Departmental Report for the Justice and Electoral Committee

CRIMINAL PROCEDURE (REFORM AND MODERNISATION) BILL

Crime Prevention and Criminal Justice Unit, Ministry of Justice
New Zealand Law Commission
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Section I: INTRODUCTION

INTRODUCTION

1. This Report advises the Justice and Electoral Committee (the Committee) on the issues arising from submissions on the Criminal Procedure (Reform and Modernisation) Bill (the Bill). It also proposes amendments arising from further work undertaken by advisers following introduction of the Bill.

2. The Report is divided into six sections:

   2.1. Section I: Introduction (containing an overview of submissions on the Bill);
   2.2. Section II: A summary of the recommendations in this Report;
   2.3. Section III: Commentary on the general concerns of submitters about the Bill as a whole, and the Departmental response;
   2.4. Section IV: Commentary on the particular concerns of submitters about substantive policy proposals in the Bill, and the Departmental response;
   2.5. Section V: Commentary and the Departmental response to issues raised on specific Parts or clauses of the Bill;
   2.6. Section VI: Commentary on issues raised by submitters not directly addressed by the Bill.

3. Recommended technical amendments to the Bill, and the Departmental response to submissions of a technical nature are provided in the attached Appendices.

OVERVIEW OF SUBMISSIONS ON THE BILL

4. The Committee received 74 submissions on the Bill (excluding supplementary submissions). Thirty-two supported the Bill in principle (with either general or specific concerns), 26 were generally neutral about the Bill (with either general or specific concerns) and 16 opposed the Bill. Thirty-seven submitters presented orally to the Committee.

<table>
<thead>
<tr>
<th>No.</th>
<th>Submitter</th>
<th>Supports in principle/ Opposes/ Neutral</th>
<th>Oral submission</th>
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<tr>
<td>1</td>
<td>William O’Brien</td>
<td>Oppose</td>
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<td>2</td>
<td>Don Mathias</td>
<td>Support</td>
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<tr>
<td>2a</td>
<td>Don Mathias, supplementary</td>
<td>Support</td>
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<td>3</td>
<td>Family First</td>
<td>Support</td>
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<td>4</td>
<td>Green Party member</td>
<td>Oppose</td>
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<td>4a</td>
<td>Green Party member, supplementary</td>
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<td>5</td>
<td>John Lee</td>
<td>Oppose</td>
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<td>6</td>
<td>None</td>
<td>Oppose</td>
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<td>7</td>
<td>Tim Matsis</td>
<td>Oppose</td>
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<td>8</td>
<td>Peter Young</td>
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<td>9</td>
<td>Tania Smith</td>
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<td>10</td>
<td>Royal Federation of New Zealand Justices Associations</td>
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<td>11</td>
<td>Candor Trust</td>
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<td>12</td>
<td>Daniel Schellenberg</td>
<td>Oppose</td>
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<td>13</td>
<td>Dunedin Community Law Centre</td>
<td>Support</td>
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<td>14</td>
<td>Judge David John Harvey</td>
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<td>15</td>
<td>Michael Charles Jacobs</td>
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<td>16</td>
<td>Adam Edwards</td>
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<td>17</td>
<td>Anne Stevens</td>
<td>Oppose</td>
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<td>18</td>
<td>Auckland District Law Society Inc. Criminal Law Committee</td>
<td>Support</td>
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<td>18a</td>
<td>Mental Health and Disability Law Committee, Auckland District Law Society Inc.</td>
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<td>19</td>
<td>Cameron Walker</td>
<td>Oppose</td>
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<td>20</td>
<td>Children's Commissioner</td>
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<td>21</td>
<td>Christopher Edmund Burke</td>
<td>Support</td>
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<td>22</td>
<td>Coalition of Community Law Centres Aotearoa Inc</td>
<td>Oppose</td>
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1 The Mental Health and Disability Law Committee, Auckland District Law Society's submission endorses the submission of the Auckland District Law Society (ADLS) and has therefore been counted as one submission with that of the ADLS.
<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Position in New Zealand</th>
<th>Support/Oppose</th>
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<tbody>
<tr>
<td>23</td>
<td>Criminal Bar Association of New Zealand Incorporated</td>
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<td>23a</td>
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<td>24</td>
<td>Crown Solicitors Network</td>
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<td>25</td>
<td>David Farrar</td>
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<td>26</td>
<td>District Court Judges</td>
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<td>27</td>
<td>Graeme Moyle</td>
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<td>28</td>
<td>Human Rights Commission</td>
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<td>Support</td>
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<td>29</td>
<td>Human Rights Foundation</td>
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<td>Oppose</td>
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<td>30</td>
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<td>31</td>
<td>James Kaea</td>
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<td>32</td>
<td>John Goddard</td>
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<td>Oppose</td>
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<td>33</td>
<td>Judith Ablett-Kerr</td>
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<td>34</td>
<td>Judy Ashton</td>
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<td>Support</td>
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<td>35</td>
<td>Ken Evans</td>
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<td>36</td>
<td>Leigh Woodman</td>
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<td>37</td>
<td>Media Freedom Committee of New Zealand</td>
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<td>National Council of Women of New Zealand</td>
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<td>39a</td>
<td>James Richardson</td>
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<td>39b</td>
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<td>No.</td>
<td>Name and Organization</td>
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<td>43</td>
<td>Patrick Winkler and Roderick Mulgan</td>
<td>Oppose</td>
<td>✓</td>
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<td>44</td>
<td>Rebecca and Andrew Templeton</td>
<td>Support</td>
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<td>45</td>
<td>Robert Terry</td>
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<td>46</td>
<td>Sensible Sentencing Trust</td>
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<td>47</td>
<td>Sensible Sentencing Trust (Napier)</td>
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<td>48</td>
<td>Sharlene and Malcolm Barnett</td>
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<td>49</td>
<td>Simon Cowen</td>
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<td>Tech Liberty</td>
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<td>51</td>
<td>Telecommunications Carriers Forum</td>
<td>Neutral</td>
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<td>52</td>
<td>Television New Zealand Limited, News and Current Affairs</td>
<td>Neutral</td>
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<tr>
<td>53</td>
<td>Edward Miller and Kris Gledhill, University of Auckland</td>
<td>Oppose</td>
<td></td>
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<tr>
<td>54</td>
<td>Tony Ellis</td>
<td>Neutral</td>
<td>✓</td>
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<td>55</td>
<td>Trade Me</td>
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<tr>
<td>56</td>
<td>Valerie Anne Burr</td>
<td>Support</td>
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<td>57</td>
<td>Wellington Criminal Bar Association</td>
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<td>58</td>
<td>Working Group of Hamilton Legal Practitioners</td>
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<td>60</td>
<td>Chief Justice</td>
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<td>61</td>
<td>David White</td>
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<td>✓</td>
</tr>
<tr>
<td>62</td>
<td>Jardine (Jock) Jamieson</td>
<td>Support</td>
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<tr>
<td>63</td>
<td>Margaret Jamieson</td>
<td>Support</td>
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<td>#</td>
<td>Question</td>
<td>Member requesting</td>
<td>Information provided at:</td>
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<tr>
<td>1</td>
<td>How is the court record currently accessed generally and, in particular, how does this link with the proposed suppression register?</td>
<td>Mr Quinn</td>
<td>Paragraphs 1599 to 1606</td>
</tr>
<tr>
<td>2</td>
<td>What is the difference between ‘publishers’ and ‘providers’ (clause 216) in the context of the suppression discussions?</td>
<td>Mr Quinn</td>
<td>Paragraphs 1062 to 1067</td>
</tr>
</tbody>
</table>

2 The Criminal Law Committee, Wellington Branch of the New Zealand Law Society’s submission endorses the submission of the New Zealand Law Society (NZLS) and has therefore been counted as one submission with that of the NZLS.
<table>
<thead>
<tr>
<th></th>
<th>Question</th>
<th>Author(s)</th>
<th>Page(s)</th>
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</thead>
<tbody>
<tr>
<td>3</td>
<td>Why are provisions retained that are, in effect, the current ‘middle-band’?</td>
<td>Mr Chauvel</td>
<td>Paragraphs 547 to 553</td>
</tr>
<tr>
<td>4</td>
<td>Why is the offence structure still so complex?</td>
<td>Mr Chauvel</td>
<td>Paragraphs 288 to 292</td>
</tr>
<tr>
<td>5</td>
<td>How do sentencing indications currently operate and, in particular, what role or rights do victims have in this process?</td>
<td>Mr Bridges, Mr Chauvel</td>
<td>Paragraphs 510 to 539, particularly 523 to 524; Note also paragraphs 1474 to 1476</td>
</tr>
<tr>
<td>6</td>
<td>What evidence is there of ‘game playing’ by defence leading to delay? (The Departmental Report should present a balanced response to issues; that is both defence and prosecution perspectives.)</td>
<td>Mr Chauvel</td>
<td>Paragraphs 199 to 203</td>
</tr>
<tr>
<td>7</td>
<td>What response can be made to the human rights criticisms made on aspects of the Bill, particularly those raised by James Richardson about initiatives that are similar to those which have been discredited in the UK.</td>
<td>Mr Borrows</td>
<td>Sections IV &amp; V of the report (discussed in particular issues)</td>
</tr>
<tr>
<td>8</td>
<td>Why has the option of ‘alternate’ jurors not been adopted (instead of the proposal to allow jury numbers to fall in more circumstances than currently)?</td>
<td>Mr Chauvel</td>
<td>Paragraphs 1446 to 1453</td>
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</tbody>
</table>
Section II: SUMMARY OF RECOMMENDATIONS

