



May 2009

## **DISCUSSION DOCUMENT: MECHANISMS TO ENSURE COMPLIANCE WITH CRIMINAL PROCEDURE OBLIGATIONS**

### **INTRODUCTION**

1. The Criminal Procedure (Simplification) Project is proposing a range of comprehensive reforms to criminal procedure. A key part of this Project involves the overhaul of current summary and indictable processes with a view to putting in place a simpler and more transparent criminal procedure. This reform is likely to include statutory obligations being placed on the parties to comply with procedural requirements, particularly at the pre-trial stage.<sup>1</sup> This discussion document discusses ways to ensure compliance by counsel with those obligations.
2. It is likely that the reforms arising out of the Simplification Project will require change to some long-established and entrenched practices. Mechanisms are therefore needed to reinforce desired reforms and encourage parties to support and cooperate with any necessary changes to established practices. Effective incentives are required that support and encourage parties to change their behaviour, and ensure that compliance with statutory obligations is in their interests. In the few instances where compliance does not occur, effective sanctions are required that hold parties accountable and act as a deterrent against further instances of non-compliance by that individual and by others.
3. The mechanisms discussed in this paper are not limited to encouraging compliance with pre-trial processes, although it is likely that this is where most procedural obligations will fall. Pre-trial processes establish the groundwork for what follows and are therefore critical to the overall quality of justice delivered in criminal proceedings.
4. Nor are the mechanisms discussed in the paper limited to the defence bar. However, most would accept that the defence bar has traditionally operated in a fairly unregulated way. There are more incentives for defence counsel than for prosecutors to delay the progress of cases, and fewer levers to discourage this practice. In addition, accountability structures are in place for prosecutors

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<sup>1</sup> One potential obligation, the pre-trial identification of issues in dispute, is the subject of a separate discussion paper. See *Discussion Document: Identification of the Issues in Dispute*.

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that are not in place for defence counsel. Therefore, the identified mechanisms are likely to have particular implications for the defence bar.

5. Views on any parts of the paper are welcome. Particular questions for discussion are also included at Appendix One.

## **MECHANISMS THAT ARE SPECIFIC TO CRIMINAL PROCEDURE LEGISLATION**

6. There are a range of potential mechanisms that are specific to the criminal procedure context and target compliance with particular obligations. Some are already in use in New Zealand on a limited basis.

### **Adverse comments/inferences**

#### *Current approach in New Zealand*

7. There is no ability in New Zealand to make an adverse comment or draw an adverse inference from a defendant's failure to comply with criminal procedure requirements.<sup>2</sup>

#### *Approach of other jurisdictions*

8. Some jurisdictions enable adverse comments to be made about a party's failure to comply with procedural requirements. The relevant provisions differ as to whether a comment may only be made with the leave of the court, and whether the comment can go so far as to suggest an inference of guilt.
9. In New South Wales, the judge or, with the leave of the court, any party, may comment on a party's failure to comply with pre-trial disclosure requirements. However, where the comment relates to the accused's non-compliance, that comment cannot suggest that an accused failed to comply because the accused was, or believed that he or she was, guilty of the offence concerned.<sup>3</sup>
10. In contrast, in the United Kingdom, in those situations where comment on an accused's non-compliance with pre-trial disclosure requirements is permissible, that comment may draw such inferences about an accused's guilt as appear proper. In most situations, leave of the court is not required before such comment can be made.<sup>4</sup> In Victoria, leave of the court is always required before a party may make an adverse comment about an accused's non-compliance. The court will only grant leave if it is satisfied that the proposed comment is relevant and is not likely to produce a miscarriage of justice.<sup>5</sup>

#### *Discussion*

11. Most jurisdictions reviewed for this paper that enable adverse comments to be made or adverse inferences to be drawn tend to limit these comments or

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<sup>2</sup> The only thing comparable is the ability in some circumstances to draw an adverse inference from an accused's failure to testify (see *Trompert v Police* (1984) 1 CRNZ 324). However, that is of a different nature to what is being discussed here, and its scope is uncertain.

<sup>3</sup> Criminal Procedure Act 1986, s148(4).

<sup>4</sup> Criminal Procedure and Investigation Act 1996, s11.

