



Criminal Procedure (Simplification) Project

Reforming Criminal Procedure

This paper contains proposals to improve criminal procedure and create a modern legislative framework for the administration of criminal justice in New Zealand's courts. It has been developed for consultation purposes and is not Government policy.

21 December 2009

Preamble

1. Over the last 10 to 20 years, there has been building criticism of criminal procedure in New Zealand. This criticism has focussed on 'needless delay' and inefficiency of court processes, and an out-of-date and unnecessarily complex legislative framework, complicated by numerous piecemeal amendments over many years. In response to these criticisms the Criminal Procedure (Simplification) Project (the Project) was established to undertake a comprehensive review of criminal procedure in order to identify improvements. It is a joint undertaking between the Ministry of Justice and the Law Commission. (See Appendix 1 for more information.)
2. During 2008 and 2009, the Project released for consultation a number of papers seeking comment from key stakeholders on specific proposals for reform. It also tested changes to criminal processes in the summary jurisdiction at Manukau and Tauranga District Courts. (See Appendix 2 for a list of papers and description of the tests.) These proposals have, however, been developed as part of an integrated package. Their benefits can therefore only be effectively assessed in the context of the wider change that is proposed.
3. In order to present this integrated package to stakeholders, and to enable further feedback and development of the proposed reforms, the Project has prepared this consultation document. **Part 1** provides a commentary of the overall shape of the suggested improvements, including proposals for both legislative and operational change. **Part 2** contains a Bill Plan outlining key legislative amendments being contemplated to give effect to the proposed change. References to clauses in this Bill Plan are noted in ***bold italics*** throughout the commentary.
4. The commentary has been written with a wide audience in mind, including both legally trained and lay persons. More detailed discussion of some of the proposals is available in the consultation documents previously released.
5. It is anticipated that the Bill Plan will provide the foundation for a new Criminal Procedure Bill. This new Bill will replace most of the Summary Proceedings Act 1957, consolidate some aspects of criminal procedure currently contained in the Crimes Act 1961, the District Courts Act 1947 and other legislation, and implement the proposed change over an appropriate time period.
6. Specific comment is primarily sought where the proposed policy reflected in the Bill Plan has not previously been consulted on, or that consultation has resulted in change. Although we welcome further comment on those proposals that have already been the subject of consultation, we would particularly appreciate feedback on 'new' policy proposals and on whether the draft provisions are workable and give effect to the proposed policy.

Please provide written comments by **1 March 2010** to either:

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Part 2: Bill Plan

Part 1: Proposed New Criminal Procedure

A. Aims of Proposed Reforms

1. The reforms proposed in this paper aim to address long-standing inefficiencies and concerns with criminal procedure. These problems include:
 - 1.1. Repeated adjournments of cases.
 - 1.2. Unnecessary court appearances to deal with matters that should have been addressed by prosecution and defence out of court.
 - 1.3. Late guilty pleas that result in inefficient use of court and judge time.
 - 1.4. Trials that fail to proceed on their scheduled date.
 - 1.5. Inadequate incentives and sanctions to ensure that prosecution and defence progress the case as they should.
 - 1.6. Long delays before the final disposal of cases.
 - 1.7. A trial system in which relatively minor cases may be tried by jury.
 - 1.8. Barriers to the use of modern technologies and an excessively paper-based process.
 - 1.9. An excessively complex and outdated legislative framework.
2. To give an indication of the scale of these problems, we estimate that:
 - 2.1. 10% of summary court appearances that occur after the first four weeks of a matter being before the Court may be unnecessary.
 - 2.2. 15-20% of pre-committal court appearances may be unnecessary.
 - 2.3. 10% of post-committal court appearances may be unnecessary.
3. This translates into approximately 14,900 unnecessary court appearances per year, which results in costs (financial and emotional) to victims, witnesses and defendants, as well as costs to Police, Corrections, the courts, legal aid and other justice sector agencies.
4. Further, the median time to dispose of a District Court jury trial is one year from first appearance until final disposal. This is an increase of about five-and-a-half weeks in the past five years. The median time to dispose of a High Court jury trial is sixteen-and-a-half months from first appearance (in the District Court) to final disposal. This is an increase of approximately five-and-a-half months in the past five years. The median time to dispose of a summary defended hearing is

157 days from first appearance until final disposal, down from 176 days in 2004. This small decrease comes from administrative efforts to improve court efficiency. However, this is still an undesirable length of time and further reductions will require more fundamental changes.

5. It is also instructive to note the costs of court proceedings. The average cost to the courts' administration of processing a jury trial case from start to finish in the District Court is estimated to be approximately \$20,000.¹ By comparison, the average cost to the courts' administration of processing a summary defended case from start to finish in the District Court is estimated to be approximately \$2,000², or one tenth of the cost. While some of this difference in cost can be attributed to the greater seriousness and complexity of the typical case that proceeds to a jury trial, the jury trial process is nevertheless substantially more expensive in itself. More time and cost is involved in the process leading up to the trial, and the involvement of jurors increases the cost and the length of the trial itself.
6. The reforms in this paper are therefore designed to ensure that:
 - 6.1. Where an offender intends to plead guilty, the plea is entered as soon as practicable.
 - 6.2. Court hearings are held only when a judicial decision or other judicial intervention is required.
 - 6.3. Better information is exchanged between parties with out-of-court discussions becoming the standard (and expected) way for progressing a case.
 - 6.4. Incentives and sanctions are in place to promote compliance with procedures by all parties, including both defence and prosecution counsel.
 - 6.5. Unnecessary adjournments and the number of cases that fall over close to trial are minimised.
 - 6.6. All pre-trial matters are adequately dealt with before trial.
 - 6.7. There is proper focus on the issues in dispute at trial.
 - 6.8. Jury trials are reserved for only the most serious cases.
 - 6.9. Modern technologies are appropriately utilised.
7. We anticipate that this will deliver benefits for:
 - 7.1. Defendants, who have both the right to a fair trial and also to know the outcome of the case against them in a timely manner.

¹ This figure excludes building costs, and costs to defendants, victims, witnesses, counsel, Department of Corrections and other agencies.

² This figure excludes building costs, and costs to defendants, victims, witnesses, counsel, Department of Corrections and other agencies.

- 7.2. Victims and witnesses, who have to attend court to give evidence.
- 7.3. Taxpayers, who largely bear the cost of the system.
- 7.4. Counsel, who will have reduced waiting times, experience more efficient scheduling of court dates and who will be able to provide better service to their clients.
- 7.5. Justice sector agencies, who will experience greater efficiencies in prisoner transport, security and court attendance costs.

B. General Approach

1. Primary and Secondary Legislation

Proposed Approach

8. The drafting of the new legislation has proceeded on the basis that matters which are fundamental to criminal procedure or that are in the nature of high-level procedural requirements should be included in primary legislation. These matters include, for example, the way in which an upper-level (indictable) or lower-level (summary) trial should be conducted and the obligation on the parties to engage in case management discussions. Matters of detailed court procedure (for example, the nature and timing of the required case management discussions) should be included in secondary legislation (regulations).
9. This approach aims to preserve minimum standards for the conduct of criminal proceedings while ensuring that the legislation is sufficiently flexible to take account of particular circumstances (for example, differences arising from the nature of different types of offence or defendant), future technology changes (as noted in paragraphs 12 to 14), and other developments (for example, experience with the new case management process).

2. Modernising and Simplifying Provisions

Proposed Approach

10. The drafting approach also aims to generally simplify and modernise language. Many current provisions relating to criminal procedure have not been altered since they were first drafted in 1957 or 1961. This can hinder the general public's access to and understanding of the law. Therefore, while we do not wish to substantially change a number of these provisions, they will be revised to conform to modern standards for legislative drafting.
11. The Bill Plan in Part 2 of this paper omits many sections currently contained in the legislation. (The aim of this paper is to consult on key reforms.) However, when a final Bill for introduction is drafted, all sections (whether substantially reformed or not) will be updated in a modern style.

3. E-Courts

Proposed Approach

12. A central drafting approach taken by the Project is to ensure that court processes can take advantage of developing information technologies. In so doing we have been guided by the following principles:
 - 12.1. In general, the use of any information technology should be permissible in the legislation. For example, the legislation may specify that certain information is required but not the medium or manner in which it is presented to the Court.

- 12.2. In some instances, the use of technology may need to be prescribed. If this is the case, then consideration should be given to prescribing the use of technology in secondary legislation rather than the primary legislation, bearing in mind the pace of technological change and the likelihood that any such provision may require amendment at a future date.
- 12.3. The rights of participants in criminal procedures must be considered. For example, it is unlikely that service of the first summons in criminal proceedings should be by electronic means (given current technologies). Failure to answer a summons may put a defendant's liberty at risk and the Court consequently requires proof of service. This may be best done in person, at least when establishing the first contact with a defendant.
- 12.4. Information technologies may be used to help facilitate any part of criminal procedure.
- 12.5. Access to and security of the information held under an electronic regime must be protected.

Rationale

13. Over time it is proposed to increase the use of information technology in courts. The Ministry of Justice, together with other justice sector agencies, is currently beginning to develop options to:
 - 13.1. Replace paper court records and case files with electronic court records to improve efficiency and reduce cost, improve security, and increase flexibility.
 - 13.2. Reduce, automate and simplify workflow.
 - 13.3. Improve access to appropriate parts of the court record and case file for authorised participants to speed up processes, enable earlier preparation for hearings, and reduce costs.
 - 13.4. Reduce the risk of unauthorised access to case files and the risk to the credibility of the justice system, and the privacy of court users.
14. These operational changes towards an electronic operating model are largely beyond the scope of the proposals contemplated by this Project and will proceed independently of them. (Refer paragraphs 209 to 213 for further information.) Nevertheless, we note that one of the impediments to greater use of information technology in courts is the way that the legislation is currently framed. Because the legislation currently anticipates a paper based system for managing information (alternatives could not have been contemplated when it was first drafted), even where electronic systems are currently in place, duplicate paper systems must also be maintained.

4. Terminology

Relevant provisions

Clause 5 of Bill Plan

Proposed Approach

15. We have used generic terms to apply equally to both summary (lower-level) and indictable (upper-level) processes, where appropriate. This is in line with our intention to modernise and simplify provisions and recognises that both procedures are to be included in the one piece of legislation. Where we have had to choose between terms that essentially refer to the same thing (but in different jurisdictions), we have attempted to select the one that is most widely recognised.

Main Changes

Summary/Indictable : Lower-level/Upper-level

16. Our proposals retain two forms of criminal procedure – a shorter procedure for less serious cases and a longer procedure for more serious cases. The shorter procedure is currently termed ‘summary’ procedure (to reflect its ‘summary’ nature). The longer procedure is termed ‘indictable’ procedure (from the ‘indictment’ presented after committal).
17. Later in this paper we describe proposals to eliminate the committal step and remove the need for an indictment to be presented (refer paragraphs 113 to 116). If there is no further need for an ‘indictment’, then the term ‘indictable’ becomes somewhat obsolete. A better descriptor of the longer form of criminal procedure is required.
18. We have considered a number of terms to describe both the shorter (summary) and longer (indictable) procedure and in this document and in the Bill Plan have adopted the terms ‘lower-level’ and ‘upper-level’ to distinguish between them. However, we are not altogether comfortable with these terms and would welcome any suggestions for alternative labels.

Informant/Prosecutor

19. We have adopted the term ‘prosecutor’ to refer to the person or agency responsible for prosecuting an offence in court. We see no reason to retain the separate term ‘informant’, which is currently used to describe this person or agency in the summary (lower-level) jurisdiction.

Defendant/Accused

20. We have adopted the term ‘defendant’ when referring to the person who is charged with an offence. As above, we see no reason to retain the separate term ‘accused’, which is currently used to describe this person in the indictable (upper-level) jurisdiction.

Defended Hearing/Trial

21. We have adopted the term 'trial' to refer to the event at which charges are gone into and a verdict of the Court given. Currently this event is called a 'defended hearing' when it is conducted in the summary jurisdiction (lower-level) and a 'trial' (jury trial or judge alone) when conducted in the indictable (upper-level) jurisdiction.
22. This is potentially confusing because the term 'hearing' may be used in the legislation to describe other court events where something is 'heard', but the substantive case is not gone into. We have therefore reserved the term 'hearing' for these other events and adopted 'trial', as indicated.

Information/Indictment

23. We have adopted the term 'charge' instead of the terms 'information' and 'indictment'. 'Charge' refers to any document alleging that a person has committed a certain offence or offences. This is to facilitate options such as electronic filing and management of charging information. (See also discussion at paragraphs 12 to 14.)

Lay/Laid

24. We have not used the term 'lay' (or 'laid') in relation to criminal proceedings. Currently, proceedings are commenced by the 'laying' of an 'information' (the initial charging document). This means substantiating the charges against a person that are set out in the appropriate form before a judicial officer (or 'swearing an information'). The information is then filed in the Court. However, the term 'lay' is unhelpful and is often confused with the act of filing in a court. Further, we propose (at sub-paragraph 54.3) that there be no requirement to substantiate a charging document on oath.
25. Under our proposals, proceedings will commence at the point when a charge is filed in the Court (refer sub-paragraph 54.1). There is, therefore, no reason to retain the term 'lay'.

Do you consider the terms used in the Bill Plan are appropriate? In particular:

- *Does the use of the term 'trial' to cover both the shorter and longer form of procedure cause any issues;*
- *Are there alternate terms to describe the longer and shorter forms of criminal procedure referred to as 'upper-level' and 'lower-level' procedure in the Bill Plan?*

5. Audio Visual Links

Proposed Approach

26. We discussed a proposal to increase the use of Audio Visual Linkages (AVL) for court proceedings in a discussion paper entitled [*Audio Links and Audio Visual Links in Proceedings*](#), issued from the Project in November 2008. Following further development of this proposal, the Courts (Remote Participation) Bill was introduced to Parliament on 8 December 2009.

27. This work remains part of the overall Project. However, it is being progressed separately because the benefits of increasing the use of AVL in court proceedings can be achieved largely without the other reforms being proposed, and because these changes can be implemented within a shorter timeframe.

Courts (Remote Participation) Bill

28. The Courts (Remote Participation) Bill (the Bill) will allow AVL to be used in all proceedings and will let the Judge decide in each individual case whether it is appropriate to do so, subject to:
- 28.1. A presumption in favour of the use of AVL in certain procedural matters.
 - 28.2. Legislative criteria to guide the Courts' decisions on the use of AVL in any proceeding. (The Court will be responsible for determining the weight to be given to each criterion, depending on the particular circumstances of the case and the nature of the proceedings.)
29. The Bill sets out who can participate by AVL including: the defendant, witnesses, prosecutors and defence counsel, judges and juries. It is available for viewing on the Parliamentary website.³
30. We are not seeking comment on this Bill as part of this consultation. Any comment that anyone wishes to make should now be provided through the usual Select Committee processes. Rather we note it here as part of our general proposals to modernise the court system.

6. Implications under the New Zealand Bill of Rights Act 1990

31. We are aware that some of our proposals have implications under the New Zealand Bill of Rights Act 1990 (NZBORA). For example:
- 31.1. Our proposed change to the jury trial threshold (refer paragraphs 40 to 42) inevitably raises NZBORA concerns, and is likely to require an amendment to the NZBORA to implement (although we note that the relevant provision is not based on the International Covenant on Civil and Political Rights, which does not require a jury trial but only a fair trial).
 - 31.2. Other proposals raise difficult questions under NZBORA, in particular, as to the consistency with fair trial rights of the requirement to identify issues in dispute (see paragraphs 85 to 94) and the provisions for trial in the absence of the defendant (see paragraphs 172 to 174).
32. However, because the Bill Plan is an early draft to enable consultation, it has not been vetted for consistency with NZBORA. That will occur once a finalised Bill is prepared for introduction into Parliament.

³ <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/>

C. Framework for Bill Plan

7. Categories of Offence

Relevant provisions

Clause 6 of Bill Plan

Proposed Approach

33. The offence categories reflected in the Bill Plan are set out in the table below.

Table 1: PROPOSED CATEGORIES OF OFFENCE

Category 1	Offences that are not punishable by a term of imprisonment ('non-imprisonable offences')
Category 2	Offences that are punishable by a term of imprisonment not exceeding 3 years ('summary offences')
Category 3	Offences punishable by a term of imprisonment of more than 3 years that do not fall into categories 4 or 5 ('electable offences')
Category 4	Offences punishable by a term of imprisonment of more than 3 years that may be tried in either the District Court or the High Court ('middle band offences')
Category 5	Offences punishable by a term of imprisonment of more than 3 years that must be tried in the High Court ('High Court only offences')

34. For ease of reference, throughout this paper we use the terms non-imprisonable offences; summary offences; electable offences; middle band offences; and High Court only offences in conjunction with the category number, as indicated in the table above. However, these terms are used purely for the convenience of the reader, are not reflected in the Bill Plan, and do not necessarily mirror the current categories of offence to which they apply.

35. The new offence categories, which we propose, reflect the:

- 35.1. Abolition of the offence category of 'minor offences' which has fallen into disuse. (Infringement offences will remain but are not included in the Bill Plan.)
- 35.2. Division of the previous category of summary offences into two categories: those summary offences that are punishable by imprisonment and those that are not.

- 35.3. Proposed change to the jury trial threshold from offences punishable by a maximum penalty of more than 3 months to more than 3 years.
- 35.4. Abolition of the category of indictable offences that may be laid summarily at the discretion of the prosecution.⁴ In the future, these offences will initially follow 'lower-level' (summary) procedure, with the defendant able to elect trial by jury (unless the offence does not meet the jury trial threshold).
- 35.5. Abolition of the District Court only category of indictable offences. The offences in that category have been re-allocated to the other categories.
36. These changes would result in a higher proportion of the courts' caseload being subject to lower-level (summary) processes than currently, lower proportions of cases that are subject to upper-level (indictable) processes and lower proportions of cases where the defendant may elect jury trial. These changes are summarised in the table below.

Table 2: ESTIMATED MOVEMENT OF COURTS' CASELOAD⁵

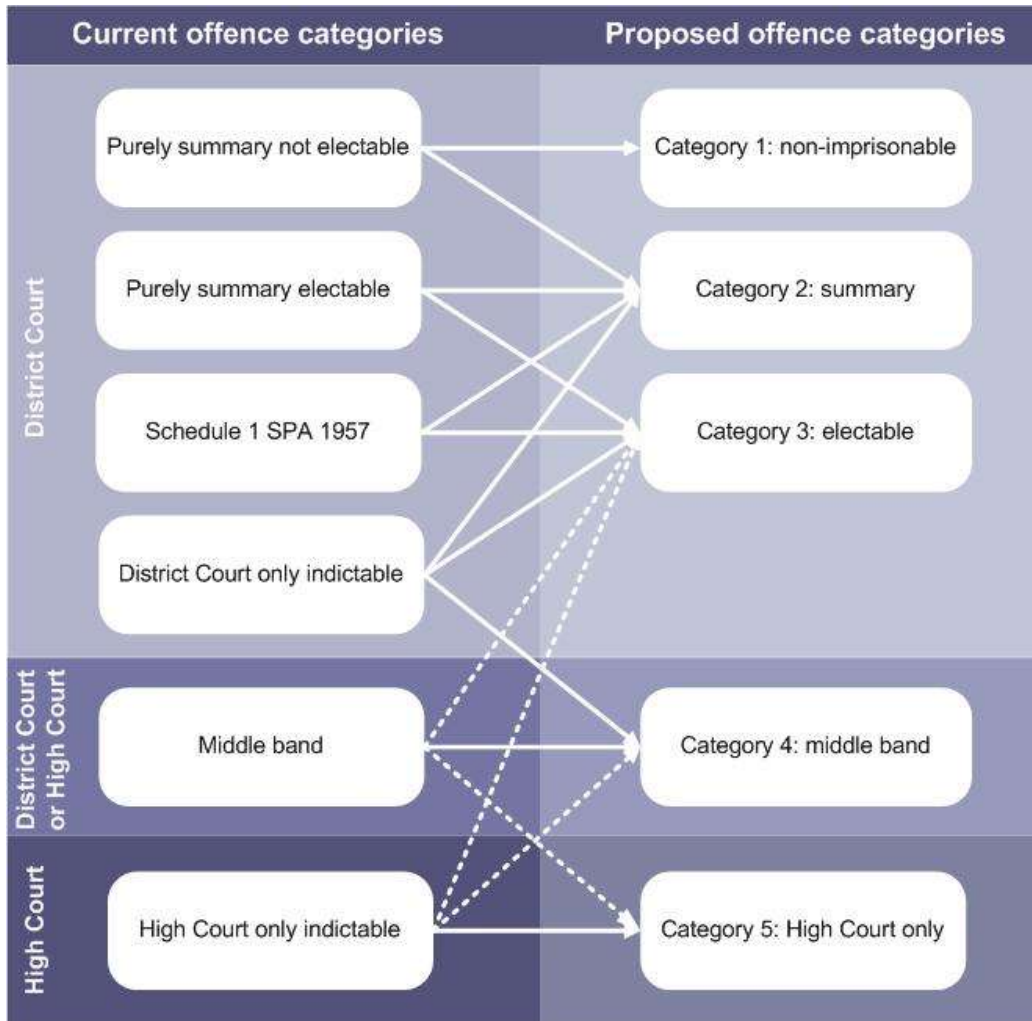
CATEGORY OF OFFENCE: Current <i>Proposed</i>	NUMBER OF CRIMINAL CASES (PERCENT OF TOTAL CASELOAD)	
	2007/2008	<i>Estimated after proposed reforms</i>
Summary Cases (Non- Electable) <i>Categories 1 & 2</i>	103,900 (59%)	145,200 (82%)
Summary Cases (Electable) <i>Category 3</i>	66,000 (37%)	28,300 (16%)
Indictable Cases <i>Categories 4 & 5</i>	6,800 (4%)	3,200 (2%)

37. Proposals in relation to categories 3 – 5 are discussed in more detail in the discussion document [Categories of Offences and the Middle Band](#) issued from the Project on 21 October 2009 (refer Appendix 2). As discussed in that paper, changes have been made to the offences identified as middle band and High Court only offences. Revised schedules for these offence categories are also attached to the Bill Plan.
38. The following diagram summarises the current scheme and proposed new categories of offence.

⁴ Those offences listed in Schedule 1 of the Summary Proceedings Act 1957.

⁵ Source: Ministry of Justice Summary and Indictable datasets. This analysis is based on 2007/2008 annual disposals in those calendar years. These datasets exclude cases that have been joined to other cases and represent case disposals prior to the implementation of the Criminal Procedure Bill in June 2009.

Figure 1: DIAGRAM ILLUSTRATING CURRENT AND PROPOSED CATEGORIES OF OFFENCE



NB. Any case to be heard by a jury in the District Court could potentially be transferred to the High Court under section 28J of the District Courts Act 1947/ **clause 54** of the Bill Plan.