6. The recommendations contained in this report are summarised below.

7. Advisers recommend that:

<table>
<thead>
<tr>
<th></th>
<th>Identification of issues in dispute</th>
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<tbody>
<tr>
<td>1</td>
<td>there be a new provision providing that a defendant may raise a new issue during the trial that is not identified in advance under clause 64;</td>
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<td></td>
<td>clause 64(1)(a) be amended to require the defendant to give notice of any particular elements of the offence that the defendant denies (or words to that effect);</td>
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<td></td>
<td>the issues in dispute (and adverse inference) provisions be amended to provide greater clarity about when the issues in dispute must be identified;</td>
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<thead>
<tr>
<th></th>
<th>Adverse inferences from failure to identify issues in dispute</th>
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<tr>
<td>2</td>
<td>the adverse inference provisions be amended so that a co-defendant is able to comment to the fact-finder about another defendant’s failure to identify the issues in dispute;</td>
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<tr>
<th></th>
<th>Proceeding in absence of defendant</th>
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<tbody>
<tr>
<td>3</td>
<td>clause 125(2)(c) be amended so that the defendant is not required to be present when the hearing is solely concerned with the timing of the trial or the admissibility of evidence;</td>
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<td>clause 130 be amended so that:</td>
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<td>o the grounds for ordering a retrial for a category 1 offence are the same as those for an offence in category 2, 3 or 4;</td>
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<td>o the court may order a rehearing as to sentence if a defendant is sentenced for a category 1 offence in his or her absence;</td>
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<td>clause 131 be amended to provide that, in addition to the ground already provided for ordering a retrial for a category 2, 3 or 4 offence:</td>
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<td>o the court must order a retrial if the defendant did not have notice of the hearing;</td>
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<td>o the court may order a retrial of the charge if the defendant had a reasonable excuse for his or her absence that was unknown to the court at the time of the trial, and it is in the interests of justice that there be a retrial;</td>
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<td></td>
<td>clause 132 (which should apply to retrials ordered under clause 130 and clause 131) be amended to extend the timeframe in which an application for a retrial must be made from 10 working days to 15 working days;</td>
</tr>
</tbody>
</table>
| 4 | **Costs orders**  
   | the Bill be amended to provide that:  
   | • when a costs order is made under clause 361, that is intended to reflect costs incurred by any person connected with the proceedings, the court may order that some or all of the amount is to be paid to the affected person(s); and  
   | • a costs order can be imposed for failure to comply with regulations made under the Criminal Disclosure Act 2008;  
| 5 | **Bail conditions**  
   | clauses 402 and 405 be redrafted to apply only to defendants who have pleaded, or been found, guilty and are awaiting sentencing;  
| 6 | **Aggravating and mitigating factors at sentencing**  
   | clause 431 be amended to:  
   | • re-draft new section 9(2)(fa) of the Sentencing Act 2002 (inserted by subclause 2) to make clear that it is only a mitigating factor if the offender has taken steps beyond that required by the Act or any other enactment to shorten the trial or reduce costs;  
   | • add the word “adverse” to describe the effect on the defendant in the mitigating factor in new section 9(2)(fb) of the Sentencing Act 2002 (inserted by subclause 2); and  
   | • enable the new aggravating and mitigating factors to apply to failure to comply with regulations made under the Criminal Disclosure Act 2008;  
| 7 | **General**  
   | Parliamentary Counsel be given permission to make technical drafting amendments identified in consultation with advisers, in addition to the specific changes recommended in this report;  
| 8 | clause 2 (commencement) be amended to:  
   | • include in subclause (1)(d) a reference to section 400 (regulations to make consequential amendments);  
   | • relocate the reference to section 403 (Bail Act amendment about publication of bail hearings) from subclause (1)(f) to subclause (1)(c);  
| | **Part 1**  
| 9 | clause 3 (purpose) be amended to make it clear that the Act is intended to facilitate/enable the use of electronic technology generally (not just filing and permanent court record);  
| 10 | the Bill be amended to clearly state that the criminal jurisdiction of the District Court (set out in clause 9 and Part 7) can be exercised by any
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<td>11</td>
<td>clause 10 (who may conduct proceedings) be amended by deleting subclauses (3) and (4) and by amending its heading to make explicit its purpose, being who may conduct proceedings against a defendant;</td>
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<tr>
<td>12</td>
<td>clause 11 (who may appear for defendant at hearings) be amended to make explicit that its purpose is to provide who may conduct proceedings for a defendant;</td>
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<td>13</td>
<td>the Bill be amended to allow a non-legally qualified representative to act for any purpose under the Bill that he is she is authorised by a corporation to perform;</td>
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<td><strong>Part 2</strong></td>
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<td>14</td>
<td>the Bill be amended to specify that a requirement for commencing proceedings is that the person alleging that a defendant has committed an offence has good cause to suspect that the defendant has committed the specified offence;</td>
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<td>15</td>
<td>the Bill be amended so that the particulars of the person alleging that a defendant has committed an offence is specified as an additional matter that must be included in the charging document;</td>
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<td>16</td>
<td>clause 14 (content of change) be amended to:</td>
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<td>• make it clear that a representative charge must be specified as such and should contain particulars that fully and fairly inform the defendant of the nature of the conduct of which the charge is representative, including:</td>
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<td>- the dates between which the conduct of which the charge is representative is alleged to have occurred;</td>
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<td>- the nature of the offence or offences which are representative of the conduct;</td>
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<td>- other particulars, such as:</td>
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<td>- the name of any complainant;</td>
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<td>- if the offence relates to the loss of or damage to property, the minimum value of the property lost or damaged;</td>
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<td>- if the offence is a drugs offence under the Misuse of Drugs Act 1975, the minimum quantity of drugs involved;</td>
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<td>• clearly identify that the charge is in the alternative in accordance with clause 16;</td>
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<td>the intent of clause 20(2) be clarified to ensure that only those responsible for providing the particulars included in a charging</td>
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<td>Part 3</td>
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<td><strong>clause 33</strong> (right to plead to category 1 offence by notice to Registrar) be amended to:</td>
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<td>• reflect current practice that a notice is filed in court rather than “given” to the Registrar (including deleting subclauses 33(3) and (5));</td>
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<td>• provide that a defendant who pleads guilty by notice is able to indicate whether he or she wants to appear at court for sentencing and to provide written submissions to be taken into account at sentencing;</td>
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</table>

| 19 | **clause 34** (Registrar may receive not guilty plea) be amended to ensure that: |
| • a defendant can plead (before the court or a Registrar) before being required to under clause 35 (requirement on defendant to plead); |
| • a Registrar can accept not guilty pleas only to an offence in categories 1, 2 and 3 (if the defendant indicates the wish to plead guilty, the matter will need to be put before a judge); |

| 20 | • **clause 35** (requirement on defendant to plead) be amended to: |
| o provide that the defendant should only be required to plead if the prosecutor has made initial disclosure in accordance with section 12(1) of the Criminal Disclosure Act 2008; |
| o enable a Registrar to require a defendant who is charged with an offence in category 1, 2 or 3 to plead (if the defendant indicates he or she wishes to plead guilty, the matter will need to be put before a judge); |
| o provide that the court (or Registrar) needs to inquire into the matters in clause 35(1) only when an unrepresented defendant is entering a plea; |
| • section 12(1)(b) of the Criminal Disclosure Act be amended to remove the words “before entering a plea”; |

| 21 | • **clause 38** (defendant may amend plea to guilty) and related provisions be amended to ensure that the Bill adequately deals with all the situations in which a defendant might change his or her not guilty plea; |
| • the protections provided in subclause (2) of clause 39 (procedure if defendant makes request under section 38) for defendants who indicate they wish to plead guilty but then do not do so should also apply to defendants who indicate a desire to plead guilty at the outset; |
**in relation to special pleas (clauses 42 – 47):**

- the phrase “factual circumstances” in clauses 43, 44 and 46 be substituted with "facts";
- a new provision be included in clause 43 to the effect that nothing in that clause requires a court to dismiss a charge arising from the same facts as those for which a person has been convicted, if the court is satisfied that evidence of a more serious charge with which the person is subsequently charged was not readily available at the time of the original charge;
- clause 45 be deleted as it is already addressed by clause 43 (including the new provision above);
- clause 42(3) be redrafted to make clear that a person who enters a special plea must provide information as to the conviction, acquittal or pardon upon which the plea is based;

**clause 52 (adjournment for case management) be amended to:**

- require parties to make arrangements for “fair” resolution of proceedings, rather than “just” resolution as currently;
- provide that when a notice has been given under clause 140(1)(a) that charges are to be tried together (and the charges are not severed under clause 140(4)), a case management memorandum may cover all joined charges;

**clause 54 (case review hearing) be amended to require an unrepresented defendant to appear at a case review hearing regardless of whether a case is proceeding to a Judge-alone trial or a jury trial;**

**clause 60 (further provisions relating to giving sentence indication) be amended by deleting the requirement for parties to be heard when sentence indication proposed for type and quantum (subclause (1)) because it is both unnecessary and implies a hearing is not necessary for other types of sentence indications;**

**consistent with the prohibition on publishing sentence indications in clause 61 (further provisions relating to giving and reporting sentence indication), it should be an offence to knowingly publish information about a request for a sentence indication or about an indication that has been given prior to sentencing or dismissal of a charge, with a maximum penalty of three months’ imprisonment for individuals and a $50,000 fine for a body corporate;**

**the Bill be amended to extend the protocol/application process, which currently applies only to category 3 offences, to category 2 offences;**

**clause 68 (establishment of protocol) be amended to require the Chief High Court Judge and Chief District Court Judge to publish in the New Zealand Gazette the protocol and any changes made to it;**
<table>
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<tr>
<th></th>
<th>29</th>
<th>the Bill be amended to enable the District Court judge to decline to refer a case to a High Court judge under clause 69 if he or she considers that an offence does not fall within the protocol;</th>
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<td></td>
<td>30</td>
<td>clause 74 (designation of proceedings for category 3 offences as ready to proceed) be replaced with a simpler provision that enables offences to be transferred to the trial court when required (the references to designation in other clauses will also need to be removed and replaced);</td>
</tr>
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<td></td>
<td>31</td>
<td>clause 75 (category 3 offences) be amended to clarify that, despite an election of jury trial, the trial must be dealt with by a judge alone if an order to do so is made under clauses 102 or 103;</td>
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<td>32</td>
<td>section 19 of the Summary Proceedings Amendment Act (No 2) 2008, which requires a review of new Part 5 of the Summary Proceedings Act (changes to committal process two years after commencement), be repealed;</td>
</tr>
</tbody>
</table>
|   | 33 | clause 82 (requirements for formal statements) be amended to:  
   |   | • delete clause 82(1)(b), as issues of admissibility are best left to clause 86, which deals with the evidential status of formal statements;  
   |   | • replace clause 82(5) with a provision to the effect that, when filing a formal statement that is a recording of the evidential interview, the Police may also file a summary of the interview which identifies the material from the interview that the Police considers is sufficient to justify trial; |
|   | 34 | clause 87 (trial callover memoranda to be filed in trial court) be amended to require the prosecutor to file a trial callover memorandum whether or not the defendant is represented; |
|   | 35 | clause 92 (making oral evidence order) be redrafted to provide the following grounds for making an oral evidence order:  
   |   | • it is necessary to take the oral evidence of the witness in order to determine a pre-trial application on any matter;  
   |   | • a witness has been requested to give evidence in the form of a formal statement and has refused or failed to do so; and the anticipated evidence is relevant to the charge against the defendant;  
   |   | • it is otherwise in the interests of justice to take the oral evidence of the witness; |
|   |   | **Part 4** |
|   | 36 | clause 105 (conduct of Judge-alone trial) be amended to better integrate the rule in section 98 of the Evidence Act 2006 (enabling a party, with the court’s leave, to give further evidence after the closure
of its case) with the order of evidence specified in clause 105(2);

| 37 | • clause 107 (decision of court) be amended to require the court to give reasons for its decision that a defendant is guilty or not guilty;  
|    | • the Bill be amended to:  
|    | o explicitly state that a court cannot sentence a defendant convicted of an offence in category 2, 3 or 4 in his or her absence;  
|    | o enable a court to issue a warrant for the arrest of a defendant who fails to appear at a sentencing hearing;  

| 38 | clause 108 (judicial officer may order retrial or rehearing as to sentence) be amended to:  
|    | • restrict its scope to category 1 and 2 offences;  
|    | • allow a rehearing to be sought in respect of an order made against a defendant under section 106(3) of the Sentencing Act (which allows discharge without conviction);  
|    | • ensure the powers to order a retrial or rehearing continue to be available in respect of any offence heard and determined in the Youth Court;  
|    | • clarify in subclause (5) that a defendant may not apply for a retrial or rehearing under clause 108 if the reason for the application is that the original hearing proceeded in the defendant’s absence;  

| 39 | • clause 109 (procedure if retrial or rehearing ordered) be amended to provide, in subclause (5), that if the defendant does not appear at the retrial or rehearing, the court has discretion to restore the original conviction, sentence or order;  
|    | • the Bill be amended to clarify the powers available to the trial and appeal courts for dealing with a defendant when a retrial or rehearing as to sentence is ordered;  

| 40 | clause 110 (conduct of jury trial) be amended to better integrate the rule in section 98 of the Evidence Act 2006 with the order of evidence specified in clause 110(3);  

| 41 | section 34(1)(b) of the Criminal Disclosure Act 2008 be amended so that section 34 (which allows for an adjournment when the defence has not disclosed required information) also applies when the information was disclosed but outside the time required by section 22 (for alibi) or section 23 (for expert evidence);  