<sup>5</sup> Crimes (Criminal Trials) Act 1999, s16(2).

inferences to non-compliance with disclosure requirements, rather than a failure to comply with pre-trial requirements more generally.<sup>6</sup> As part of the Simplification Project, we have proposed that the defence 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. We have also suggested that the fact-finder be able to draw an adverse inference from the defence's failure to comply with this requirement.<sup>7</sup>

12. We do not support the New South Wales' approach of allowing a party to comment on an accused's non-compliance while prohibiting that party from making related suggestions about an accused's guilt. There seems little to be gained from such a comment, and it is difficult to see what the fact-finder could make of it other than to draw the obvious inference.
13. There is the potential for an adverse inference to be unfair to the defendant, particularly where responsibility for non-compliance rests with counsel. A requirement that leave be sought before an adverse inference can be drawn mitigates these concerns to some extent. Limiting the ability to draw adverse inferences to a particular type of non-compliance (the failure to identify the issues in dispute) may also address these concerns. For example, where a defendant raises a number of inconsistent defences during trial, it seems appropriate and fair to allow an inference to be drawn about the validity of those defences.<sup>8</sup> Even where a comment is not made by the prosecution or defence to that effect, it is likely that the fact-finder will be drawing that inference.
14. It is only appropriate to draw an adverse inference from an accused's failure to comply with procedural requirements where there is a logical connection between that failure and the accused's guilt or innocence. For example, it would not be appropriate to draw an adverse inference on the basis of counsel's continual failure to attend court. Other sanctions are more appropriate in that situation. We have been unable to identify any other areas where the ability to draw an adverse inference may be appropriate.

## **Mitigation or aggravation in sentencing**

### *Current approach in New Zealand*

15. There is no statutory ability for judges to take into account an offender's compliance with procedural requirements as a factor in sentencing, and this is not a factor that has developed through case law. It is also established principle in New Zealand that the way in which the defence was conducted is irrelevant to an offender's sentence.<sup>9</sup>

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<sup>6</sup> An exception is Victoria, which enables comment to be made in relation to a party's failure to comply with any requirement of, or order made under, the Crimes (Criminal Trials) Act 1999. See s16 of that Act.

<sup>7</sup> See paragraph 78 of the discussion document on the identification of issues in dispute.

<sup>8</sup> For example, in a case of sexual violation, that the defendant was not the offender but that if the prosecution could establish otherwise, the defendant had a reasonable belief in the complainant's consent.

<sup>9</sup> See, for example, *R v Minto* [1982] 1 NZLR 606, 608 in which the Court of Appeal considered that it would be contrary to sentencing principle to add to the offender's sentence to reflect the time and cost of the trial and the manner in which the defence was conducted.

*Approach of other jurisdictions*

16. In three Australian jurisdictions, the extent of an offender's compliance with procedural requirements may be taken into account in sentencing.
17. In New South Wales, the extent to which the defence made pre-trial disclosures is relevant as a mitigating factor when the offender is tried on indictment.<sup>10</sup> In Victoria, the offender's conduct on or in connection with the trial (including the extent to which he or she complied with procedural requirements under the Crimes (Criminal Trials) Act 1999) is relevant as an indication of the offender's remorse or lack of remorse.<sup>11</sup> In South Australia, the court is required to take into account an accused's unreasonable failure to make pre-trial admissions of facts.<sup>12</sup> An "unreasonable failure" will include where the accused claims privilege against self-incrimination as a reason for not making the admission, and requires the prosecution to prove facts that are not seriously contested at the trial.<sup>13</sup>
18. It is difficult to reach firm conclusions about how these factors have been applied. We have not been able to locate any Victorian sentencing decisions where pre-trial cooperation has led to a reduction in sentence.<sup>14</sup> A reduction in sentence for pre-trial disclosure appears to be given more readily in New South Wales, although the scope of the statutory mitigating factor appears limited to those cases where pre-trial disclosure requirements apply.<sup>15</sup> The actual reduction given is not always specified. In *R v Smale* [2005] NSWSC 903, an offender being sentenced for murder received a 10% reduction in sentence (reducing a 20-year sentence to 18 years) for his pre-trial admission that he would admit involvement in the robbery that led to a hotel employee's murder. In *R v Durant* [2007] NSWSC 428, an offender being sentenced for murder received a reduction "appreciably above the bottom of the 10–25% range" for the extent of her pre-trial admissions.<sup>16</sup>

*Discussion*

19. The rationale for taking an offender's cooperation with the criminal process into account in sentencing has some parallels with the rationale for the established practice of reducing an offender's sentence to recognise his or her guilty plea or assistance to the authorities. To the extent that such cooperation expedites proceedings, it relieves victims and witnesses of the trauma, stress and inconvenience that is caused by a delay in disposing of the

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<sup>10</sup> Crimes (Sentencing Procedure) Act 1999, s22A

<sup>11</sup> Sentencing Act 1991, s5

<sup>12</sup> Criminal Law Consolidation Act, s285BA(6).

<sup>13</sup> Criminal Law Consolidation Act 1935, s285BA(7).