Rationale

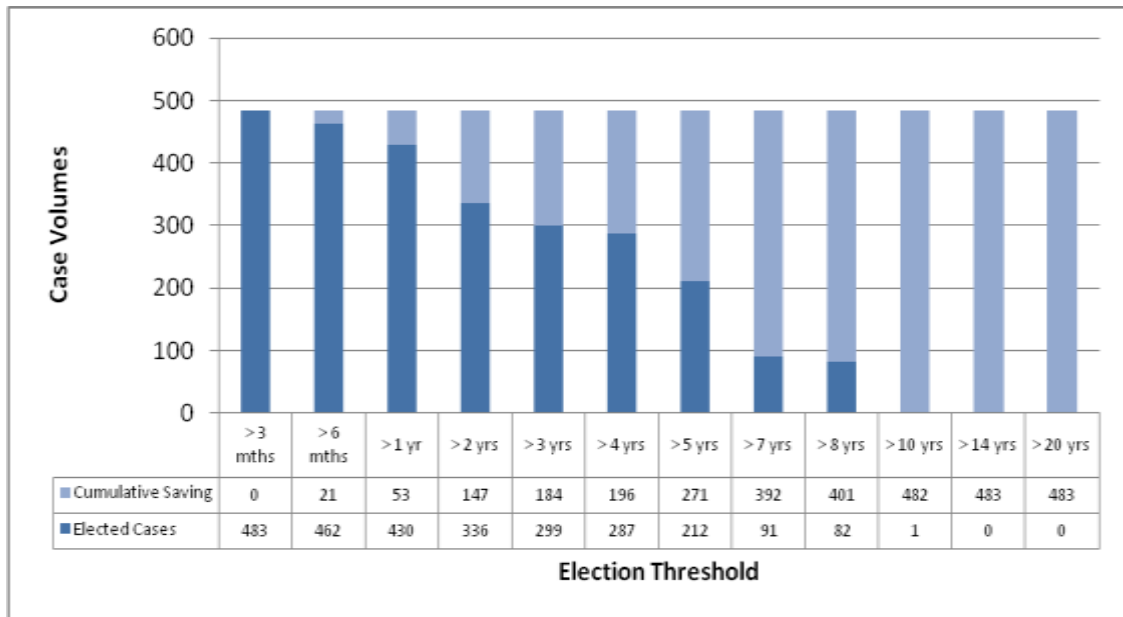
39. The proposed restructure of offence categories aims to put in place a simplified approach that addresses the complexity of current categories, and ensures, in relation to categories 4 (middle band) and 5 (High Court only), that offences are allocated to categories on a principled and rational basis.

Restricting the availability of jury trials

40. Cases dealt with by jury trials are generally more serious and complex than cases dealt with under the current summary process. The average jury trial process takes significantly longer to complete than the summary process from the time a charge is laid, and costs ten times more. Based on 2007 figures, it is estimated that removing the category of indictable offences that may be laid summarily at the discretion of the prosecution (Schedule 1 offences) and raising the election threshold to over three years would have led to an estimated 1100 fewer cases being committed for trial, and 300 fewer jury trials.

41. The following graph demonstrates the estimated impact of raising the jury threshold in terms of the elected workload (the number of elected jury trials) and savings (number of jury trials avoided). It is based on the volume of cases elected in 2007 (483 cases). The dark blue bars represent the number of jury trials that it is estimated would be elected at different thresholds. The light blue bars indicate the number of elections avoided compared to volumes at the current election threshold.

Figure 2: ESTIMATED ELECTED CASELOAD* IF JURY THRESHOLD IS RAISED



*Based on 2007 volumes

42. These proposals are discussed in more detail in the discussion document [Criminal Procedure \(Simplification\) Project: Proposals relating to Restricting Jury Trials](#) issued from the Project in June 2009 (see Appendix 2).

Outstanding Issues

Offences that must be heard by a jury

43. The Crimes Act 1961 currently provides that an offence that is punishable by a maximum penalty of 14 years or more must always be heard by a jury.⁶ However, with the possible exception of murder and treason, we are not sure whether there are any offences that must always be tried by a jury. This is on the basis that the right to jury trial is fundamentally a right of the defence. In addition, under our proposed changes to offence categorisation, some offences with a maximum penalty of 14 years imprisonment will become electable. This includes the offence of blackmail, which is currently a High Court only offence.

Are there any offences that should always be tried by a jury? If so, what offences?

⁶ Section 361B(5), Crimes Act 1961.

An Alternate Framework

44. Although our proposals make a number of significant improvements to the current approach taken to offence categorisation, we consider that there may be scope for more improvements to be made.
45. The current framework is based on a link between two logically independent issues: the appropriate fact-finder (judge or jury) and the level of the hierarchy in which a case should be tried (High Court or District Court). However, if these two issues were separated, it may be possible to further simplify the approach taken to offence categorisation, proposed above.
46. The basis for this alternate framework is a view that the decision about whether a case proceeds to jury trial should largely be independent of the decision about whether the case should be tried in the District Court or the High Court. Under this alternate framework, the vast majority of offences that carry a maximum penalty of more than three years imprisonment would be electable, so that the decision about whether the case was heard by a judge or a jury would be left in the hands of the defendant. All electable cases would begin in the District Court, with the ability for parties to apply to the District Court to have the case transferred to the High Court. Cases that meet specified criteria would also be systematically reviewed to consider whether they should be tried in the High Court even when there has not been an application by the parties.
47. The alternate framework, which simplifies even further current arrangements for deciding how a case is to be heard, is discussed in more detail in Appendix 3. We welcome comments on whether this framework should be developed further. If it were adopted, it would require a significant change to a number of aspects of the Bill Plan.

What are your views on our proposals to re-categorise offences?

Do you consider that the alternate framework, based on separating the issues of the appropriate fact-finder and the level of the hierarchy in which a case is tried, should be pursued further?

8. Jurisdiction and Related Matters

Relevant provisions

Clauses 9, 179, 180 and Part 8 of Bill Plan

Proposed Approach

48. The key aspects of the approach reflected in the Bill Plan are that:
 - 48.1. Provisions relating to the criminal jurisdiction of the District Court are simplified and consolidated in the one piece of legislation.
 - 48.2. District Courts have jurisdiction over offences through all stages, except for category 3 and 4 cases that are

transferred to the High Court for trial, and category 5 cases that are required to be tried in the High Court.

- 48.3. In those cases that are to be tried in the High Court, the District Court has jurisdiction over the proceeding until it is sent to the trial court.
 - 48.4. District Court Judges with a trial warrant will continue to preside over upper-level trials in the District Court.
 - 48.5. The jurisdiction of Justices of the Peace and Community Magistrates over certain category 1 and 2 offences is largely maintained, except that Justices of the Peace no longer have jurisdiction over continuing offences.
 - 48.6. As a general rule, sentencing jurisdiction follows trial jurisdiction.
49. Some of these proposals are discussed in more detail in the discussion document [Discussion Document: Sentencing Jurisdiction and Appeals](#) issued from the Project in April 2009 (refer Appendix 2). A diagram setting out the main features of the criminal jurisdiction of the District and High Courts is also set out below. This diagram should be read in conjunction with our proposals under *Section E. Procedure before Trial* (page 25).

Rationale

50. Current provisions relating to criminal jurisdiction⁷ are unnecessarily complex and require amendment to reflect our proposed new categories of offence (refer paragraphs 33 to 38). Consolidating them in the one piece of legislation will make them clearer and easier to follow.
51. The current restrictions on the sentencing powers of District Court Judges are also complicated and prone to misunderstanding. Removing sentencing limits so that sentencing jurisdiction follows trial jurisdiction will not only simplify the law but has the potential to enhance administrative efficiency.
52. In the light of feedback on our discussion paper ([Discussion Document: Sentencing Jurisdiction and Appeals](#), refer Appendix 2), we have not pursued changes to the core jurisdiction of Justices of the Peace and Community Magistrates, except to remove the ability of Community Magistrates to sentence offenders found guilty by a District Court Judge.

⁷Provisions relating to criminal jurisdiction of the District Courts are currently set out in Part 1, Summary Proceedings Act 1957 and part 2A, District Courts Act 1947. Some provisions relating to the criminal jurisdiction of the High Court are contained in the District Courts Act 1947 at section 28A(2), section 28J and Part 2, Schedule 1A. Section 184Q Summary Proceedings Act 1957 deals with allocation of 'middle band' cases between the District and High Courts. There are also additional rules limiting the jurisdiction of Justices of the Peace and Community Magistrates (sections 9A-9G, Summary Proceedings Act 1957, and restricting the sentencing powers of District Court Judges (sections 7 and 44, Summary Proceedings Act 1957).

Outstanding Issue

53. Community Magistrates appear to have the jurisdiction conferred at **clause 182(1)(f)** of the Bill Plan under the Land Transport Act 1998 by **clause 180**. Further analysis is required to determine if this paragraph is necessary.

Table 3: PROPOSED CRIMINAL JURISDICTION OF COURTS

KEY: = District Court jurisdiction = High Court trial jurisdiction

PHASE	Categories 1 and 2	Category 3		Category 4	Category 5
ADMINISTRATIVE phase	<p>Charge filed</p> <p>Engage counsel or legal aid assignment Initial disclosure by informant</p> <p>Plea</p> <p>If not guilty, to Review phase If guilty, to Trial phase for sentence</p>	<p>Charge filed</p> <p>Engage counsel or legal aid assignment Initial disclosure by informant</p> <p>Plea</p> <p>If not guilty, to Review phase If guilty, to Trial phase for sentence</p>		<p>Charge filed</p> <p>Engage counsel or legal aid assignment Initial disclosure by informant</p> <p>Plea</p> <p>If not guilty, to Review phase If guilty, to Trial phase for sentence</p>	<p>Charge filed</p> <p>Engage counsel or legal aid assignment Initial disclosure by informant</p> <p>Plea</p> <p>If not guilty, to Review phase If guilty, to Trial phase for sentence</p>
	<p>REVIEW phase</p> <p>Disclosure continues</p> <p>Case management discussions Case Management Memorandum filed</p> <p>Review (may result in judicial intervention)</p> <p><i>(NOTE: It is not currently proposed that case management processes will be required for some Category 1 offences)</i></p>	<p>Disclosure continues</p> <p>Case management discussions Case Management Memorandum filed</p> <p>Review (may result in judicial intervention)</p> <p>Opportunity to elect jury trial</p> <p>No election</p>	<p>Elects jury trial</p> <p>Formal written statements served (notice to court)</p> <p>Case management discussions Case Management memorandum filed</p> <p>Review (may result in judicial intervention)</p> <p>Sent to trial court (District Court)</p>		<p>Disclosure continues</p> <p>Formal written statements served (notice to court)</p> <p>Case management discussions Case Management Memorandum filed</p> <p>Review (may result in judicial intervention)</p> <p>Middle band decision</p> <p>Sent to trial court (District Court or, if middle band decision made for High Court, to High Court)</p>

PHASE	Categories 1 and 2	Category 3		Category 4		Category 5
TRIAL phase	Lower-level Trial	Lower-level Trial	Formal written statements and physical evidence filed Callover Pre-trial applications (including oral evidence, admissibility and applications for discharge) Pre-trial telephone conference Upper-level Trial (District Court)	District Court Formal written statements and physical evidence filed Callover Pre-trial applications (including oral evidence, admissibility and applications for discharge) Pre-trial telephone conference Upper-level Trial (District Court)	High Court Formal written statements and physical evidence filed Callover Pre-trial applications (including oral evidence, admissibility and applications for discharge) Pre-trial telephone conference Upper-level Trial (High Court)	Formal written statements and physical evidence filed Callover Pre-trial applications (including oral evidence, admissibility and applications for discharge) Pre-trial telephone conference Upper-level Trial (High Court)
	Sentencing	Sentencing	Sentencing	Sentencing	Sentencing	Sentencing

Notes

- Although this option is not specified in the table (to keep it simple), note that any category 3 and 4 case that is proceeding towards an upper-level trial in the District Court can be transferred to the High Court pursuant to proposed **clause 54**.
- The Administrative phase concludes with the defendant's plea. After a not guilty plea, the case moves into the Review phase. However, if the defendant pleads guilty at the end of the Administrative phase, the case goes straight to the Trial phase for sentencing.
- In all cases, if the defendant pleads guilty at any subsequent point he or she will go straight to sentencing in the Trial phase.
- With one qualification, Category 2 and 3 cases pass seamlessly from the Review phase to the Trial phase. The qualification relates to Category 3 prosecutions where the defendant elects a jury trial. When this occurs, the case goes through the same case management processes that apply to Category 4 and 5 offences.
- In Category 4 and 5 cases and Category 3 (where an election is made), the case is sent to the relevant trial court at the conclusion of the Review phase.
- Sentencing will be in the High Court if the case is a Category 5 case, or a Category 3 (elected) or 4 case that is transferred to the High Court for trial (following either a middle band decision or transfer under proposed **clause 54**). Note that the High Court also has power to sentence if the District Court declines jurisdiction because it considers a sentence of preventive detention should be considered – section 90, Sentencing Act 2002.

D. Commencement of Proceedings

Relevant provisions

Clauses 10-21 of Bill Plan

9. Charges

Proposed Approach

54. Key aspects of the approach reflected in the Bill Plan are that:
- 54.1. Proceedings are commenced by the filing of a 'charge' (rather than any particular form of document), and the form of the charge is left to regulations (**sub-clause 10(1)**).
 - 54.2. The 'place of filing' is left to regulations.
 - 54.3. The current requirement to swear an information is replaced with a new offence of knowingly or recklessly filing a charge containing false or misleading information (**sub-clauses 11(3) and 11(4)**).
 - 54.4. The current common law principles relating to the joining and severance of charges are codified and combined with our linked proposal that related charges should be dealt with by the same process in the same Court (**clauses 138 to 140**).
 - 54.5. Original charges continue for all categories of offence, subject to the power of the Crown to amend and withdraw them (**clauses 135 and 137**). Therefore, there is no requirement for charges to be presented in the new form of an indictment for category 4 (middle band) and 5 (High Court only) cases, or category 3 (electable) cases, where a jury trial has been elected. (Refer also to paragraphs 113 to 116.)

Rationale

55. Whether or not charges are, for example, in separate documents or a single document, and stored electronically on a central electronic repository (accessible from the appropriate locality) or in a paper case file in a courthouse cabinet, is largely a matter of administrative convenience. However, as noted at paragraph 14, current provisions for commencing proceedings have been designed around a system in which information is recorded and managed on paper.
56. While courts will continue to rely on paper records of charging information in the short to medium term (at least for some percentage of cases⁸) they will

⁸ We anticipate that 'dual' systems for presenting charging information will be required, at least for some period, as different prosecuting agencies will acquire the necessary technology at different rates.

increasingly come to rely on electronic filing and electronic records. This is because paper case files and the manual exchange of information is a constraint on the timely access of information and contributes to wider issues of delay and inefficiency.

57. The legislation therefore needs to be framed to accommodate improvements as the technology allows. It is this imperative that has largely driven our drafting approach. In future, for example, charges may be filed in a central electronic repository. This is why the 'place for filing' will be dealt with in regulations.

Outstanding Issues

58. We would welcome any comments on these proposals or on other issues that arise from them. We are particularly interested in feedback on whether the drafting of the provisions that relate to hearing charges together is satisfactory.

10. Time for Filing Charge

Relevant provisions

Clause 13 of Bill Plan

Proposed Approach

59. Key aspects of the approach reflected in the Bill Plan are that:
- 59.1. There are two limitation periods for category 1 and 2 offences, as follows:
 - 59.1.1 Offences with maximum penalties of no more than a \$7,500 fine or 3 months' imprisonment are subject to a limitation period of 6 months.
 - 59.1.2 All remaining category 1 and 2 offences are subject to a limitation period of 10 years.
 - 59.2. There are no limitation periods in respect of other categories of offence.
 - 59.3. The current discretion the Attorney-General has to consent to proceedings after the expiry of the 10 year limitation period will apply to category 1 and 2 offences other than those to which the 6 month limitation period applies.
 - 59.4. Exceptions to the general rules relating to limitation periods remain, as provided in statute.

Rationale

60. Limitation periods⁹ encourage efficient prosecution; reduce the risk of unfairness caused by undue delay; provide certainty for defendants; and help assure that offenders are held accountable. The public interest in prosecuting offences carrying up to 3 months' imprisonment diminishes over time.
61. Currently, limitation periods are determined partly according to offence category¹⁰ and partly due an offence's maximum penalty.¹¹ The proposed amendments to offence categories (refer paragraphs 33 to 38) have made it difficult to maintain the present approach, largely due to the wide range of offences falling within categories 1 and 2.¹²
62. The general rules proposed above will apply unless there is a statutory provision to the contrary for a particular offence.
63. The proposed approach will have the effect of increasing the limitation period for some offences from 6 months to 10 years. Conversely, the fact that category 2 offences include those punishable by *up to* 3 years' imprisonment will impose a 10 year limitation period on a small number of offences that currently have no limitation period due to section 10B of the Crimes Act. In framing our proposals we have aimed to strike a balance that is fair to suspects in relatively low level offending but which recognises the public interest in an effective criminal justice system.
64. We can think of no compelling reason to introduce limitation periods for serious offences for which investigation may be lengthy and complex and the greatest public interest exists in bringing an offender to justice. The powers of the Court to dismiss cases for undue delay or abuse of process provide sufficient safeguard in these cases.

Outstanding issues

Regulatory offences

65. The proposed limitation periods may create an issue in respect of those regulatory offences with a maximum penalty of a significant fine. Under our proposal, a limitation period of 10 years will now apply to these offences. Arguably, this is too long.
66. However, our research indicates that most regulatory offences have their own limitation periods, significantly less than 10 years.¹³ While the 10 year limitation period will become the default for fine only offences carrying more than \$7,500 in the future, we would expect agencies to justify the need for such a lengthy period, when compared to corresponding limitation periods in other statutes. Limitation

⁹ In the present context a limitation period is the time specified for the prosecutor to file charges after an offence is alleged to have been committed. Some statutes dealing with discrete areas of the law specify limitation periods as running from the time of detection of the contravention.

¹⁰ Section 14 Summary Proceedings Act 1957.

¹¹ Section 10B Crimes Act 1961.

¹² This is the result of the proposal to raise the threshold for the defendant to elect trial by jury for offences carrying more than 3 months imprisonment to more than 3 years imprisonment.

¹³ For example, section 162 Biosecurity Act 1993 and section 18 Smoke-free Environments Act 1990.

periods should continue to be tailored in individual statutes as to what is reasonable in the context of the particular statutory scheme.

Do you agree with the proposed limitation regime?

Do you agree that a 10-year limitation period is appropriate for any offence carrying a fine over \$7,500 (particularly in the regulatory context) or more than 3 months' imprisonment?

Are any concerns about having such a lengthy limitation period mitigated by the court's ability to dismiss charges for delay or as an abuse of process in particular cases, even if the limitation period has not been exceeded?

11. Contents of Charge (and Representative Charges)

Relevant provisions

Clause 14 of Bill Plan

Proposed Approach

67. The key aspects of the approach reflected in the Bill Plan are that a charge should relate to a single offence unless it is an alternative or representative charge. Where an alternative or representative charge is laid, we propose that the defendant will have the ability to apply to the Court to sever or amend the charges if the form of the charge prejudices the defendant in his or her defence.

Discussion

68. Currently there is no statutory recognition of representative charges although they are permitted in sexual cases by virtue of a 2004 Practice Note¹⁴. A discussion document entitled [Representative Charges: Options and Issues](#) was issued from the Project in December 2008 and there has been further consultation since then.
69. Following the consultation on this paper we have reached a tentative view that representative charges should be available in two circumstances:
- 69.1. Where there has been repeated conduct over a period of time but it is not possible to fully particularise the individual charges.
 - 69.2. Where there is repetitive or multiple offending in circumstances where: a) particulars are available but the number of charges makes separate charges unmanageable; and b) the verdict on one charge is likely to be the same as the verdict on all charges.

Repeated conduct where particularisation is not possible

70. We suggest that the Practice Note be codified and extended to other forms of offence. We see no significant reason for limiting representative charges to

¹⁴ Practice Note *Form of indictment – particulars of sexual offending*, issued 21 November 2004.

sexual offences, although the difficulties about particularisation are most likely to occur in this context. Where a representative charge is laid, the Practice Note provides that the prosecution must prove that the accused committed at least one criminal act of the kind alleged during the period stated in the charge. If the prosecution does so, it is left to the trial Judge to determine the full extent of the criminality. The ability for the defendant to apply to the Court to sever or amend charges where the form of the charge prejudices the defence protects against any inappropriate use of representative charges.

Repeated conduct where single charges are unmanageable

71. There are currently difficulties in dealing with repetitive offending involving a large number of charges. This is particularly likely to occur in theft and fraud cases where there may be hundreds of charges involving exactly the same conduct. There is case law that suggests that it is 'oppressive' to hear more than 20 charges at once although we understand that in many cases Courts can and do hear cases involving a much larger number of charges. However, these cases cause logistical difficulties particularly for juries in reaching verdicts. This adds to the length and complexity of trials.
72. The law already recognises some circumstances involving a continuing course of conduct where it would be artificial to characterise the conduct as separate offences, although the boundaries of this rule are unclear. We can see no reason in principle why cases of repetitive offending involving large numbers of charges should not be dealt with in the same way. If it is fair to deal with repeated conduct by representative charges where it is not possible to fully particularise the individual offences, it is difficult to see why it is unfair to proceed with repeated conduct as a representative charge when particulars are available but it is administratively burdensome to have a large number of separate charges.
73. The precise form of the charge would depend on the offence but, for example, a repetitive fraud might allege the dishonest use of documents between specified dates involving not less than a specified amount. The requirement that the prosecution prove at least one criminal act of the kind alleged would also apply in this context. It would then be left to the trial Judge to determine the extent of criminality. Again the ability to apply for severance or amendment of the charges will protect against the inappropriate use of this form of charge. This might be necessary, for example, where the defence alleges there are different defences to some charges than to others.
74. We would welcome your comments on these initial proposals.

Should the legislation provide for representative charges?

If so, is the procedure in the 2004 Practice Note: Form of indictment – particulars of sexual offending appropriate?

Should the Practice Note procedure be extended to all categories of offence where there has been repeated offending over a period of time that it is not possible to particularise?

Should representative charges be available to deal with repetitive offending involving such a large number of charges as to make separate charges unmanageable?

12. Who Can File a Charge (Private Prosecutions)

Relevant provisions

Clause 11 of Bill Plan

Proposed approach

75. The approach reflected in the Bill Plan is that anyone may commence criminal proceedings.

Discussion

76. It has been suggested to us that our proposals to improve criminal procedure should include reforms to address problems that arise when private prosecutors (specifically individuals who are motivated by personal grievance) attempt to bring unmeritorious or malicious prosecutions.
77. The Law Commission considered the issue of private prosecutions in [Report 66, Criminal Prosecution](#), published in October 2000. It concluded that private prosecutions have an important constitutional and theoretical place within the New Zealand justice system. We agree, and note that there does not generally appear to be a good policy rationale for significantly limiting the current right to a private prosecution.
78. We have considered a number of options for mitigating problems relating to some private prosecutions including, for example, introducing a leave to file requirement for private prosecutors, and the possibility of a procedure equivalent to the vexatious litigant procedure in section 88B of the Judicature Act that applies in civil cases.
79. Generally we have concluded that the various possible 'solutions' create as many (or more) problems as they solve. For example, both a leave requirement and the vexatious litigant procedure have the potential to involve a disproportionate amount of court time. However, we have identified two possible reforms that may warrant further consideration. These are:
- 79.1. amend the current fees structure; and/or
 - 79.2. give District Court Judges power to require private prosecutors to produce evidence that establishes a prima facie case prior to the issue of a summons or warrant to arrest.