**Part 5**

| 42 | clause 135 (amendment of change) and clause 138 (procedure it charge amended during trial) be amended to provide that a charge may be amended on the application of either party or on the court’s
| 43 | own motion;  
|    | • clause 136 (procedure if charge is amended before trial) be amended to provide that the case management process (clauses 52 to 57) does not apply when a defendant pleads not guilty to an amended charge, unless the court orders otherwise;  
|    | • clause 137 (procedure if charge amended after order made under section 70 or 72), which relates to a decision about District Court or High Court trial for category 3 offence, be amended to provide greater flexibility to enable a proceeding to be considered for transfer to the High Court before the trial but after an order has been made for a District Court trial under sections 70 or 72;  
| 44 | clause 138 (procedure if charge amended during trial) be amended to provide that the court must amend a charge to which clause 138(1)(a) and (b) applies if of the opinion that the amendment will not mislead or prejudice the defendant in his or her defence;  
| 45 | • clause 139 (proceedings against parties to offences, accessories and receivers) be amended to insert the words “stolen or” before “dishonestly obtained” in each case where they appear;  
|    | • the Bill be amended to carry forward section 343 of the Crimes Act 1961 (which provides that a defendant may be convicted as a party even if not charged as a party);  
| 46 | the Bill be amended to clarify the approach that applies when a new charge is joined to one or more existing charges, following the prosecutor giving notice under clause 140 that he or she proposes to try two or more charges together or to try charges against more than one defendant;  
| 47 | clause 148 (prosecutor must notify court if defendant completes programme of diversion) be amended so that it applies to a diversion programme conducted in relation to a public prosecution;  
| 48 | clause 150 (offence proved when attempt is charged) be amended to make clear that the power to amend a charge may only be exercised when the defendant is not prejudiced or misled in his or her defence;  
| 49 | clause 157 (transfer of proceedings to court at different place or different sitting) be amended to provide that:  
|    | • in any case, the court can order that proceedings be transferred if satisfied that it is in the interests of justice that the proceedings be heard at that other place or sitting;  
|    | • in the case of proceedings for a category 1 or category 2 offence, the Registrar of the court may make an order, if the parties consent;  
| 50 | clauses 159 to 162 (relating to taking the evidence of witnesses who are at a distance, about to leave the country, or dangerously ill) be
<table>
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<th>Page</th>
<th>Amendments</th>
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<tr>
<td>51</td>
<td>Clause 163 (proving previous convictions on sentencing), which requires the defendant to give advance notice if disputing a previous conviction prior to sentencing, be deleted because it conflicts with the policy intent that defendants are not required to do this until having pleaded or been found guilty;</td>
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<td>52</td>
<td>Clause 170 (witness refusing to give evidence may be imprisoned) should be amended to allow a witness aged under 20 years of age to be remanded in the custody of the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and their Families Act 1989;</td>
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<td>53</td>
<td>Clause 177 (mode of issuing summons and warrant issued under this Act) be deleted in light of recommended changes to facilitate electronic management of documents;</td>
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<td>54</td>
<td>Clause 183 (stay of proceedings) be amended to provide that the Attorney-General will notify the court of the stay of proceedings, but that failure to notify the court shall not affect the Attorney-General's stay;</td>
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<td>55</td>
<td>Clause 184 (service of documents) be deleted and that the Bill’s rule making powers provide that rules can prescribe what notices, applications, orders and other documents under the Bill that must be served;</td>
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<td>56</td>
<td>Clauses 185 to 187, which relate to the correction of erroneous sentences, be amended to enable a judge to correct an erroneous sentence on his or her own motion;</td>
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<td>57</td>
<td>Clauses 192-197 (role of Crown in prosecutions) be amended to provide that:</td>
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<td>• on filing a notice under clause 194, or within the prescribed period after filing that notice, the Solicitor-General or Crown prosecutor can give a notice to the court hearing the proceeding to add a new charge or charges to that proceeding without leave of the court;</td>
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<td>• the new charges will be treated as if charging documents had been filed under clause 12 and a notice had been given under clause 140(1) joining the new charges to the existing proceeding;</td>
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<td>• clause 22 (time for filing charging document) applies to the new charges;</td>
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<td>• the Crown’s ability to amend, withdraw or add charges without leave of the court does not apply once the trial has started;</td>
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<td>58</td>
<td>Clause 198 (interpretation), which defines terms for the purposes of suppression provisions, be amended to:</td>
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<td>• delete the definition of “identifying information”;</td>
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|      | • define “name” to mean name and any particulars that are likely to
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<td><strong>lead to the person’s identification; and that</strong></td>
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<td>• clauses 204, 205, 206, 207, 208, 213 and 215 be consequentially amended to replace the references to “name” and “any other identifying information” with “name, address or occupation;**</td>
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</table>
| **59** | clause 200 (court proceedings generally open to public) be amended to provide that it is also subject to clause 97 (persons who may be present if oral evidence is taken from complainant in cases of a sexual nature) and “any other enactment”;
| **60** | clause 201 (power to clear court) be amended to replace “any Police employee” in subclause (1)(f) with “the Police employee in charge of the case”;
| **61** | Advisers recommend that clause 202 (exception for members of media) be amended to:
| • replace “media reporter” with “journalist”;
| • change the definition of “member of the media” to mean a journalist who is subject to, or is employed by an organisation that is subject to, a code of ethics and also the complaints procedure of the Broadcasting Standards Authority or the Press Council;
| **62** | clause 204 (Court may suppress identity of defendant) be amended:
| • to clarify the wording in subclause (3) so that the fact that a defendant is well known does not of itself mean that publication of his or her “name” (as per the new definition recommended in clause 198) will result in extreme hardship for the purposes of that ground of suppression in subclause (2)(a);
| • so that interim orders expire automatically without judicial intervention (subclause (5));
| **63** | clause 210 (Registrar’s power to make and renew interim suppression orders) be amended to:
| • confine this power to making only name suppression orders under clause 204 and only on the defendant’s first appearance;
| • simplify the wording in subclause 210(1)(b) to simply require that both parties consent;
| **64** | clause 214 (regarding standing of members of media), which relates to suppression order applications, be amended to:
| • bring the definition of media into line with the definition proposed in clause 202;
| • make it is clear that the media can initiate proceedings, not just be heard on existing proceedings;
| **65** | clause 215 (offences and penalty), relating to breaches of suppression, be amended to create two levels of offences and penalties:
- knowingly or recklessly publishing suppressed information with a maximum penalty of $100,000 fine for a body corporate and 6 months imprisonment for individuals; and
- a strict liability offence for publishing suppressed information with a maximum of $50,000 fine for a body corporate and $25,000 fine for individuals;

66 clause 216, concerning liability of onshore Internet service providers, be deleted as the focus of law enforcement and criminal liability in this area should be on the person who publishes the suppressed information (already addressed in clause 215), rather than the host of that content;

**Part 6**

67 the Bail Act 2000 be amended so that appeal paths for bail decisions by Justices of the Peace are aligned to the appeal paths for bail decisions by Community Magistrates (both should be appealed to a judge in the District Court in the first instance);

68 the provisions in Part 6 that govern second appeals to the High Court and Court of Appeal be amended to:
- remove the requirement that the appeal be on a question of law; and
- provide that leave may be granted for a second appeal only if the court is satisfied that:
  - the appeal involves a matter of general or public importance; or
  - a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard;

69 clause 220 (right of appeal by prosecutor of defendant against pre-trial admissibility decision in a Judge-alone case) be extended to enable the following matters to be appealed before the trial in a Judge-alone case:
- an order made under section 44 of the Evidence Act 2006 giving or refusing permission to question a complainant in a sexual case about his or her sexual experience;
- an order giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 to question an undercover police officer, or give evidence about, his or her true name and address;
- making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006;

70 clause 236 (first appeal court to determine appeal) be amended to:
- delete subclause 236(2), because it erroneously suggests only
Judge-alone trials proceed by way of a rehearing; and

- amalgamate and re-draft subclauses (3)(c) and (d) to define “Substantial miscarriage of justice” to include any error or irregularity that –
  - has created a real risk that the outcome of the trial was affected; or
  - has resulted in an unfair trial or a trial that was a nullity;

| 71 | • clause 238 (conviction and sentence for different offence may be substituted) be amended to enable the appeal court, on determining a conviction appeal by a person who pleaded guilty, to substitute a conviction for a different offence based on facts admitted in relation to the original charge, if the appellant agrees; and
  - clauses 238 and clause 240 (confirmation or substitution of sentence for another offence) be amended to allow an appeal court, instead of exercising its power to re-sentence under those clauses, to remit the matter to the trial court for sentencing; |
<p>| 72 | in relation to appeals against conviction, subclause (4) of clause 252 (how to commence first appeal) be amended to enable the first appeal court to extend the time within which the document evidencing the Solicitor-General’s consent must be filed; |
| 73 | in relation to appeals against a sentence, subclause (1) of clause 257 (right of appeal against determination of first appeal court) be amended to enable a convicted person to appeal, with leave, against a determination by the first appeal court, regardless of whether he or she brought the first appeal; |
| 74 | in relation to appeals against a sentence, the Bill include a right to appeal an order made against the defendant under section 106(3) of the Sentencing Act (discharge without conviction); |
| 75 | subclause (4) of clause 303 (deferral or adjournment of trial if notice of application for leave to appeal filed) be amended to provide that, where an appeal on a question of law is filed during the trial, the trial must continue unless the court considers it in the interests of justice for the jury to be discharged; |
| 76 | the new Solicitor-General’s reference procedure in clauses 315 to 319 be extended to enable the Solicitor-General to refer a question of law to the Court of Appeal which arises in or in relation to a defendant’s appeal to the High Court against conviction or sentence where the prosecutor has no right of appeal against that Court’s determination; |
| 77 | subclause (1) of clause 315 (Solicitor-General’s right to refer question of law) be clarified to provide that the Solicitor-General can refer a question of law to the Court of Appeal even though an offender’s appeal against conviction or sentence has yet to be dealt with; |</p>
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<th>Clause</th>
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<tr>
<td>78</td>
<td>Clause 326 (right of attendance at hearing) be amended to delete subclause 326(2)(a), regarding court rules (which are not required);</td>
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<td>79</td>
<td>Subclause (1) of clause 333 (powers exercisable by Judges or Court) be amended to revert to the current position in section 393(2) of the Crimes Act – that a single Judge may determine applications to extend time, but with recourse to the Court if the decision is not in the appellant’s favour – instead of two Judges without recourse to the Court, as in the Bill currently;</td>
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<tr>
<td>80</td>
<td>Clause 340 (judgment to be accompanied by reasons) be amended to enable an appeal court to give reasons for its decision at a different time from the judgment;</td>
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**Part 7**