<sup>14</sup> See, for example, *R v Howard* [2004] VSC 73 and *R v Deakes* [2002] VSCA 136 (sentencing judge considered that defence cooperation not indicative of remorse and credit therefore not given). In some cases, the offender's conduct at trial (in particular, the way in which the defence was conducted) has been identified by the courts as indicating that the offender is not remorseful. See, for example, *R v RND* [2002] VSCA 192 and *R v Whyte* [2004] VSCA 5.

<sup>15</sup> *R v Abou-Charbake* [2003] NSWSC 125, para 23. As a consequence, credit under section 22A is only possible when the court has ordered pre-trial disclosure in respect of a complex criminal trial.

<sup>16</sup> The Crown Prosecutor had conceded that "the defence could not, consistently with maintaining the defence of substantial impairment, have done more than was done" (see para 61).

case. More generally, such cooperation furthers the administration of justice and is likely to result in costs savings to the system.

20. We do not believe it is appropriate for an offender to receive a reduction in sentence simply because he or she complied with pre-existing statutory obligations. However, it may be appropriate for some recognition to be given to other measures he or she has taken in an effort to expedite proceedings. This could include, for example, making a substantial number of section 9 admissions or agreeing that the evidence of a number of witnesses be read at trial. We therefore propose that section 9(2) of the Sentencing Act 2002 be amended to include as a mitigating factor any steps that the offender has taken before or during the trial to reduce the cost or expense of proceedings or to shorten the time to disposition.
21. We also think it is appropriate for an offender's non-compliance with procedural requirements to be taken into account as an aggravating factor. Unlike the maintenance of a not guilty plea throughout proceedings (which is appropriately not treated as an aggravating factor), non-compliance with procedural requirements is not a right of the accused that must be protected and respected. It is instead a breach of a statutory obligation. We therefore propose an amendment to section 9(1) of the Sentencing Act 2002 to enable the offender's non-compliance with procedural requirements to be taken into account as an aggravating factor in sentencing.
22. There is a further question about whether a delay in resolving proceedings due to the prosecution's non-compliance with procedural requirements should reduce an offender's sentence. Where that non-compliance results in a delay that is so significant that it amounts to a breach of section 25(b) of the New Zealand Bill of Rights Act 1990, remedies ranging from a stay to a reduction in sentence may be available.<sup>17</sup> It is less clear what remedies, if any, are available to an offender where the delay does not amount to a breach. In one sense, reducing an offender's sentence to recognise prosecution failures can be seen as punishing the community and victims for the prosecution's mistake. This does not seem appropriate. However, the "all-or-nothing" approach currently taken to delay also seems problematic; in particular, it does not seem right that a delay has to amount to a breach of section 25(b) before any remedy is available. Delay, and the effects of that delay on the offender, must instead be on a continuum.

## Costs

### *Current approach in New Zealand*

23. Limited provision for costs to be imposed in criminal cases is provided under the Costs in Criminal Cases Act 1967.
24. Under section 4 of the Act, a court may order a convicted defendant to pay such sum as it thinks just and reasonable towards the costs of the prosecution. Under section 5, a court may order that the prosecution pay such sum as it thinks just and reasonable towards the costs of the defence if a

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<sup>17</sup> Section 25(b) of the New Zealand Bill of Rights Act 1990 provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay.

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defendant is acquitted, the information charging the defendant is dismissed or withdrawn, or the defendant is discharged under section 167 of the Summary Proceedings Act 1957.<sup>18</sup>

25. Both sections have very limited application. In respect of costs against the defendant, the Court of Appeal has held that the imposition of costs should be limited "...to those cases where the defendant has deliberately prolonged proceedings or committed some sort of misconduct in the course of the trial."<sup>19</sup> In addition, costs can only be imposed against the defendant personally and not against the defendant's counsel. Costs against the prosecution are limited to cases where the prosecution has been unsuccessful.

### *Approach of other jurisdictions*

26. Most jurisdictions have a costs regime that enables the court to impose costs on the parties in specified circumstances. Some jurisdictions limit the imposition of costs to the prosecution or the defendant. Other jurisdictions enable costs to be imposed on defence counsel as well.

27. In Victoria, costs may be awarded against a party whose pre-trial act or omission has prolonged the trial, or where that party has substantially departed in the trial from pre-trial disclosure and admissions, or has otherwise failed to comply with a requirement or order made under the Crimes (Criminal Trials) Act 1999.<sup>20</sup> Costs may also be imposed on a legal practitioner who has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay, negligence, or by any other misconduct or default. This may include when a proceeding cannot be heard or proceed, or fails or is adjourned without any useful progress being made because, for example, the legal practitioner failed to attend in person or failed to file any document which ought to have been filed.<sup>21</sup>

28. In the United Kingdom, costs may be imposed in criminal proceedings in the following situations:

- A convicted defendant may be required to pay such costs to the prosecution as the court considers just and reasonable;<sup>22</sup>
- One party may be required to pay the costs another party has incurred as a result of an unnecessary or improper act or omission by, or on behalf of, that party;<sup>23</sup>

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<sup>18</sup> Because, after all the evidence has been given at a preliminary hearing, the Court is of opinion that the evidence adduced by the informant is not sufficient to put the defendant on his trial for any indictable offence.