Outstanding issues

Fees

80. Currently fees are payable by private prosecutors when they commence a prosecution summarily but not if they commence a prosecution indictably¹⁵. This may create a perverse incentive on private prosecutors to augment charges in order to avoid fees. In our view, if fees are to be charged for private prosecutions, they should apply in all categories of case.
81. The more difficult question is whether fees should be charged at all. The main argument in support of fees is that they may discourage trivial or vexatious prosecutions. Against that, charging fees may deter private prosecutions that are in the public interest. A better option may be the imposition of costs where a prosecution lacks merit.
82. We seek views on whether:
- 82.1. it is appropriate to impose fees for private prosecutions in order to discourage trivial prosecutions; and if so;
 - 82.2. the level of fees that would be appropriate.

Do you agree that fees be charged for private prosecutions and, if so, what level of fees is appropriate and at which steps in the process?

Vexatious prosecutors

83. We suggest a possible approach to safeguarding against vexatious prosecutions may be to give District Court Judges the power to require private prosecutors to produce evidence that establishes a prima facie case before a summons or warrant to arrest is issued.
84. We do not suggest that this power should be routinely exercised for all private prosecutions. But where there is cause for concern about a private prosecution, whether arising from the form of the charges or for some other reason, it seems appropriate that there be an ability to check that the prosecution is reasonable. There is no need for an equivalent power in relation to state prosecutors because the State has other mechanisms for dealing with prosecutorial misconduct. Again, we would welcome comment on this initial proposal.

Do you agree that District Court Judges should have power to require private prosecutors to adduce evidence that establishes a prima facie cases before a summons or warrant to arrest is issued?

If not are there other appropriate mechanisms for dealing with vexatious prosecutions?

¹⁵ Fees are prescribed in Schedule 2 of the Summary Proceedings Regulations 1958. No fees are payable where an information is laid by the Police, Crown agencies, local authorities or other statutory authorities or boards (Section 207(3) of the Summary Proceedings Act 1957). No fees are payable by any prosecutor where an information is laid indictably (Summary Proceeding Regulations 1958 Schedule 2 Note 2).

E. Procedure before Trial

All Offences

13. Issues in Dispute

Relevant provisions

Clauses 31-34, 96 and 100-103 of Bill Plan

Proposed approach

85. The key aspects of the approach reflected in the Bill Plan are that:

85.1. The defence must give notice, as part of prescribed case management processes, of the issues that are in dispute. The Court's leave must be sought to give notice of issues that are in dispute outside of the prescribed case management process (**clauses 31-33**).

85.2. At the start of a jury trial, the prosecution and defence must each give an opening statement. The defence's opening statement is for the purpose of identifying the issue or issues at trial (**sub-clause 96(2)**).

85.3. In both forms of trial (lower-level and upper-level), the prosecutor and/or the trial Judge may invite the fact-finder to draw an inference about the defendant's guilt from the failure to identify the issues in dispute (**clauses 100-103**).

86. This proposal is discussed in more detail in the discussion document [Identification of the Issues in Dispute](#), issued from the Project in May 2009.

Rationale

87. Despite the fact that many aspects of the prosecution case may not be challenged by the defence, there is no expectation on the defence to identify what elements of the offence with which they are charged are in dispute. Instead, many defended hearings and trials proceed as if everything is disputed. As a result the fact-finder (and particularly the jury) may listen to the evidence without knowing what the trial is really about.

88. Defence identification of the issues in dispute is likely to lead to less inconvenience to witnesses (because they will only appear if really needed) shorter and less complex trials, and greater clarity for the fact-finder (judge or jury) about the issues they must consider to decide a defendant's guilt. In addition, there will be savings for both the prosecution and defence because resources will not be directed to irrelevant matters. It will also enable robust estimates of trial length to be made improving courts' ability to schedule trials with greater accuracy.

Outstanding issues*Relationship with admission of facts*

89. Under the current proposal, defence identification of an issue in dispute does not change the prosecution's obligation to prove all elements of the offence beyond a reasonable doubt. The exception is when the defence admits facts under section 9 of the Evidence Act 2006 – in those cases the prosecution has no onus in respect of the admitted facts.
90. During consultation on the original proposal, it was suggested that the prosecution should not be required to prove elements of the offence that the defence has not identified as being in dispute. Instead, any facts relating solely to those elements should be deemed to have been admitted and should not be able to be adduced by either party in evidence. This is on the basis that a logical implication to be drawn from the defence not identifying that an element is denied is that it is admitted. It is therefore arguably unnecessary for court time to be taken up on its proof. If this approach were taken, it would, for example, prevent the prosecution from adducing evidence (for example, the condition of a dead body) solely for 'colour' when the nature of the death is not relevant to any issue in dispute.
91. This will not prevent the Judge or either party from commenting on the elements of the offence in the course of drawing to the jury's attention what is in dispute. For example, in a case of burglary, the jury would be told that the defendant does not dispute that a person entered a property with intent to commit a crime, but that the defendant does dispute that he or she was that person. This would also provide the jury with the necessary context to decide the disputed issues.

Should the non-identification of an issue be taken as an admission of fact?

Implications for a judge's summing up

92. It is a common law requirement that a trial judge in his or her summing up to the jury must cover any defence that is reasonably available on the evidence even if it has not been raised by the defence.¹⁶ As noted in our original discussion paper on identifying the issues in dispute,¹⁷ this requirement sits uneasily with a proposal that places primary responsibility for deciding and identifying the issues in dispute on the defence.
93. As a basis for consultation, we have included a provision in the Bill Plan that requires the Judge to sum up on an issue not raised by the defence when the Judge is of the opinion that a direction on that issue is necessary to secure a fair trial. The reason why an issue was not raised (for example, because it was the result of an oversight or mistake by counsel) is relevant to that assessment.
94. This approach is similar to that proposed recently by the Victorian Law Reform Commission.¹⁸ It carries some risks. For example, Judges may err on the side of caution and direct on issues not raised by the defence, even when that reflects a

¹⁶ See *R v Keremete* CA247/03 23/10/03 and *R v Tavete* [1998] 1 NZLR 428.

¹⁷ See *Discussion Document: Identification of the Issues in Dispute*, paragraphs 65-69.

¹⁸ Jury Directions, July 2009

deliberate decision made by counsel in the defendant's interests. We are interested in views about whether this proposal is workable and, if not, suggestions for an alternative approach.

In a jury trial, should the Judge be required to sum up on issues that are available on the evidence but have not been raised by the defence?

14. Pleas

Relevant provisions

Clauses 25-29 and 114-118 of Bill Plan

Proposed Approach

95. The Bill Plan's provisions primarily reflect the current approach. The change of most significance is that, as a matter of routine, the Courts will be required to ask defendants in all cases to plead after they have had an opportunity to obtain legal advice and have received initial disclosure from the prosecution.
96. In addition:
- 96.1. Defendants who fail or refuse to plead when asked to by the Court may have a plea of not guilty recorded, where legal advice and disclosure requirements are satisfied and there are no concerns about the defendant's fitness to plead.
 - 96.2. Defendants will not be formally 'arraigned' (plead to counts in an indictment) prior to commencement of the trial in category 4 (middle band), category 5 (High Court), and category 3 (electable) cases where there has been an election of trial by jury.

Rationale

97. Until recently, in indictable cases the defendant was not asked to plead until after committal. Even now, defendants are only asked to plead at an earlier stage following a Practice Note issued in June 2009 by the Chief District Court Judge¹⁹. Asking defendants to enter a plea at an early stage of proceedings will help ensure that cases progress to later stages only if defendants intend to defend the charges.
98. Our proposed case management processes will only commence when there is a not guilty plea. Where a defendant fails to enter a plea it is necessary for a deemed not guilty plea to be recorded by the Court for the matter to continue to progress. Currently this is what happens as a matter of practice in summary cases while a similar ability to record a not guilty plea is already provided for in indictable cases.

¹⁹ PN17 Practice Note – Committal Procedure in the District Court

99. As defendants will be required to enter a plea to the charges as filed at an early opportunity, and then to any amended charges at the time of the amendment, there is no need for a formal arraignment prior to the commencement of trial in upper-level (indictable) cases. In addition, the original or amended charges will continue without the current obligation for an indictment to be presented (refer paragraphs 113 to 116). Therefore, a plea to counts in an indictment will be redundant.
100. The changes proposed do not affect a defendant's ability to enter a plea of guilty at any stage of proceedings regardless of whether a not guilty plea was recorded earlier. Nor do the changes affect the ability of a defendant to apply to the Court to withdraw a guilty plea.

15. Case Management

Relevant provisions

Clauses 22-24 of Bill Plan

Proposed Approach

101. Effective case management is essential to achieving many of the aims of our reforms. To this end we propose mandatory case management memoranda to facilitate discussions between the prosecution and defence with the aim of resolving issues between themselves sooner and, if possible, prior to any subsequent court event. We have also been conscious of the need to design processes aimed at ensuring that all appearances at court are 'meaningful', in the sense that cases can be actively progressed.
102. We consider that many case management improvements can be implemented administratively and those legislative provisions that are necessary are largely best left to regulations rather than the primary legislation (refer also to paragraphs 8 to 9). This is reflected in the Bill Plan, which includes provisions that impose a burden on the prosecution and defence to manage their cases in accordance with the prescribed procedures, and provides a regulation making power only.

Rationale

103. It has become a feature of the court process that case management activities are largely centred around the court rather than by cases being actively managed between court appearances. This includes the taking of instructions from clients, charge negotiations, and discussions between the prosecution and the defence. Our proposed process places the responsibility for managing cases back on the parties. The prosecutor and defence counsel are officers of the Court and should progress cases responsibly and professionally without the need for court intervention to require them to do so. Defendants also have a responsibility to cooperate, and to instruct their counsel in a timely manner. (This is why we also propose mechanisms to help ensure compliance with procedure at paragraphs 166 to 171, below.)

Criminal Process Generally

104. We have considered criminal procedure as occurring in three stages:

- 104.1. the administration stage;
 - 104.2. the review stage; and
 - 104.3. the trial stage.
105. In the administration stage, matters dealt with include disclosure, bail, name suppression, and arrangements for legal representation. It is currently often characterised by 'churn' (repeated appearances) and delay. Reasons have included difficulties with Police disclosure (although we note that the Criminal Disclosure Act 2008 is likely to be reducing disclosure delays), in the assignment of legal aid, and with the fact that counsel has failed to take instructions in a timely manner.
106. In the review stage, full disclosure is provided, charges may be withdrawn or amended, and a sentence indication may be sought by the defendant (who may also change their plea). While this stage is principally about parties preparing for trial, activity in this stage is often centred around scheduled court events, such as status hearings. For indictable cases, this stage includes committal processes.
107. In the trial stage evidence is presented and a verdict given. For indictable cases, this stage includes callover and pre-trial hearings.

Proposed Process: Category 1 (Non-Imprisonable) Cases

108. The process we propose is as follows:
- 108.1. The defendant may enter a plea by giving notice to the Registrar, including submissions about suitable sentence, if appropriate. The notice, to be prescribed in regulations, will be served on the defendant with the summons to appear.
 - 108.2. If the defendant pleads guilty by notice, sentencing will occur as far as possible on the date given in the summons. The defendant may appear, or sentencing can occur in the defendant's absence.
 - 108.3. If the defendant pleads not guilty by notice, a lower-level trial (defended hearing) will be held. If the defendant does not appear, the Court may proceed by way of formal proof (evidence given in affidavit form rather than by examination). If found guilty, sentencing may also occur in the absence of the defendant.
 - 108.4. If the defendant does not enter a plea by notice, the Court will expect the defendant to appear on the date given in the summons. If the defendant does not appear, the matter may proceed by way of formal proof and sentencing may also occur, if found guilty. If the defendant does appear, the defendant may enter a plea.

108.4.1 If that plea is guilty, the defendant will be sentenced or the matter will be set down for sentencing.

108.4.2 If that plea is not guilty, the matter will be set down for a lower-level trial (defended hearing). If the defendant does not appear on that date the Court may proceed in the defendant's absence (by way of formal proof), including for sentencing if appropriate.

109. This process does not differ from the current process for non-imprisonable offences except that we propose that the form of notice given to the defendant be prescribed in regulations. Currently, there is no requirement for defendants to be informed of their right to give sentencing submissions (particularly where a discharge without conviction may be an appropriate sentence), irrespective of an intention to appear. We propose the new notice include this information.

Proposed Process: Category 2 (Summary) and 3 (Electable) Cases

110. The process we propose is as follows:

110.1. Appearances in the administration stage of proceedings (that is, up to the point of plea) should be limited to a maximum of two (as a matter of best practice). To achieve this, there needs to be early Police disclosure of the information necessary to inform decisions about plea, and legal aid assignments need to be made in a timely manner and at the earliest stage possible. This is to be achieved by developing best practice protocols between prosecuting agencies and the courts (as was tested at Manukau and Tauranga District Courts, refer Appendix 2) and through the improvements we expect as a result of the review of legal aid conducted by Dame Margaret Bazley (refer paragraphs 202 to 205).

110.2. After entry of a not guilty plea the defendant is remanded to a review date and a case management memorandum is issued to the defence.

110.3. The prosecution and defence are required (outside of the court) to enter into case management discussions, jointly complete the case management memorandum, and file it in court at least five working days before the review date. The memorandum will identify whether, as a result of those discussions, there is to be a guilty plea, a not guilty plea is to be maintained, an election is to be made or some form of judicial intervention is required (for example, the defendant may have requested a sentence indication).

110.4. A hearing before a judge to review the case is only held if the memorandum indicates a specific need for judicial intervention (prior to scheduling a lower-level trial).

- 110.4.1 If the defendant pleads guilty, he or she will be dealt with on the case review date or the case will be included in the next court list.
- 110.4.2 If a not guilty plea is to be maintained, and judicial intervention is required, the defendant will appear in the list court scheduled on the date of review (or will be remanded to a later date if there is no scheduled list court on that date).
- 110.4.3 If a not guilty plea is to be maintained and judicial intervention is not required and no election is made, the defendant will be remanded by the Registrar to a lower-level trial ('defended hearing) date. Counsel need not appear as the memorandum should also indicate suitable dates, although they may choose to.
111. Diagrams illustrating the proposed process and the current process are presented in Figures 1 and 2 below. The charts assume a not guilty plea is maintained throughout the process, although at many points in the process it would be possible for a defendant to plead guilty, in which case the next step would become sentencing.
112. The principal differences between the proposed process and the current process are:
- 112.1. The current process does not require parties to complete a case management memorandum or engage in case management discussions.
- 112.2. While practice varies across courts, cases are often automatically set down for a status hearing after the administration stage, whether or not they are likely to benefit from one. A status hearing or 'case review' before a judge will not be automatic under our proposed process.
- 112.3. Currently elections are entered during the administration phase (refer paragraphs 117 to 120).

Figure 3: CURRENT SUMMARY PROCESS

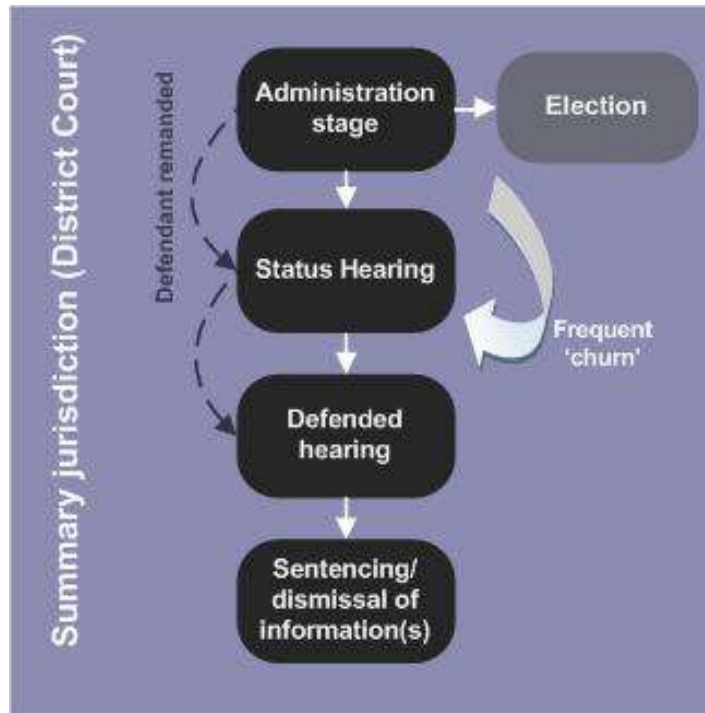
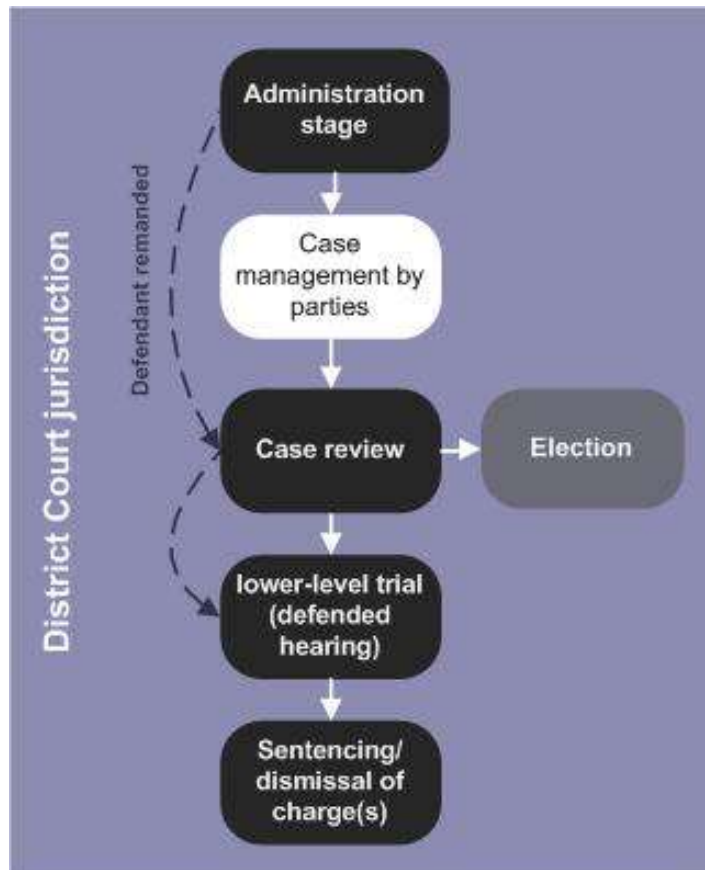


Figure 4: PROPOSED PROCESS FOR CATEGORY 2 & 3 CASES



Proposed Process: Category 4 (Middle Band) and 5(High Court Only) Cases

113. The process we propose is as follows:

- 113.1. There will be an initial and a second appearance in the administration stage of proceedings as for category 2 and 3 cases. The defendant should enter a plea by no later than the second appearance (refer paragraph 95).
- 113.2. After entry of a not guilty plea, the defendant is remanded to a review date and a case management memorandum is issued to the defence (as for category 2 and 3 cases).
- 113.3. The prosecution is generally required to serve formal written statements on the defence within 42 days of the not guilty plea being entered. These are copied to the Crown (which, under our suggestion at paragraphs 125 to 126, would then assume responsibility for the case), and notice of service is given to the court.
- 113.4. The prosecution and defence are required to enter into case management discussions, jointly complete the case management memorandum, and file it in court no later than 5 working days before the review date.
- 113.5. In the case of category 4 (middle band) offences, a District Court Judge will determine whether the case should be heard in the High Court or a District Court (that is, a 'middle band' determination is made, refer paragraphs 135 to 136).
- 113.6. As recommended for category 2 and 3 cases, a hearing before a judge to review the case is only held if the memorandum indicates a specific need for judicial intervention. If not, the defendant is remanded by the Registrar to a callover date at the trial court.
- 113.7. The case is transferred to the trial court (refer paragraph 145).
- 113.8. Immediately following transfer of the case, the prosecution is required to file formal written statements at the trial court, as well as any accompanying exhibits.
- 113.9. At callover, issues identified in the case management memorandum are discussed and (if possible) resolved, pre-trial matters are identified, and a pre-trial hearing timetabled (if required). In addition, oral submissions on any oral evidence order applications are heard (see below, at paragraphs 148 to 149). Callovers will generally be limited to a maximum of two, as a matter of best practice.
- 113.10 Before the trial date (5–10 days before), a teleconference is held to confirm readiness for the fixture.

114. The principal differences with the current process relate to our proposals to:
 - 114.1. Eliminate the committal step.
 - 114.2. Introduce a case management memorandum and require case management discussions between the prosecution and the defence.
 - 114.3. Change the stage at which a 'middle band determination' is made, the judicial officer who makes that determination, and the court to which a middle band case is initially transferred to for callover (we discuss this in more detail at paragraphs 135 to 140).
115. These reforms build upon changes already made to the committal process in 2009, and address some of the difficulties that have emerged with that process. While these changes to the committal process are still relatively new, they took a number of years to come about and, given the comprehensive nature of the current Project, consideration has had to be given to the possibility their further reform.
116. Diagrams illustrating the proposed process and the current process are presented in Figures 5 and 6 below. The charts assume a not guilty plea is maintained throughout the process, although at many points in the process it would be possible for a defendant to plead guilty, in which case the next step would become sentencing.