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| 81 | • The jurisdiction of Community Magistrates’ and Justices of the Peace be clarified to ensure that they can deal with matters outside their trial and sentencing jurisdiction in respect of:
  o taking pleas;
  o receiving elections for trial by jury.
• The Bill be amended to enable Community Magistrates and Justices of the Peace to make suppression orders on the following basis:
  o on first appearance: order may be made after an opposed application or by consent for all matters (ie not just identity) on a time limited or interim basis only;
  o on subsequent appearances: order may be made by consent for all matters (ie not just identity) on a time limited or interim basis only;
• Community Magistrates’ jurisdiction be able to be extended to any category 1 offence with a maximum fine of up to $40,000 that is specified in regulations (including adding to the Bill a regulation making power, requiring the concurrence of the Chief District Court Judge and the Chief Justice, for such regulations);
• Community Magistrates’ ancillary powers (clause 357) include the ability to make orders under section 4(3) of the Costs in Criminal Cases Act 1967;
• Clause 354 be amended to provide Community Magistrates with jurisdiction over infringement offences (to align their jurisdiction in that respect with the jurisdiction provided to Justices of the Peace; |

**Part 8**

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<tr>
<td>82</td>
<td>Clause 377 be amended to replace the word “reheard” with a wider phrase along the lines of “dealt with”, as subclause (3) could imply</td>
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that proceedings must be reheard when this may not be necessary

| 83 | clause 378 (payment of costs orders) be amended to apply section 208 of the Summary Proceedings Act to all Court fees, fines, reparation (including costs orders to be paid to a third party under clause 361(8)), costs, and other money payable on a charge or on any conviction or order made by a District Court; |
| 84 | clause 379 (payment and recovery of fees) be amended to add to subclause (4) words along the lines of, “except as provided in regulations made under this Act” to allow for the possibility in future of charging a fee to the Crown (eg, cost recovery for electronic filing); |
| 85 | clause 380 (enforcement of monetary penalties) be amended to:
  * provide that, if a fine is imposed by the High Court at first instance, then sections 19 – 19F of the Crimes Act apply;
  * provide that, where an appeal court imposes or varies a fine, the order should be enforced by the court that initially passed the sentence or made the order from which the appeal arose; and
  * ensure a clear interface between the Bill and Part 3 of the Summary Proceedings Act by making it clear that “fine” has the same meaning as in section 79 of the Summary Proceedings Act and any necessary changes to the name of the clause; |
| 86 | • a general provision is inserted into the Bill requiring parties to conduct proceedings in accordance with the Bill and any rules or regulations made under the Bill;
  • specific references in other clauses to a rule or regulation making power be removed, except where essential to meet the purpose of the power;
  • clauses 382 (rules) and 383 (regulations) be amended so that the rule and regulation making powers they contain clearly reflect the intended scope of the rules and regulations;
  • any necessary consequential amendments be made by Parliamentary Counsel Office to give effect to the above policy;
  • clause 383(g) be retained. |
| 87 | • clause 384 (meaning of commencement date) and associated provisions be amended to make it clear when the existing law or the new legislative regime applies in reference to the provisions set down in clause 2(1) along the lines already set down for provisions that will come into force pursuant to clause 2(2) or (3);
  • legislative exceptions to the standard approach that the provisions that come into force pursuant to clause 2(1) apply only to proceedings after the date they come into force where this is not already set down in the Bill be included:
    o to allow warrants to arrest issued prior to early commencement to be withdrawn post early commencement (clause 435); |
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| 88     | • a transitional provision be inserted into clause 385 (transitional provision for sentence indications), or be associated with that clause, to make it clear that sentencing indications can be provided in respect of proceedings already commenced;  
          • a transitional provision be inserted into clause 386 (transitional provision for public access and restrictions on reporting), or be associated with that clause, to make it clear that the existing law relating to name suppression will continue to apply to proceedings commenced prior to early commencement;  
          • the media be given the right to exercise existing appeal rights regarding name suppression in respect of proceedings commenced after early commencement and before full commencement; |
| 89     | • clause 389 (proceedings commenced before the commencement date) be amended to include proceedings commenced by filing an indictment in accordance with section 345 of the Crimes Act 1961 in respect of an offence;  
          • it be made clear that the term "proceeding" includes any appeals, retrials and rehearings arising from determination of the original charge; |
| 90     | clause 393 (no proceeding invalid if does not comply with section 391 or 392) be amended to remove the reference to new sections 391 and 392, so that, if any proceeding is conducted under the old law rather than the new law, then it will not be invalid only on that basis; |
| 91     | clause 397 and clause 398, dealing with certain transitional matters in relation to existing regulations, be omitted, because they are not necessary; |
| 92     | • subclause (2) of clause 399 (regulations providing for transitional matters) be amended to the effect that regulations may not be made later than two years after the date on which the rest of the
Act comes into force under section 2 (2) or (3) as the case may be; and

- if Parliamentary Counsel agrees, clause 399 be amended so that it expires two years after the majority of the Bill comes into force;

93 clause 400 (regulations making consequential amendments):

- if Parliamentary Counsel agrees, be amended so that it expires two years after the majority of the Bill comes into force (similar to clause 399, discussed above); and
- be adjusted to allow references to “laying a complaint” (and related terminology) and to “summary offence” to be amended by way of regulations;

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<td>94 Parliamentary Counsel consider how Part 9 may be broken up into relevant amendment acts;</td>
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<tr>
<td>95 clause 403 (section 19 substituted), which relates to section 19 of the Bail Act 2000, be amended to mirror the changes in offences and penalties for publishing suppressed information in clause 215;</td>
</tr>
<tr>
<td>96 the Bill be amended to make it clear that subclause (2) of clause 411 (duty of persons arresting), which will allow a copy of an arrest warrant rather than the original to be shown, applies whether the proceedings to which the warrant or process relates commenced before or after the date that clause 411(2) commences;</td>
</tr>
<tr>
<td>97 the Bill be amended to make it clear that clause 435 (withdrawal of warrant) applies whether the warrant to which the withdrawal relates was issued before or after clause 435 comes into force;</td>
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<tr>
<td>98 clause 437 (second stage of amendments to Summary Proceedings Act 1957) be amended by omitting the repeal of the title of the Summary Proceedings Act;</td>
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<td><strong>Schedule 2 (Amendments to Bail Act 2000)</strong></td>
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<td>99 • schedule 2 be amended to include an amendment to section 22 of the Bail Act to align the information to be provided to a defendant on a bail bond with that required on a summons;</td>
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<tr>
<td>• the Bill be amended to ensure that appeal and trial courts are provided with the necessary powers to grant bail to a defendant pending and following an appeal;</td>
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| **Schedule 3 (Amendments to the Children, Young Persons, and Their Families Act 1989)** |
| 100 clauses 126 and 128-132 should not apply to Youth Court proceedings; |
| 101 | schedule 3 be amended to include an amendment to section 275 of the Children, Young Persons, and Their Families Act 1989 to:  
|     | make it clear that the applicable pre-trial processes (modified as necessary) are those set down in subparts 1-4 of Part 3 of the Bill, but subject to the modifications that will be set down in further provisions;  
|     | apply this approach to cases where a young person is to be tried jointly with an adult in a court other than the Youth Court; |
| 102 | schedule 3 be amended to include a further provision to be inserted into the Children, Young Persons, and Their Families Act 1989 specifying that the issues in dispute provisions only apply to:  
|     | a child or young person who must be tried by a jury or is to be tried by a jury; and  
|     | an adult who is jointly charged with a child or young person and who is to be tried in the Youth Court with that child or young person; |
| 103 | schedule 3 be amended to include amendments to the Children, Young Persons, and Their Families Act 1989 enabling the Bill's case management and sentence indication provisions to:  
|     | always apply for category 3 and 4 when a young person was to be tried by a jury; and  
|     | apply at the discretion of the Youth Court judge in other cases; |
| 104 | schedule 3 be amended to include an amendment to section 275 of the Children, Young Persons, and Their Families Act 1989 to extend its applicability to young people (and not children) who are to have a jury trial because they are jointly charged with an adult who has elected such a trial; |
| 105 | the references to admissions of fact in new sections 10 (inquiry before trial into defendants involvement in the offence) and section 11 (inquiry during Judge-alone trial into defendant’s involvement) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 be replaced with provisions that enable the court to consider the defendant’s involvement in the offence on a broad basis, including with reference to any formal statements or oral evidence, and any other evidence that is provided by the parties; |

**Schedule 5 (Amendments to the Summary Proceedings Act 1957)**

| 106 | schedule 5 be amended to include a new section 106G of the Summary Proceedings Act 1957 to:  
|     | insert words along the lines of “unless otherwise stated in section 78B or Part 3” be inserted;  
|     | provide for modifications as applicable;  
|     | insert “oral” before “hearing”;  
|     | insert a reference to registrars; |
### Schedule 5 - amendments to other enactments

**107** schedule 5 be amended to include a stand-alone provision incorporating the content of section 124 (5) of the Summary Proceedings Act 1957 to be inserted into Part 3 of that Act;

**108** schedule 5 be amended to include an amendment to new section 203AA of the Summary Proceedings Act 1957 to more clearly link it to section 21(8) and section 106G of that Act;

**109** that the whole of section 203 of the Summary Proceedings Act be repealed;

### Schedule 6 - amendments to other enactments

**110** schedule 6 be amended:

- to reflect amendments agreed to substantive provisions in the Bill where necessary, including the restructuring of Part 9 of the Bill, and retention of the title to the Summary Proceedings Act 1957;
- to amend the Criminal Disclosure Act 2008 to substitute references to “days” with references to an equivalent number of “working days”, or in the case of appeals the same number of “working days”;
- to amend enactments that use the phrase “in a summary way” or “in a summary manner” to link either to Part 3 of the Summary Proceedings Act 1957 where the intent is to enable payment of money to be enforced; or to link to the Bill where the intent is to outline the process to be applied;
- to amend Acts that had their 3rd reading on or after 24 August 2010, and regulations made on or after 24 August 2010;

**111** schedule 6 be amended to remove the following reverse onus provisions from the Bill:

- Fisheries Act 1996, section 113A; and
- Civil Aviation Act 1990, section 53A(4A);

**112** schedule 6 be amended to include the necessary consequential amendments to the Costs in Criminal Cases Act 1967, the Trade in Endangered Species Act 1989, and the Armed Forces Discipline Act 1971 to reflect the new dismissal policy and the terminology used in the Bill;

### Appendices

**113**

- clause 23 (manner of authentication and filing charging document) be deleted following recommended changes to facilitate electronic management of documents;
- clause 382 (rules) be amended to insert a general reference to rules allowing for the use of electronic technology. These rules should allow for differentiation between courts, prosecutors and
defendants;

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<td><strong>114</strong></td>
<td>Advisers recommend that the Committee agree to advisers discussing with Parliamentary Counsel the most appropriate way to ensure that powers of judicial officers and Registrars to adjourn, issue warrants to arrest and grant bail are clearly and appropriately stated in the Bill and that they form a coherent package of reforms with the relevant Bail Act powers;</td>
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<tr>
<td><strong>115</strong></td>
<td>“court” be defined to mean “a court presided over by a judicial officer with authority to exercise the court’s jurisdiction in relation to the matter”;</td>
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| **116** | - a definition of “victim” be included in clause 5 of the Bill (which will cross-reference the definition of “victim” in the Victims’ Rights Act 2002); and  
- amendments are made to the Bill to ensure a consistent use of the terms “victim” and “complainant”. |
| **117** | the Bill be amended to adopt the following consistent and principled approach to use of the expression “days” versus “working days” in the Bill:  
- maximum periods of imprisonment/custody – “days” (because there needs to be certainty about the duration);  
- duration of orders – “days” (because there needs to be certainty about the duration of a court order, irrespective of when an order is made);  
- sentence indications – “working days” (because defendants require access to, and consultation with, counsel during office hours);  
- deadlines for filing documents/making applications/serving notices – “working days” (because parties will need access to their lawyers, and they will only be able reasonably to have that on working days); and  
- deadlines by which hearings must take place – “working days” (to be consistent with filing); |
| **118** | the Bill be amended to make it clear on the face of the Bill the policy intention that rules prescribe certain timeframes. |
Section III: COMMENTARY ON GENERAL CONCERNS

COMMON CONCERNS ON THE BILL AS A WHOLE

8. Advisers have identified a number of common concerns underlying many submissions. These were that the Bill:

   8.1. over-emphasises administrative efficiency to the detriment of fundamental principles of justice;
   8.2. does not achieve its purpose of consolidating the law;
   8.3. was rushed and not subject to sufficient consultation; and
   8.4. will not deliver the projected benefits (which have not been established based on information provided by the Ministry of Justice).