<sup>19</sup> *R v Jury* (31 October 2002) CA148/02, para 25. That principle was applied more recently in *R v Mackay* (27 July 2007) CA180/07.

<sup>20</sup> Crimes (Criminal Trials) Act 1999, s24. The Court has a broad power to "make any order that it thinks fit with respect to the costs of and incidental to the trial" and has "full power to determine by whom, to whom and to what extent these costs are to be paid".

<sup>21</sup> Crimes (Criminal Trials) Act, s25. A notable feature of this costs order is its impact on the fees that would normally be paid by the client to the practitioner – the court may disallow some or all of those fees or require that they be repaid to the client if already paid, and can also order the legal practitioner to pay to the client all or any costs which the client was ordered to pay to any other party; or to pay all or any costs payable by any party other than the client.

<sup>22</sup> Prosecution of Offences Act 1985, s18.

<sup>23</sup> Prosecution of Offences Act 1984, s19.

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- A legal representative may be required to pay costs incurred by the other party as a result of his or her improper, unreasonable, or negligent act or omission (a “wasted costs order”);<sup>24</sup>
- A third party who has committed serious misconduct may be required to pay the costs incurred by a party as a result of that misconduct.<sup>25</sup>

### *Discussion*

29. In 2005, the Law Commission recommended that legislative provision should be made for costs orders against either defence counsel or prosecution agencies, if they fail without reasonable excuse to comply with procedural obligations.<sup>26</sup> This would supplement the current ability to impose costs against defendants when the failure to comply with obligations is attributable to them.

30. The potential for costs to be imposed against a party for poor or inadequate performance emphasises the responsibility of parties for effective case preparation and the need for them to perform their role to a high standard. Costs orders therefore have a strong symbolic value. It is likely that the first cases in which costs are imposed against counsel will become quickly known to the profession and will have an immediate effect on behaviour.

31. There are some difficulties with costs orders that should also be acknowledged. For example, it may be difficult to attribute blame for defence failure to comply with procedural obligations between the defendant and his or her counsel. In instances where non-compliance is attributable to a defendant personally, an order for costs may rarely be an option in reality due to the defendant’s limited financial means.<sup>27</sup> The imposition of a costs order on a state-employed prosecutor can also be described as a “money-go-round”, because money given by the government with one hand (in the budget process) is then taken with the other (a costs order to the benefit of the consolidated fund).

32. None of these difficulties detract from the symbolic value that a costs order, when imposed, is likely to have. There will be value in the symbolism of even a small costs order against a defendant where this is feasible. Similarly, costs orders on government agencies will still be salutary, despite their ‘money-go-round’ appearance. Accountability is promoted by making performance failure explicit and public. The impact of a costs order on the budget of the agency concerned is also likely to be sheeted home to the individual in their performance assessment, and a change in behaviour of that individual and his or her colleagues is likely to follow. Costs orders on defence counsel will be similarly salutary.

33. We therefore propose that costs orders be able to be imposed against prosecutors and defence counsel for failure to comply with specific statutory

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<sup>24</sup> Prosecution of Offences Act, s19A.

<sup>25</sup> Prosecution of Offences Act, s19B.

<sup>26</sup> New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, Wellington, 2005) para 398.

<sup>27</sup> See, for example, *R v Burrett and Payne* (18 June 2003) HC WN T3347/02, para 20 in which Hammond J notes he would have awarded substantial costs against Burrett if not for the fact that he was impecunious.

requirements without reasonable excuse. Under this proposal, for example, if counsel failed to comply with a requirement to file a case management memorandum, he or she would be liable to a costs order unless it could be shown that reasonable steps were taken to file the memorandum but there was a problem with the filing process. Where defence counsel are concerned, it would not be sufficient merely to argue that he or she had not received instructions from the defendant since the proper course in that situation would be to file the memorandum advising the court that no instructions had been received.