Figure 5: CURRENT JURY TRIAL PROCESS
(assumes 'not guilty' plea is maintained)

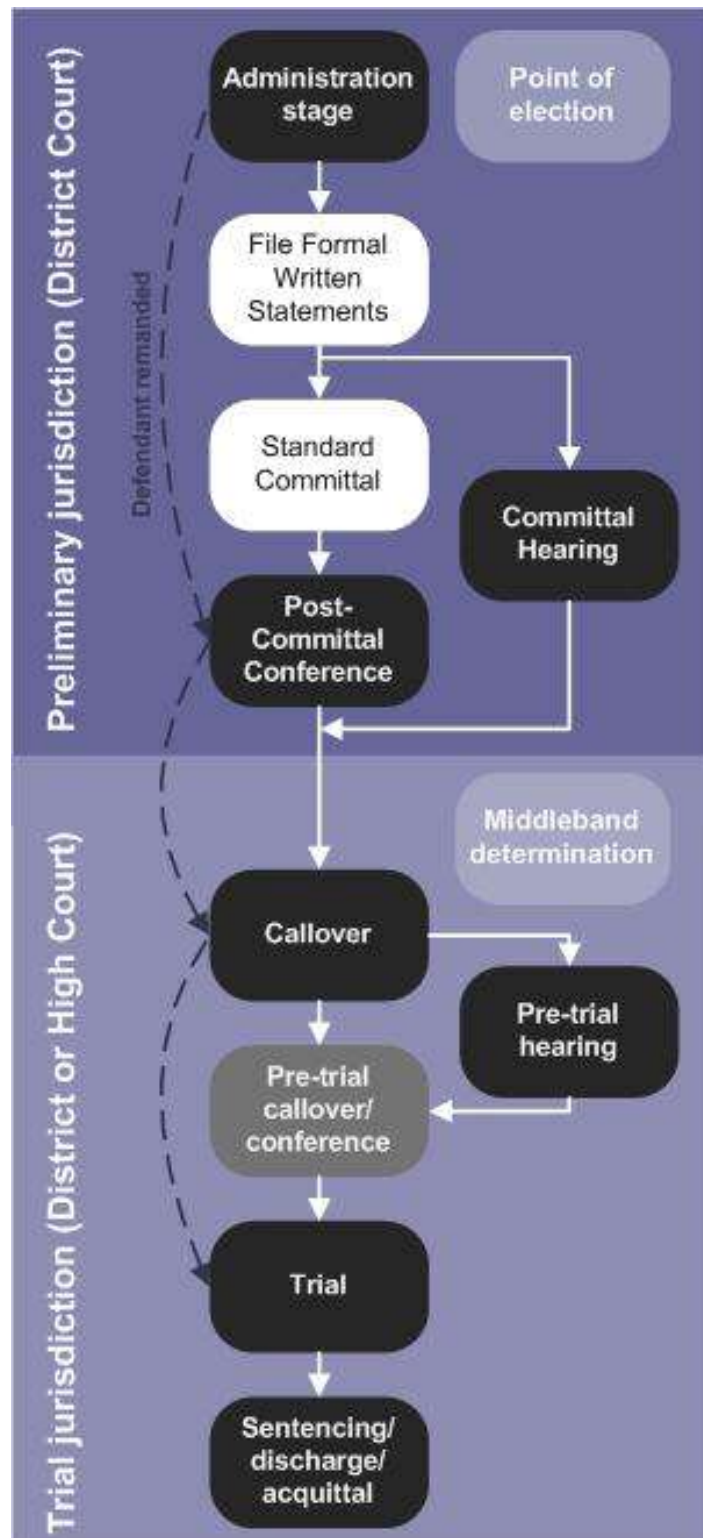
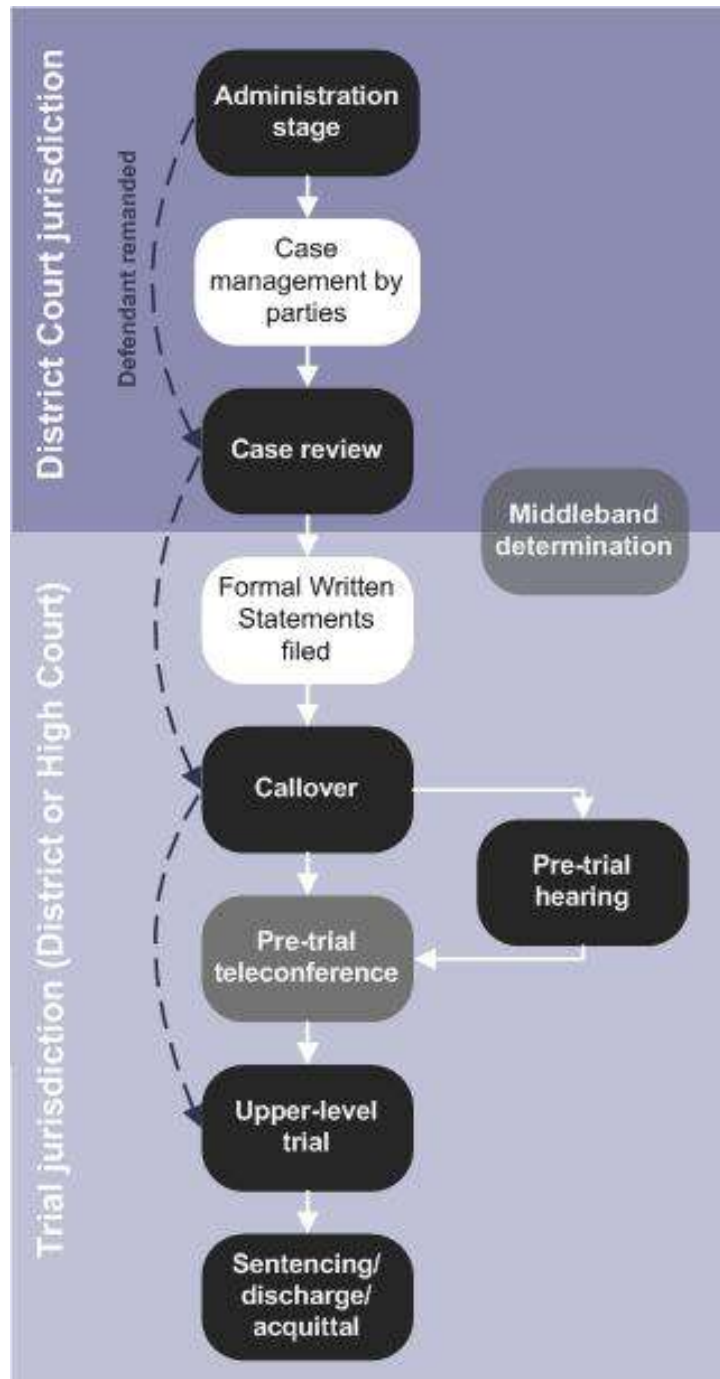


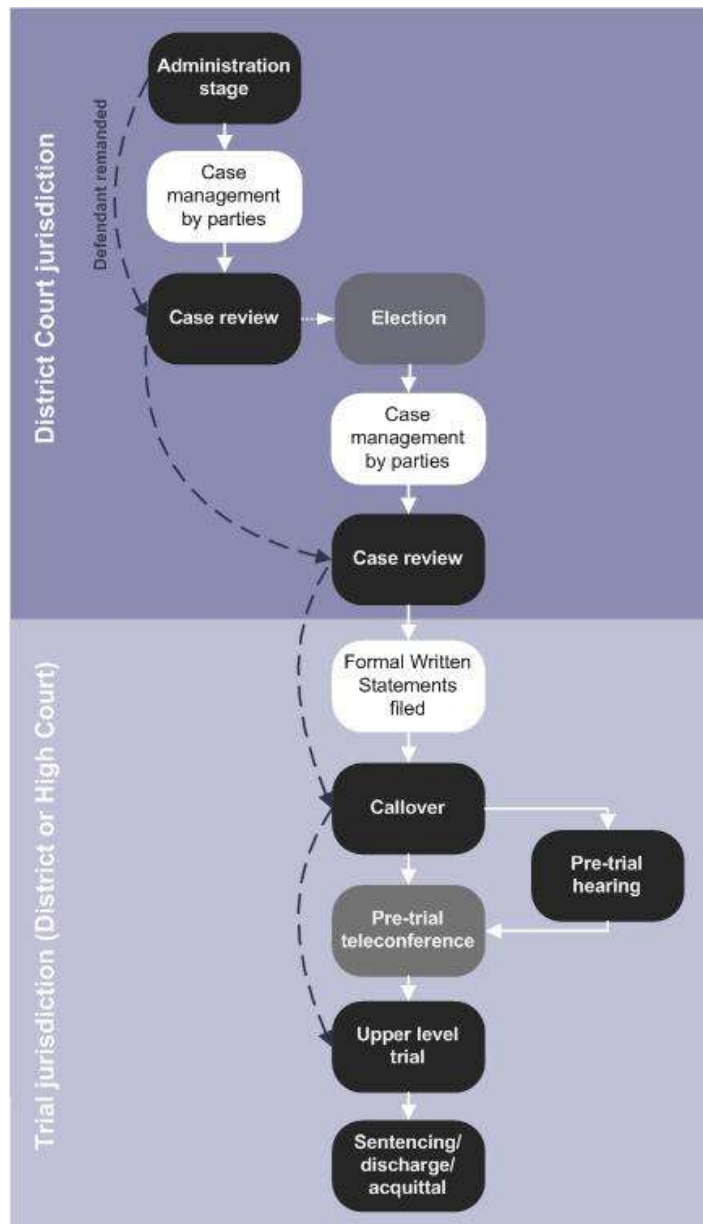
Figure 6: PROPOSED PROCESS FOR CATEGORY 4 & 5 CASES
(assumes 'not guilty' plea is maintained)



Proposed Process: Category 3 (Electable) Cases – Election Made

117. The proposed process for category 3 (electable cases) is essentially the same as for category 2 (summary) cases unless an election is made. If an election is made, an upper-level case management memorandum is issued to the defence, the prosecution is required to serve formal written statements on the defence within 42 days of election and the process continues as for category 4 and 5 cases from sub-paragraph 113.2 (including completing the upper-level case management memorandum).
118. Some changes are proposed to the process for electing jury trial:
 - 118.1. The point of election is to be postponed until after lower-level case management discussions have taken place.
 - 118.2. A decision not to elect jury trial cannot be changed without the Court's leave, which will only be granted where there has been a change in circumstances that might reasonably affect the election. For example, a co-defendant pleading guilty (see **clause 43**).
 - 118.3. An election cannot be withdrawn without the Court's leave, which will only be granted if it will not result in delay or the defendant has been ordered to be tried by jury because a co-defendant elected and that co-defendant is no longer to be tried by jury (see **clause 46**).
119. Limiting the ability of defendants to change their election will mean that current opportunities for delay are reduced. We discuss the proposal to postpone the point of election in more detail below.
120. A diagram illustrating the proposed process is presented in Figure 7, below.

Figure 7: PROPOSED PROCESS FOR ELECTED CASES
(assumes 'not guilty' plea is maintained)



Further Information

121. Further background to our case management proposals is provided in the discussion document [Criminal Procedure \(Indictable Jurisdiction\): Process Models](#) issued by the Project in June 2009 (refer Appendix 2), and in material describing the tests conducted in the summary jurisdiction at Manukau and Tauranga District Courts. (Refer to Appendix 2.)

Outstanding Issues

Point of election

122. Currently defendants elect jury trial at the time of entering a plea. At this stage, there may not have been any discussions between the prosecution and the defence in an effort to resolve the case. Accordingly, this decision may be made before the defendant is sure that he or she wishes to defend the charges. Our proposal means that there may be cases in which a defendant might elect jury trial which could be resolved before he or she elects. This will mean consequent savings in time and effort as formal written statements will not need to be prepared in these cases. It should also reduce the prospect of a defendant wishing to change his or her election at a later stage.
123. Postponing the point of election will mean that, in cases where the defendant does elect jury trial, there will be an additional period of delay for written statements to be served, and an additional requirement on parties to complete a second case management memorandum (covering items in the upper-level memorandum not included in the lower-level memorandum that would have already completed).
124. Initial modelling work suggests that approximately 845 cases would be delayed by the new process by approximately 6 weeks. On the other hand, the modelling also suggests that about 100 cases (assuming current election rates, although they may change as a result of some of our other proposals) would be disposed by guilty plea and/or withdrawal of charges before election, whereas if an election was called earlier, they would have elected trial by jury.

Should the point of election be earlier (for example, at the time of plea) or later in the criminal process (as proposed)?

Involvement of the Crown

125. Currently, in indictable cases, the Crown becomes involved in a case from the point of committal. Without a committal step there needs to be a clear understanding about the point at which the Crown becomes involved.
126. We suggest that the Crown assumes responsibility for the file at the point when case management discussions are initiated between defence and prosecution in order to complete the case management memorandum. This is effectively much earlier than currently. Further assessment of this suggestion is required.

Do you think there are benefits in having earlier Crown involvement in upper-level cases and, if so, what would the nature of the benefits be?

16. Sentence Indications

Relevant provisions

Clauses 35-41 of Bill Plan

Proposed Approach

127. The key aspects of the approach reflected in the Bill Plan are that:

127.1. A sentence indication may be given for all categories of offence at the request of the defendant.

127.2. A sentence indication may only be requested before the commencement of either a lower-level (summary) or upper-level (indictable) trial.

127.3. A sentence indication can only be given by a judicial officer with jurisdiction to sentence the defendant requesting the indication.

127.4. Before a Court provides a sentence indication as to type and quantum it must have certain minimum information.²⁰

127.5. Sentence indications cease to have any effect after 5 working days or a date specified by the Court.

127.6. A sentence indication is binding on the judicial officer that gave it unless information becomes available after the sentence indication was given, but before sentencing, and that judicial officer is satisfied that the information materially affects the basis upon which it was given.

127.7. A defendant may seek leave of the Court to withdraw a plea of guilty that was given following a sentence indication if the Judge at sentencing intends to impose a greater sentence than indicated.

128. Further background on the proposal to formalise sentence indications is provided in the discussion document [Development of a Formalised Sentence Indication Scheme](#) issued from the Project in May 2009 (see Appendix 2).

Rationale

129. A sentence indication is an indication by the Court of the sentence a defendant is likely to receive if he or she pleads guilty at that time. Such indications can result in earlier guilty pleas. This allows for earlier resolution of cases, with associated cost savings and reduced stress for victims and witnesses. This has been demonstrated in the District Courts where the practice of giving sentence indications is now well established.

²⁰ An agreed summary of facts, information as to previous convictions of the defendant, and a copy of any victim impact statement prepared.

130. Nevertheless, there is currently no statutory authority for the practice of giving a sentence indication. This raises some risks²¹ and the High Court, in particular, has consequently indicated a reluctance to provide them. The Court of Appeal has expressed support for the development of legislation authorising the use of sentence indications.²²
131. Providing legislative authority for sentence indications, with appropriate safeguards, will provide certainty and clarity in the law, encourage their use, and assist in resolving more cases earlier.

Outstanding Issues

Restriction on defendant vacating plea if harsher sentence imposed on appeal

132. The discussion document proposed that, if on a Crown appeal against sentence, the Court intends to impose a more severe sentence than that indicated, the defendant has the right to have the case remitted to the court of hearing so that a not guilty plea may be entered.
133. Following submissions on the discussion document, we now propose that where a sentence indication is given and relied upon by a defendant in pleading guilty, successful Crown appeals against sentence (on the basis that it is manifestly inadequate) will not result in an ability for that convicted person to vacate his or her plea.
134. This is on the basis that it must be assumed that any plea given is genuine and informed. As part of making an informed decision about plea, we expect that defendants would be advised that a sentence indication may not be final, including that it would not be possible for a plea to be vacated if a more severe sentence was imposed on appeal. (Note that the appeal provisions have not been drafted for the Bill Plan, see paragraphs 156 to 160.)

Do you agree that a defendant should not be able to vacate his or her plea on the basis that a more severe sentence to that indicated was imposed on appeal?

Are you satisfied that judges and counsel can be relied upon to explain to defendants the limits of the sentence indication?

Provisions Applicable to Specific Categories of Offence

17. The 'Middle Band' Process

Relevant provisions

Clause 53 of Bill Plan

²¹ For example, lack of consistency in approach in giving the sentence indication, sentence indications being given without sufficient information, inconsistent sentences and uncertainty as to rights of appeal based on the indication.

²² *R v Smail* [2008] 2 NZLR 448.

Proposed Approach

135. The key aspects of the approach reflected in the Bill Plan are that:

135.1. A District Court judge, rather than a High Court judge as currently, will initially determine whether a middle band offence should be tried in the District Court or the High Court.

135.2. The decision will be made against specified statutory criteria in light of any written submissions from the prosecution and the defence.

135.3. Despite an earlier decision that a case be tried in the District Court, a High Court judge will have a residual discretion to transfer the case to the High Court for trial. This may be done either on a High Court judge's own motion or on application by the prosecution or the defence.

136. This proposal is discussed in more detail in the discussion document [Categories of Offences and the Middle Band](#), issued from the Project in October 2009 (see Appendix 2).

Rationale

137. A middle band process is required for three reasons:

137.1. To enable factors like the public importance or complexity of a particular case to influence the Court in which a case is heard.

137.2. To enable the Courts to be responsive to the fluctuating workloads of the District Court and the High Court, consistent with the defendant's right to a trial without undue delay.

137.3. To ensure the High Court maintains a critical mass and range of trial work.

138. However, there are a number of difficulties with the current middle band process:

138.1. It does not systematically address workload issues in the court system as a whole, because it transfers work to the District Court without sufficient consultation or analysis of the implications for that jurisdiction.

138.2. It creates avoidable administrative costs upon the High Court and District Court registries.

138.3. It builds in unnecessary delay while cases are transferred to the High Court, only for a substantial majority of them to be transferred back again.

138.4. The sequence of events around middle banding leaves court customers (particularly victims and defendants) with an impression of poor service.

139. Some of these problems could be mitigated to some degree within the current middle band structure. (For example, information to victims could be improved.) However, the core difficulties with the current structure would remain. On that basis we think that significant changes are required to the way in which middle band decisions are made.

Outstanding issues

140. We understand that the Judicial Heads of Bench have met and developed proposals on how the middle-band process might best be reformed. Details of their proposals are expected shortly. We will take into account any suggestions made by the Judiciary along with feedback on the proposal in the Bill Plan before recommendations are developed for Cabinet's approval.

What are your views on our proposals in relation to the middle band process?

18. Transfer of Proceedings to the High Court

Relevant provisions

Clause 54 of Bill Plan

Proposed Approach

141. The key aspects of the approach reflected in the Bill Plan are that:

141.1. The High Court has the power to order category 3 (electable) proceedings be heard in the High Court where there has been an election of trial by jury and the case meets the criteria for transfer of a middle band case to the High Court.

141.2. The High Court has residual discretion to order category 4 (middle band) proceedings be heard in the High Court where it is satisfied that the case meets the criteria for transfer of a middle band case to the High Court but a District Court judge has earlier decided that the case should be heard in the District Court.

142. This proposal is discussed in our discussion paper [Categories of Offences and the Middle Band](#) issued from the Project on 21 October 2009 (refer Appendix 2).

Rationale

143. There are some offences that, in the event that a jury trial is elected, may be suitable for trial in the High Court. For example, serious fraud cases that involve complex financial transactions and result in major financial loss.

144. In addition it is useful for the High Court to maintain a residual ability to transfer category 4 (middle band) cases, notwithstanding that the District Court decided to hear the case.

19. Forwarding Proceeding to the Trial Court

Relevant provisions

Clauses 55-61 of Bill Plan

Proposed Approach

145. The key aspects of the approach reflected in the Bill Plan are that:

145.1. All cases commence in the District Courts jurisdiction (refer paragraph 48).

145.2. Category 4 and 5 (middle band and High Court only) proceedings, and category 3 proceedings where the defendant has elected trial by jury, are forwarded to the trial court after 'case review'. (Note: The 'case review' stage starts after a plea of not guilty has been entered and includes service of formal written statements, completion of the case management memorandum, judicial intervention, if required, and making a middle band decision, in appropriate cases. See paragraphs 113 to 115.)

Rationale

146. Currently committal is the trigger to transfer a case. Without the committal step another trigger is required. On review, it will be clear whether a case is to proceed to trial. At this point the defendant can be remanded to a callover date and it is appropriate to transfer the case file.
147. The proposal requires that there be active case management at an early stage of the process before a case is forwarded to the trial court. This will ensure that cases are only forwarded when it is clear that they are to progress to trial.

20. Written Statements and Oral Evidence before Trial

Relevant provisions

Clauses 63-80 of Bill Plan

Proposed Approach

148. The key aspects of the approach reflected in the Bill Plan are that:
- 148.1. Formal written statements are served on the defence prior to these (and any accompanying exhibits) being filed in Court.
 - 148.2. Notice that formal written statements have been served on the defence is filed in the Court with preliminary jurisdiction.
 - 148.3. The formal written statements (and any accompanying exhibits) are filed in the trial court following transfer.
 - 148.4. Applications for an oral evidence order are made to the trial court. Oral submissions for oral evidence orders can be dealt with at callover.
 - 148.5. Where an application for an oral evidence order is successful, the oral evidence is heard at a pre-trial hearing, or the evidence may be heard before a Registrar or a judicial officer, as appropriate.
149. Most aspects of this proposal are discussed in more detail in our discussion paper [Criminal Procedure Case Progression Model](#) issued from the Project in June 2009 (see Appendix 2).

Rationale

150. Without a committal step, written statements are not required by the Court with preliminary jurisdiction (and currently they are not considered by that Court unless an oral evidence application is filed in any case²³). Written statements are, however, necessary to enable the defence to participate fully in case management discussions and should, therefore, be prepared and provided to the defence within the same timeframes as they are currently provided to the Court.
151. Under our case management proposals (refer paragraph 113), parties will indicate on the case management memorandum whether they intend to apply for an oral evidence order. They will apply to the trial court at first callover.
152. We expect oral evidence orders to be uncommon²⁴. However, if granted, they will often involve cases where the Court will later hear evidence from the same

²³ Under the section 177 Summary Proceedings Act 1957, the Court must commit the defendant for trial without considering the evidence, unless an application for an oral evidence order is made.

²⁴ From 1 July to 31 October 2009, 97 Oral Evidence Order applications were received and, of these, 19 were granted.

witnesses as part of a pre-trial application for the exclusion of evidence. An ability to hear the oral evidence as part of the pre-trial process will mean that it need not be heard on multiple occasions. This will reduce costs in those cases where oral evidence is heard and will also mean much less disruption for witnesses and victims.

153. Where there is no advantage in the oral evidence being heard at a pre-trial hearing, there is the flexibility to order it be heard before a Registrar or judicial officer, such as a Justice of the Peace.

F. Provisions Relating to Trial

21. Lower-Level (Summary) and Upper-Level (Indictable) Trials

Relevant provisions

Clauses 81-90, 93 and 96-97 of Bill Plan

Proposed Approach

154. We do not propose any substantive change in lower-level (summary) or upper-level (indictable) trial procedure except in relation to:
- 154.1. Requirements on the defence to identify issues in dispute (discussed at paragraphs 85 to 94).
 - 154.2. The reframed ability to proceed in the defendant's absence (discussed at paragraphs 172 to 174).
 - 154.3. Upper-level (indictable) trials in relation to jury numbers (discussed at paragraphs 181 to 185).
155. However, we do propose that sections 337 and 338 of Crimes Act 1961, apply equally to lower-level (summary) trials as to upper-level (indictable) trials (refer to paragraphs 189 to 191).

G. Appeals

22. Appeal Paths

Relevant provisions

Relevant provisions are not yet drafted

Proposed Approach

156. The proposed approach is not yet finalised.
157. Initial consultation on appeal processes has already taken place as part of this Project (see discussion document: [Sentencing Jurisdiction and Appeals](#), Appendix 2). Since that consultation occurred, proposed changes have been developed to other aspects of criminal procedure which have implications for the way in which appeals should be dealt with. This includes, for example, the abolition of the concept of a case being ‘committed’ for trial, as well as changes to the types of cases that will be dealt with in the lower-level (summary) and higher-level (indictable) jurisdictions.
158. A further discussion paper, [Appeal Paths](#), has therefore been prepared by the Project that identifies additional options for future appeal paths. These can be divided into two broad alternatives:
- 158.1. Current appeal paths could be reflected to the extent possible in light of other changes to criminal procedure.
- 158.2. Appeal paths could take a more hierarchical approach.
159. The paper is available in Appendix 4. Questions for discussion are included as an Annex to this paper and views on any part of it are welcome.
160. The proposed approach to appeal paths will be finalised once consultation on the paper has taken place. That approach will then be reflected in the Bill that is introduced into Parliament.