9. These overriding themes and the Departmental response are outlined below.

THE BILL OVER-EMPHASISES ADMINISTRATIVE EFFICIENCY

10. Seven submitters, William O’Brien (1), Tim Matsis (7), Dunedin Community Law Centre (13), Anne Stevens (17), Coalition of Community Law Centres (22), New Zealand Bar Association (39), Edward Miller and Kris Gledhill, University of Auckland (53), indicate concern that the reforms proposed in the Bill sacrifice certain fundamental justice principles for the sake of efficiency.

11. On the other hand, the New Zealand Police Association (41) indicates that it believes that the reforms will deliver greater efficiencies without compromising the interests of justice.

Comment

12. Those submitters who argue that the Bill emphasises efficiency over justice principles, generally refer to those policies discussed in Sections IV of this Report. For the reasons discussed in these sections, advisers do not consider that fundamental justice principles have been compromised.

13. More generally, criminal courts have been operating under increasing cost pressures, which are expected to continue. Criminal workloads have risen as volumes of cases have grown and the complexity of these cases has also increased. While this growth has slowed over the last 12-18 months, given past and forecast growth patterns, the operation of the criminal courts is not sustainable at current levels of funding.

14. Further, this pressure has contributed to inefficiencies within the criminal justice system. For example, the Ministry’s of Justice’s analysis has indicated that there are at least 14,000 unnecessary court events per annum in the criminal jurisdiction. It has also contributed to longer delays in the time to dispose of cases (eg, the average case now takes over 10% longer to dispose of compared to 10 years ago), with the average jury case in the High Court now taking approximately 16 months to complete.

15. It is agreed that efficiency should not be the primary focus of criminal proceedings; the focus should be on society’s interest in a fair trial. However,
efficiency gains are often justice gains, so that it is critical that inefficiencies are addressed. For example, repeated adjournments put a strain on court resources and delay can affect the accuracy of evidence, as witnesses become unavailable, begin to ‘give up’ on the process, or simply forget the details of an incident over time.

16. Inefficiency and delay also undermine public confidence in the justice system. This confidence is critical to the maintenance of a well-functioning democracy. To avoid the risk that confidence is undermined, the resources involved in supporting criminal processes need to be managed to maximise outcomes – for parties as well as the taxpayer.

17. The savings will not compromise fundamental justice principles. Rather, they will allow the courts to reduce delay and ultimately deliver a higher quality of justice and better experience for defendants, victims, witnesses and others caught up with the criminal process (often through no fault of their own). This is expected to enhance confidence in the courts, which will contribute to the economic and social security of the country.

THE BILL DOES NOT ACHIEVE ITS PURPOSE OF SIMPLIFYING AND CONSOLIDATING THE LAW

Submissions

18. Nine submitters (Anne Stevens (17), Coalition of Community Law Centres (22), Criminal Bar Association (24), District Court Judges (26), Judy Ashton (34), James Richardson (39a), New Zealand Police Association (41), Wellington Criminal Bar Association (57) and the Legislation Advisory Committee (69)) commented in their written submissions on the extent to which they thought the Bill’s purpose of simplifying and consolidating the law had been achieved.

19. The Legislation Advisory Committee said

[T]his legislation represents a substantial improvement over existing legislation governing criminal procedure, which is split between the Summary Proceedings Act 1957, the District Courts Act 1947, and Parts 12 and 13 of the Crimes Act. The benefits, in terms of comprehension and accessibility, are particularly noticeable in Parts 4 to 6, dealing with the trial, general provisions, and appeals. The provisions are rewritten in short sections (which are easy to read) and are structured logically, and different topics can easily be located.

20. The District Court Judges (26) expressed support for the procedural reform, particularly the need to address the current jury trial system’s unnecessary complexity and to replace the Summary Proceedings Act 1957. The New Zealand Police Association is also optimistic that the Bill will deliver benefits in simplifying and streamlining the criminal process.

21. However, the Coalition of Community Law Centres (22) and James Richardson (39a) criticised the Bill for being neither comprehensive nor simple. James Richardson (39a), Anne Stevens (17) and the Wellington Criminal Bar Association (57) criticised the Bill’s retention of the District Courts’ and the High Court’s shared jurisdiction for more serious offences.

22. Anne Stevens (17) and the Legislation Advisory Committee (69) suggested further simplification was possible, such as with regard to the categories of offences; rationalising and clarifying rules regarding when the failure to comply
with criminal procedure results in a nullity and further simplifying the interface between the Bill and the Supreme Court Act. The Coalition of Community Law Centres (22) and the Legislation Advisory Committee (69) made a number of suggestions for further consolidation, including integrating into the Bill: other aspects of the Summary Proceedings Act such as collection of fines and the infringement offence procedures; the Courts (Remote Participation) Act 2010; the Criminal Disclosure Act 2008; the Bail Act 2000; and the Sentencing Act 2002.

Comment
23. The rules governing criminal procedure in New Zealand are currently spread across a number of different statutes and regulations. In addition, criminal procedure is informed by case law and administrative instruments (eg, Practice Notes) put in place by the Courts, which have powers to regulate their own procedure.


25. The Bill repeals and replaces:
   25.1. most of the Summary Proceedings Act 1957;
   25.2. almost all of Part 12 and all of Part 13 of the Crimes Act 1961; and

26. The Bill also consolidates most aspects of criminal procedure currently contained in the Crimes Act 1961, the District Courts Act 1947 and other legislation. In addition, the Bill amends a number of statutes pertaining to criminal procedure, to ensure consistency of terminology, processes and procedures.

27. However, the Bill does not incorporate all criminal procedure legislation into one statute, for a number of reasons. First, it would make the Bill unwieldy. So long as the processes and requirements of each Act work together, there is arguably little to be gained by combining all criminal procedure legislation into one comprehensive Act. Further, some statutes (eg, the Criminal Procedure (Mentally Impaired Persons) Act 2003) or aspects of them (eg, infringement offence procedures in the Summary Proceedings Act 1957) are about to be reviewed, and consideration of their incorporation into the Bill is not desirable until these substantive reviews have occurred. Also, more recent statutes (eg, the Criminal Disclosure Act 2008) have bedded in well and those working in the area are familiar with them. Finally, some statutes apply to both the criminal and civil jurisdictions, so it is not appropriate to incorporate them.

28. With regard to simplifying the law relating to criminal procedure, the Bill eliminates unnecessary complexity and addresses other issues from the piecemeal amendments to statutes first enacted 50 years ago. This includes modernising and simplifying language. However, there are limits as to how far any legislation can be simplified, or how accessible criminal procedure can be made even with reforming and redrafting.
29. The two trial courts in New Zealand, which share jurisdiction of more serious offences, are a consequence of the progressive and sometimes ad hoc extension of the District Courts' trial jurisdiction. Proposals have been made from time to time for a Crown Court model, in which there would be one trial court to conduct all jury trials. These proposals have not progressed. The existence of two trial courts with overlapping jurisdiction contributes to the complexity of current arrangements, both under the existing law and under the Bill. However, the structural reform that the creation of one trial court would require would be significant and disruptive. In addition, the reforms under this Bill are required regardless of the structural arrangements in place. (See also the discussion regarding the categorisation of offences from paragraph 288.)

Effect of procedural and jurisdictional error

30. Advisers agree with the Legislation Advisory Committee that the 'no invalidity rules', regarding minor jurisdictional errors that should not invalidate a court decision or order, may benefit from further consideration. However, the issues are complex and have significant policy implications. They may also stretch beyond the scope of the Bill.

31. No single rule can deal with all cases. There is a critical distinction (that the Bill already makes) between minor defects of form (clause 376) that do not render a document, process or proceeding invalid and fundamental errors of jurisdiction that render a proceeding a nullity. As recently as 2009, the Supreme Court affirmed that something that is a nullity (eg, a conviction by a court that has no jurisdiction to try the accused) is simply unlawful, constitutes a substantial miscarriage of justice and cannot be upheld.

32. Between the two poles falls a wide range of procedural errors that the courts assess on a case-by-case basis, determining whether the error is primarily a matter of form or one of substance, occasioning an injustice. If the current statutory rules were to be amended or made more specific, that would require detailed policy assessment of the options and their impact on criminal process and fair trial rights as well as the efficient business of the courts. It is by no means a straightforward exercise.

33. Such an exercise might logically extend to invalidity/no invalidity rules in other criminal process statutes and, possibly, areas of civil law (eg, regulatory statutes that utilise quasi-criminal processes and civil penalties). In summary, advisers consider that it is not feasible to address this issue raised by the Legislation Advisory Committee in this Bill.

THE BILL HAS BEEN RUSHED AND NOT SUBJECT TO SUFFICIENT CONSULTATION

Submissions

34. Four submitters, Dunedin Community Law Centre (13), Coalition of Community Law Centres (22), Human Rights Commission (28), and Patrick Winkler and Roderick Mulgan (43), suggest in their written submissions that the process to develop the Bill had been unnecessarily rushed. Two further submitters, New Zealand Law Society (NZLS) (40) and the Criminal Bar Association (23), mentioned this in their oral submissions and the Committee may be aware that this criticism has also been proffered by others through various media.

35. Particular concerns include:

35.1. the scope of the Bill is simply too large to expect it to be completed in the time allowed without significant errors (22, 43);

35.2. the changes encompassed in the Bill potentially impact on New Zealand’s constitutional framework, and so, by their very nature, need more time for wider community consultation (13, 23, 28, 40);

35.3. additional time should be allowed to consider other options that may be more effective at addressing the problems identified as driving this reform (22).

Comment

36. In any Bill as large and as complex as this, it is likely that there will be some minor errors, regardless of the time allowed for its preparation. However, these errors have been identified for amendment.