34. A costs order could be imposed by a judge on his or her own motion, or on application by the other party. An order would generally be imposed at the time the non-compliance came to the judge's attention or at the time a successful application was made. The party against whom a costs order was being considered would have the opportunity to make submissions before an order was imposed. Any costs imposed would be enforceable as a fine.
35. There is a further question about the potential use of wasted costs orders in New Zealand. Their use has proved problematic in the United Kingdom, primarily because of the complexity of the procedure that must be followed before an order can be imposed. That procedure has been variously described as "cumbersome",<sup>28</sup> "a time-consuming, tedious and usually ultimately futile exercise",<sup>29</sup> and "extremely technical, resulting in protracted satellite litigation which most judges and magistrates prefer to avoid".<sup>30</sup> It is a desire to avoid these types of problems that have led us to propose the costs order outlined in paragraph 33. However, there are some situations where the ability to impose a wasted costs order may prove useful. These include, for example, when counsel fail to make section 9 admissions in relation to evidence or facts that are not disputed at trial. In that situation, there is no instance of non-compliance with a procedural requirement; rather, counsel's actions have resulted in proceedings being needlessly prolonged and unnecessary cost and expense.

## **MAKING USE OF GENERIC PROCESSES**

36. Despite the variety of specific mechanisms that have been made available in criminal procedure legislation in other jurisdictions, we understand that most are seldom, if ever, used. In the United Kingdom, for example, one commentator has noted that prosecution failures "rarely lead to any meaningful sanction",<sup>31</sup> and sanctions tend only to be imposed if the prosecution's failure has resulted in some specific prejudice to the defendant that has impacted on his or her right to a fair trial.<sup>32</sup> Similarly, judges are reluctant to impose sanctions on a defendant for failure to comply with pre-

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<sup>28</sup> Right Honourable Lord Justice Auld *Review of Criminal Courts of England and Wales* (September 2001) ([www.criminal-courts-review.org.uk/ccr-10.htm](http://www.criminal-courts-review.org.uk/ccr-10.htm)), para 230.

<sup>29</sup> Roderick L Denyer "Non-Compliance with Case Management Orders and Directions" (2008) CLR 784, 788.

<sup>30</sup> His Honour Judge John Phillips "Reducing Delay in the Criminal Courts of England and Wales (2007) 17 Commonwealth Judicial Journal 21.

<sup>31</sup> Roderick L Denyer, above n 29, 789.

<sup>32</sup> *Ibid.*, 791.

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trial requirements if those sanctions would place the defendant's right to a fair trial at risk.<sup>33</sup>

37. Concerns such as these have led other jurisdictions to consider the applicability of more generic mechanisms that are already in place to regulate the behaviour of the legal profession. In New Zealand, these mechanisms include incentives and sanctions available through the legal aid system and the standard disciplinary framework that applies to the legal profession.

## Legal aid

### *Current approach in New Zealand*

38. Research suggests that the structure of legal aid payments is an important influence on the way in which parties behave as a case progresses through the system.<sup>34</sup> In New Zealand, all legal aid payments are made on a 'fee for hours of service' basis, with a standard maximum number of hours specified for particular activities. The hourly rate varies depending on the seriousness and complexity of the proceedings, and the experience of the provider. In general, legal aid payments for pre-trial matters tend to be based around an event or hearing. Preparation time for these events or hearings is capped, with the maximum number of hours available dependent upon the complexity of the proceeding.

39. A new method of providing legal services has recently been trialled in the Auckland and Manukau District Courts through the Public Defence Service (PDS). The PDS was made permanent in August 2008. An evaluation of the PDS found that it maintained or improved the quality of legal services in Auckland and Manukau and was generally more efficient than the private sector, with lower average case costs in three of the four years of the pilot.<sup>35</sup> The evaluation noted that:

"PDS cases tend to result in a greater use of guilty pleas, less changes of pleas, and lead to fewer substantive hearings. These patterns could not be explained by factors that are known to influence both pleas and case path (eg. offence type, seriousness, offender history), indicating that there is something particular about PDS cases that lead to these results".<sup>36</sup>

40. The Legal Services Agency (LSA) is responsible for investigating and managing the performance of counsel who are legal aid providers.<sup>37</sup> The key

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<sup>33</sup> Ibid; Right Honourable Lord Justice Auld, above n 28, para 230.

<sup>34</sup> Cyrus Tata and Frank Stephen "Swings and Roundabouts": Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Outcomes (2206) CLR 722, 740. That research notes that personal reputation among one's peers and active judicial case management may be at least as influential.

<sup>35</sup> Legal Services Agency *2007-08 Annual Report* (Wellington, 2008). Modelling for 2007/08 indicates that using the Public Defence Service and not private providers saved the Crown in the vicinity of \$0.63m (pg. 28).

<sup>36</sup> Sonia Ogier and Richard Tait *Evaluation of the Public Defence Service Pilot: Final Report*. (Martin Jenkins, Wellington, May 2008) 2.