You are invited to make comments on the discussion paper, [Appeal Paths](#), in Appendix 4.

23. Attorney-General’s References

Relevant provisions

Relevant provisions are not yet drafted.

Proposed Approach

161. We propose that the new Criminal Procedure Bill contain provisions that would enable the Attorney-General to refer questions of law arising from criminal proceedings to the Court of Appeal and, if necessary, to the Supreme Court. The key aspects to the reference procedure proposed are that:

- 161.1. The Attorney -General will be able to refer questions of law in criminal cases to the Court of Appeal by leave with the defendant's acquittal or discharge on the charge(s) that he or she faced at trial left unaffected.
- 161.2. It will be used for significant questions of criminal law which do not come to an end when the trial in which the issue arose concludes. The purpose of the appeal would be to clarify the law for future cases.
- 161.3. The reference should be available whether the accused person was acquitted or convicted.
- 161.4. The procedure should be available in respect of issues arising during both lower-level (summary) trials and upper-level (indictable) trials.
- 161.5. The Court of Appeal should determine whether to give leave to consider a reference, with a further appeal to the Supreme Court with that Court's leave.
- 161.6. References will be undertaken by way of adversarial proceeding. To achieve this, it is likely that court-appointed counsel will be required (or, at least, *amicus*) to argue the defence case.

Rationale

162. There is currently a gap in prosecution rights of appeal that may be addressed by an Attorney-General's reference procedure like that in the United Kingdom. The purpose of the proposed Attorney-General's reference is to enable aspects of criminal law, of significance beyond the immediate case, to be determined without affecting the outcome of the particular case in which the issue arose.
163. We discussed a proposal to enable Attorney-General's references in a discussion paper entitled [Attorney-General's reference for New Zealand](#) issued from the Project in July 2009 (see Appendix 2). That paper provides further background to our proposal for Attorney-General's references, which has been developed following the (limited) feedback we received on that paper.
164. It is anticipated that the reference procedure would be exercised sparingly.

Outstanding Issues

165. We would welcome any comments on these proposals or on other issues that arise from them.

H. General Provisions

24. Mechanisms to ensure Compliance with Obligations

Relevant provisions

Relevant provisions are not yet drafted.

Proposed Approach

166. We propose that:

166.1. In sentencing or otherwise dealing with an offender, the Court will be required to take into account, to the extent it is applicable:

166.1.1 The failure of the prosecution or the offender to comply with a requirement imposed on them by or under the new criminal procedure legislation;

166.1.2 Steps taken by the offender to expedite or reduce the cost of proceedings.

166.2. When appropriate, the Court will be able to impose a costs order against defence counsel or the prosecutor if satisfied that either party has failed without reasonable excuse to comply with a requirement imposed by or under the new criminal procedure legislation.

167. Further, we propose that the courts' administration will establish systems to capture information in relation to parties' compliance with procedural timeframes. Registrars will have the ability to generate reports on compliance rates for different participants in criminal proceedings. These will be able to be provided to relevant authorities (for example, New Zealand Police, Crown Law, New Zealand Law Society or Legal Services Agency).

168. These proposals are discussed in more detail in the discussion document [*Mechanisms to Ensure Compliance with Criminal Procedure Obligations*](#) issued from the Project in May 2009 (refer Appendix 2). They supplement measures that are being taken in other areas to regulate the performance of practitioners in the criminal justice system. This includes, for example, recommendations arising from Dame Margaret Bazley's review of the legal aid system (see paragraphs 202 to 205).

169. A further mechanism that will assist in promoting compliance is our proposal, discussed in the next section (paragraphs 172 to 174), to provide more flexibility for court proceedings to carry on where a defendant fails to appear at a hearing.

Rationale

170. The current system has few consequences for defendants, defence counsel or prosecutors if they fail to do what is required of them or otherwise needlessly prolong proceedings.
171. Mechanisms are therefore needed to:
 - 171.1. Effect a change in culture to ensure that the behaviour of defendants, defence counsel and prosecutors does not unnecessarily contribute to court delays;
 - 171.2. Support other reforms to criminal procedure which will involve changes to some long-established and entrenched practices.

25. Proceeding in the Absence of the Defendant

Relevant provisions

Clauses 124-131 of Bill Plan

Proposed approach

172. The key aspects of the approach reflected in the Bill Plan are that:
 - 172.1. The defendant may be present during any hearing in relation to the charge against him or her. The Court may proceed in the defendant's absence if the defendant interrupts the proceeding to such an extent that it is impracticable to continue in his or her presence, or the Court has permitted the defendant to be out of court.
 - 172.2. The defendant must be present at any hearing if he or she has been summonsed or remanded in custody, on bail, or at large to attend that hearing.
 - 172.3. As currently, a defendant charged with a summary non-imprisonable offence may be tried and sentenced in his or her absence.
 - 172.4. Once a plea has been entered, a defendant charged with any other offence may be tried (but not sentenced) in his or her absence. The Court must do so if satisfied that the defendant does not have a reasonable excuse for his or her absence, unless that would be manifestly unjust. There are non-exhaustive statutory criteria to assist the Court to make this assessment.
 - 172.5. When the defendant is tried and convicted in his or her absence, the Court may set aside the conviction and order a retrial if the defendant establishes that he or she has a

defence that would have had a reasonable prospect of success if he or she had attended the trial.

173. This proposal is discussed in more detail in the discussion document [Proceeding in the Absence of the Defendant](#), issued from the Project in May 2009 (see Appendix 2).

Rationale

174. Defendants commonly cause delay by failing to appear in court when required. The result is generally an adjournment (sometimes indefinitely, in cases where the accused has absconded) and the issue of an arrest warrant. Proceeding without the defendant, rather than adjourning in the hope that a defendant will turn up, prevents defendants dictating when the case against them will proceed. It ensures that a trial proceeds as scheduled; reduces inconvenience and stress to victims, witnesses, and jurors; and reduces the risk of witnesses' memories fading.

26. Registrars' Powers

Proposed approach

175. We propose that Registrars of the District Courts are empowered to exercise their quasi-judicial functions in any District Court. More particularly, we propose that an amendment be made to section 12 of the District Courts Act 1947 by adding a new subsection to allow a Registrar to exercise jurisdiction in respect of any proceeding commenced in a court other than the one to which he or she has been appointed.

Rationale

176. District Court Registrars are currently empowered by legislation to exercise a number of quasi-judicial functions²⁵. However, their jurisdiction is currently limited within the geographical boundaries of the District Court to which they are appointed²⁶.
177. In order to assist with high volume work, and to enhance operational flexibility, Registrars are often appointed to multiple District Courts. However the extent of their jurisdiction remains confined within the boundaries of the specific District Courts to which they are appointed.²⁷
178. Progress towards greater use of technology for filing, processing and management of cases in the District Courts presents opportunities to improve court services. In order to fully realise the benefits presented by these

²⁵ Generally, a Registrar's jurisdiction:

- predominantly relates to procedural matters;
- is exercised in the Court Registry, or Chambers or Registrar's List Court;
- only arises where a Judge is not available and directs the Registrar (on some occasions), and
- in some situations, arises only where all parties to be affected by the order consent to an order being made.

²⁶ This reflects the structure of the District Courts, which are established by section 3 of the District Courts Act 1947.

²⁷ In contrast, District Court Judges are appointed to exercise civil and criminal jurisdiction within New Zealand. (that is, their jurisdiction is not limited to a particular District Court).

opportunities, however, it is necessary to remove geographical restrictions to allow Registrars to exercise their powers in any District Court in New Zealand.

179. Consideration is also being given to locating all references to Registrars' powers in one part, or sub-part, of the new Criminal Procedure Bill for ease of access and reference. (See, for example, part 2, sub-part 2, of the High Court Rules, particularly rule 2.5, which sets out Registrars' jurisdiction and powers relating to interlocutory applications.) However, further work is required to determine how feasible this proposal is.

Legislative Vehicle

180. District Court Registrars' powers are currently also being considered in the context of development of the proposed Courts and Criminal Matters Bill (which has existing Cabinet approval to remove restrictions in relation to the civil enforcement regime²⁸). It is desirable to make the desired changes only once. If the Courts and Criminal Matters Bill is likely to pass before the proposed new Criminal Procedure Bill then this amendment will be contained in that vehicle.

²⁸ The limitation was previously removed for fines enforcement by section 106D of the Summary Proceedings Act 1957.

I. Miscellaneous Issues

27. Jury Numbers

Relevant provisions

Relevant provisions are not yet drafted.

Proposed Approach

181. We propose that trials should proceed when jury numbers fall to ten, subject to Judges' existing powers to dismiss the whole jury if there is good reason. The ability to proceed with fewer than ten jurors where the parties consent should also be retained.
182. In addition, we propose that the relatively new provisions that allow majority verdicts apply equally to juries of ten²⁹.
183. These proposals will require amendments to the Juries Act 1981. While we have not included any such provisions in the Bill Plan, we anticipate the appropriate amending clauses would be in the Bill when it is introduced.

Rationale

184. When two jurors are dismissed from a jury "exceptional circumstances"³⁰ must exist for the case to continue, and the Supreme Court has said this creates a high threshold³¹. This means that in circumstances where jury numbers fall to ten, trials usually need to be abandoned and a retrial called. This is both costly and stressful for all parties.
185. We discussed options for addressing this problem in our paper [Options for avoiding re-trials following the discharge of jurors after trial commencement](#), issued in November 2008 (see Appendix 2). Following consultation our views remain that:
- 185.1. A jury of ten is still large enough to be representative and to provide robust decision making (unless there are circumstances relating to the particular case that would make it unfair).
- 185.2. The policy objectives for permitting majority verdicts³² are just as relevant to ten member juries as to larger juries, and the agreement of nine is sufficient in the circumstances prescribed for accepting majority verdicts.

²⁹ Section 29C of the Juries Act 1981 allows for verdicts agreed by all but one juror to be accepted. This section was added by the Juries Amendment Act 2008.

³⁰ Section 374A Crimes Act 1961

³¹ *Rajamani v The Queen* SC ;8/2007 [2007] NZSC 68; *Wong v The Queen* SC 53/2007 [2008] NZSC 29

³² These objectives were to ensure appropriate verdicts are not subverted by single rogue jurors, to reduce hung juries and consequent stress for all participants, and to reduce costs to society by reducing retrials.

28. Suppression Orders

Relevant provisions

Relevant provisions are not yet drafted.

Proposed Approach

186. The proposed approach is not yet finalised.

Law Commission Report

187. The Law Commission published a report, [Suppressing Names and Evidence - NZLC R 109](#) on 16 November 2009.³³ The Report concludes that a number of changes are required to the existing suppression framework to place greater emphasis on the principle of open justice and to ensure that departures from this principle are based on transparent, explicit, and consistent grounds.

Government Response

188. Further consideration is being given to these recommendations before the Government decides its response to the Law Commission's Report. Any changes agreed to will be included in the new Criminal Procedure Bill.

29. Miscellaneous Drafting Issues

Clauses 144, 146 and 147 – Included offences and attempts

189. **Clause 144** reflects, in simpler terms, the established principle in section 339(1) of the Crimes Act 1961 that a defendant may be convicted of an offence that is included in the offence with which he or she has been charged, even if he or she is not convicted of the charged offence. Similarly, **clauses 146 and 147** carry over sections 337 and 338 of the Crimes Act 1961, which relate to convictions for attempts.
190. Currently, all three sections apply only to indictable proceedings. In summary proceedings, the original charge is simply amended by the Judge to the offence with which the defendant is convicted.
191. As drafted, the Bill Plan applies these sections to both lower-level and upper-level trials. This is because, as a matter of principle, we see no reason why these matters should be treated differently according to the type of trial in which the charge is dealt with. This does, however, change the current approach.

*Should **clauses 144, 146 and 147** apply to both lower-level and upper-level trials?*

If not, what should the provision for each level of trial contain (that is, what are the key differences in these matters between lower-level and upper-level trials)?

³³ This report is available on the New Zealand Law Commission's website at: <http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=158>.

Clauses 80 and 107 – Power to discharge defendant before trial

192. Section 347 of the Crimes Act 1961 is replicated in **clause 80** (in relation to discharges before the trial) and **clause 107** (in relation to discharges at the trial).
193. As with section 347, both clauses contain a broad discretion to discharge a defendant. **Clause 80** specifies one ground in which a discharge may be appropriate (when a properly directed jury could not reasonably convict on the evidence) but otherwise does not provide any statutory criteria or guidance about when a discharge may be granted. We are interested in your views about whether any additional guidance should be given.
194. For example, existing case law³⁴ has established that a discharge may be appropriate in the following two broad situations:
- 194.1. When no useful purpose would be served by the proceedings continuing – for example, because the defendant has pleaded guilty to associated charges or because the facts indicate that only a nominal punishment is likely to be imposed.
- 194.2. When continuation of the proceedings amounts to an abuse of process – for example, because it is impossible for a defendant to receive a fair trial or because continuing with the trial would “tarnish the Court’s own integrity or offend the Court’s sense of justice and propriety”.³⁵
195. We are not aware of any difficulty in the application of section 347 to indicate that statutory guidance is required. However, the inclusion of some guidance may provide additional transparency and clarity about when a discharge may be granted.

*Should **clauses 80 and 107** include statutory guidance or criteria, based on current case law, about when a discharge may be granted (in addition to the proposed ground relating to evidential insufficiency)?*

Clause 17 – Issue of summons or warrant to arrest defendant

196. Currently, a District Court Judge has a broad discretion to issue a warrant to arrest a defendant charged with a non-imprisonable offence and bring him or her before the Court.³⁶ Registrars, Community Magistrates and Justices of the Peace may only issue a warrant for a defendant’s arrest if the defendant is liable on conviction to a sentence of imprisonment.³⁷
197. The Bill Plan does not contain any ability for a warrant to be issued to arrest a defendant who is charged with a non-imprisonable offence. This is because, as a matter of principle, we think that it is inappropriate to enable a defendant to be arrested and held in custody when he or she is not liable to a sentence of imprisonment. In addition, as now, proceedings will be able to continue on the

³⁴ Based on discussion in Adams on Criminal Law, CA 347.01.

³⁵ *Fox v Attorney-General* [2002] 3 NZLR 62 (CA), 72.

³⁶ SPA, section 19(1)(c).

³⁷ SPA, section 19(1)(b).

basis of formal proof when a defendant charged with a non-imprisonable offence fails to appear in court. We also understand that it is rare for a warrant to be issued in relation to these defendants.

198. The only situation where we think an ability to arrest a defendant charged with a non-imprisonable offence may continue to be required is when a defendant issued with a summons is evading service. In that situation, there is no other mechanism that would enable a defendant to be brought before the Court.
199. We are interested in views as to whether there are any other situations when a warrant to arrest a defendant charged with a non-imprisonable offence may be required. We are also interested in views about whether, in light of those situations, an ability to issue a warrant in respect of a defendant charged with a non-imprisonable offence is required.

Should the Bill contain a power to issue a warrant to arrest a defendant charged with a non-imprisonable offence?

In what situations would that power be required?

Clause 139 – Trial of different charges together

200. The Bill does not carry over section 344AA and those provisions in section 344 of the Crimes Act 1961 that deal specifically with the way in which charges relating to money laundering and receiving offences may be tried. In our view, there is no need to make specific provision for these offence types. Instead, they can be dealt with under the general provisions that relate to the hearing of charges together (see **clauses 139 and 140**).

Do you agree that there is no need to make specific provision for the way in which money laundering and receiving charges may be dealt with?

Clause 109 – Motion in arrest of judgment. Sentence

201. The Bill Plan includes a placeholder for section 371 of the Crimes Act 1961. Broadly, section 371 enables an accused on being found guilty or pleading guilty to move that the indictment does not state any crime. We are not aware of the section being used in recent times, and propose its repeal on that basis. We are interested in views on the continued need for the section (including any recent examples of its use).

Should section 371 of the Crimes Act 1961 be included in the new Criminal Procedure Bill?

J. Links to Other Initiatives

30. *Legal Aid Review*

202. The recent review of the legal aid system chaired by Dame Margaret Bazley found that the legal aid system is facing serious challenges. The review report, [*Transforming the Legal Aid System – Final Report and Recommendations*](#)³⁸ was released on 27 November 2009 and makes 86 recommendations to improve the provision of legal aid services in New Zealand. The Minister of Justice has indicated his intention to implement a number of Dame Margaret's recommendations and to consider in more detail a number of others before deciding how to respond to them.
203. We expect improvements to legal services to complement improvements to procedures we recommend in this paper. The success of any procedure largely depends on the contribution of all those who participate in it. In the case of criminal procedure, those who participate include Judges, prosecutors and defence lawyers, among others.
204. While it is beyond the scope of this paper to consider Dame Margaret's recommendations in any detail, a high proportion of defendants are legally aided. Any improvements to services provided to them are therefore likely to positively impact on the timeliness and efficiency of criminal cases more generally.
205. More specifically, we expect improvements resulting from improving procedures for accessing criminal legal aid, improving the quality of advice to legally aided defendants, and providing the proper incentives (for example, reflected in fees structures) for progressing legal aid cases efficiently.

31. *Auckland Service Delivery Programme*

206. The Auckland metropolitan region is the area of the greatest workload pressure for courts. The number of outstanding cases on hand is higher in the Auckland region than in other region, and cases on hand are older. Further, people in Auckland face longer waiting times for matters to be disposed than elsewhere in New Zealand.
207. The Ministry of Justice established the Auckland Service Delivery Programme in November 2007 to identify operational improvements for the greater Auckland region, recognising the particular challenges of delivering court services to this large and growing population. The programme is investigating options for increasing capacity and efficiency across the region by, for example, improved use of technology to meet customer needs, and co-locating like activities.
208. The programme covers a wider scope than just the criminal courts. However, the reforms proposed in the Bill Plan will assist a number of the improvements being pursued as part of the Auckland Service Delivery Programme (for example, improved use of technology).

³⁸ The report is available at <http://www.justice.govt.nz/publications/global-publications/t/transforming-the-legal-aid-system/transforming-the-legal-aid-system>.

32. Electronic Operating Model

209. The Ministry of Justice has established the Electronic Operating Model Project to develop high level requirements and options for increasing the use of electronic information in courts. As noted earlier in this paper, courts' current operating model is paper-based. However, in the future there will be an increasing reliance on electronic information.
210. The Electronic Operating Model Project is planning how to manage this transition (which is expected to occur over a number of years). In the criminal courts greater use of electronic information requires changes to the legislative framework recommended in this paper to permit electronic transfer and management of information and records.
211. The Electronic Operating Model focuses on simplifying the number of steps in the existing work-flows and leveraging existing and (some) new technology to replace paper court records and case files with an electronic court record and greater electronic case management for all parties.
212. At its heart, the model proposes replacing paper court records and case files with electronic court records through electronic filing and case management for all parties. Maintaining appropriate security of access will be a primary consideration as the shift to an electronic operating model occurs to ensure the integrity of the court record is maintained.
213. The benefits of an electronic model are smarter, faster and more integrated delivery of services. The proposal is not simply about implementing a technology solution, but improving the way the court system operates.

K. Next Steps

33. Development of Further Policy Proposals

214. This paper makes proposals for reform in a number of significant areas. However, there remain a number of other areas of policy in relation to criminal procedure that require consideration before a new Criminal Procedure Bill can be prepared for introduction. Further consultation on these issues will be initiated after the New Year. These issues include, but are not restricted to those under the headings below.

Unrepresented defendants

215. Defendants who choose not to be represented by legal counsel raise their own set of challenges for court procedures. For example:

215.1. it may not be appropriate that they enter into certain negotiations with prosecutors;

215.2. they often do not understand procedure and require court staff to explain it to them; and

215.3. they may need assistance to complete documents.

216. Once we have completed our proposals we consider that we will need to review all of them to determine that the appropriate provisions are made for unrepresented defendants.

Court Record

217. There is currently some lack of clarity as to what precisely constitutes the 'court record'. This issue and associated issues such as whether and in what form the 'Crown Book' should be kept, become particularly important in the context of an electronic operating environment. We will, therefore need to resolve these issues in the new Criminal Procedure Bill in order to facilitate future increased use of information technology and appropriate security of information.

Implications for Youth Court

218. We have not considered what, if any, impact our proposals may have on procedure in the Youth Courts. However, once our proposals are more settled we consider that it will be necessary to make an assessment of what implications they may have for the operation of the Youth Courts and to address any issues that may be identified.

Criminal Procedure (Mentally Impaired Persons) Act 2003

219. Limited aspects of the Criminal Procedure (Mentally Impaired Persons) Act 2003 will be reviewed in the context of the proposed reforms and in response to some minor issues that have arisen with the current legislative provisions.

Reverse Onus: Section 67(8) Summary Proceedings Act

220. Section 67(8) of the Summary Proceedings Act 1957 allocates the persuasive burden of proving the applicability of any exception, exemption, proviso, excuse or qualification to the defendant in any case tried summarily. It places a legal or persuasive burden on a defendant to satisfy the fact-finder, usually on the balance of probabilities, that the exemption clause applies. This can be contrasted with an evidential burden, which would require the defendant to point to sufficient evidence to satisfy a Judge that the exemption clause is a triable issue, after which the prosecution would still need to negate the exemption beyond reasonable doubt.
221. In our opinion, the ongoing desirability of section 67(8) needs to be reassessed in light of:
- 221.1. The legislative affirmation of the presumption of innocence in section 25(c) of the New Zealand Bill of Rights Act 1990.
 - 221.2. The recent Supreme Court decision in *R v Hansen*,³⁹ which suggests that few intrusions on the presumption of innocence will be held to be justified under section 5 of the New Zealand Bill of Rights Act.
 - 221.3. Some of our other proposals, which will alter the future operation and role of section 67(8) by increasing the proportion of cases that are to be tried summarily (category 2 offences).
222. We will release a discussion paper, canvassing the key issues and options for reform, in early February 2010, requesting submissions by 1 March 2010.

Adverse comment from failure to call a spouse to give evidence

223. Section 366(2) of the Crimes Act 1961 prohibits adverse comment on the fact that an accused does not call his or her spouse as a witness to give evidence. Similarly, section 67(5) of the Summary Proceedings Act 1957 provides that the informant may not make any adverse comment in relation to a defendant who refrains from giving evidence or from calling his or her spouse.
224. The prohibition on adverse comment upon a failure by a defendant to call his or her spouse (husband or wife) to give evidence was originally closely tied to the non-compellability of spouses rule, based on a reluctance to intrude into the sanctity of a marital relationship by compelling one spouse to give evidence that may be contrary to the interests of the other.
225. The spousal non-compellability rule was abolished by the Evidence Act 2006. This reflects the current climate in which the relationship of marriage is not one that is held out as deserving of special protection through the laws of evidence to the implicit exclusion of other relationships, and the difficulty in drawing a line as to which relationships should enjoy a greater level of 'protection'.

³⁹ [2007] 3 NZLR 1.

226. In light of these considerations, it is proposed that there is no longer a justification for the prohibition contained in sections 366(2) and 67(5) in relation to failure to call a spouse to give evidence.