37. The Project to develop this Bill has had a very long genesis. The Law Commission began work to simplify criminal procedure over 10 years ago and published three relevant study papers/reports:

37.1. Simplification of Criminal Procedure Legislation (NZLC SP7), January 2001;

37.2. Delivering Justice for All - A Vision for Zealand Courts and Tribunals (NZLC R85), March 2004;

37.3. Criminal Pre-Trial Processes - Justice through Efficiency (NZLC R89), June 2005.

38. These papers were the subject of wide consultation, including with the judiciary, legal profession and community. After they were published, work continued on specific issues at the Commission and at the Ministry of Justice until the current Project, which developed this Bill, was established in late 2007.

39. This Project, the ‘Criminal Procedure Simplification Project’, has been overseen by an inter-agency Steering Group including the New Zealand Police, Crown Law Office and Parliamentary Counsel Office, as well as the Law Commission and Ministry of Justice (both policy and operations divisions). In addition, until the introduction of the Bill, consultation was ongoing with a judicial committee established by the Chief Justice to consider this work, other Heads of Bench, and justice sector groups and agencies (including those representing the legal profession) through both written media and at various committees.

40. Sixteen discussion papers were prepared for comment through 2008, 2009 and 2010, including:

40.1. Audio-visual links;\(^4\)

40.2. Proposals relating to restricting availability of jury trials;

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\(^4\) Work on audio-visual links was subsequently progressed separately and has resulted in the Courts (Remote Participation) Act 2010, which enables various participants in court processes to appear in court by audio-visual link.
40.3. Representative charges: options and issues;

40.4. Suppressing names and evidence (Law Commission paper);

40.5. Sentencing jurisdiction and appeals;

40.6. Development of a formalised sentence indication scheme;

40.7. Identification of the issues in dispute;

40.8. Mechanisms to ensure compliance with criminal procedural obligations;

40.9. Proceeding in the absence of the defendant;

40.10. Options for avoiding re-trials following the discharge of jurors after trial commencement;

40.11. Criminal procedure case progression model;

40.12. A-G’s reference for New Zealand;

40.13. Categories of offences and the middle band;

40.14. Appeal paths;

40.15. Section 67(8) Summary Proceedings Act 1957;

40.16. Supplementary legal consultation issue: Adverse inference from defendant’s failure to give evidence.

41. With the cooperation of Police and other court participants, the new case management processes set out in the Bill have also been tested in the summary jurisdiction at Tauranga and Manukau District Courts. These tests, involving over 5000 summary cases, have been formally evaluated with the cooperation of those participating in them. The pilots indicate that the case management processes in the Bill will:

41.1. reduce the time taken for cases to be resolved;

41.2. better focus the next court appearance after the defendant enters a plea;

41.3. increase the proportion of cases in which pleas are entered or charges are withdrawn as a result of out-of-court discussions.

42. A Bill Plan and Commentary were sent to key stakeholder groups for consultation at the end of 2009. These documents and other information (including the discussion papers and information regarding the tests at Manukau and Tauranga) have also been made available on the Ministry’s external website. The consultation over three years has been sufficient to adequately inform the development of the Bill.

43. The Bill aims to maximise benefits by building on and linking to other significant initiatives in the justice sector. The Project Team has therefore been conscious of the need for the Bill to link to the following projects:
43.1. the Ministry of Justice’s Electronic Operating Model Project (implementing electronic filing and management of court information);

43.2. the 2009 legal aid review and consequent implementation of the review’s recommendations;

43.3. Police initiatives to improve prosecution processes (eg, ‘Police Alternative Resolutions’);

43.4. the Victims of Crimes initiatives, which provide better practical and emotional support and information for victims of crime and their families.

44. There is broad agreement among submitters and other stakeholders that the existing law on criminal procedure is in need of significant reform (even if there is disagreement as to what form this should take). The Bill should be considered as only one part, albeit a necessary one, of criminal procedure reform.

**ESTIMATED BENEFITS OF THE REFORM**

45. Five submitters Criminal Bar Association (23), Human Rights Commission (28), New Zealand Bar Association (39b), New Zealand Law Society (NZLS) (40), and Patrick Winkler and Roderick Mulgan (53) query the quantitative analysis supporting the proposals for reform.

46. The Ministry of Justice estimates that benefits from the proposed reform will include:

46.1. 43,000 fewer court events;

46.2. 1,000 to 1,400 fewer cases being designated for trial by jury (resulting in 350 to 1,400 additional cases at judge alone case review – equivalent to a status hearing); but

46.3. 1,100 to 3,300 fewer cases that require either a Judge-alone or jury trial (including 820 to 2,700 fewer cases requiring a Judge-alone trial and 300-600 fewer cases requiring a jury trial)

47. Fiscal benefits are estimated to amount to $24.3 million over a five year period, using a discount rate of 8%, and $80.7 million over ten years, using the same discount rate.

48. These estimates are based on all the reforms being implemented. If any one particular proposal was removed from the Bill (eg, jury threshold, identification of issues in dispute, etc.) any and all of these measures may be impacted. This is because the Bill has been developed as an integrated package. While some of the proposed reform might, on the face of it, appear to ‘stand-alone’, its impact has been modelled in relation to the overall change to criminal procedure. Conversely, none of these estimated benefits can be attributed to only one proposal for change.

49. As is required for any forecasting exercise, a number of assumptions have had to be drawn to enable the calculations of benefits to be made. However, these assumptions have been informed by:

49.1. how cases currently proceed through the courts;
49.2. how cases at the two sites where the new processes have been tested have proceeded (refer paragraph 41); and

49.3. an interagency working group (including representatives from the prosecution, defence bar, and judiciary).

50. This has provided a robust basis for modelling the impact and benefits of the proposals.

51. Many of the submitters’ particular concerns regarding estimates of benefits and costs specifically relate to the proposal to raise the jury threshold. These are, discussed below (paragraphs 54 to 85).
Section IV: COMMENTARY ON SUBSTANTIVE POLICY MATTERS

CONCERNS RELATING TO SUBSTANTIVE POLICY MATTERS

52. Advisers have identified a number of concerns submitters have regarding substantive policy proposals in the Bill. These proposals are:

52.1. the change to the jury threshold (clauses 6 and 48);

52.2. the requirement on the defence to identify issues in dispute (clauses 64 – 67);

52.3. the ability to draw an adverse inference from failure of a defendant to identify issues in dispute (clauses 106, 112-114);

52.4. the ability to commence or continue proceedings in the absence of the defendant (clauses 124-132); and

52.5. the provision of incentives and sanctions (specifically cost orders and the ability to take compliance into account at sentencing) in order to encourage parties to comply with the new procedural requirements (clauses 361, 431).

53. The provisions that reform the current suppression framework (subpart 3 of Part 5) also raised particular concerns and attracted significant comment from submitters. However, for convenience, these issues are discussed in the following section (Section V), which contains a commentary on specific parts and clauses of the Bill.

RAISING THE THRESHOLD FOR JURY TRIAL

54. Clause 6 of the Bill defines four categories of offences, while clause 48 allows defendants who are charged with category 3 offences to elect to be tried by a jury. Together these clauses raise the threshold at which a defendant can elect jury trial from an offence for which the maximum penalty is more than three months’ imprisonment to an offence for which the maximum penalty is more than three years’ imprisonment. Section 24(e) of the New Zealand Bill of Rights Act 1990 (NZBORA) is consequentially amended by clause 429 of the Bill.

Submissions

55. The table below summarises the number of submissions on the proposal to raise the jury trial threshold.

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<th>Total commenting</th>
<th>Opposed</th>
<th>Support</th>
<th>Neutral</th>
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<td>15</td>
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56. The concerns of those opposed to the proposal (2, 3, 7, 8, 13, 17, 18, 22, 23, 28, 38, 40, 53, 57, 58) are summed up in the submission of the Auckland District Law Society (18):
The jury is a bastion of liberty against the power of the State. It is of fundamental constitutional significance and deeply rooted in the public's sense of access to justice. It should not be restricted without an appropriate form of due process.5

57. The constitutional place of juries and their value to the wider community is generally noted by submitters opposed to raising the threshold. Many (2, 13, 18, 22, 28, 39, 40) consider that any amendment to the NZBORA should require a much greater level of public debate and consultation than has been undertaken in relation to this Bill. One submitter, Peter Young (8), argues that juries are the citizen’s only avenue to participate directly in public decision making.

58. A number of submitters (2, 17, 22, 23, 35, 53, 57) assert that the estimated economic benefits do not justify the removal of such a fundamental right. Three submitters, the Human Rights Commission (28), New Zealand Bar Association (39) and Edward Miller and Kris Gledhill, University of Auckland (53), further challenge the figures provided by the Ministry of Justice and suggest actual savings are likely to be less than those forecast.

59. Two submitters (17, 22) suggest that the threshold of more than three years’ imprisonment is arbitrary, and others suggest that the current threshold might be raised to a lesser degree. The Auckland District Law Society (18) and NZLS (40) suggest a threshold of two years’ imprisonment and over, and the New Zealand Bar Association (39) and Independent Criminal Bar at Hamilton (58) suggest a threshold of one year imprisonment and over.

60. Some submitters (Family First (3), the New Zealand Bar Association (39) and Independent Criminal Bar at Hamilton (58)) suggest that a threshold of over three years’ imprisonment may be acceptable if certain offences are exceptions to this rule. They contend that some offences are particularly appropriate for jury consideration by their nature – for example, because they are subject to public debate or interest, or because they involve a determination of ‘reasonableness’. Offences suggested as possible exceptions include: male assaults female (which commonly involves individuals in domestic relationships); offences involving assault on a child (in order to ‘catch’ the so-called ‘smacking’ offence); and other assault offences for which defences such as self-defence may be relevant.

61. The Criminal Bar Association (23) submits a further reason for not raising the threshold is that jury trials for less serious matters provide a useful training opportunity for junior counsel.

62. The District Court Judges (26) support the proposal to raise the jury threshold, as do the New Zealand Police Association (41) who suggest it will promote more timely resolution of matters.

63. The remaining submitters in support of raising the threshold (35, 44, 46, 47, 62) all mentioned concerns around a failure of jurors to respond to summons and the consequential lack of representativeness of juries.

Comment

64. Submitters’ concerns about raising the jury threshold mainly fall into two areas: that the economic benefits are not sufficiently great to justify the change in threshold; and the constitutional significance of the change.

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5 Paragraph 3.2.
Expected benefits of reform

65. If the only change made in the Bill in relation to trial by jury was to raise the jury trial threshold as proposed, 141 fewer jury trials would occur (based on 2009 figures). That is the number of jury trials held in the 2009 calendar year where no count in the indictment had a maximum penalty greater than three years.

66. However, the impacts of raising the jury trial threshold are not fully captured by the expected reduction in the number of trials themselves. (That is, this is only a subset of the overall estimated savings indicated at paragraph 46). Account must also be taken of other factors such as the numbers of cases that proceed along a jury trial track (which is more complex, more costly and more lengthy than the judge alone track) but which are disposed of before the trial commences.

67. The Ministry of Justice estimates indicate that only 20% of the caseload will automatically proceed in the jury track, compared to 40% now (meaning that the caseload of the Judge-alone jurisdiction will increase by 4%). This is a direct consequence of legislative changes raising the election threshold, removing prosecution discretion to require jury trial for some offences, and re-categorising offences to better match court procedure to the seriousness of the offences. (ie, The calculated benefits are the result of the combined impact of a number of proposed changes, not just the single proposal to raise the threshold.)