<sup>37</sup> Where an external complaint is received or an Agency concern arises that relates to the Rules of Professional Conduct and Care, the matter may be referred to the New Zealand Law Society (Legal Services Agency *Provider Manual: Part 3 – Investigating and Managing Provider Conduct* [www.lsa.govt.nz/documents/Part3InvestigatingandManagingProviderConductAug08.pdf](http://www.lsa.govt.nz/documents/Part3InvestigatingandManagingProviderConductAug08.pdf), last accessed 11 May 2009).

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components of the LSA's approach, supported by relevant provisions in the Legal Services Act 2000, are:<sup>38</sup>

- A warning system, under which a series of warning notices may be issued after a LSA investigation has deemed that an external complaint or internal concern is justified. The notices may have conditions attached, which may include the imposition of conditions on a provider's listing approval such as supervision or completion of training courses;
- Random and special audits to review the quality and value of services provided by the provider. Special audits target individual providers and are likely to be in response to a specific concern or complaint that has been raised about that provider;
- Temporary suspension or cancellation. Since 1 March 2007, the LSA may temporarily suspend a listed provider if the person is charged with an offence or is subject to the disciplinary procedures under the Law Practitioners Act 1982 [sic]; and the LSA considers that this will have an adverse effect on the interests of aided persons (whether generally or in a particular case), or the integrity of legal aid schemes more generally.<sup>39</sup> The LSA may also cancel a provider's listing on a number of grounds including, for example, if the services being provided are not of an acceptable standard or if the provider has failed to comply with a condition of approval.<sup>40</sup>

### *Approach of other jurisdictions*

41. It is beyond the scope of this paper to review the legal aid arrangements of other jurisdictions. However, other jurisdictions have undertaken reform of their legal aid systems in recent years.<sup>41</sup> In England and Wales, for example, this reform includes changes to the structure of legal aid payments and the delivery of legal aid services, and measures to ensure the quality of legal aid providers. Reform of the legal aid system is proceeding in tandem with reforms to the criminal process.<sup>42</sup>

### *Discussion*

42. There is significant potential within the legal aid system to ensure appropriate incentives and sanctions are in place to encourage desirable behaviour and to ensure compliance with procedural requirements. In April 2009, the Minister of

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<sup>38</sup> Legal Services Agency *Provider Manual Part 3 – Investigating and Managing Provider Conduct and Part 4 – Listed Provider Audit Policy* [www.lsa.govt.nz/documents/Part3InvestigatingandManagingProviderConductAug08.pdf](http://www.lsa.govt.nz/documents/Part3InvestigatingandManagingProviderConductAug08.pdf), last accessed 11 May 2009.

<sup>39</sup> Legal Services Act 2000, s72A.

<sup>40</sup> Legal Services Act 2000, s73.

<sup>41</sup> See, for example, Scottish Government and Scottish Legal Aid Board *Reform of Criminal Summary Legal Assistance: Consultation Paper* October 2007.

<sup>42</sup> Lord Carter of Coles *Legal Aid: A Market-based Approach to Reform*, July 2006; Legal Services Commission *Assuring and Improving Quality in the Reformed Legal Aid System*, December 2007; Office for Criminal Justice Reform *Working Together to Cut Crime and Deliver Justice: A Strategic Plan for 2008–2011*. See also Scottish Government and Scottish Legal Aid Board *Reform of Criminal Summary Legal Assistance: Consultation Paper* October 2007.

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Justice announced a fundamental review of the legal aid system. Amongst other things, that review is expected to consider the impact of legal aid funding arrangements on the efficient and effective operation of the court system. Changes made as a result of that review are therefore likely to support and reinforce the objectives of the Simplification Project. In our view, reform is required in the following areas.

43. First, legal aid payments must be structured to provide appropriate incentives so that, for example, there is no financial benefit to providers in needlessly prolonging proceedings and providers are adequately remunerated for time spent in pre-trial preparation. Rather than the current focus of legal aid payments on events and hearings, payments should be based around compliance with pre-trial processes particularly any out-of-court processes such as adequate and timely completion of a case management memorandum.
44. Secondly, evaluation of the PDS pilot suggests this model of service delivery has considerable potential to provide high-quality legal services in a more efficient way. There is considerable scope to extend this method of service delivery to other areas.
45. Finally, there must be effective processes and sanctions in place to manage provider conduct and to investigate instances of poor performance. There may be further scope for codifying available sanctions less than suspension or cancellation. This includes, for example, explicitly identifying in legislation the type of conditions that can be imposed on a provider's approval. Currently, explicit statutory backing is only given to the more extreme sanctions.

