



May 2009

DISCUSSION DOCUMENT: IDENTIFICATION OF THE ISSUES IN DISPUTE

INTRODUCTION

1. Criminal procedure in New Zealand can be unnecessarily complex, a source of confusion for those who interact with the system, and a key contributor to the court delays that are the cause of much public and political concern. One reason for current court delays is the lack of focus, before and during the trial, on those aspects of the prosecution case that the defence actually disputes (the “issues in dispute”). In many cases, there will be parts of the prosecution case that the defence does not challenge. For example, in a case of serious violence, the defence may not dispute that force was used but instead argue that the accused used that force in self-defence. However, the defence is currently not required, either before or during the trial, to make these matters known to others, particularly the prosecution, judge and jury.
2. Unless the defence identifies before trial the stance it intends to take, the case must progress as if everything is disputed. As a consequence, the prosecution must undertake preparation that is ultimately not required; in the above example, this may include preparing witnesses to give evidence that it was the accused, and not some other person, who inflicted the violence. The trial itself may also take longer than it otherwise should because, for example, witnesses must be called to give unnecessary evidence on matters that are not in dispute.
3. A failure to identify the issues in dispute leads to trials that are unnecessarily complex. In addition to increasing the time required to conduct a trial, this unnecessary complexity makes the fact-finder’s job (whether judge or jury) more difficult. This is because it must hear and then sift through evidence on a raft of matters that are ultimately not in dispute, in an effort to identify and decide on what is really in issue. As shown in juries research conducted some years ago, this can lead juries to listen to, sift, and evaluate the prosecution evidence with entirely the wrong “frame” (or notion of what the case is about) in mind.¹ Witnesses are also inconvenienced from having to attend court and give evidence on matters that are not disputed. And additional trauma and stress is caused to victims from a case taking longer to resolve than it should.

¹ New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, Wellington, 2001) pp 115–116.

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4. Not identifying the issues in dispute may also mean that some trials progress further than they otherwise should. If the issues in dispute are identified at an early stage, defence counsel may determine that the case has little prospect of success and advise their client to plead guilty earlier than they otherwise would. The prosecution may also consider amending or withdrawing charges.
5. It is difficult to identify robust estimates of the savings in preparation and trial time that could be made if the issues in dispute were identified prior to trial. However, a small survey of Crown solicitor files in two centres² indicated that out of a total 1337 trial days in the High Court and District Court,³ an estimated 85 trial days were saved through the voluntary defence identification of issues in dispute and the admission of facts.⁴ An estimated 54 days of preparation were also saved. It was estimated that an additional 108 trial days and 48 preparation days could have been saved if the issues were identified in all cases.
6. This paper seeks views on the desirability of establishing a new process so that the issues in dispute are identified before a defended hearing or trial.⁵ Under this process:
 - (a) The defence would be required to identify, at a specified time before a defended hearing in the summary jurisdiction or a trial in the indictable jurisdiction, the issues that are in dispute; and
 - (b) When there is a jury trial:
 - The defence would provide an opening statement at the commencement of the trial that identified the issues in dispute; and,
 - The judge would provide an opening statement to the jury that outlined the legal elements of the offence that needed to be proved in the light of the issues in dispute (with the proviso that other elements may need to be proved or other defences may emerge on the basis of evidence given during the trial).
7. It is clear from anecdotal evidence and our survey of Crown solicitor files that some defence counsel, particularly experienced and senior defence counsel, identify the issues in dispute before the hearing or trial and agree to the admission of evidence without proof that is not relevant to those issues.⁶ This paper merely proposes that this good practice becomes uniform practice.

² Crown Solicitors in Auckland and Christchurch were asked to review their last 10-15 cases and complete a standard questionnaire. The completed questionnaires were not all received in time to include in this paper.

³ Involving 287 cases.

⁴ Under s9 of the Evidence Act 2006.

⁵ This proposal is made as part of the Criminal Procedure (Simplification) Project, being jointly led by the Ministry of Justice and the Law Commission.

⁶ In relation to the Crown Solicitor survey, pre-trial defence identification of the issues in dispute occurred in 30% of cases and admission of facts occurred in 32% of cases.

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8. In our view, the proposed process is likely to have widespread benefits for prosecutors, defence counsel, judges, juries, victims, witnesses, and court administration. However, it also raises some potentially significant issues, particularly for the defence, that would benefit from further consideration.
9. Views on any parts of the paper are welcome. Particular questions for discussion are also included at Appendix One.

CURRENT LAW AND PRACTICE IN NEW ZEALAND

Pre-trial identification of issues in dispute

Legislative requirements

10. Under section 9 of the Evidence Act 2006, the prosecution or the defendant may admit any fact so that the fact does not need to be proved at a later hearing or trial.
11. In 2008, the Criminal Disclosure Act was passed which codified and consolidated disclosure requirements for both the prosecution and the defence.⁷ The Act reflects the principle that the prosecution must disclose all relevant information to the defence unless there is good reason to withhold it. The Act also imposes some limited requirements on the defence to disclose matters related to the evidence upon which the defence case will be based. These matters are:
 - (a) Alibi evidence – if the defendant intends to adduce evidence in support of an alibi, he or she must give written notice to the prosecution of the particulars of the alibi within a specified time,⁸
 - (b) Expert witness evidence – if the defendant proposes to call an expert witness, he or she must disclose to the prosecutor any brief of evidence or report provided by the expert witness, or a summary of evidence to be given and conclusions of the report.⁹
12. There are no legislative requirements on the defence to identify the issues in dispute. Rather, identification by the defence of those issues occurs as a matter of (voluntary) practice in the ways described below.