68. If the jury trial threshold is not raised as proposed, the impact on the benefits of the package of proposals contained in the Bill has been modelled to be as follows:

68.1. 640 court events and 1,300 sitting hours would no longer be saved, with a consequent impact on court delay;

68.2. Estimated savings of approximately $1.6 million per year would be lost to the courts;

68.3. Estimated savings of approximately $0.5 million would be lost to the Crown (because of the additional caseload the Crown would need to take up); and

68.4. Additional costs of $0.8 million would be incurred (again, because of the additional caseload the Crown would need to take up under the proposed reform).

69. If the threshold were to be set at a level lower than three years but higher than the current threshold, it would now be difficult to be precise about the extent to which the savings and costs set out above would be lost. That is because a number of offences up to the 3 year threshold are currently in Schedule 1 of the Summary Proceedings Act and can be laid on indictment by the prosecution (so that they proceed automatically to jury trial). Schedule 1 is being abolished, so that all offences in that category will proceed as a Judge-alone trial unless the defence elects otherwise. Assumptions would therefore need to be made about the proportion of cases currently laid on indictment by the prosecution that would result in a defence election.

70. In response to the specific submission from Edward Miller and Kris Gledhill, University of Auckland (53), where certain aspects of the Ministry’s calculations are queried, advisers make the following points:
70.1. All projections on savings arising from the proposals in the Bill agreed to by Cabinet took into account the difference between the cost of summary trial (defended hearing) and that of a jury trial.

70.2. Some jury trials that will be avoided by reason of the proposal to raise the jury threshold will not be as complex as some others that will continue to be eligible for trial by jury. The maximum penalty for an offence is not, of itself, an accurate indication of the length of a jury trial and the cost associated with running that trial.

70.3. Unlike a jury verdict, a reasoned verdict provides possible grounds for appeal against the reasoning process apparent in that verdict. However, that needs to be balanced against the fact that appeals that are currently brought on the basis of alleged error in the judge’s summing up will be reduced. There is no reason to believe that the increase in the former will be greater than the reduction in the latter. If anything, it is arguable that there will be a reduction in the number of appeals.

70.4. While judicial time will be required to write a judgment as to the legal and factual basis for the decision, there will be time saved from removing the need to prepare and issue directions to juries or summing ups in those cases.

71. The Human Rights Commission (28), New Zealand Bar Association (39), and Edward Miller and Kris Gledhill, University of Auckland (53) further challenge the figures provided by the Ministry of Justice and suggest actual savings are likely to be less than those forecast.

72. Some submitters may not have realised that the original estimates provided in the 2009 Discussion Paper were indicative savings only. As work on calculating fiscal impacts of proposals has continued since that time and have been further developed before going to Cabinet, some submitters have been inadvertently comparing two different sets of numbers prepared, in some instances, at different times for different purposes. Some submitters may also have been unaware that benefits have been calculated in relation to a number of initiatives, with the greater proportion of savings resulting from removal of the prosecution discretion to require a jury trial than from raising the jury threshold.

73. Submission 39 also contends that raising the jury trial threshold will increase the number of conviction appeals to the High Court. As a result of the overall package of reforms proposed in the Bill, there will be more appeals to the High Court. This will be balanced by a corresponding reduction in appeals to the Court of Appeal.

Constitutional significance of the change

74. The Attorney-General’s (A-G’s) section 7 report on the Bill’s proposed amendment to section 24(e) of the New Zealand Bill of Rights Act 1990 (NZBORA) noted:

74.1. it was unnecessary to specify a threshold for jury trial in NZBORA – “The real issue is that an accused person has a fundamental entitlement to a fair and just trial, which may or may not be by jury”.6

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6 Paragraph 19 A-G’s NZBORA report on this Bill regarding the proposed amendment to s 24(e) NZBORA.
74.2. the specification of a 3-month threshold for jury trial “has had a profoundly negative effect on the conduct of criminal litigation in this country, causing serious delays in the criminal justice system which may raise far more serious concerns about access to justice”.

74.3. the proposed increase in the jury threshold would not put New Zealand in breach of its international obligations, nor would it place defendants in this country at any comparative disadvantage to those in comparable jurisdictions (noting that Canada provides a threshold for jury trial at imprisonment for 5 years or more).

75. There is little historical justification for the current three months’ threshold, which was based on the United Kingdom’s threshold at the time the provision was enacted in New Zealand (but no longer represents the UK position). By international standards the threshold is low, and there are no international human rights documents that prescribe a specific threshold. As stated by the Supreme Court recently:

...it is obviously open to Parliament to amend s 24(e) by substituting a longer period. There seems to be nothing particularly sacrosanct about three months: in Canada the equivalent period is five years...

76. While the right to a jury trial is an important aspect of the criminal justice system in New Zealand, the critical issue as identified by the A-G is not the threshold at which trial by jury is elected, but whether the right to a fair trial is preserved.

77. Another important constitutional right under NZBORA, is the right to be tried without undue delay (under section 25). When the absolute adherence to one right results in a negative impact on another, consideration must be given to the greater public good in redressing the balance to ensure better adherence to the principles underpinning both rights.

78. As noted above, some submitters considered that there should be exceptions to the threshold for some offences on the basis that they are better suited to being heard by a jury. It is difficult to identify the basis on which such exceptions would be made. For example, using a reasonableness standard to decided if an offence with a penalty of less than the proposed threshold should be subject to a jury trial is problematic as the mere fact of “reasonableness” does not make an offence more appropriate to be heard by 12 people rather than one. There are many instances in the law (eg, civil negligence) where the judiciary is trusted to determine the “reasonableness” of a person’s action.

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7 Paragraph 20 A-G’s NZBORA report on this Bill regarding the proposed amendment to s 24(e) NZBORA.
8 Paragraph 22 A-G’s NZBORA report on this Bill regarding the proposed amendment to s 24(e) NZBORA.
9 The Human Rights Act 1998 does not provide for the right to trial by jury. In practice, the right to a jury trial in the United Kingdom is only available for prosecutions for offences tried on indictment. Minor offences are tried summarily in Magistrates’ Courts. Middle ranking (“triable either way”) offences may be tried summarily or the defendant may elect trial by jury.
10 Siemer v Solicitor General [2010] NZSC 54 (Blanchard J at [67]).
Further benefits resulting from raising the jury threshold

Making jury service more worthwhile and juries more representative

79. Some submitters in support of raising the threshold (35, 44, 46, 62) identified the failure of jurors to respond to summons and the consequential lack of representativeness of juries.

80. The Committee may be interested in the recent observations of the Rt. Hon. Lord Justice Leveson commenting on the position in the United Kingdom:

When looking at jury trials, there is another element to consider: that is the experience of the twelve jurors.

... There is always a degree of waiting around, not least because planned trials do not take place perhaps if the defendant pleads guilty at the last moment, or a witness is ill and cannot attend but if the jurors end up trying a serious case.... I have often wondered, however, how the members of the jury feel, when, having arranged their lives to enable them to attend, usually at some inconvenience and cost, they find themselves faced with a case of shoplifting with little to explain why so much public money – their money – has been expended.

But let me ask the question have we got the balance right? You may say we have and you may think that the costs that have to be expended as a result of allowing defendants to elect trial by jury are appropriate. Alternatively, you may think, as a society, we should reserve this Rolls Royce approach to our most serious cases....

81. To be the truly representative, democratic process that some submitters state that jury service should be, and other submitters note is at risk of being eroded, it must have appeal to a wide range of members of the public. Some may view jury service as a waste of time due, at least in part, to the trivial nature of some cases requiring juries to serve.

More timely disposition of cases

82. As the A-G noted in his report on this aspect of the Bill the serious delay caused by allowing jury trial for all offences carrying more than three months’ imprisonment gives rise to concern about access to justice.

83. The current election threshold provides an opportunity for the defence to unjustifiably delay cases by electing jury trial. This is a particular problem with family violence cases since the typical family violence charge (male assaults female under section 194 of the Crimes Act 1961) is electable. Defendants have an incentive to elect trial by jury in the expectation that complainants will change their minds.

84. This factor provides a compelling reason against the submissions of those who advocate that such offences should be eligible for jury trial, notwithstanding that the penalty falls below the proposed jury threshold.

85. Advisers recommend no change to the jury threshold proposed in the Bill.

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11 The Rt. Hon. Lord Justice Leveson, a barrister and judge for 40 years, addressed the LJMU Roscoe Foundation for Citizenship on “Criminal Justice in the 21st Century” at St. George’s Hall, Liverpool, on 29 November 2010.
Defence requirement to identify issues in dispute

86. Clauses 64 to 67 place a requirement on the defendant to give pre-trial notice of the issues in dispute. Associated provisions at clauses 106 and 112 to 114 allow an adverse inference to be drawn from a failure of defendants to adequately identify issues in dispute.

87. While these two sets of clauses are closely linked, they can be considered separately. In addition, notwithstanding that these proposals are complementary, the requirement to identify the issues in dispute can stand as a useful initiative in its own right and could proceed without the statutory ability to draw an adverse inference from the defendant’s failure to do so.

Submissions

88. The table below summarises the number of submissions on the proposal to require the defence to identify issues in dispute.

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<th>Total commenting</th>
<th>Opposed</th>
<th>Support</th>
<th>Neutral</th>
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<tr>
<td>23</td>
<td>18</td>
<td>2</td>
<td>3</td>
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89. The Crown Solicitors Network (24) and the New Zealand Police Association (41) support the identification of issues in dispute. The New Zealand Crown Solicitors Network notes this is an established feature in other modern criminal justice systems. It contends that the requirement will meet its objective of reducing preparation and court time, shortening trials, avoiding the need for witnesses to testify, making trials less complex and giving clearer focus to the fact finder. It also notes that there may be greater resolution of cases before trial. The New Zealand Police Association considers it will lead to a more efficient and focused trial process.

90. The NZLS (40) presented a balanced submission on this aspect of the Bill, noting that the profession “is strongly divided on whether or not it supports defence identification of disputed issues”.

91. Submitters opposed to this proposal (including the Chief Justice (60), Criminal Bar Association (23) and Human Rights Commission (29)) believe a statutory requirement to identify issues to be an unjustified limitation on fair trial rights, including the ‘right to silence’, and that it shifts the burden of proof to the defence by requiring it to assist the prosecution case. Some submitters, particularly those from the defence bar, also believe that defence counsel are justified in their use of “ambush” tactics as a means of exposing weaknesses in the prosecution case; and some believe that it may place defence counsel in a conflict as they would not be acting in the best interests of their clients.

Attorney General’s (A-G) report

92. The A-G’s report on the Bill concluded that the relevant provisions had adequate safeguards and did not impinge upon the right to a fair trial. The A-G noted that the provisions in the Bill do not require a defendant to identify the evidence or identify the witnesses upon whom they will rely or otherwise disclose the way in which the defence case is to be conducted at trial. Nor do they contravene the ‘right to silence’. Further, to the extent that defendants have in the past profited

12 Paragraph 162 A-G’s main section 7 NZBORA report on this Bill.
from an element of surprise to take advantage at trial of curable defects in the prosecution case, the A-G noted that they have not done so under protection of the NZBORA – in other words, there is no general right of non-cooperation with the criminal justice process.