## Professional standards and discipline

### *Current approach in New Zealand*

46. The Lawyers and Conveyancers Act 2006 establishes fundamental statutory obligations with which every lawyer must comply. These obligations are to:
  - (a) Uphold the rule of law and to facilitate the administration of justice in New Zealand;
  - (b) Be independent in providing regulated services to his or her clients;
  - (c) Act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;
  - (d) To protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.<sup>43</sup>
47. Compliance with these fundamental obligations, and all other aspects of the Act, is enforced through a new complaints and disciplinary framework that responds to poor or inadequate performance by lawyers. Of particular significance is the new ability to address instances of unsatisfactory conduct, rather than only instances of serious misconduct as under the previous regime. Unsatisfactory conduct includes conduct that "falls short of the

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<sup>43</sup> Lawyers and Conveyancers Act 2006, s4.

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standard of competence or diligence that a member of the public is entitled to expect of a reasonably competent lawyer” as well as conduct “that would be regarded by lawyers of good standing as being unacceptable”.<sup>44</sup> It therefore covers lesser instances of poor performance that do not amount to serious misconduct.

48. The Act established a new three-tiered system for responding to complaints about lawyer performance:

- Standards Committees, which are part of the New Zealand Law Society’s Complaint Service, have been established at both a local and national level to hear and determine complaints from clients and others about lawyer performance;
- An independent Legal Complaints Review Officer has been appointed to provide independent oversight and review of the decisions made by the Standards Committees;
- There is also a Lawyers and Conveyancers Disciplinary Tribunal to hear and determine disciplinary charges against members of the legal profession referred to it by a Standards Committee or the Legal Complaints Review Officer.<sup>45</sup>

49. The new complaints and disciplinary framework is a key contributor to the overall purposes of the Act, which include to maintain public confidence in the provision of legal services and to protect the consumers of legal services.<sup>46</sup> The focus is on timely and effective resolution of complaints, in a way that promotes transparency and maintains the accountability of the profession.

### *Approach of other jurisdictions*

50. As in New Zealand, all jurisdictions have professional disciplinary frameworks that apply to the conduct of legal practitioners. In addition, at least two jurisdictions make explicit statutory provision in their criminal procedure statutes for a report to be made by a judge to the relevant professional disciplinary authority about a counsel’s failure to comply with relevant procedural requirements.<sup>47</sup>

### *Discussion*

51. The Lawyers and Conveyancers Act came into force on 1 August 2008, and is therefore still in its “bedding-in” phase. It is too soon to determine what impact the Act’s complaints and disciplinary framework will have on counsel who practise in the criminal jurisdiction.

52. There may be more that can be done to reinforce and clarify the ethical obligations of counsel practising in the criminal jurisdiction. This includes, for

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<sup>44</sup> Lawyers and Conveyancers Act 2006, s12.

<sup>45</sup> It also receives applications regarding suspension, striking off, revocation of orders and restoration of practitioners to the roll or register.

<sup>46</sup> Lawyers and Conveyancers Act 2006, s3.

<sup>47</sup> Criminal Law Consolidation Act 1935 (South Australia) and s285BC, Crimes (Criminal Trials) Act 1999 (Victoria), s28.

example, clarifying the relationship between a counsel's overriding duty to the court and his or her fundamental obligations to a client. It may also be appropriate to impose explicit obligations on counsel to comply with orders and directions of the court and to assist in the smooth running of the court process, consistent with their overriding duty to the court. For example, the United Kingdom Solicitors' Code of Conduct imposes a specific obligation on solicitors to comply with court orders.<sup>48</sup> In this regard, it is interesting to note that New Zealand's Rules of Conduct and Client Care impose a duty on prosecution lawyers to comply with all disclosure obligations,<sup>49</sup> but impose no similar duty on defence counsel.

### **Proposed process to monitor and enforce professional standards**

53. We consider that the LSA and New Zealand Law Society (NZLS) processes for monitoring and enforcing the professional standards of counsel should be used more often to hold counsel accountable for, and to put in place measures to address, poor performance. However, this requires that there be an effective process in place by which those processes can be triggered.
54. Arguably, judges are best placed to identify sub-optimal performance and to reach a view about the impact that performance is having on the ability to make progress in individual cases. Most judges already know who the poorly-performing counsel are. Currently, there is nothing to preclude judges reporting poor performance to either the LSA or the NZLS. However, most are reluctant to do so for fear it will compromise their independence in future proceedings where that counsel appears before them. We acknowledge the validity of these concerns.<sup>50</sup>
55. An alternative option is to require the court registry to record and collate evidence of performance failures, with a view to passing these reports onto the LSA or the NZLS in appropriate cases. The focus would be on non-compliance with particular (and objective) procedural requirements, such as a failure to file a case management memorandum within specified timeframes. It would not extend to more subjective views of counsel performance. The registry would only make reports to the LSA or NZLS where there were repeated instances of non-compliance that amounted to a pattern of misbehaviour. It would not report one-off instances of non-compliance. A report from the registry would act as a trigger for the invocation of LSA or NZLS standard disciplinary processes. The LSA would have primary responsibility for acting on reports in relation to legal aid providers, and the NZLS would have primary responsibility in relation to counsel who were not legal aid providers.