Practice in the summary jurisdiction

13. A case management process being piloted in the Manukau and Tauranga District Courts invites the defence to identify the issues in dispute in a case management memorandum. The pilot commenced on 14 June 2008.
14. A three-month review of the pilot indicated that defence identification of the issues in dispute via the case management memorandum was occurring in

⁷ The Criminal Disclosure Act will come into force by Order in Council later this year.

⁸ Criminal Disclosure Act 2008, s22.

⁹ Criminal Disclosure Act 2008, s23.

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some cases, but that it was not yet a widespread practice.¹⁰ The findings of a six-month review are currently being collated. These findings will provide broader and more comprehensive analysis, including qualitative interviews with participants reflecting on their experiences to date.

15. Outside of the pilot process, our understanding is that pre-trial identification of the issues in dispute is occurring on a voluntary basis by some defence counsel. In 2004, the Law Commission observed that “some judges who preside over status hearings...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.”¹¹

Practice in the indictable jurisdiction

16. In October 2007, the Chief District Court Judge issued a Practice Note on pre-trial procedures in criminal jury trials in the District Court. The Practice Note aims to:
 - Improve judicial management of trials;
 - Achieve greater certainty and efficiencies in the disposal of trials;
 - Minimise late pleas of guilty and late adjournments;
 - Improve trial time estimates.
17. The Practice Note requires the defence to prepare and file a defence memorandum prior to the first callover that, amongst other things, is to address:
 - *(f) if appropriate, the likely issue(s) at trial (any such indication would not constitute an admission of facts pursuant to section 9 Evidence Act 2006);*
 - *(l) any other issue which it has identified and which will or may require determination before the trial.*
18. Our understanding is that the extent of compliance with these requirements varies across the country.
19. The Practice Note built on processes that had been initiated in other courts on an ad hoc basis to encourage identification of the issues in dispute as part of wider case management. For example, in Auckland, the Public Defence Service developed a practice of providing a pre-trial memorandum of trial issues, which included agreement as to facts and evidence by consent and an optional statement of issues in dispute, to the judge and opposing counsel.¹²

¹⁰ We also understand that disclosure by the defence may be occurring as part of more informal pre-trial discussions with the prosecution, but that this information is not being included in the case management memorandum.

¹¹ New Zealand Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005) para 170.

¹² In Christchurch, a jury trial case management process was developed under which the Crown was required to file a memorandum of pre-trial issues before the first callover and the defence had a week to file a response. The Practice Note appears to reflect this process.

Opening statements by the defence and judge in jury trials

20. Section 367 of the Crimes Act 1961 allows the defence to make an opening statement:
- At the commencement of a trial, after the prosecution has made its opening statement and before any evidence is adduced, and only for the purposes of identifying the issue(s) at trial;¹³ and
 - At the start of the defence case, after the prosecution has concluded its case.¹⁴
21. In both circumstances, the defence has a right to make an opening statement but is not required to do so. Our understanding is that some defence counsel make opening statements as a matter of course, while others will do so from time to time.¹⁵
22. A judge is not required in law to make an opening statement to the jury before a trial commences. However, in practice, most judges will make some preliminary remarks. These remarks are most likely to cover basic housekeeping matters, fundamental rules such as the need for confidentiality, and the burden and standard of proof.¹⁶

APPROACH OF OTHER JURISDICTIONS TO IDENTIFYING THE ISSUES IN DISPUTE

23. Paragraphs 24–34 outline the approach taken by other jurisdictions to the identification of the issues in dispute. As in New Zealand, many jurisdictions also require defence disclosure relating to the evidence on which the defence case will be based, in particular, notice of alibi and expert evidence.¹⁷

Pre-trial identification of issues in dispute

United Kingdom

24. In the United Kingdom, the Criminal Procedure and Investigation Act 1996 provides for reciprocal pre-trial disclosure by the prosecution and the defence. In indictable proceedings, following initial disclosure by the prosecution, the defence is required to set out the nature of his or her defence in a defence statement that must identify:

¹³ Crimes Act 1961, s367(1A).

¹⁴ Crimes Act 1961, s367(1). See also *R v Edwards* (1992) CRNZ 329 (CA) 333, in which the Court states “in simple cases the opening on behalf of the accused is generally confined to a statement of the nature of the defence case together with an outline of the evidence to be called. In addition there is often reference to the onus and standard of proof and a modest degree of criticism or comment relating to the prosecution case.”

¹⁵ In our limited survey of Crown Solicitor files (see paragraph 5 above), the defence made an opening statement in 159 cases (55%).

¹⁶ New Zealand Law Commission, above n 1, pp 115–116.

