to offer to withdraw some charges in return for a guilty plea on others. There is no reason in principle why the defendant should not be able to obtain an indication of the likely sentence if that offer is accepted. If they are unable to do so, they will be forced to make a choice between accepting the prosecution offer in the absence of the information as to sentence that they would otherwise have been entitled to receive, or continuing with their not guilty plea.

*Discretion to give sentence indication*

60. The Judge will have the discretion to refuse to give a sentence indication when it is requested. He or she will need to be satisfied that an indication would be likely to facilitate the early resolution of the case and that there are no other circumstances that make it inappropriate to give a sentence indication.
61. In the *Goodyear*<sup>40</sup> case a number of situations were described where a Judge may feel it was inappropriate to give a sentence indication. These included where the defendant is already under pressure (perhaps from a co-accused), or vulnerable and a sentence indication will add to the pressure; or where there are a number of defendants and an indication given to one defendant may create pressure on another defendant.

*Content of sentence indication*

62. The scheme will need to define what a sentence indication can include.
63. The Law Commission earlier recommended that an indication should generally specify the type and quantum of penalty that would be imposed if the defendant were to plead guilty at that time. The District Court Bench Book standards state on the other hand that the indication should be limited to the type of sentence that the Judge thinks appropriate. Anecdotal evidence, though, suggests that it is not unusual for District Court Judges to specify the quantum.
64. The Victorian Sentencing Advisory Council recommended that in the indictable jurisdiction the only indication that should be given is whether the defendant was likely to be sentenced to a term of imprisonment or not<sup>41</sup>. The Australian Law Reform Commission also recommended that the sentence indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range<sup>42</sup>. Its reasoning was the same as the Victorian Sentencing Advisory Council: it felt that an indication of a specific quantum presupposes that all relevant information is before the court at the time of the indication, and does not cater for the possibility that a judicial officer may need a measure of flexibility in imposing sentence in order to accommodate any additional information that comes to light at the time of sentencing.
65. In reality it seems the specificity of the indication that can be given will vary in accordance with the information that is available to the court. It is therefore recommended that there should be a wide discretion for Judges to tailor a sentence indication to what is appropriate in the circumstances of the particular case. A sentence indication could include:

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<sup>40</sup> Above, note 13 page 129

<sup>41</sup> Above, note 21 page 116

<sup>42</sup> Above, note 3 page 425

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- a) the type of sentence e.g. imprisonment or community sentence; or
- b) the type and general indication of the range; or
- c) the type and specific quantum.

### *Specification of information that must be before the court*

66. One way of ensuring sentence indications are based on good quality information is to specify the minimum information that must be before the court where a sentence indication includes a specific quantum. It is suggested that this should include a summary of facts, the victim impact statement where applicable, the defendant's previous convictions and the opportunity for submissions from the prosecution and defence.
67. However, in the early stages of the case (e.g. first appearance), it will be possible for the Judge to give an indication only as to type of sentence (e.g. custodial or non-custodial) on the basis of more limited information (for example, the summary of facts and the previous convictions but not the victim impact statement or submissions).

### *Sentence indication to be given in open court in the presence of the accused and reporting restrictions should apply*

68. An important element of ensuring that the use of sentence indications is perceived as a fair and open process is that it is given in open court in the presence of the accused. This is universally recommended as an essential feature of sentence indication regimes. This requirement guards against any suggestion that arrangements have been made in private.
69. As an adjunct to this requirement there should be a prohibition on reporting information on the sentence indication hearing until the defendant either pleads guilty, or is found guilty after a hearing or trial.

### *Sentence indication ceases to have effect after reasonable period of time*

70. A sentence indication is intended to specify the sentence applicable at the time it is given. The principle that the earlier the guilty plea is entered the greater the discount, is a relevant factor in determining the sentence indication. If the defendant does not plead guilty within a reasonable time of the indication being given, it would no longer represent an appropriate sentence.
71. The scheme should therefore provide that the sentence indication is to expire after a time period set by the Judge. The deadline should allow sufficient time for the defendant to consult his or her counsel. It is

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difficult to set any fixed timeframe for all cases, as circumstances will differ. It is important, however, that there be a clear deadline to provide certainty for all involved and provide integrity for the sentence indication process. Requiring the Judge to set an expiry time for the indication, if it is not accepted at the hearing itself, will achieve these objectives.