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<sup>48</sup> See, in particular, rule 11.02 which states "You must comply with any court order requiring you or your firm to take, or refrain from taking, a particular course of action." The commentary to rule 11.02 states that solicitors must comply with any court order made against them and advise clients to comply with court orders made against them. Solicitors Regulation Authority *Solicitors' Code of Conduct* [www.sra.org.uk/solicitors/code-of-conduct/198.article](http://www.sra.org.uk/solicitors/code-of-conduct/198.article) last accessed 15 May 2009.

<sup>49</sup> Rules of Conduct and Client Care, rule 13.12(a).

<sup>50</sup> For this reason, we do not propose to progress the Law Commission's 2005 recommendation that placed greater responsibility on judges to assess and report on counsel misconduct and performance failures. See New Zealand Law Commission, above n 26, para 397.

56. Although this proposal could be implemented as an internal administrative process, it seems more appropriate to impose a statutory obligation on the registry to undertake this function. This would give the registry's role additional authority and legitimacy and make the process clearer and more transparent for all parties.

## **CONCLUSION**

57. The mechanisms discussed in this paper are aimed at securing the cooperation of parties with pre-trial processes and other procedural requirements, in an effort to ensure that criminal proceedings progress in a just but efficient manner.

58. Available mechanisms can usefully be divided into two types. The first type are those statutory mechanisms that are specific to the criminal procedure context and target compliance with particular obligations (for example, pre-trial disclosure requirements). Most mechanisms of this type have the potential to directly impact on the defendant and how his or her case may be run. Concern has been expressed that sanctions of this type 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. Most are therefore applied in a very limited way (if at all) in other jurisdictions. However, concerns like these do not necessarily mean such sanctions should never be considered. Rather, they indicate the need to have adequate safeguards in place such as, for example, a requirement that a defendant is warned and notified of the risk that a sanction for non-compliance may be imposed.

59. The second type of mechanisms focus on counsel. These mechanisms involve the more effective use of generic systems and processes that are already in place to regulate counsel performance. In other jurisdictions, the limited success of the first type of mechanisms has meant there is increasing focus on the potential of these generic mechanisms to regulate behaviour.

60. It is envisaged that any sanctions which are developed as a result of the Simplification Project will only be available as a last resort, to be applied when counsel have failed to change their behaviour on a voluntary basis. It is far more preferable that behavioural change occurs voluntarily and pro-actively, perhaps prompted through the use of incentives, rather than through the use of sanctions that are imposed after the event.

61. In addition, the 'stick' of sanctions or the 'carrot' of incentives will not be sufficient to ensure compliance with criminal procedure obligations. An attitudinal and cultural change is also required in which compliance with such obligations is seen as part of a counsel's professional duties. Judges also have an important role to play in emphasising and reinforcing to counsel the need to ensure such obligations are complied with, and being willing to enforce compliance and impose sanctions in appropriate cases.

**COMMENTS**

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

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## APPENDIX ONE

### QUESTIONS FOR CONSIDERATION

#### *Potential mechanisms that are specific to criminal procedure legislation*

1. Is it appropriate to draw an adverse inference from the defendant's failure 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?
2. Are there any other areas of non-compliance for which you consider an adverse inference may be appropriately drawn?
3. Should section 9(1) of the Sentencing Act 2002 be amended to include as a mitigating factor any steps that the offender has taken before or during the trial to reduce the cost or expense of proceedings or to shorten the time to disposition?
4. Should section 9(1) of the Sentencing Act 2002 be amended to include as an aggravating factor that the offender has not complied with procedural requirements?
5. Should it be possible to reduce an offender's sentence to recognise a delay in resolving proceedings (and the effects of that delay) due to the prosecution's non-compliance with procedural requirements?
6. Should costs orders be able to be imposed on parties when they fail to comply with specific statutory requirements?
7. Should a wasted costs order be available?

#### *Making use of generic processes*

8. Are there any aspects of legal aid that should be addressed other than those identified in the paper (that is, reviewing the structure of legal aid payments, the possible extension of the Public Defence Service, and reviewing LSA processes for investigating and managing providers)?
9. Do you agree that the framework provided by the Lawyers and Conveyancers Act 2006 has a role to play in this area? Is anything more required (see, in particular, paragraph 52)?
10. Do you agree with the proposal discussed in paragraphs 55-56 of the paper, under which the court registry would be given statutory authority for recording and reporting on counsel non-compliance with procedural requirements?

#### *Other*

11. Are there other mechanisms, not identified in this paper, which could be used to ensure compliance with procedural requirements?