¹⁷ See, for example, Criminal Procedure and Investigation Act 1996 (UK), s6A(2); Criminal Procedure (Scotland) Act, s257; Criminal Procedure Act 2004 (Western Australia), ss 62 & 96; Crimes (Criminal Trials) Act 1999 (Victoria), s9; Criminal Procedure Act (New South Wales), s190.

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- (a) The nature of the accused's defence, including any particular defences on which she or he intends to rely;
 - (b) The matters of fact on which the accused takes issue with the prosecution
 - (c) In the case of each such matter, why the accused takes issue with the prosecution; and
 - (d) Indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.¹⁸
25. The purpose of this disclosure is to create a level playing field, ensure a "no surprises" approach, and reduce legal argument in the court, thereby reducing court costs.¹⁹ A defence statement is not mandatory in summary proceedings, but may instead be voluntarily provided by the defence.²⁰

Australia

26. In Australia, requirements for the identification of issues in dispute vary across states. Some states have prescribed these requirements through legislation, while others have a common law regime. Pre-trial defence identification of the issues in dispute is mandatory in Victoria, New South Wales, Western Australia, and South Australia.
27. In Victoria, unless the court directs otherwise, the prosecution must provide a summary of its opening and a notice of its pre-trial admissions not less than 28 days before the trial.²¹ The notice of pre-trial admissions must include copies of the statements of witnesses whose evidence, in the prosecutor's opinion, ought to be admitted as evidence without further proof.²² The defence must respond to this disclosure not less than 14 days before the trial and identify:
- The acts, facts, matters, and circumstances with which it takes issue;
 - The basis for doing so; and
 - What evidence in the notice of pre-trial admission is agreed.²³
28. The defence is not required to state the identity of any defence witness other than an expert witness, or to state whether the accused will give evidence.²⁴
29. In New South Wales, the Criminal Procedure Act 1986 enables the District and Supreme Courts to impose, on a case-by-case basis, pre-trial disclosure requirements on both the prosecution and the defence in

¹⁸ Criminal Procedure and Investigation Act 1996, s6A.

¹⁹ Lord Harris of Haringey, Lords Hansard, 16 June 2003, column 578.

²⁰ Criminal Procedure and Investigation Act 1996, s6.

²¹ Crimes (Criminal Trials) Act 1999, s6.

²² This may include evidence that is directed solely to formal matters including continuity; a person's age; or proving the accuracy of a plan, or that photographs were taken in a certain manner or at a certain time. See Crimes (Criminal Trials) Act 1999, s6(3).

²³ Crimes (Criminal Trials) Act 1999, s7.

²⁴ Crimes (Criminal Trials) Act 1999, s7(4).

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complex criminal trials.²⁵ When the court orders pre-trial disclosure, the Crown and the defence are required to reveal specific evidence and material at a reasonable time before the trial. In respect of the defence, these matters include:

- Whether the accused intends to raise a defence such as insanity or self-defence;
 - Copies of any reports by expert witnesses that may be relied on at trial;
 - The names and addresses of any character witnesses that may be called at trial;²⁶ and
 - The accused's response to the matters contained in the notice of the case for the prosecution including, for example, the extent to which certain prosecution evidence is disputed.²⁷
30. In Western Australia, in both summary and indictable proceedings, an accused must provide written notice to the prosecution before the trial of the factual elements of the offence that the accused may contend cannot be proven, as well as any objection to a document or evidence that the prosecution intends to produce at trial including the grounds for that objection. The accused must also lodge and serve written notice of the details of any alibi evidence to be given at trial and any expert evidence material that relates to the charge.²⁸
31. In South Australia, the court may require the defence, on application by the prosecutor, to identify whether the defence intends to raise a positive defence such as self-defence or provocation.²⁹ The prosecution may also serve on the defence a notice to admit specified facts,³⁰ and the court may require the defence to notify the prosecution in writing about whether it consents to dispensing with the calling of prosecution witnesses to establish the admissibility of certain evidence.³¹

Opening statements by the defence and the judge

Australia

32. In Victoria, following on from its comprehensive pre-trial regime, the defence must present an opening statement to the jury immediately after the prosecution opening.³² Unless there are exceptional circumstances, both the prosecution and defence must limit their opening statements to those matters disclosed pre-trial.³³ At any time after the defence opening

²⁵ Criminal Procedure Act 1986, ss134–149.

²⁶ The prosecution must give an undertaking that any such witness will not be interviewed before the trial by police officers or the prosecutor in connection with the proceedings without the leave of the court – see s139(1)(c)).

²⁷ Criminal Procedure Act 1986, s139(2).

²⁸ Criminal Procedure Act 2004, s62 and 96.

²⁹ Criminal Law Consolidation Act 1935, s285BB.

³⁰ Criminal Law Consolidation Act 1935, s285BA(1).

³¹ For example, documentary, audio, visual, or audiovisual evidence of surveillance or interview. See Criminal Law Consolidation Act 1935, s285BB.

³² Crimes (Criminal Trials) Act 1999, s13.