Adverse comment from the defendant's failure to give evidence

227. There are also wider issues as to comment that may be made and inferences that may be drawn from failure of a defendant to give evidence. These need to be considered in light of *Trompert v Police* [1985] 1 NZLR 357⁴⁰ which held that a fact-finder (Judge or jury) can draw inferences where giving evidence or calling another to do so may have provided an explanation for, or clarification of, a material matter in the case. Subsequent cases have acknowledged that, even where comment on the election of the accused not to give evidence is prohibited, there is no corresponding prohibition on the fact-finder drawing inferences from that silence, or from a failure to call other witnesses.⁴¹
228. A discussion paper on these issues and on possible legislative reform will be released in early February 2010, requesting submissions by 1 March 2010.

34. Implementation

229. We are aware that, due to the magnitude of the changes we are proposing, implementation of the recommendations in this paper will pose significant challenges for both courts and others who participate in criminal proceedings. Many of these challenges will be operational in nature, and we note that the Ministry of Justice, New Zealand Police and other key justice sector agencies are already beginning to consider how this might be managed.
230. Careful consideration will need to be given to both the sequencing and timing of the proposed changes, including commencement and transitional provisions for the new Bill. Further, it is critical that the legislative changes are carefully aligned with the necessary operational changes.

35. Consequential Amendments

231. When the new Criminal Procedure Bill is introduced to Parliament it will contain a large number of consequential amendments to other enactments to reflect the new scheme. For example, offence provisions will be amended to omit references to 'summary' conviction' or conviction 'on indictment'. Enactments that provide for a different sentence if a person is summarily convicted of an indictable offence will be amended to remove that different sentence for summary conviction.
232. While there is no need for people commenting on the Bill Plan to suggest amendments such as these, we welcome any suggestions of any especially

⁴⁰ The Court of Appeal decision in *Trompert* emphasises that allowing a fact finder to draw obvious inferences does not impinge upon the right to silence.

⁴¹ See *R v Butcher & Burgess* [1992] 2 NZLR 257 (adverse inference may be drawn if accused remains silent at trial in the face of evidence pointing to guilt); *R v Clarke* CA417/93 (16/12/93) (circumstances from which an adverse inference may be drawn does not contravene ss 23 or 25 NZBORA nor does it amount to compulsion to give evidence); *Drain v Police* (1994) 11 CRNZ 576 (no breach of section 25 (c)or(d) NZBORA from adverse inference from failure to give evidence); and *R v Nobakht* [2007] NZCA 488 (a judge may comment on an accused's decision not to give or call evidence, although such comment is exercised with caution).

unusual or less obvious consequential amendments to enactments that should be made.

Are there any unusual consequential amendments that you can identify as likely to be required for the new Criminal Procedure Bill?

36. New Criminal Procedure Bill

233. We expect the Government to introduce a new Criminal Procedure Bill in mid-2010.

L. Benefits

234. The changes, which we propose, are part of a wider set of reforms planned across the whole of the justice sector over the next 5 years. They complement initiatives in other justice sector agencies and are aimed at supporting a fundamental overhaul of our criminal justice system.
235. Specifically, the benefits we anticipate from the proposed reforms to criminal procedure will be realised as a result of a reduction in the number of unnecessary court events, more focussed court appearances, court events being able to proceed where they previously could not, and the clarification of the roles and responsibilities of all those who participate in court processes.
236. Key benefits to the justice sector from the implementation of the proposals outlined in this paper and Bill Plan are estimated to include:
- 236.1. 14,000 fewer court events (on current volumes) achieved largely as a result of improved case management.
 - 236.2. Costs avoided as a result of continuing with hearings when a defendant fails to appear (approximately 7,000 events).
 - 236.3. Earlier resolution and disposal of criminal proceedings in up to 3,000 cases per annum (on current volumes).
 - 236.4. Around 1,200 jury trial days⁴² saved per annum on current volumes (this saving is partially offset by some of these cases being heard in the lower-level (summary) jurisdiction).
 - 236.5. Sitting time savings on current volumes to be in the order of 7,700 – 9,700 sitting hours per annum.
237. The Project tested the proposed lower-level (summary) process between July 2008 and January 2009 at Manukau and Tauranga District Courts. The evaluation of this test demonstrated a decrease in the average number of list appearances of 4% at both sites saving 361 list court events, an increase in the number of guilty pleas by 2%, and reduced time to disposal.⁴³ In addition, the evaluation demonstrated a significant increase in the changes in plea or charges withdrawn⁴⁴ after Case Management Memorandum discussions. The testing has allowed us to ensure the proposed process can be operationalised and to refine our proposals, and increased our understanding of the potential benefits prior to legislative drafting (and implementation).
238. The movement of some less serious cases from the current indictable jurisdiction to the proposed 'lower-level' (summary) jurisdiction will also mean significant fiscal savings, and represents improved value for money for taxpayers in addition to time saved for those directly involved in criminal court cases.

⁴² 1200 jury trial days: made up of 900 trial days saved from 300 less jury trials at an average of 3 days each, and 300 trial days saved from identification of issues in dispute (Crown Solicitor estimate).

⁴³ A minimum reduction of 12% (16 days) at Tauranga District Court and 23% (17 days) at Manukau District Court.

⁴⁴ 25% in Tauranga District Court and 60% in Manukau District Court.

239. To illustrate the potential benefits of having more sitting time available to the court system, we estimate that if the capacity freed up is utilised, it could be used to dispose of an additional 2,700 lower-level trials (defended hearings) and 60 upper-level (jury trials) per year. This is approximately the number of defended hearings⁴⁵, and approximately one-third of the number of jury trials⁴⁶ heard at Auckland District Court last year.
240. We expect that the improvements expected as a result of implementing the proposed reforms would begin to be realised in Year 3 of their implementation and could be fully realised from Years 4 – 5 onwards.
241. Reduced waiting times, greater efficiency, and clearer processes will also deliver less quantifiable benefits to witnesses, victims and other court participants in terms of diminished anxiety and stress. We also anticipate that these reforms will help to address community concerns, improve confidence in criminal justice processes, and ‘future-proof’ our courts in an increasingly technological society.

⁴⁵ For the year ended June 2009, 2586 defended hearings were heard at Auckland District Court.

⁴⁶ For the year ended June 2009, 183 jury trials were heard at Auckland District Court.

Appendices

Appendix 1: Criminal Procedure (Simplification) Project

Background

In July 2007, it was agreed that work on the Government's work programme which has a bearing on court delay should be brought together as a coordinated package. As a result, the Criminal Procedure (Simplification) Project was established jointly by the Ministry of Justice and the Law Commission, with the key objectives to:

- reduce court delay via legislative and operational change; and
- create an accessible and simplified criminal procedure.

The Project builds on work previously undertaken by the Ministry of Justice and the Law Commission and integrates a range of further initiatives within these agencies and others, including the New Zealand Police and the Legal Services Agency, to improve court processes.

Scope of Work

The scope of work of the Project is broad. It has focussed on:

- developing operational improvements in criminal summary and indictable processes (including a new case management regime and technology solutions); and
- developing legislation to repeal the Summary Proceedings Act 1957 and replace it with a new Criminal Procedure Act that will:
 - consolidate current provisions governing criminal procedure;
 - support the new operational processes being developed;
 - better enable technology solutions in courts both now and in the future; and
 - clarify and simplify the relevant law.

Structure of Project

Recognising that criminal processes involve a range of different participants, the Steering Group for the Project includes representatives from the Ministry of Justice (Policy and Courts Operations), the Law Commission, the New Zealand Police, the Crown Law Office and, in an advisory capacity, Parliamentary Counsel Office.

In addition, every effort has and is being made to seek input from the judiciary and other stakeholders through regular reporting, the release of consultation papers, and the design and implementation of tests⁴⁷ of new processes, as appropriate.

⁴⁷ Tests of new processes have been conducted at Manukau and Tauranga District Courts. Refer Appendix 2.

Appendix 2: Previous Consultation Papers and Testing

Consultation

The Criminal Procedure (Simplification) Project has previously circulated papers outlining proposals to improve criminal procedure in relation to a number of specific issues. They provide further background to the proposals in this paper and include:

- Audio-Visual links
- Proposals relating to restricting availability of jury trials
- Representative charges: options and issues
- Suppressing names and evidence (Law Commission paper)
- Sentencing jurisdiction and appeals
- Development of a formalised sentence indication scheme
- Identification of the issues in dispute
- Mechanisms to ensure compliance with criminal procedural obligations
- Proceeding in the absence of the defendant
- Options for avoiding re-trials following the discharge of jurors after trial commencement
- Criminal procedure case progression model
- Attorney-General's reference for New Zealand
- Categories of offence and the middle band

Where appropriate, feedback provided in response to these papers has been incorporated into the proposals presented in this discussion document. They are available on the Ministry of Justice website: <http://www.justice.govt.nz/Simplification-Project/Criminal-procedure.html>.

Testing

The Project has also tested procedural changes in the summary jurisdiction at the Manukau and Tauranga District Courts, and published an evaluation of the first six months of this testing (July 2008 to January 2009). Key features tested included:

- Earlier and more extensive disclosure by the prosecution (the goal was to have a comprehensive initial disclosure package provided to the defence by no later than the second appearance).
- A differentiated caseflow management system that allocated defended cases to different procedural tracks (broadly, a simple track for purely summary cases and an extended track for electable cases).
- Requirements on the prosecution and defence to engage in case management discussions (whether by meeting or otherwise).
- Requirements on the prosecution and defence to complete a case management memorandum to reflect that parties interacted outside of court hearings to progress matters.

Further information of the tests is available from the Ministry of Justice website, as above.

Appendix 3:

Alternative Proposal for Categorisation of Offences and Allocation of Cases between District Court and High Court

1. The Bill Plan in Part 2 of this document has five categories of offences:
 - Category 1: offences that are not punishable by a term of imprisonment;
 - Category 2: offences that are punishable by a term of imprisonment not exceeding 3 years;
 - Category 3: offences that are punishable by a term of imprisonment of more than 3 years that do not fall into categories 4 or 5;
 - Category 4: offences punishable by a term of imprisonment of more than 3 years that may be tried in either the District Court or the High Court;
 - Category 5: offences punishable by a term of imprisonment of more than 3 years that must be tried by the High Court.
2. These categories are discussed in more detail in the discussion document [Categories of Offences and the Middle Band](#) issued from the Project on 21 October 2009 (refer Appendix 2). They substantially modify the current categorisation of offences. In particular, they remove categories in which the prosecution may choose whether to lay the charge summarily or on indictment by eliminating Schedule 1 of the Summary Proceedings Act; they raise the threshold for jury trials from more than 3 months to more than 3 years; and they reduce the number of offences that may be tried in either the District Court or the High Court.
3. Notwithstanding the significant improvements that these modifications make, the categories still largely reflect the current framework. It is arguable that this framework is unduly complicated and is not fit for purpose. In particular, its method of allocating cases between the District Court and the High Court has an element of arbitrariness.
4. Part of the reason for this is that, for largely historical reasons, the current framework is based on a link between two logically independent issues: the appropriate fact-finder (judge or jury) and the level of hierarchy in which the case should be tried (High Court or District Court). The fact that the current structure is based on that link makes it difficult to ensure that cases are allocated to the most appropriate court in the hierarchy.
5. For example, we noted in the discussion document [Categories of Offences and the Middle Band](#) that it had been proposed to us that the cases that ought to be eligible for trial in either the High Court or the District Court should include prosecutions brought by the Serious Fraud Office and some corporate offences under the Companies Act 1993, the Securities Markets Act 1988 and the Takeovers Act 1993. However, we opposed this proposal. While we agree that cases such as this will often be complex and involve technical issues of law and fact that might well make them suitable for trial before a High Court rather than a District Court Judge, the only mechanism for enabling that to occur under the current framework is to make them

offences triable only by jury. That, in our view, would be an odd result. Their complex and technical nature is in fact likely to make them unsuitable for trial by jury and, in the absence of the consent of the parties, few of them would satisfy the restrictive statutory criteria⁴⁸ that enables long and complex cases to be tried before a Judge alone.

6. This suggests that there might be some merit in reconsidering the framework itself, so that the decision about whether a case proceeds to jury trial is largely independent of the decision about whether it should be tried in the High Court or District Court. If that were done, it would leave scope for cases to be transferred to the High Court without application by the parties where the defence does not elect a jury trial but the seriousness or complexity of the cases warrants a High Court trial. There would accordingly be more judge-alone trials in the High Court. That is arguably a desirable outcome when the issues involve complicated questions of law or fact that require the attention of the High Court.
7. If such a model were adopted, we envisage that it would have the following features:
 - (a) Only a small number of offences would be left as High Court offences triable only by jury. Our preliminary view is that these offences would be confined to murder and treason.
 - (b) All other offences carrying a maximum penalty of more than three years imprisonment would be made electable, so that the decision about the fact-finder would be left in the hands of the defendant. This is predicated on the view that the right to jury trial is a protective right that is vested in the defendant to enable him or her to choose trial by his or her peers rather than by a judge; that (with the exception of the two offences noted above) there is no particular public interest in having specified types of offences tried by a jury; and that there will be a sufficient number of defence elections to ensure that the broader functions of jury trials (such as community education and community participation in the criminal justice system) are maintained.
 - (c) With the exception of murder and treason, there would be no statutory allocation of offence categories to either the High Court or the District Court. All electable cases, whether or not jury trial was in fact elected, would begin in the District Court. However, they would all be able to be transferred to the High Court.
 - (d) Cases in the electable category would generally only be considered for transfer if either the prosecution or the defence applied for transfer in the case management memorandum. The decision about whether a case should be transferred would be made by a District Court Judge based on the following statutory criteria (which are the same as those currently proposed in the middle band decision in **clause 53** of the Bill Plan):
 - the nature and seriousness of the offence;

⁴⁸ Under section 361D of the Crimes Act 1961.

- the complexity of the factual and legal issues likely to arise in the proceedings;
- the extent to which the offender has a high public profile or has provoked widespread public or media interest;
- the need for enhanced security or facilities during the trial that are not readily available at the District Court;
- the respective workloads of the High Court and the District Court in their particular locality and the desirability of the prompt disposal of trials;
- the interests of justice generally.

Either party could apply to the High Court for a review of the decision to retain a case in the District Court.

- (e) In addition, there would be a protocol between the Chief High Court Judge and the Chief District Court Judge as to the cases which would be systematically reviewed to consider whether they should be tried in the High Court even when there has not been an application by the parties. That review would be undertaken by a District Court Judge nominated on a regional basis by the Chief District Court Judge. We anticipate that the protocol would be based on objective criteria that would strictly confine the types of cases that would need to be actively considered in every instance. The protocol could identify the particular offence categories (such as sexual violation or corruption and bribery of an official) that should always be considered. It could also include a range of other criteria that might point to the need for active consideration of the appropriate forum (such as the monetary value involved in dishonesty cases or the number of co-defendants). The protocol would therefore allow for more flexibility in decision-making than the current middle band process.

8. We welcome views on this alternative proposal. If it were adopted, it would require a significant change to a number of aspects of the Bill Plan.

Appendix 4: Appeal Paths

4 December 2009

PURPOSE

1. The Criminal Procedure (Simplification) Project is proposing a range of comprehensive reforms to criminal procedure with the aim of reducing unnecessary court delay and creating a simplified criminal process. This paper discusses options for potential reform of the pathways for appeals in criminal cases ('appeal paths'), in light of changes being made to other parts of criminal procedure. It also identifies some more minor issues with appeal processes that could be addressed as part of this Project.
2. This paper has been prepared to enable further discussion about future appeal paths with members of the judiciary, legal practitioners, and interested agencies and individuals. It does not present a preferred option. The appeal paths that are ultimately progressed will be reflected in the new Criminal Procedure Bill, planned for introduction into Parliament in 2010.
3. Views on any parts of the paper are welcome. Questions for discussion are attached as Annex One. Written comments should be provided by 1 March 2010.

EXECUTIVE SUMMARY

4. Initial consultation on appeal processes has already taken place as part of the Simplification Project.⁴⁹ Since that consultation occurred, new proposals have been developed for how cases should progress through the summary and indictable jurisdictions.⁵⁰ More broadly, changes are proposed that will have implications for the type of cases that are dealt with in each jurisdiction. All of these changes have implications for the way in which appeals should be dealt with.
5. This paper proposes two broad options. Under option 1, current appeal paths would be reflected to the extent possible. This would enable the Court of Appeal to maintain its current supervisory role in jury trials and in sentencing. However, in some cases, appeal paths differ according to whether the appeal is brought before or after committal. It is now proposed that the committal process be abolished. This will have particular implications for first instance appeals in indictable cases from the District Court. Post-committal appeals from the District Court make up a substantial proportion of the Court of Appeal's criminal workload. Option 1 therefore aims to retain present appeal paths to the extent possible, with necessary changes to allow for the abolition of the committal process.
6. Option 2 proposes more fundamental reform, where appeal paths would reflect a more hierarchical approach. This option would have a significant effect on the Court

⁴⁹ See *Discussion Document: Sentencing Jurisdiction and Appeals*.

⁵⁰ See *Discussion Document: Criminal Procedure Case Progression Model*. Currently, the indictable jurisdiction deals with cases that are tried by a jury. The summary jurisdiction deals with cases where the option of trial by jury is not available or the defendant has not elected to be tried by a jury. It provides a simpler process for dealing with criminal cases. All cases in the indictable jurisdiction are dealt with in the District Court's summary jurisdiction until they are committed for trial in either the District Court or the High Court.

of Appeal, because it may lose up to two-thirds of its indictable criminal appeal workload. These appeals (first-instance indictable appeals from the District Court) would instead be heard in the High Court. As a consequence, option 2 puts at risk the Court of Appeal's supervisory role. To address this concern, there would need to be a residual ability for appeals that would otherwise be heard in the High Court to "leapfrog"⁵¹ the High Court to the Court of Appeal. This could include, for example, when an appeal raises an important or novel question of law, when there are inconsistent decisions in the High Court, or when it concerns a sentence for which no or insufficient sentencing guidance exists.

BACKGROUND

Current appeal paths

7. A summary of current appeal paths is attached as Annex Two. For appeals from the original decision made or order imposed ("first-instance appeals"), the situation is broadly as follows:

(a) Appeals against bail and name suppression decisions are heard in the next immediate court in the court hierarchy – for example, appeals against bail decisions made in the District Court are heard in the High Court, and appeals against bail decisions made in the High Court are heard in the Court of Appeal.

(b) With the exception of bail and name suppression:

(i) Appeals against decisions in the District Court's summary jurisdiction (which includes all indictable cases⁵² before a case is committed for trial) are heard in the High Court, except for appeals from decisions of Community Magistrates which are heard in the District Court.

(ii) Appeals against decisions in indictable cases after a case has been committed for trial are heard in the Court of Appeal, whether or not the decision being appealed against was made in the District Court or the High Court.

(iii) "Related"⁵³ appeals against conviction and sentence are heard together in the Court of Appeal, even if the decisions appealed from were made by different courts.

8. Most first-instance appeals are as of right (do not require the leave of the court).⁵⁴ Appeals from decisions made in first-instance appeals ("subsequent appeals")

⁵¹ By "leapfrog" we mean that the appeal is not heard by the next court in the hierarchy, but instead in the court above upon a successful application by the parties.

⁵² See footnote 2. Indictable cases and offences are those which will eventually be heard by a jury in the indictable jurisdiction. All indictable offences, including those that must eventually be tried in the High Court, begin in the District Court.

⁵³ An appeal will be a related appeal if it is in respect of an offence that arises from the same incident or series of incidents as the conviction or sentence appealed to the Court of Appeal, or is an offence for which the person was sentenced on the same occasion as the imposition of the sentence appealed to the Court of Appeal (s 384A(1)(a) & (b) inserted by Crimes Amendment Act 2008 (No 2)).

⁵⁴ Exceptions include a prosecution appeal against conviction and sentence in indictable proceedings (s383(2), Crimes Act 1961), appeals in pre-trial matters (s379A, Crimes Act 1961), and appeals to the Supreme Court (s12, Supreme Courts Act 2003).

require leave. Sometimes this leave must be granted by the court appealed from (for example, subsequent appeals on name suppression from the District Court or the High Court, and most appeals from the summary jurisdiction), and sometimes by the court appealed to (any appeal to the Supreme Court). Appeals from the High Court can “leapfrog” the Court of Appeal and go directly to the Supreme Court in some circumstances.⁵⁵

9. A key feature of current appeal paths is the Criminal Appeal Division of the Court of Appeal (CAD), which was established in 1991 along with a civil appeal equivalent. CADs are divisions of three judges which may comprise three Court of Appeal judges (a “permanent division”), two Court of Appeal judges and one High Court judge, or one Court of Appeal judge and two High Court judges.⁵⁶ Their main purpose is to deal with the majority of criminal appeals made to the Court of Appeal each year. This enables the permanent Court of Appeal to focus on appeals requiring analysis of more difficult or complex legal issues and to clarify and provide guidance on matters of legal principle.⁵⁷
10. All criminal appeals are set down for a hearing before a CAD comprising two High Court judges and one Court of Appeal judge unless the President of the Court of Appeal directs otherwise.⁵⁸ In 2008, these CADs heard 340 of the 404 criminal appeals dealt with by the Court of Appeal.⁵⁹ CADs with High Court judge involvement also enable criminal appeal decisions to draw on the experience of current trial judges.

Rationale of current appeal paths

11. Appeal paths for bail and name suppression reflect the hierarchical approach. Bail decisions, particularly, are more likely to be routine and involve factual matters that do not require the Court of Appeal’s oversight and expertise. In addition, neither bail nor name suppression have an impact on how a jury trial is conducted, which is a particular focus of the Court of Appeal’s supervisory function in the indictable jurisdiction.
12. There are two underlying rationales for other appeal paths. The first is that issues which arise in the indictable jurisdiction are sufficiently complex, serious, or important that oversight by a specialist appellate body, the Court of Appeal, is required. The second is the desirability of the Court of Appeal exercising a supervisory function over jury trial cases, which enables the development of a consistent approach and jurisprudence in matters ranging from pre-trial applications about the admissibility of evidence to sentencing.
13. In relation to the first rationale, the assumption that issues which arise in the indictable jurisdiction will necessarily be more complex than issues which arise in the

⁵⁵ See, for example, section 383(1) and (2)), Crimes Act 1961 in relation to appeals against conviction and sentence in indictable proceedings.

⁵⁶ Judicature Act 1908, section 58A.

⁵⁷ New Zealand Law Commission *Delivering Justice For All* (NZLC R85, Wellington, 2004) p 278, and E Geddis “The Criminal Appeal Division” the first three years” (1995) NZLJ 118.

⁵⁸ Counsel for either the appellant or the respondent may request a direction that an appeal be heard by a permanent division or a Full Court. See *New Zealand Gazette* No 116, 12 October 2006, pg.3461.