### *Extent to which sentence indication is binding*

72. The scheme should provide that, once an indication has been given and the defendant has pleaded guilty, the indication is binding on the Judge that gave the indication, unless fresh evidence becomes available which materially affects the position.
73. The Victorian legislation provides that, once an indication is given and the defendant pleads guilty, the court cannot impose a more severe type of sentence. The *Goodyear*<sup>43</sup> guidelines include a requirement that the sentence indication should be binding on any Judge who sentences a defendant who pleads guilty in reliance on the indication.
74. In our view, this would inappropriately restrict Judges' independence and is not desirable. We also note that it would cause considerable difficulty if a different Judge were required to impose a sentence that he or she did not agree with, and to give reasons for it. A better approach is to allow a defendant to withdraw his or her guilty plea if a different Judge believes the sentence indication was unduly lenient.

### *Defendant must be allowed to vacate plea where a more severe sentence is indicated*

75. If, after an indication is given, it is thought a more severe sentence should be imposed because either fresh evidence has emerged or the matter has come before another Judge who does not agree with the sentence indication, the scheme should provide that the defendant is entitled to vacate his or her plea.
76. This ensures that a defendant who pleads guilty on the basis of a sentence indication has some recourse if the sentence indication is not upheld. The defendant should be in no worse a position than they were before they entered their guilty plea, if they are given the opportunity to vacate their plea where the sentence indication is not supported.

### *Evidence concerning sentence indication should be inadmissible in any subsequent trial*

77. If a defendant applies for a sentence indication but subsequently elects to defend the matter, any evidence relating to the application should be

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<sup>43</sup> Above note 13 para [21]

inadmissible in any ensuing trial or hearing. The fact of applying for a sentence indication could be interpreted as an admission of guilt and prejudice the defendant's right to a fair trial. This is consistent with the *Goodyear* guidelines.

78. In the Australian Law Reform Commission regime (see paragraph 27) it is recommended that where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer. We do not support adopting this particular requirement. Firstly, it would pose practical difficulties for court scheduling - especially in smaller centres. Secondly, allowing a Judge to preside at trial after giving a sentence indication is no different from allowing Judges who have decided bail applications involving consideration of the defendant's previous record, from presiding over the subsequent trial. Judges are well able to put matters such as this aside when evaluating evidence.

*Appeal Rights unaffected and codification of current case law relating to successful appeals against sentence by the Crown*

79. The scheme should also clarify that a sentence given on the basis of a sentence indication does not affect the appeal rights of either the defendant or the prosecution.
80. It should also provide that where on appeal against sentence a more severe sentence is indicated, the defendant has the right to have the case remitted to the court of hearing so they can enter a not guilty plea. The right to have the case remitted to the court of hearing should be available to a defendant if they give evidence that they made their guilty plea in reliance on the sentence indication, and that if the matter is remitted to the court of hearing they intend to plead not guilty.

**COMMENTS**

Please provide written comments on this paper by 15 June 2009 to either:

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## **Consultation Questions:**

1. Do you think a formalised sentence indication scheme should be developed? Why? Why Not?
2. If you think there should be a formal sentence indication scheme what features do you think should be included? What features should not be included?
3. Do you think there are some circumstances where it is appropriate for the prosecution to make the application for a sentence indication? If so, what are those circumstances?
4. Do you think Judges should be required to make explicit the discount being given when giving a specific sentence quantum?
5. Do you think it is appropriate to have a generic legislative regime to cover all courts – or separate regimes for the High Court and District Court?
6. Do you have any other comments about any aspects of the proposed sentence indication regime?