³³ Crimes (Criminal Trials) Act 1999, s8.

statement, the judge may (but is not required to) address the jury on the issues in the trial.³⁴

33. The Victorian Law Reform Commission is considering whether these provisions should be supplemented by the preparation, jointly by the prosecution and defence, of an Aide Memoire for the jury that sets out the elements of each offence charged and identifies the issues in dispute.³⁵ The judge would use the Aide Memoire as the basis for his or her opening statement to the jury. It would be a statutory requirement that the jury could not be empanelled until the judge had approved the Aide Memoire and all pre-trial issues were resolved.
34. In all other Australian states, the defence may give an opening statement but is not required to do so. Nor is there any statutory requirement for the judge to give an opening statement.

PROPOSED PROCESS FOR IDENTIFYING THE ISSUES IN DISPUTE

Summary of proposal

35. It is proposed that a new process be established for identifying the issues in dispute, under which:
 - (a) The defence would be required to identify, at a specified time before a defended hearing in the summary jurisdiction or a trial in the indictable jurisdiction, the issues that are in dispute – that is, the particular elements of the charge that are denied, or the defences that it is intended to run; and
 - (b) When there is a jury trial:
 - The defence would provide an opening statement at the commencement of the trial that identified the issues in dispute; and
 - The judge would provide an opening statement to the jury that outlined the legal elements of the offence that needed to be proved in the light of the issues in dispute (with the proviso that other elements may need to be proved or other defences may emerge on the basis of evidence given during the trial).
36. The proposed process would not require the disclosure of new information. Rather, information that would otherwise be identified or become apparent during the hearing or trial would be identified at an earlier stage and in a more transparent and clearer way.³⁶

³⁴ Crimes (Criminal Trials) Act 1999, s14(a).

³⁵ Victorian Law Reform Commission *Jury Directions Consultation Paper* (Victoria, September 2008) 101-102.

³⁶ We have not yet attempted to set out in detail how the proposed pre-trial process would work (e.g. the required timeframes, mechanisms by which disclosure is made, or the stage at which it is made). That work will follow depending on the response to this paper.

A mandatory rather than voluntary process

37. We see merit in making this process mandatory on all parties. This would create additional certainty (because the same requirement would apply in all cases), and provide additional transparency and clarity for judges and counsel about what is required.
38. It could be argued that a mandatory requirement is unnecessary, because many defence counsel are already identifying the issues in dispute in some cases, and this practice is likely to continue. In addition, a voluntary process enables counsel to assess what is appropriate and advantageous for a defendant in the circumstances of the individual case, and protect the defendant from disclosure when it is against his or her interests. In that sense, a voluntary process also helps to overcome the objections that could otherwise be made to the proposed process (see paragraphs 51–64 below).
39. However, experience to date in New Zealand suggests that compliance by defence counsel with a voluntary process is likely to be patchy and inconsistent. Our understanding is that some defence counsel, particularly experienced defence counsel, see the benefits of identifying the issues in dispute pre-trial (or making an opening statement) and often do so. Less experienced counsel may be less inclined to do so, believing that it is in some way contrary to their client's case or not in their client's best interests.
40. It may be possible to build some incentives into the system to encourage identification of the issues in dispute on a voluntary basis. However, as now, ensuring this occurs would largely be left to the cajoling and persuasion of defence counsel by individual judges.
41. Each component of the proposed process (pre-trial identification of the issues in dispute and opening statements by the defence and the judge) is inter-linked. If pre-trial identification of the issues in dispute is mandatory, it makes sense for the remaining aspects of the process to also be obligatory.
42. We are interested in views about whether the proposed process should be mandatory, and why. We are also interested in feedback on the extent to which the identification of the issues in dispute occurs already, and the barriers to it occurring more often.

LIKELY BENEFITS OF THE PROPOSED PROCESS

Summary

43. In our view, the proposed process is likely to have widespread benefits for:
 - Prosecution and defence resources, by ensuring they are not misdirected to irrelevant matters (thereby allowing for more effective preparation);
 - The length and complexity of hearings;
 - Court administration, including accurate scheduling;

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- Inconvenience to witnesses, by ensuring that those who appear really need to appear;
 - The finder of fact (either judge or jury) by providing clarity about the issues it needs to decide.
44. Our limited survey of Crown Solicitor files supports this view. Where savings in preparation time were identified from pre-trial identification of the issues in dispute, these savings tended to result from the ability to focus preparation on the most relevant matters, and a reduction in time spent preparing unnecessary witnesses. Savings in trial time tended to result from the likelihood that more matters would be admitted by consent, which would negate the need to call witnesses on those matters or reduce the amount of evidence those witnesses were required to give.
45. Most concern about the proposed process is likely to focus on the implications for the rights of the defendant (see paragraphs 51–64 below). However, the advantages for the defendant of the proposed process must also be considered. These advantages, such as the ability for the fact-finder (judge or jury) to be able to evaluate the evidence as it is presented with the defence in mind or the potential for charges to be withdrawn or reduced, are likely to be one reason why some defence counsel choose to identify the issues in dispute on a voluntary basis.