⁵⁹ *Court of Appeal Annual Report for 2008*, pg. 11. 56 appeals were heard by the permanent division, and 8 were heard on the papers.

summary jurisdiction is at least questionable. It is true that there are a number of matters unique to jury trials that have no equivalent in summary trials. In addition, other changes being made as part of the Simplification Project are likely to increase the seriousness and complexity of cases dealt with in the summary jurisdiction. However, even in indictable cases some appeals are relatively straightforward (eg, many defence appeals against sentence⁶⁰). Hearing routine or straightforward appeals is arguably not an optimal use of the Court of Appeal's expertise and skill.⁶¹

14. In relation to the second rationale, the large number of appeals CADs deal with, coupled with their varying membership,⁶² creates a risk of inconsistency in their decisions. To mitigate the risk of inconsistency, we understand that draft CAD decisions are now circulated to the permanent members of the Court of Appeal a short time before release. It is unclear whether this practice has been effective in achieving its objective.
15. While the stated rationales for current appeal paths have been diluted, we are not aware of any suggestion that the current appeal paths are fundamentally flawed or are causing injustice. Hearing appeals from the District Court's indictable trial jurisdiction in the Court of Appeal (effectively bypassing the High Court) is an anomaly in one sense. In principle, however, it enables the Court of Appeal to maintain its supervisory jurisdiction over indictable matters, particularly the conduct of jury trials. The process has also been exacerbated in the past by complexities in how cases end up in the summary and indictable jurisdictions. Many of these complexities may be addressed as part of the Simplification Project.

Implications of the Criminal Procedure (Simplification) Project reforms

16. As part of earlier work in this Project on sentencing jurisdiction and appeals, it was proposed that appeal paths continue to reflect current arrangements.⁶³ The exception was in respect of first-instance appeals from decisions of Community Magistrates and Justices of the Peace. Currently, appeals from Justice of the Peace decisions are heard in the High Court, while appeals from Community Magistrate decisions are heard in the District Court. It was proposed that first-instance appeals from decisions of both of these types of judicial officer be heard by a District Court judge.
17. Since then, a range of other changes have been proposed to criminal procedure that have implications for appeal paths. This includes changes in the type of cases that are dealt with in the summary and indictable jurisdictions. In particular, it has been proposed that the prosecution's ability to lay charges summarily or indictably in respect of those offences identified in Schedule 1 of the Summary Proceedings Act 1957 should be removed,⁶⁴ and that the jury trial threshold should be raised to more

⁶⁰ For example, an appeal contending that the sentencing judge did not correctly apply a relevant guideline judgment, or did not take into account a relevant aggravating or mitigating factor.

⁶¹ See similar discussion in New Zealand Law Commission *Delivering Justice For All* (NZLC R85, Wellington, 2004) p 274.

⁶² We understand that current practice is for the CAD workload are allocated on a rotational basis.

⁶³ See *Discussion Document: Sentencing Jurisdiction and Appeals*, paragraphs 19-23.

⁶⁴ See *Discussion Document: Criminal Procedure (Simplification) Project – Proposals Relating to Restricting Availability of Jury Trials*. For those offences listed in Schedule 1, the prosecution can choose whether to lay a charge summarily (so that the case is dealt with in the summary jurisdiction unless the defendant elects trial by jury) or indictably (so that the case is heard by a jury unless the defendant pleads guilty at an earlier stage).

than three years imprisonment.⁶⁵ As a result of these changes, there are likely to be fewer cases in the indictable jurisdiction, and cases dealt with in the summary jurisdiction may be more serious and complex.

18. We propose to abolish the concept of committal of a case for trial.⁶⁶ Committal currently represents the stage in the process at which an indictable case moves from the summary jurisdiction to the indictable jurisdiction. Appeal pathways under the Criminal Disclosure Act 2008 are linked to committal,⁶⁷ as may be appeal paths against a sentence imposed in the District Court for contempt of court.⁶⁸
19. With the exception of those offences that must be tried in the High Court, committal also affects how appeals against sentence in other indictable cases are dealt with.⁶⁹ If the defendant pleads guilty *before* the case is committed for trial,⁷⁰ and the sentence imposed is within the summary sentencing limit,⁷¹ any appeal against it is heard in the High Court.⁷² When the sentence exceeds the summary sentencing limit, the appeal is heard in the Court of Appeal.⁷³ If the defendant pleads guilty *after* an indictable case is committed for trial, the appeal against sentence is heard in the Court of Appeal. This occurs whether or not the sentence was nominally within the summary sentencing limit.⁷⁴
20. If committal is abolished, there is a question about whether all sentence appeals in indictable cases should be heard in the Court of Appeal, regardless of when a guilty plea was entered, or whether some sentence appeals should still be heard in the High Court.

⁶⁵ See *Discussion Document: Criminal Procedure (Simplification) Project – Proposals Relating to Restricting Availability of Jury Trials*. Currently, defendants have a right to elect trial by jury if they are charged with an offence punishable by more than three months imprisonment.

⁶⁶ The primary function of committal is to act as a means of establishing whether there is sufficient evidence to put the defendant on trial. The substantive components of committal are the filing of written statements of evidence from prosecution witnesses that outline the case against the defendant, applications for oral evidence orders to require a witness to give evidence at a hearing, and applications to discharge the defendant on the basis that there is insufficient evidence to put the defendant on trial. Although it is proposed to abolish the concept of committal, these substantive components will remain. See *Discussion Document: Criminal Procedure Case Progression Model*.

⁶⁷ Criminal Disclosure Act 2008, s33.

⁶⁸ Right of appeal to High Court against District Court sentence for contempt of court imposed under s206 of Summary Proceedings Act (except an order to the effect only that a person be taken into custody and detained until the rising of the Court) (SPA, s115B). The appeal path provided by the statutory provision is not clear as to whether there is a pre-committal/post-committal division.

⁶⁹ This includes cases involving “electable” offences where the defendant has a right to elect trial by jury, and “middle band” offences which may be heard in either the District Court or the High Court. There is a statutory process for deciding which court middle band offences will be heard in – see Summary Proceedings Act 1957, s184Q.

⁷⁰ In this situation, High Court only offences must be transferred to the High Court for sentence.

⁷¹ District Court judges without a jury trial warrant cannot sentence over that limit. The standard summary sentencing limit is five years imprisonment or a \$10,000 fine (s7, SPA). Some statutes provide specific summary penalties which override the standard limit (see, for example, sections 6, 9, and 12A of the Misuse of Drugs Act 1975).

⁷² Summary Proceedings Act 1975, s115(2A); District Courts Act 1947, s28H(2)(b).

⁷³ Crimes Act 1961, s383(1A); District Courts Act 1947, s28H(2)(a).

⁷⁴ Note that the summary sentencing limit does not apply to sentences imposed following guilty pleas entered after committal.

PATHWAYS WHERE STATUS QUO RETAINED

No proposed reform to Supreme Court appeal thresholds

21. The proposals in this paper are not intended to affect the threshold for appeals from the High Court or Court of Appeal to the Supreme Court.

No proposed reform to appeals against bail and name suppression

22. This paper is focused on appeal paths for matters that arise pre-trial or involve appeals against conviction and sentence. As noted previously, bail and name suppression appeals follow a hierarchical approach. There is a question about whether this remains appropriate, or whether appeals from District Court name suppression and bail decisions in indictable cases should follow the same appeal paths as all other indictable appeals.

23. However, if the Court of Appeal was to hear District Court name suppression and bail decisions in indictable cases, its workload would soon become unmanageable. On current workloads, we estimate that the Court's workload would increase by approximately 177 cases per year if it were to hear all indictable bail appeals from the District Court.⁷⁵ We do not have comparable figures for name suppression.

24. In addition, the issues that arise in bail and name suppression decisions tend to be different in nature from the issues that arise in appeals against pre-trial decisions or against conviction. Bail and name suppression decisions tend to be fact-based decisions that rely heavily on the judge's discretion and assessment of the particular circumstances of the case. They do not lend themselves so readily to a supervisory jurisdiction.

25. We therefore do not propose any change to appeal paths for bail and name suppression at this stage.

TWO BROAD OPTIONS FOR REMAINING APPEAL PATHS

26. There are two broad options in relation to future appeal paths from the District Court (excluding bail and name suppression) in light of other proposed changes to criminal procedure.⁷⁶

- (a) Reflect current appeal paths to the extent possible;
- (b) Reflect a broadly hierarchical approach so that appeals generally move from one court in the hierarchy to the next.

⁷⁵ Average indictable bail appeals filed in the High Court each year, for the three years from 2006 to 2008. Ministry of Justice estimates.

⁷⁶ It is proposed that for each of the approaches outlined, first-instance appeals from the High Court would continue to be dealt with in the Court Appeal.

27. When considering these options, it is intended that where one case comprises a mixture of offences, the case will be dealt with according to the process (and appeal path) required for the offence which falls into the highest offence category. The tables also use the term “Preliminary Stage” to represent the procedural court processes prior to transfer to a trial court under the proposed simplification reforms.

Option 1: Reflect current appeal paths to the extent possible

Current appeal paths		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA
	HC	

28. For current appeal paths to be maintained to the extent possible, at least some adjustment to them is required in light of other proposed simplification changes.

29. Reflecting current appeal paths in summary cases is relatively unproblematic. First-instance appeals would continue to be heard in the High Court. Leave would be required to take a subsequent appeal to the Court of Appeal, which would be limited to a question of law. First-instance appeals from decisions of Community Magistrates and Justices of the Peace would be heard by a District Court judge, with subsequent appeals to the High Court limited to questions of law and requiring the leave of the District Court. The following discussion, therefore, refers only to appeals from indictable cases.

30. The proposed abolition of committal creates a difficulty in relation to first-instance appeals in indictable cases from the District Court. There are three possible approaches to addressing this difficulty:

- (a) Enable the Court of Appeal to hear all first-instance indictable appeals;
- (b) Enable the Court of Appeal to hear all first-instance indictable appeals from a particular point in the process;
- (c) Enable the Court of Appeal to hear all first-instance indictable appeals, or all first-instance appeals from a particular point, except for sentence only appeals that are less than a particular sentencing limit.

Approach (a): Enable the Court of Appeal to hear all first-instance indictable appeals

Option 1(a) 1 st instance appeals to CA		Appeal Court
Preliminary Stage	DC	CA
Trial Stage	DC	CA
	HC	

31. Under this approach, the Court of Appeal would hear all first-instance indictable appeals from the District Court and High Court. This would include all appeals in

relation to purely indictable offences⁷⁷ from the time a charge is laid, and all appeals in relation to electable offences⁷⁸ from the point at which a defendant elects to be tried by a jury.

32. The main difference between this approach and the current situation is that the Court of Appeal would hear sentence only appeals from District Court indictable cases when a guilty plea is entered before the case transfers to the trial court and the sentence imposed is less than the current summary sentencing limit.
33. This approach it strengthens the Court’s supervisory function in indictable cases. The primary concerns are that the Court of Appeal may be required to deal with more appeals in minor matters, particularly appeals against sentences that are less than the current summary sentencing limit, and the potential impact on the High Court and Court of Appeal workloads.
34. In respect of the first concern, sentences below the summary sentencing limit are appealed to the Court of Appeal now if the sentence is imposed following a guilty plea entered after committal and the appeal is a sentence only appeal. The dividing line that committal provides for sentence appeals is therefore somewhat artificial.
35. The impact on the Court of Appeal’s workload is more of a concern under this approach. We estimate that, on current workloads, an additional 87 sentence appeals would be filed in the Court of Appeal each year. This can be compared to the current average workload of 129 sentence only appeals filed each year, and represents an increase of 67%.⁷⁹ However, some of this impact may be balanced by the potential reduction in its workload arising from the movement of some indictable cases into the summary jurisdiction, as a result of an increase in the jury trial threshold, and other changes.⁸⁰ First-instance appeals in those cases would be heard in the High Court.

Approach (b): Enable the Court of Appeal to hear all first-instance indictable appeals from a particular point in the process

Option 1(b) 1 st instance pre-transfer to HC; post-transfer to CA		Appeal Court
Preliminary Stage	DC	HC
Trial Stage	DC	CA
	HC	

36. A second approach is for the Court of Appeal to hear all first-instance District Court indictable appeals from a point in the process (a “switch-over point”) that is relatively similar in time to committal. Appeals from District Court decisions made prior to that point, including sentence only appeals following an early guilty plea, would be heard

⁷⁷ Purely indictable offences are offences that are almost always tried by a jury, other than in exceptional cases. They include middle band offences (offences that may be tried in either the District Court or the High Court) and High Court only offences (offences that must be tried in the High Court).

⁷⁸ Electable offences are offences for which the defendant has the right to elect trial by jury.

⁷⁹ Average indictable sentence only appeals filed in the High Court each year, for the three years from 2006 to 2008. On average, over the three years, 129 indictable appeals were filed each year. Ministry of Justice estimates.

⁸⁰ In particular, the removal of the prosecution’s ability to lay charges summarily or indictably in respect of those offences included in Schedule 1 of the Summary Proceedings Act 1957.

in the High Court. Appeals from decisions made after that point would be heard in the Court of Appeal.

37. We have considered a number of possibilities for what the switch-over point could be. The most obvious is from the time the case is transferred to the court in which the trial will take place (the “trial court”). This point is effectively an equivalent point in the process to committal. Other potential points are the point of the first callover, or from the time the prosecution is required to file formal written statements. Both are close in time to committal.⁸¹
38. The insertion of a switch-over point provides a pragmatic mechanism to manage the appeals workload, while enabling the Court of Appeal to maintain its supervisory jurisdiction over cases that are progressing to an indictable trial. There is no principled basis to choose one switch-over point over another. All have a degree of arbitrariness. On a pragmatic basis, transfer of a case to the trial court seems the preferable point to apply. It is a discrete point in the proposed case progression process for indictable cases and will be reflected in legislation. For example, there is not currently an intention to make legislative provision for the first callover.
39. Regardless of which switch-over point was chosen, this approach would increase the High Court’s appeal workload and decrease the Court of Appeal’s workload. The High Court would hear sentence only appeals against sentences that were imposed following a guilty plea entered before the switch-over point, including those over the current summary sentencing limit that are now heard in the Court of Appeal. However, this would only move approximately 15 appeals from the Court of Appeal to the High Court every year.⁸²

Approach (c): Enable the Court of Appeal to hear all first-instance indictable appeals, or all first-instance indictable appeals from a particular point, except for sentence only appeals against sentences that are less than a particular sentencing limit

40. A third approach is to impose a sentencing limit so that the Court of Appeal would only hear more serious sentence appeals as indicated by the original sentence imposed. For the purposes of this discussion, we propose that a “serious” sentence is any sentence of more than five years’ imprisonment. This reflects the current summary sentencing limit.
41. This approach would be implemented in combination with either of the above two approaches. There are a number of ways it could work. For example:
- (i) The Court of Appeal could hear all first-instance appeals, but not hear sentence only appeals against sentences that were five years imprisonment or less imposed by the District Court. These would be heard in the High Court.

⁸¹ The first callover is the next hearing or process step after a case is committed for trial. The filing of written statements is currently part of the committal process.

⁸² In the three years from 2006-2008, the Court of Appeal heard 309 appeals against sentences of five years imprisonment or more, 264 of which arose post-committal and 45 pre-committal, giving an average over the three years of 15 pre-committal appeals (Ministry of Justice estimates).

Option 1(c)(i) Option (a) + sentencing limit		Appeal Court
Preliminary Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
Trial Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
	HC	CA

- (ii) The High Court could hear all first-instance appeals prior to the switch-over point, except for sentence only appeals where the sentence is greater than 5 years. The Court of Appeal would hear those appeals and all first-instances appeals after the switch-over point. This option most closely resembles current appeal paths.⁸³

Option 1(c)(ii) Option (b) + sentencing limit*		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA
	HC	

* Sentencing limit only has effect prior to transfer to the trial court

- (iii) The High Court would hear all appeals prior to the switch-over point, except for sentence only appeals against sentences greater than 5 years' imprisonment. The Court of Appeal would hear all other first-instance appeals.

Option 1(c)(iii) Option (b) + sentencing limit‡		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
	HC	CA

‡ Sentencing limit has effect prior to and following transfer to the trial court

42. There are two main justifications for including a sentencing limit in the appeal pathways. First, it helps to manage the increase in the Court of Appeal's workload that would occur if the Court heard all indictable appeals, particularly all sentence only appeals. Secondly, it ensures that the Court can continue to provide sentencing guidance, another critical aspect of its supervisory role, but without having to hear minor sentence only appeals.

⁸³ With the possibility of appeals against decisions made under the Criminal Disclosure Act 2008, which could also be heard in the Court of Appeal.

43. However, some difficulties with this approach remain. As happens currently, the Court of Appeal would still hear appeals against sentences of five years or less when an appeal was filed against both conviction and sentence. This may lead to appeals against conviction being made in cases to ensure the sentence appeal can be filed in the Court of Appeal. The appeal against conviction could then be abandoned when the appeal was actually heard. We are uncertain whether this would eventuate in practice, as this is not a significant issue under the current system.
44. Fundamentally, any choice of sentencing limit is arbitrary. We have no reason to identify a sentence of more than five years imprisonment as a “severe” sentence other than that it reflects the current summary sentencing limit. The difference between an offender who receives a sentence of six years and an offender who receives a sentence of five years imprisonment may simply be that the latter offender pleaded guilty to the offence at an early stage (and therefore received a reduction in sentence to recognise that plea) while the former did not. The actual sentence imposed may not provide a reliable indication of the seriousness of the offender’s conduct.
45. The summary sentencing limit, on which this approach is based, is also to be abolished. Currently, its main purpose is to restrict the sentencing jurisdiction of District Court judges who do not hold a jury warrant. Some may consider it inconsistent to abolish a sentencing limit in relation to this purpose, but to retain a sentencing limit for another.
46. In addition, it will not always be the case that sentences of five years imprisonment or less do not require any oversight from the Court of Appeal. For example, Court of Appeal guidance may be required in respect of sentencing for high-volume offences like drink driving or lesser assault offences. However, these cases would not reach the Court of Appeal unless they involved a point of law.

Can more matters be heard by a single Court of Appeal judge?

47. With the exception of 1(c)(ii) approach (which most closely reflects current appeal paths), the Court of Appeal under Option 1 is likely to hear some appeals that previously would have been dealt with by a single High Court judge.
48. It may be possible for some appeals to be heard by a single Court of Appeal judge. For example, there seems no reason in principle why a single Court of Appeal judge could not deal with routine appeals made under the Criminal Disclosure Act 2008. It is difficult to see why routine appeals against sentence that were previously dealt with by a single High Court judge should now be dealt with by a three-judge Court of Appeal.
49. Currently, a Court of Appeal judge acting alone may decide whether an application or appeal will be heard orally or on the papers,⁸⁴ decide applications for leave to appeal against conviction or sentence,⁸⁵ extend timeframes for notices of appeal or applications for leave to appeal,⁸⁶ allow the appellant to be present at proceedings when he or she is not entitled to be present,⁸⁷ issue a warrant for the accused’s

⁸⁴ Crimes Act 1961, s392A(3).

⁸⁵ Crimes Act 1961, s393(1).

⁸⁶ Crimes Act 1961, s393(2)(a).

⁸⁷ Crimes Act 1961, s393(2)(b).

detention pending a new trial,⁸⁸ or grant bail to an appellant.⁸⁹ There is also a range of administrative matters that he or she may deal with.⁹⁰

50. One reason why having a greater range of appeals heard by a single Court of Appeal judge may not be appropriate is concern about the potential for inconsistency and variation in decisions. If this concern applies to decisions made by CADs, it must also apply to decisions made by a judge acting alone. It would also be necessary to develop a procedure and criteria for determining which appeals can be heard by one judge.

Summary Comments on Option 1

51. An approach to appeal paths that reflects current arrangements as much as possible would require the least change and be the least disruptive. For that reason alone, it should be seriously considered. Approach (a) has the advantage of simplicity, but may increase the Court of Appeal’s workload as the Court of Appeal would be dealing with more minor sentence only appeals than currently. Approach (b) has less impact on the Court of Appeal’s workload but does distinguish between appeals from the preliminary stage and appeals from the trial stage. Approach (c) relies on various options provided by a sentencing limit for sentence only appeals based on the level of sentence imposed.

Option 2: Reflect a hierarchical approach

52. The aim of a hierarchical approach is to put in place simplified appeal arrangements, in which appeals step through the court hierarchy. Broadly, if a hierarchical approach was followed, the next court in the hierarchy would hear all appeals in the first instance. There are two possible approaches:

- (a) Establish appeal paths based on the level of the court in which the case is heard;
- (b) Establish appeal paths based on the categorisation of the offence.

Approach (a): Appeal paths based on the level of the trial court in which the case is heard

Option 2(a) Hierarchical 1 st instance appeals		Appeal Court
Preliminary Stage	DC	HC
Trial Stage	DC	HC
	HC	CA

53. Under this approach, the High Court would hear all first-instance appeals from decisions made in the District Court, and the Court of Appeal would hear all first-instance appeals from decisions made in the High Court.

⁸⁸ Crimes Act 1961, s393(2)(c).

⁸⁹ Crimes Act 1961, s393(2)(d). Note that for all matters under s393, if on an application by an appellant, a judge refuses to exercise a power in favour of the appellant, the appellant may have the application determined by a bench of three – see s393(3).

⁹⁰ *R v Chatha* [2008] NZCA 466, para 8.

54. This approach assumes that the level of the court in which the case is heard provides an indication of the seriousness and complexity of the case itself. If a matter is not so serious or complex that it must be dealt with in the High Court, it can be presumed that the matter is unlikely to require the expertise of the Court of Appeal to deal with any appeals that arise from it in the first instance.
55. The primary impact on appeal paths would be on first-instance appeals from decisions of the District Court in indictable cases. These would all be heard in the High Court, rather than be split between the High Court and Court of Appeal as currently. This has at least six implications.
56. First, there would not be one appellate court dealing with all or most appeals from indictable cases. Although the High Court would continue to be guided by principles developed by the Court of Appeal in appeals that Court deals with, there is still potential for inconsistency, both in the outcome of appeals (for example, from one sentence appeal to another) and in matters of legal principle. The result may be the development of a supervisory jurisdiction that differs between High Court regions.
57. Secondly, the Court of Appeal's criminal appeal workload would reduce significantly. We estimate that the Court of Appeal would lose approximately two-thirds of its first-instance indictable workload.⁹¹ This would enable the Court to devote more time to the appeals it does receive, and relieve it of more minor appeals. However, it is unlikely that a sufficient number of cases would reach the Court to enable it to exercise its supervisory role. Most first-instance sentence only appeals, where the need for guideline judgments arise, would be heard in the High Court. The Court of Appeal's supervisory role would largely shift to the High Court.
58. Thirdly, the Court of Appeal would be relieved of many appeals that it currently deals with, and for which CADs were originally established to hear. Most appeals that would previously have been heard by CADs would instead be heard in the High Court. The increased workload of the High Court may mean that High Court Judges, in their current capacity, could no longer sit as part of CAD. An amendment to the Judicature Act 1908 may be required, and there would be a significant change to the operation of the Court of Appeal.
59. Fourthly, the High Court's criminal appeal workload would increase by the same amount that the Court of Appeal's workload decreased. Effectively, the High Court judicial resource currently allocated to hear appeals in the Court of Appeal would be re-allocated back to the High Court. However, there would also be substantial implications for other Court of Appeal and High Court resources including Registry staff, scheduling and rostering requirements, courtrooms and technological resources which would need to be modelled and considered.
60. Fifthly, High Court judges who sit on CADs are exposed to the practice of other geographical areas through sitting on appeals nationally. This may have a moderating effect on each judge's practice which, as a result, may lead to greater national consistency in High Court trial practice. To the extent that this is a side-effect of CAD, it will be lost through the removal of High Court judges from CADs. The result may be greater inconsistency in trial practice between different High Court regions.