Pre-trial identification of the issues in dispute

46. Pre-trial identification of the issues in dispute may prompt earlier resolution of some cases. This is because both prosecution and defence counsel will be required to turn their mind to the issues in dispute at an early stage and, in particular, focus on those matters most relevant to proving or defending a charge. It may lead to the prosecution withdrawing a charge if identification of the issues in dispute by the defence indicates that the defence has a strong case. Alternatively, defence counsel may realise that the defence is not strong and advise their client to plead guilty.
47. Identification of the issues in dispute will also assist both parties to identify facts that are not relevant to the disputed issues so that section 9 admissions can be made. (Indeed, we believe that there should be an expectation that evidence that is not in dispute is admitted by consent.) Where a case does proceed to a defended hearing or trial, that hearing or trial will be more focused. Prosecution and defence counsel will concentrate on preparing and presenting the relevant (and disputed) issues.

Opening statements

48. As with the system in Victoria, pre-trial identification of the issues in dispute is best viewed as part of a broader arrangement where issues in dispute are identified at an early stage and in a transparent way. In this sense, identification of the issues in dispute via opening statements by the defence and the judge is arguably a natural consequence of pre-trial identification of the issues in dispute. In addition, independently of its relationship with pre-

trial arrangements, opening statements have the potential to provide valuable assistance to the fact-finder. For example, research suggests that opening statements assist the jury by enhancing the jury's ability to comprehend, assimilate and evaluate the evidence, and by giving the jurors a contextual frame.³⁷

49. Not requiring the defence to provide an opening statement may create an unjustifiable anomaly between cases being heard by a judge sitting alone and cases being heard by a jury. In the former, the judge is likely to have access to the disclosed information on the court file. In the latter, the information will not be available at all.
50. It is questionable whether both defence counsel and the judge should traverse the issues in dispute at the beginning of the trial. There is at least some risk that this will lead to unnecessary duplication and lengthen trials for little real benefit. We do think it would be useful for the jury if the issues in dispute were not just identified in a general way, but instead were related to what it needed to decide – for example, by linking the issues to the elements of the charge that needed to be proved. It seems more appropriate for the judge to undertake this task than defence counsel, albeit with an opportunity for defence counsel (and the prosecution) to have input into the judge's remarks. We are interested in your views.

LIKELY CONCERNS ABOUT THE PROPOSED PROCESS

51. It is likely that a number of objections will be made about the proposed process, particularly with respect to its mandatory nature and the implications for the defence. In particular, some may argue that the identification of issues in dispute has the potential to impact upon fundamental principles underpinning the criminal justice system. The likely objections can be summarised as follows:
 - Any requirement on the defence to identify the issues in dispute would be contrary to the right to silence and the privilege against self-incrimination;
 - Defence identification of the issues in dispute would also 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 system, under which the defence is entitled not to commit itself pending an assessment of whether the prosecution has established a prima facie case;
 - 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.

³⁷ New Zealand Law Commission, above n 11, para 211.

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52. Any concerns relating to the encroachment of fundamental principles as a result of the proposals in this paper are important and should be considered. We are interested in your views on the extent to which these concerns are valid. Our current view follows.

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

53. The right to silence of suspects and defendants in criminal investigations and proceedings, of which the privilege against self-incrimination forms part, is embodied in the New Zealand Bill of Rights Act 1990 in section 23(4) (anyone arrested or detained shall have the right to refrain from making any statement) and section 25(d) (right not to be compelled to be a witness or to confess guilt).
54. The rights set out in section 23(4) and 25(d) do not constitute a right to literal and continuous silence. They instead have two aspects, neither of which we consider to be engaged by the identification of issues in dispute. These aspects are:
- 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.
55. We also consider that the identification of issues in dispute does not engage the privilege against self-incrimination. That privilege embodies the right to refuse to provide evidence or information that the prosecution may rely upon to establish guilt or decide whether or not to prosecute, or that may open the prosecutor to an incriminating line of inquiry.³⁸ The identification of issues in dispute does not assist in this way. Instead, it simply identifies how the defence proposes to defend a charge that has already been laid.

Impact on “the golden thread”

56. The onus of proof in criminal proceedings, encapsulated in section 25(c) of the New Zealand Bill of Rights Act 1990, requires the prosecution to prove its case to the required standard without assistance from the defence.
57. It has been argued that requiring the defence to identify the issues in dispute undermines the onus of proof by providing a measure of assistance to the prosecution. It has also been argued that it is contrary to the presumption of innocence, because the defendant must decide on and assert a defence before it has been established that there is a case to meet.
58. However, requiring the defence to identify issues in dispute (for example, by indicating whether all or only some of the prosecution case is contested), does not change the prosecution’s fundamental obligation to establish the elements of the offence, or to negate defences, beyond reasonable doubt. It is also not materially different from a requirement that a defendant says

³⁸ *Burke v The Superintendent of Wellington Prison* [2003] 3 NZLR 206, paras 26–27.

whether the charge is defended; it merely makes more explicit what is being denied.