⁹¹ For the three years from 2006 to 2008, DC indictable appeals comprised 67% of the Court of Appeal's workload. Ministry of Justice estimates.

61. Finally, this option would have implications for the allocation of appeals between Crown Counsel employed by Crown Law and Crown Solicitors. Currently, Crown Solicitors deal with appeals in the High Court, and Crown Counsel deal with appeals in the Court of Appeal. If that approach was retained, most of the work currently undertaken by Crown Counsel would instead be dealt with by Crown Solicitors, who could more easily appear in local High Courts.
62. To address the potential impact on the Court of Appeal’s supervisory function, it may be useful to have a residual ability for appeals that would otherwise be heard in the High Court to “leapfrog” that Court in favour of the Court of Appeal. This could occur on the application of either party when the appeal to the High Court raises an important or novel question of law, when there are inconsistent decisions in the High Court, or when it concerns a sentence for which there is no or insufficient sentencing guidance. However, we note that a “leapfrogging” provision will add to the complexity of the appeals structure, and may also result in a greater administrative burden on the courts (particularly if the Court of Appeal has to consider a significant number of these applications).⁹²

Approach (b): Appeal paths based on the categorisation of the offence

Option 2(b) Offence category 1 st instance appeals		Appeal Court
Preliminary Stage	DC	HC if elected
		CA if middle band or HC purely indictable
Trial Stage	DC	HC if elected
		CA if middle band
	HC	CA

63. The court in which the case is tried will not always provide a reliable indicator of the case’s seriousness or complexity. For example, whether a middle band offence is tried in the District Court or the High Court will depend, in part, on the respective workload of each court. It seems problematic for appeal paths to partly depend on fluctuations in trial court workload.
64. To address this difficulty, a second approach is for appeal paths to follow offence categorisation. The only real change from the first approach is in relation to middle band offences. First-instance appeals from these cases would all be heard in the Court of Appeal, regardless of whether they are tried in the District Court or the High Court. First-instance appeals against decisions made in respect of summary or electable offences would be heard in the High Court.
65. This approach reflects an assumption that the categorisation of an offence as a middle band offence provides an indication that its seriousness, complexity, or public importance requires Court of Appeal oversight. As part of related work on offence categories,⁹³ we have proposed that offences should only be included in the middle band if, for symbolic reasons or due to their seriousness or complexity, a High Court trial is warranted in a sufficient proportion of cases that it is appropriate that the trial court be determined in each case. Appeal paths would follow from this principle.

⁹² Note that under this proposal the Court of Appeal would determine any application (in a similar way that the Supreme Court determines which appeals it will hear).

⁹³ See discussion document: *Categories of Offences and the Middle Band*.

66. The primary impact on current appeal paths would be on appeals from decisions of the District Court for electable offences where the defendant elects to be tried by jury. Appeals from these cases would be heard in the High Court, rather than in the Court of Appeal as currently. The Court of Appeal would also hear sentence only appeals following a guilty plea to a middle band offence entered prior to the case transferring to a trial court.
67. As with the first approach, there would be more than one appellate court dealing with both pre-committal and post-committal appeals. As appeals from decisions made in electable cases comprise the bulk of the indictable appeals workload, the Court of Appeal's workload would still reduce to the point where its supervisory role would largely shift to the High Court. As a consequence, the proposed ability for an appeal to be heard, on application, in the Court of Appeal rather than the High Court is likely to be required under this approach as well.
68. This approach also retains some systematic "leapfrogging" of the High Court in appeals from middle band cases heard in the District Court. Currently, most middle band offences are heard in the District Court.⁹⁴ The approach also relies upon appropriate and consistent decisions being made about what offences should be in the middle band category of offences. Finally, the assumption that an offence's categorisation as a middle band offence indicates that Court of Appeal oversight is required could equally work in the opposite direction. In particular, that Parliament decided that an offence was not so serious, complex, or of sufficient public importance that it must always be heard in the High Court may indicate that the offence is not so serious, complex or of sufficient importance that Court of Appeal oversight of it is required.

Appeal paths for subsequent appeals

69. Both hierarchical approaches raise the issue of subsequent appeal paths up to and including to the Supreme Court (eg, under approach (a), if the first instance appeal is to the High Court, this may lead to an extra appeal opportunity). However, this is a particular concern under the hierarchical approach, because more first instance appeals are to the High Court.
70. If a hierarchical option was applied to first-instance appeals, further consideration would also be required about where subsequent appeals were heard – for example, whether appeals from High Court appeal decisions arising from District Court indictable trials under the first approach should be heard in the Court of Appeal or the Supreme Court.
71. If subsequent appeals were heard in the Court of Appeal, it would assist the Court to maintain the mass of cases critical to fulfilling its supervisory role (although the Court may still not receive a sufficient number of cases given the limited nature of sentencing appeals on questions of law). It would also maintain the Supreme Court's more specialised role as a court of final appeal. However, an appeal route that includes the Court of Appeal will mean that appeals from District Court indictable cases will have an additional appeal available as compared to High Court indictable

⁹⁴ 93% of middle band cases are transferred to the District Court for trial. Ministry of Justice estimates.

cases. This seems anomalous, but essentially reflects the current position in relation to appeals that arise in summary proceedings.

72. If subsequent appeals were heard in the Supreme Court, the high threshold that appeals must meet before an appeal can be taken to that Court is likely to mean that few second-instance appeals are heard. It also means that the current leapfrogging of the High Court to the Court of Appeal in District Court indictable appeals would be replaced by the leapfrogging of the Court of the Appeal to the Supreme Court in those same cases. To the extent that this type of systematic leapfrogging is anomalous, we do not think one should be replaced with another.

Summary Comments on Option 2

73. The hierarchical approach is the standard approach taken to appeal paths in New Zealand. Appeals in the civil jurisdiction follow a hierarchical path. Appeal paths in the criminal jurisdiction are also largely based on court hierarchy. The key exception is appeals from decisions in District Court indictable cases after committal. The move away from the hierarchical approach in these cases is, in large part, simply the effect of a number of incremental changes made over many years to expand the District Court's indictable jurisdiction.
74. Reflecting a hierarchical approach to all criminal appeals would mean some fundamental changes to the appeals system. The Court of Appeal's criminal workload would significantly reduce. It is likely that a process would be required to ensure that the Court's supervisory role in the indictable jurisdiction, particularly with respect to providing sentencing guidance, was retained. We have suggested one way in which this could be achieved.

OTHER APPEAL ISSUES

75. Regardless of appeal paths, there are some apparent anomalies in other aspects of appeal processes that should also be addressed. For example, in relation to the timeframes for filing appeals, appeals to the High Court in the summary jurisdiction,⁹⁵ in relation to suppression orders must be lodged within three days,⁹⁶ while applications to the Court of Appeal for leave to appeal against the grant or refusal of a suppression order before a trial must be made within 10 days.⁹⁷ Appeals to the Court of Appeal against a High Court decision to refuse or grant bail must be filed within 10 days, while all other bail appeals must be filed within 28 days. We propose that timeframes for filing appeals be reviewed to ensure they follow a consistent and logical approach.
76. There are also some matters for which no ability to appeal exists, when one may have been expected. In relation to name suppression, for example, an appeal cannot be taken against a suppression order made in the course of a trial. In addition, unlike an acquittal in the District Court, when a person is acquitted in the High Court but name suppression is refused, he or she cannot appeal that decision.
77. We also intend to rationalise the different appeal grounds that apply to appeals against conviction and sentence in the summary and indictable jurisdictions. The

⁹⁵ Under Summary Proceedings Act 1957, s115C.

⁹⁶ Summary Proceedings Act 1957, s116(1A).

⁹⁷ Crimes Act 1961, s379A(ba) and s379(4).

relevant statutory provisions in relation to appeals against sentence in the summary jurisdiction are quite specific, but little is said about the grounds for appeals against conviction.⁹⁸ The reverse is true in the indictable jurisdiction.⁹⁹ There seems no reason why the same approach should not be taken to appeals in both jurisdictions.

78. When leave to appeal is required, there are some differences in whether leave must be granted by the court appealed to or the court appealed from. In general, when leave to appeal is required in summary proceedings, that leave must be granted by the court appealed from.¹⁰⁰ In indictable proceedings, leave must be granted by the court appealed to.¹⁰¹ We also intend to review these provisions (we do not intend to review the leave requirements for appeals to the Supreme Court).

79. Finally, the Crimes Act 1961 enables an appeal against conviction to be filed and (presumably) heard before a sentence is imposed.¹⁰² We assume that, in reality, the appeal against conviction would not be heard until after sentencing.¹⁰³ However, it makes more sense for an appeal against conviction not to be filed until after sentencing, so that the appeals can be filed and dealt with together. This should be clarified in the legislation.

CONCLUSION

80. The various reform proposals emerging from the Criminal Procedure (Simplification) Project have implications for current appeal pathways. This paper sets out a range of possible reforms to address those implications with no preference for any particular option. We are interested in your views on these matters and on any other issues with appeal processes that could be addressed as part of the Project.

81. We should also note that there is the potential for appeal paths to be reconsidered further if our proposal to simplify the framework for offence categories is progressed. That proposal, introduced in the postscript to the *Discussion Document: Categories of Offences and Middle Band Offences*, would separate the decision about the mode of trial (whether judge or jury) from the decision about the court in which the case was to be heard (whether the District Court or the High Court).

⁹⁸ See Summary Proceedings Act 1957, s 121, which is silent on the grounds for overturning a conviction but quite specific as to sentence.

⁹⁹ See Crimes Act 1961, s385(1) which states four specific grounds (and a proviso) for determining appeals against conviction but has only a general statement on sentence.

¹⁰⁰ See Appendix Two – for example, subsequent appeals to the Court of Appeal against conviction and sentence on a point of law require the leave of the court appealed from.

¹⁰¹ See Appendix Two – for example, the prosecutor must seek leave of the court appealed to (the Court of Appeal) in relation to a first-instance appeal against sentence. Appeals against decisions in pre-trial matters also require the leave of the court appealed to.

¹⁰² See Crimes Act 1961, s388(1).

¹⁰³ Court of Appeal's notice of appeal indicates/assumes that conviction appeal is being made after sentence.

ANNEX 1

QUESTIONS FOR DISCUSSION

1. Which of options 1 or 2 do you prefer and why?
2. In respect of option 1:
 - (a) What should be the Court of Appeal's jurisdiction over first-instance indictable appeals from the District Court? Options include for the Court of Appeal to hear:
 - (i) All first-instance indictable appeals;
 - (ii) All first-instance appeals from a switch-over point – for example, from the point at which a case is transferred to the trial court;
 - (iii) All/most first-instance indictable appeals except for appeals against sentences that are less than five years imprisonment (in combination with (i) or (ii))?
 - (b) Are there any matters that could appropriately be dealt with by one Court of Appeal judge?
3. In respect of option 2:
 - (a) Which approach should be adopted? In particular, should appeal paths be based on:
 - (i) The court in which the case was heard;
 - (ii) The categorisation of the offence.
 - (b) Should subsequent appeals from High Court appeal decisions arising from District Court indictable trials be heard in the Court of Appeal or the Supreme Court?
4. Are there any other issues related to either option 1 or 2 that should be considered?
5. Do you agree that no changes should be made to appeal paths for bail and name suppression?
6. Are there any other issues with appeal processes that could be addressed as part of the Criminal Procedure (Simplification) Project?

COMMENTS

Please provide written comments on this paper by 1 March 2010 to either:

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ANNEX 2

CURRENT APPEAL PATHS

	INITIAL APPEAL	FURTHER APPEALS
Bail		
<i>Summary proceedings</i>		
CM decisions	Right of appeal to DC to be heard by DCJ (Bail Act, s40(1) & (2), s41(1)-(3) (defendant and informant), s43(1) (defendant only) amended by Schedule 1, s45(5)).	No further right of appeal to HC (Bail Act 2000, s41(5), s43(3) amended by Schedule 1; <i>Newton v R</i> 7/10/05, Asher J, HC Hamilton CRI-2005-419-124).
JP and DCJ decisions	Right of appeal to HC (Bail Act, s41(1)-(3) (defendant and informant), ¹⁰⁴ s43(1) (defendant only), ¹⁰⁵ s45(5) (defendant and informant) ¹⁰⁶).	No further appeal to CA by way of case stated or on question of law (Bail Act, s42(3)) or in relation to entry of non-performance of bail condition in Criminal Records (s43(3)).
<i>Indictable proceedings</i>		
All DC decisions	Right of appeal to HC (Bail Act, s41(1)-(3) by virtue of s28E(2A) of District Courts Act (defendant and informant), s68(1) (defendant only)). ¹⁰⁷	No further right of appeal to CA by way of case stated or on question of law (Bail Act, s42(3) by virtue of s28E(2A) of District Courts Act) or in relation to entry of non-performance of bail condition in Criminal Records (s68(3)).
When committal to HC	Right of appeal to CA (Bail Act 2000, s66(2) (defendant and prosecutor) ¹⁰⁸ & s68(1) (defendant only) ¹⁰⁹).	Further appeal to SC with SC leave against refusal to grant bail or conditions (s69A(1)). No further appeal to SC on entry of non-performance of bail condition in Crown Book or similar register (s68(3)). ¹¹⁰
Name suppression (orders made under s138(2)(a) & (b) or s140 of CJA)		
CM decisions	Right of appeal for applicant for order or for informant to DC to be heard by DCJ (SPA, s114A(1) & (2), s115C(1) as modified by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may give special leave to appeal if DC refuses leave (s114B(1) & (5))

¹⁰⁴ Appeal against grant or refusal of bail or conditions.

¹⁰⁵ Appeal against entry of non-performance of bail condition in Criminal Records.

¹⁰⁶ Appeal against refusal to grant bail pending appeal against conviction/sentence.

¹⁰⁷ See also s49(2) (bail during committal proceedings), s50(2) (bail following guilty plea before committal), and s55 (bail once defendant committed to DC). Section 43 of the Bail Act, relating to appeals against entry of non-performance of bail condition in Criminal Records does not appear to apply when District Court exercising indictable jurisdiction.

¹⁰⁸ Appeal against grant or refusal of bail or conditions.

¹⁰⁹ Appeal against entry of non-performance of bail condition in Crown Book or other register.

¹¹⁰ SC may also hear appeal against CA decision to refuse bail pending appeal to CA against conviction or sentence – *Greer v R* [2006] 3 NZLR 740.

All other DC decisions	Right of appeal for applicant for order and informant to HC (s115C(1)). Includes when DC exercising indictable jurisdiction (District Courts Act, s28E(2B)).	Appeal to CA on question of law with HC leave (SPA, s115C(3) and s144(1)). CA may grant special leave to appeal if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)(c)). May appeal direct from HC to SC with SC leave in exceptional circumstances (s144A(1) and (2)).
HC	Pre-trial right of appeal for prosecutor and accused to CA or SC with leave of court appealed to (Crimes Act, s379A(1)(ba)). No ability to appeal order made in course of trial (<i>Re Victim X</i> ¹¹¹). After trial, sentence appeal provisions apply. ¹¹²	Appeal to SC against CA decision with SC leave (Crimes Act, s379AB).
Pre-trial applications (indictable only)		
DC and HC	Appeal to CA or SC with leave of court appealed to for the prosecutor and accused (for matters listed in s379A(1) or the accused only (for matters listed in s379A(2)) (Crimes Act, s379A).	Appeal to SC against CA decision with SC leave for the prosecutor and accused (for matters listed in s379A(1)) or the accused only (for matters listed in s379A(2)) (Crimes Act, s379AB).
Conviction¹¹³ and sentence¹¹⁴		
<i>Summary proceedings</i>		
CM decisions	Right of appeal to DC to be heard by DCJ (SPA, s114A(1) & (2), s115(1) (defendant) & s115A(1) ¹¹⁵ (informant) as modified by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave. (SPA, s114B(1) & (5))
Other DC decisions	Right of appeal to HC (SPA, s115(1) (defendants), 115A(1) (informant) ¹¹⁶). Includes sentence imposed under s28F(4) of District Courts Act when sentence imposed within the summary sentencing limit (SPA, s115(2A), DCA, s28H(2)(b)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).
<i>Indictable proceedings</i>		
DC and HC	Right of appeal to CA (defendant) or to	Appeal against CA decision to SC with

¹¹¹ *Re Victim X* [2003] 3 NZLR 220.

¹¹² *R v Liddell* [1995] 1 NZLR 538 at 544.

¹¹³ Includes appeals against finding under CPMIP Act about defendant's fitness to stand trial (s16, CPMIP) and acquittal on account of insanity (s21, CPMIP).

¹¹⁴ Includes appeals against CPMIP orders under s24 (detention of defendant found unfit to stand trial or insane as special patient or special care recipient); s25 (alternative decisions in respect of defendant found unfit to stand trial or insane); s27 (stay of proceedings when alternative decision made in respect of defendant unfit to stand trial) – s29, CPMIP Act. Also includes appeals against an extended supervision order – s107R, Parole Act 2002.

¹¹⁵ Informant appeal against sentence only, unless sentence is fixed by law (s115A(1)). Informant's right to appeal against sentence under section s115A requires S-G consent to be given and lodged with notice of appeal (SPA, s115A(2)).

¹¹⁶ Informant appeal against sentence only, unless sentence is fixed by law (s115A(1)). Informant's right to appeal against sentence under section s115A requires S-G consent to be given and lodged with notice of appeal (SPA, s115A(2)).

	CA with leave (prosecutor) or to SC with SC leave (both parties) (Crimes Act, s383(1) & (2)). ¹¹⁷ Includes DC sentence imposed under s28F(4) of DCA that exceeds summary sentencing limit (DCA, s28H(2)(a), Crimes Act, s383(1A)).	SC leave (Crimes Act, s383A(1) & (2)).
NB.	Related appeals against conviction and sentence that are before the HC and the CA are to be heard in the CA (Crimes Act 1961, s384A). ¹¹⁸ Appeal rights in sections 115 to 115DA are subject to section 384A (SPA, 115DB).	
Costs orders		
CMs	Defendant right of appeal to DC (to be heard by DCJ) against costs order made by CM at time information or complaint determined (SPA, s114A(1) & (2), s115(1)(b) as amended by Schedule 2A). Informant has no right of appeal (s114A(1) SPA).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses leave. (s114B(1), (5) & (7)).
DC summary	Right of appeal to HC against DC costs order made at time DC determines information or complaint (SPA, s115DA (informant) ¹¹⁹ ; s115(1)(b) ¹²⁰ (defendant)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, s144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).
DC indictable and all HC	Right of appeal to CA ¹²¹ or to SC with SC leave in relation to order made before, during, or after trial under Costs in Criminal Cases Act (Crimes Act 1961, s379CA(1)).	Not clear if s379CA also allows appeal to SC against CA decision with SC leave. ¹²²

¹¹⁷ Informant appeal against sentence only, unless sentence is fixed by law (s383(2)).

¹¹⁸ An appeal will be a related appeal if it is in respect of an offence that arises from the same incident or series of incidents as the conviction or sentence appealed to the Court of Appeal, or is an offence for which the person was sentenced on the same occasion as the imposition of the sentence appealed to the Court of Appeal (s 384A(1)(a) & (b)).

¹¹⁹ Section 115DA assumed to link to order made under s115(1)(b) but not immediately clear on face of legislation.

¹²⁰ Includes order for payment of costs and order declining an application for payment of costs – s115(1)(b).

¹²¹ Note s379CA(1) suggests leave not required to appeal to the Court of Appeal, but s379CA(3) suggests leave is required.

¹²² SCA, s10(a) states that SC can hear appeals authorised by Part 13 of CA. No equivalent s379AB in relation to costs orders.

Contempt of court		
CMs	Right of appeal to DC (to be heard by DCJ) against order made under s206 of SPA ¹²³ (SPA, s114A(1) & (2), s115B as amended by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses leave. (s114B(1) & (5)) Appeal to be by way of rehearing (s 119(1)).
DC summary and pre-committal(?)	Right of appeal to HC against DC sentence for contempt of court imposed under s206 of SPA ¹²⁴ (SPA, s115B).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)) Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).
HC or when DC proceeding on indictment ¹²⁵	Right of appeal against sentence for contempt of court to CA or to SC with SC leave (Crimes Act s384(2)). Right of appeal against HC finding of contempt or sentence imposed to CA or to SC with SC leave (Crimes Act, 384(4)). May bypass CA in exceptional circumstances (s384(6)).	Appeal to SC against CA decision with SC leave (Crimes Act, s384(5))
Questions of law¹²⁶		
<i>Summary proceedings</i>		
CM decisions	Right of appeal against determination of information/ complaint on question of law by way of case stated to be heard in DC by DCJ (SPA, s114A(1) & (2), s107 as amended by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses (SPA, s114B(1) & (5)).
Other DC decisions	Right of appeal against determination of information/ complaint on question of law by way of case stated to HC (SPA, s107(1)). DCJ or JPs can refuse to state a case if appeal frivolous (s109(1)). HC may require DCJ or JP to state case (s109(3)) ¹²⁷ or order removal of appeal to CA (s113(1)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(1) & (2)). No further appeal if removed to the CA by the HC under s113(1) (s113(2)).

¹²³ Except an order to the effect only that a person be taken into custody and detained until the rising of the Court.

¹²⁴ Except an order to the effect only that a person be taken into custody and detained until the rising of the Court.

¹²⁵ Unclear whether this also applies pre-committal.

¹²⁶ Including appeals by prosecution on question of law about finding under CPMIP Act that evidence not sufficient to establish defendant's caused actus reus or that defendant mentally impaired (s19, CPMIP).

¹²⁷ Applicant for case may apply to the High Court for order that District Court Justice or Justice of Peace must state case.

<i>Indictable proceedings</i>		
DC and HC	During or after trial, Court before which case is tried may reserve question of law for opinion of CA ¹²⁸ (Crimes Act, s380(1)).	Appeal to SC against CA decision with SC leave (s380(5)?). If question not reserved, party applying may move CA for leave to appeal against that refusal (s381(1)). No further appeal to SC if CA then refuses leave (s381(3A)).
	Question of law arising out of discharge under section 347 or stay of prosecution may be referred to CA on prosecutor's application (s381A(1)). Prosecutor may apply to the CA for leave to appeal against refusal of referral (s381A(5)).	No further appeal to SC if CA then refuses leave (s381(3A)).
Criminal disclosure		
Pre-committal	Appeal to HC with HC leave (or to SC with SC leave) for prosecutor or defendant against court order for disclosure of information or court order setting conditions for inspection of exhibit, or for prosecutor, defendant, or non-party against Court determination following non-party disclosure hearing (s33, CDA).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)).
Post-committal	Appeal to CA with CA leave (or to SC with SC leave) for prosecutor or defendant against court order for disclosure of information or court order setting conditions for inspection of exhibit or for prosecutor, defendant, or non-party against Court determination following non-party disclosure hearing (s33, CDA).	

¹²⁸ Other than a question already determined by the CA under section 379A.

Part 2: Bill Plan