59. There is potential for the identification of issues in dispute to assist the prosecution. For example, the prosecution could be alerted to weaknesses in its case that it can then shore up, or it may plug evidential holes or amend a charge that cannot be proven to a lesser charge that can. However, this is not a one-way exercise. It may also lead the prosecution to amend or withdraw charges. Alternatively, the defendant may plead guilty earlier than what would otherwise have occurred (because he or she realises the futility of his or her position), with the consequence that he or she can take advantage of a greater reduction in sentence for plea.
60. The most likely situation where the prosecution may be assisted is when the defence (in essence) is that there was a degree of factual criminality, but legally the prosecution has pitched it incorrectly. In those situations, the wider interests of truth and justice arguably require that the prosecution have 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. Currently, such mistakes may be rectified by an amendment of the charge by the court.³⁹

Impact on the adversarial approach

61. Some may view mandatory identification of the issues in dispute as involving a subtle step away from the adversarial process. One of the rationales said to justify an adversarial approach by defendants to criminal proceedings rather than a cooperative approach is that it compensates for the significant imbalance of resources between the prosecution and defence.
62. However, even in an adversarial criminal justice system, there is arguably a societal interest in efficiently processing criminal cases that demands a degree of mutual cooperation between the parties. In addition, addressing the resource imbalance to ensure that a defendant receives a fair trial “may require that [the defendant] 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.”⁴⁰
63. The identification of issues in dispute will not mean that there is equal and reciprocal disclosure between the prosecution and the defence. The prosecution has a mandatory evidential disclosure requirement of everything that is relevant, while the defence will only be required to state what issues are in dispute.

Erosion of fundamental criminal justice principles

64. The argument that the identification of issues in dispute contributes to the erosion of fundamental criminal justice principles itself relies on at least two

³⁹ Crimes Act 1961, s335.

⁴⁰ Rt Hon Justice EW Thomas “The So-Called Right to Silence” (1990-91) 14 NZULR 299, 309.

arguments. These are that recent changes to criminal procedure, such as the requirement for written committal rather than an oral hearing, have themselves eroded important safeguards; and, secondly, that the absence of defence identification of issues in dispute is an additional safeguard in the system that should not be undermined. However, as has been argued previously:

“...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 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.”⁴¹

OTHER ISSUES

Implication of the proposals for judges’ summing up

65. The introduction of a process for identifying the issues in dispute may have implications for the content of a judge’s summing up. Currently, a judge in his or her summing up must cover any defence that might be available on the evidence even if it has not been raised by the defence.⁴²
66. This requirement is part of a judge’s general obligation to ensure that an accused receives a fair trial. However, it may also work to the defence’s disadvantage in some cases. For example, the judge may address a defence that counsel had decided not to raise because it was assessed as not being in the client’s best interests.⁴³
67. The proposed process reflects the principle that the defence have primary responsibility for deciding and identifying the issues in dispute. This principle sits uneasily with a requirement that trial judges must identify any other issues, at the end of the trial, that are available on the evidence even though the defence has not raised them.⁴⁴
68. One option is to provide that there is no requirement for a judge to raise issues in a summing up that have not been identified by the defence unless there is a substantial risk of a miscarriage of justice. Victoria’s Law Reform Commission is considering whether the requirement should only apply when that is necessary to secure a fair trial.⁴⁵ However, either approach may lead

⁴¹ New Zealand Law Commission, above n 11, para 196.

⁴² See *R v Keremete* CA247/03 23/10/03 and *R v Tavete* [1998] 1 NZLR 428.

⁴³ For example, when a defence counsel wishes to give the jury an “all-or-nothing” choice between conviction for murder and complete acquittal, rather than leaving manslaughter open to the jury.

⁴⁴ Note that this issue does not affect the ability of the defence to raise issues with the jury that emerge during the trial. It only relates to the ability of the judge to do so, when the defence has not.

⁴⁵ Victorian Law Reform Commission, above n 35, 101-104.

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to judges covering all possible defences out of caution, rather than risk making an error that later gets overturned on appeal.

69. We are interested in your views.

Implications of the proposals for administrative resources

70. The identification of issues in dispute should result in a reduction in delays, complexities, and costs associated with criminal trials. Depending on how any new regime works in practice, additional court resources may be required to administer it. Further work will be required to quantify the extent of this impact once a proposed process is finalised.

IMPLEMENTATION OF THE PROPOSED PROCESS

71. We have considered whether it would be possible to implement the proposed process administratively or whether a legislative approach is preferable.

72. Practice Notes are issued by the Heads of Bench and are developed at the judiciary's initiative. Therefore, the issuing of a Practice Note on the identification of issues in dispute would be a matter for the judiciary. In addition, as illustrated by the extent of compliance with the disclosure requirements in the Practice Notice on District Court criminal jury trials, compliance with Practice Notes can vary across the country. Finally, it would not be possible to implement the entire process via a Practice Note. For example, a Practice Note could not require the defence to provide an opening statement in a jury trial, because this would be inconsistent with the discretion already provided to defence counsel to do so in section 367(1A) of the Crimes Act 1961. Nor would it be possible for a Practice Note to include sanctions for non-compliance.

73. A legislative approach would put the proposed process on a stronger footing, and give judges greater leverage to encourage defence counsel to comply with the requirements it places on them. In addition, the proposed process is part of a wider package of criminal procedure reforms, most of which is likely to be included in a new Criminal Procedure Act. Having some reforms in that Act, and others in a Practice Note, may compromise the coherency of the reforms and the effectiveness of the package as a whole. For these reasons, we consider legislation to be the preferable vehicle.

COMPLIANCE WITH THE PROCESS

74. Overseas experience suggests that a statutory requirement will not, in itself, ensure compliance by defence counsel with the proposed process.⁴⁶ For

⁴⁶ See, for example, the Right Honourable Lord Justice Auld *Review of Criminal Courts of England and Wales* (September 2001) (www.criminal-courts-review.org.uk/ccr-10.htm), paras 158 and 167. Lord Justice Auld noted that the defence statements "do not set out in general terms the nature of the defence or the matters on which issue is taken with the prosecution case and why. Often defence statements amount to little more than a denial, accompanying a list of material that the defence wish to see and without explanation for its potential relevance to any issues in the trial." There is also a range of practical concerns that defence lawyers face in preparing their client's defences (e.g. accessing a client on remand in custody, or clients who are unwilling or incapable).

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example, even with new mandatory requirements, there is no reason for a defendant not to raise new issues at trial if he or she can do so with no or little adverse consequence. In some cases, compliance may also be nominal or unhelpful, such as when counsel identify that all issues are in dispute or provide a list of issues that contradict each other.

75. There are some informal levers that are likely to increase compliance with the proposed process over the longer term:
- Not identifying the issues in dispute will not usually be in the client's best interests, because it gives the impression of a muddled or disorganised approach. Some self-regulation by counsel can therefore be expected.
 - Newly admitted counsel who have not known any other system are highly likely to accept it and comply. To some extent, they will also take the lead from more experienced counsel, who may be more likely to comply with the proposed process.
 - Compliance will self-perpetuate, because those who do not comply (and their clients) will not wish to be seen as uncooperative.
76. The experience of other jurisdictions suggests that trying to find effective formal mechanisms to enforce compliance will be a difficult task. Sanctions that are available in overseas jurisdictions include:
- (a) Comment from the court – for example, in Victoria, the trial judge, or other party with the leave of the court, may comment on the defence's failure to comply with the statutory disclosure requirements, although such comment may not be used to draw adverse inferences of guilt.⁴⁷ There is a similar provision in New South Wales.⁴⁸
 - (b) Adverse inferences – for example, in the United Kingdom, if a defence statement does not comply with the statutory requirements,⁴⁹ the court or other party may comment on that non-compliance, and the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.⁵⁰
 - (c) Costs against the defence – for example, in the United Kingdom, the court may order that costs be awarded to a party in a criminal proceeding when those costs have been incurred as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings.⁵¹ There is a similar provision in Victoria.⁵²

⁴⁷ Crimes (Criminal Trials) Act 1999, s16.

⁴⁸ Criminal Procedure Act 1986, s148(4).

⁴⁹ For example, because accused fails to give a defence statement, sets out inconsistent defences in the defence statement, or puts forward a defence at trial that is different to or not mentioned in the defence statement.

⁵⁰ Criminal Procedure and Investigations Act 1996, s11.

⁵¹ Prosecution of Offences Act 1985, s19 & Costs in Criminal Cases (General) Regulations 1986, reg 3.

⁵² Crimes (Criminal Trials) Act 1999, s25.

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- (d) Taking account of non-compliance in an offender's sentence – for example, in South Australia, the court is entitled to take unreasonable failure to admit facts into account when fixing an offender's sentence.⁵³
77. Despite their availability, sanctions for non-compliance are rarely, if ever, used in other jurisdictions. Some sanctions, such as comment from the court, are likely to be ineffective if not combined with the ability to draw an adverse inference. Other sanctions may falter due to the concern that they punish the defendant for the mistakes of his or her counsel and, by doing so, create injustice and place the defendant's right to a fair trial at risk.
78. There is a separate discussion document on potential mechanisms to ensure compliance with the range of procedural requirements that may be imposed on parties as a result of the Simplification Project. In relation to ensuring compliance with a requirement to identify the issues in dispute, there are at least two mechanisms that we consider are worth exploring further:
- (a) Requiring the defendant to seek the leave of the court if he or she wishes to run a defence that was not identified before the trial or hearing. This is similar to the current requirement in relation to alibi evidence, under which the leave of the court is required when the accused wishes to adduce evidence in support of an alibi, but did not give notice of that alibi post-committal.⁵⁴
- (b) Allowing the fact-finder to draw an adverse inference about the defendant's guilt from the defendant's non-compliance – for example, because he or she failed to identify the issues in dispute or identified issues that were mutually contradictory.
79. The ability to impose sanctions requires that there be sufficient clarity about what will amount to non-compliance. Particular difficulties may arise when deciding whether issues are mutually contradictory.⁵⁵ In our view, mutually contradictory issues are those that could not both (or all) be true. In a rape trial, for example, we do not consider it to be mutually contradictory for a defendant to dispute that he or she was the offender, while also challenging the credibility of the complainant on the basis that he or she was a known fabricator, or requiring the prosecution to prove that the complainant did not consent to the alleged sexual act. However, it would be mutually contradictory for the defendant to dispute that he or she was the offender, while also arguing that the defendant had a reasonable belief in the complainant's consent. In a trial for drug importation, it would not be mutually contradictory for the defendant to deny that he or she was the offender, while also challenging the reliability of the ESR analysis that the substance imported was an illegal drug. However, if the charge was possession for supply, it would be mutually contradictory to argue that the offender did not possess the drug but, if the prosecution was able to prove

⁵³ Criminal Law Consolidation Act 1935, s285BA(7).

⁵⁴ Crimes Act 1961, s367A.

⁵⁵ In the United Kingdom, when deciding whether to impose a sanction on a defendant who has put forward a defence at trial that differs to that identified pre-trial, the judge must consider the extent of the difference in the defences and whether there is any justification for it (Criminal Procedure and Investigations Act 1996, s11(8)).

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possession, that the drug was possessed only for personal use and not for supply.

80. It will also be necessary to ensure that sufficient safeguards are in place to ensure that sanctions for non-compliance are only imposed where it is just and appropriate to do so. This may include, for example, requiring the defendant to be notified of the requirement to identify the issues in dispute and warned of the potential consequences if these requirements are not complied with, or requiring the leave of the court before an adverse inference may be drawn. It may also be appropriate to make the prosecution's compliance with its obligations a relevant consideration when deciding whether a sanction should be imposed – in New South Wales, for example, the prosecution is unable to draw an adverse inference unless it has fully complied with its own obligations.⁵⁶
81. It should not be assumed that effective enforcement solely depends on sanctions. Incentives are also possible. In New South Wales, for example, there is statutory provision for an offender's sentence to be reduced to recognise the extent to which the defence has made pre-trial disclosure.⁵⁷ In the United Kingdom, the prosecution is required to review the defence statement and consider whether there is any further prosecution material that should be disclosed as a result.⁵⁸
82. We acknowledge that the burden of compliance with the proposed process will rest most heavily on defence counsel. However, this should not be overstated. Even now, the defence knows the nature of the defence it is going to run before the hearing or trial begins. The difference the proposed process makes is that this information must also be made known to the prosecution and the fact-finder.
83. The role of prosecutors and judges is also important to ensuring the proposed process is effective. For example, defence counsel are more likely to fully comply with the proposed process if the prosecution also fully complies with its requirements. In addition, both the prosecution and judges must also actively follow up cases where defence identification of issues in dispute does not occur or is inadequate.

⁵⁶ Criminal Procedure Act 1986, s148(5).

⁵⁷ Crimes (Sentencing Procedure) Act 1999, s22A. Separate provision is made for a reduction in sentence following a guilty plea, or assistance provided to law enforcement authorities. A reduction in sentence to recognise compliance with pre-trial disclosure has parallels with the ability to reduce a sentence for those two matters – in particular, the expeditious resolution of court proceedings and assistance with the administration of justice.

⁵⁸ Criminal Procedure and Investigations Act 1996, s7A. The prosecutor must either disclose any material that "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused", or provide a written statement to the accused that no further disclosure is required.

COMMENTS

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

Malcolm Luey
Policy Manager
Criminal Law Team
Ministry of Justice
Email: Malcolm.luey@justice.govt.nz
DDI: 04 473 2120

Warren Young
Deputy President
Law Commission
Email: wyoung@lawcom.govt.nz
DDI: 04 914 4838

QUESTIONS FOR DISCUSSION

1. Do you agree that a new process should be introduced for identifying the issues in dispute, under which:
 - (a) The defence would be required to identify, at a specified time before a defended hearing in the summary jurisdiction or a trial in the indictable jurisdiction, the issues that are in dispute – that is, the particular elements of the charge that are denied, or the defences that it is intended to run; and
 - (b) When there is a jury trial:
 - The defence would provide an opening statement at the commencement of the trial that identified the issues in dispute;
 - The judge would provide an opening statement to the jury that outlined the legal elements of the offence that needed to be proved in the light of the issues in dispute (with the proviso that other elements may need to be proved or other defences may emerge on the basis of evidence given during the trial).
2. To what extent does identification of the issues in dispute occur already? What are the barriers to it occurring more often?
3. Do you agree that any new process should be mandatory rather than voluntary?
4. Is it necessary for both the defence counsel and the judge to provide an opening statement on the issues in dispute?
5. Do you agree with the benefits we have identified of the proposed process? Are there any other benefits that may arise?
6. What concerns do you have about the proposed process? See, in particular, the discussion from paragraphs 51–64. Do you agree with our response to those concerns?
7. What, if any, implications do you consider this proposal has for the content of a judge’s summing up (see paragraphs 65–69)?
8. Do you agree that the process should be implemented via legislation, rather than a Practice Note (see paragraphs 71–73)?
9. What incentives and sanctions could be used to ensure compliance with the proposed process? In particular, what are your views about the options to require the leave of the court before a defence can be raised at trial that was not identified earlier, or to allow the fact-finder to draw adverse inferences (see paragraph 78)?