**Overseas approaches to the identification of issues in dispute**

93. The Committee has requested advice on the approaches taken in other jurisdictions, including available commentary on those approaches from a non-prosecution perspective. Although each jurisdiction is different and some jurisdictions only apply their requirements to particular cases (usually indictable or more serious cases), overseas requirements, when they apply, generally go further than what is proposed in the Bill.

94. The United Kingdom has had a comprehensive legislative regime covering both prosecution and defence disclosure since the enactment of the Criminal Procedure and Investigations Act 1996 (UK). That Act requires a defendant facing trial on an indictable charge to provide a defence statement setting out:

94.1. the nature of his or her defence, in general terms;

94.2. the matters on which he or she takes issue with the prosecution; and

94.3. in relation to each such matter, the reason why he or she takes issue with the prosecution.

95. An amendment brought into force on 1 May 2010 requires the defendant to give notice to the court and the prosecution of his or her intent to call any witnesses (other than him or herself) and the names and addresses of those witnesses.13

96. The objectives underlying these disclosure requirements were discussed by Lord Justice Auld in the 2001 review of the criminal courts of England and Wales:14

> To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which the guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to incriminate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.

97. In 2008, as cited in the submission by James Richardson (39a), the Lord Chief Justice of England and Wales also noted:

> It is arguable, and I do argue that a system which refuses to accept that the prosecution may be ambushed, or which rejects the idea that the defendant may manufacture a spurious defence, and seeks to address these problems, is not offending the rule against self-incrimination, nor damaging the interests of justice. Surely there is no problem with the principle the

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13 Further defence disclosure requirements were enacted by the Criminal Justice Act 2003 but have not yet been brought into force.

defence and the prosecution must contribute to an efficient trial process designed so far as possible to get at the truth. If the truth hurts one side or the other, so it should. If the truth benefits one side or the other, so it should. As far as possible we should ensure that the verdict is indeed a true one.

98. The United Kingdom approach has also been found to be consistent with the European Convention on Human Rights by both the English Court of Appeal\(^\text{15}\) and the European Court of Human Rights.\(^\text{16}\)

99. Victoria’s Criminal Procedure Act 2009, which broadly replicates requirements introduced in 1999, requires defendants in indictable cases to provide a response to:

99.1. a summary of the prosecution’s opening address, which must include the acts, facts, matters and circumstances with which issue is taken and why;

99.2. the prosecution’s notice of pre-trial admissions, which must include what evidence is agreed to be admitted, and what evidence is in issue and why.

100. The defence must inform the court and prosecution if it intends to depart substantially from that response at trial and must, if represented, give an opening address that is limited to that pre-trial response unless there are exceptional circumstances.

101. The consistency of the Victorian requirements with human rights norms was addressed in a statement of compatibility tabled in Parliament in accordance with the Charter of Rights and Responsibilities (Vic) by the Attorney-General. The Victorian Attorney-General found none of the disclosure requirements were incompatible with the rights to silence, fair trial, or to be presumed innocent.\(^\text{17}\) In relation to those provisions in the Bill requiring an accused to give the prosecution notice of evidence to be called at trial (alibi and expert evidence) and for the accused to give information to the court for case management purposes, he concluded:

\begin{quote}
I do not consider that any of these provisions limited the right against self-incrimination because they do not require an accused person to give evidence or to confess guilt. Similarly, these provisions do not limit the right to be presumed innocent because they do not involve any reversal of the ordinary burden of proof on the prosecution.
\end{quote}

\begin{quote}
Having concluded that these specific rights are not limited, I have considered whether defence disclosure provisions might limit the more general right to a fair hearing under section 24. I am aware that in Hamilton v Oades (1989) 166 CLR 486 at 499, the High Court indicated that at common law the right to a fair trial does not encompass a right to not disclose one’s defence.
\end{quote}

102. In relation to other provisions in the Bill requiring the defendant to respond to a prosecution opening outlining the case against the accused by identifying which of those “acts, facts, matters and circumstances” that the defence takes issue with, the Victorian Attorney-General concluded:

\(^{15}\) R v Essa [2009] EWCA Crim 43 at [23].

\(^{16}\) Murray v United Kingdom (1996) 22 EHRR 29 (ECHR), Condron v United Kingdom (2001) 31 EHRR 1 (ECHR Third Section).

\(^{17}\) Victorian Parliamentary Hansard, Legislative Assembly, 4 December 2008 at 4969.
This regime is important in narrowing the issues at trial to make sure that valuable court and jury resources are carefully used. However, clause 183 does not abrogate the common-law right to put the prosecution to proof on each element of the offence.

Expected benefits of reforms

103. The requirement to identify the issues in dispute is likely to minimise inconvenience to witnesses (who will appear only if needed), shorten and simplify trials, and ensure greater clarity for the fact finder (judge, or, more particularly, jury) about the issues they must consider to decide a defendant's guilt or innocence, without infringing the right to a fair trial. It also results in more targeted and cost effective use of counsel and court resources.

104. It has previously been estimated that identifying issues in dispute would result in an estimated saving of 10% of trial time. These figures are significant. If this proposal was omitted from the Bill, the impact has been modelled as follows:

104.1. 2,400 sitting hours would no longer be saved, with a consequent impact on court delay;

104.2. estimated savings of approximately $2.1 million per year would be lost to the courts;

104.3. estimated savings of approximately $275,000 would be lost to the Crown; and

104.4. estimated savings of approximately $110,000 would be lost to the Police.

Response to submitters

105. Submitters' concerns about the issues in dispute provisions broadly fall into two areas. The first is that the requirement to identify issues in dispute contravenes rights and protections provided to the defendant in the current criminal process – in particular, the right to a fair trial, the right to silence, the burden of proof, and the presumption of innocence. The second is that the policy is inconsistent with the realities of practice – for example, that it will create significant difficulties in the relationship between a lawyer and his or her client.

106. Focusing on some key submissions, the discussion below responds to submissions made in these two areas, before addressing some other issues these submitters raised.

Identification of issues in dispute infringes defendants’ rights and protections

107. The starting point for many submitters in this area (particularly those representing the criminal bar) was the rights provided to defendants under international rights conventions and the NZBORA. For example, Patrick Winkler and Roderick Mulgan (43) argue that the proposed changes do not “withstand reasonable and logical scrutiny in the context of section 5 of NZBORA”. Similarly, the Wellington Criminal Bar Association (57) argues that the changes are “contrary to the irreducible right of an accused to a fair trial...and at the heart of the NZBORA”.

108. It is important to note at the outset that provisions like these have consistently been found to withstand scrutiny under the NZBORA, Victoria’s Charter of Rights and Responsibilities and the European Convention of Human Rights. As noted above, New Zealand’s Attorney-General, the Victorian Attorney-General, the English Court of Appeal and the European Court of Human Rights have all
concluded that the requirement to identify the issues in dispute does not contravene the defendant’s rights in these instruments to a fair trial or to silence, and does not contravene the presumption of innocence or the burden of proof on the prosecution.

109. The concerns of many submitters seem to rest on an assumption that there exists a broad and overarching right to remain absolutely silent throughout the criminal process (eg, Patrick Winkler and Roderick Mulgan; and Judith Ablett-Kerr QC (33)). That assumption is incorrect. It is well-established in international jurisprudence that there is no overarching right to silence. In New Zealand, the right to silence is protected by sections 14, 23(4) and 25(d) of the NZBORA. Those rights concern the:

109.1. right to freedom of expression;
109.2. right to refrain from making a statement if a person is arrested or detained for any offence or suspected offence;
109.3. right not to be compelled to give evidence or confess guilt.

110. None of these rights is unjustifiably affected by a requirement to identify the issues in dispute. The requirement does not remove the right to silence as it is understood in international or domestic caselaw.

111. Nor does the requirement to identify the issues in dispute involve any reversal of the presumption of innocence or the ordinary burden of proof. There is still a fundamental obligation on the prosecution to establish the elements of the offence, or to negate defences, beyond reasonable doubt. As noted by the A-G, the defendant would not fail to comply with the requirement if he or she legitimately placed all elements in dispute. The contention by James Richardson (39a) and the New Zealand Bar Association (39b), therefore, that the requirement to identify the issues in dispute prohibits the defendant from putting the prosecution to the proof is incorrect.

112. To some extent the identification of issues in dispute might assist the prosecution (eg, the prosecution could be alerted to weaknesses in its case that it can then shore up, or it may plug evidential holes). However, this is not a one-way exercise. It may also lead the prosecution to amend or withdraw charges. Alternatively, the defendant may plead guilty earlier than would otherwise have occurred (because he or she realises the futility of his or her position), with the consequence that he or she can take advantage of a greater reduction in sentence for plea. All of these consequences are in the overall interests of justice.

113. Some submitters viewed the identification of issues as inconsistent with an adversarial process, and argued that an adversarial rather than a cooperative approach by defendants to criminal proceedings was necessary to compensate for the significant imbalance of resources between the prosecution and defence.

114. However, even in an adversarial criminal justice system, there is arguably a societal interest in efficiently processing criminal cases that demands a degree of mutual cooperation between the parties. In addition, addressing the resource imbalance to ensure that a defendant receives a fair trial “may require that [the defendant] be provided with resources to counter those available to the Crown. What it does not mean is that the accused, because he or she is at a disadvantage in relation to the state, should obtain a compensating “boost”
unrelated to the imbalance in those resources.” Finally, the identification of issues in dispute will not mean that there is equal and reciprocal disclosure between the prosecution and the defence. The prosecution has a mandatory evidential disclosure requirement of everything that is relevant while, under clauses 64 to 67, the defence will only be required to state what issues are in dispute. (As now, the defence will also be required to disclose details of an alibi or expert evidence under the Criminal Disclosure Act 2008.)

Identification of issues in dispute ignores the realities of practice

115. There was concern expressed by some submitters that a requirement to identify issues in dispute was not reasonable in light of the realities of practice. This included that the requirement to identify issues is not always possible until the prosecution’s case is fully elicited at trial, and that it might impose unreasonable obligations on counsel and jeopardise the relationship between counsel and the defendant.

116. The NZLS (40) answered that concern:

   Concern as to the propriety of DIDI [defence identification of disputed issues] must take into account that a defendant can, in almost all cases, indicate at a very early stage any matter which is both truthful and exculpatory because the matters relevant to it will be peculiarly within the defendant’s own knowledge. In case of a positive defence (such as self defence, compulsion) or of a belief in consent or a claim of right, or a mistake as to a matter of fact or law, the defendant can reasonably be expected (if the matters alleged are true) to be able to raise them at a stage after the provision of legal advice and full disclosure.

117. There also appear to be some misunderstandings amongst submitters about the exact nature of the obligation that clauses 64 to 67 impose. Contrary to the suggestion of Patrick Winkler and Roderick Mulgan (43), for example, there is no requirement for the defence to provide a comprehensive statement of facts or a defence statement as in the United Kingdom. Nor is there any requirement to disclose evidence or, in comparison to other jurisdictions, to provide any indication of the basis on which issues are disputed. Nothing more is required than a simple and brief statement of what the issues in dispute are. For example, stating that “identity is in dispute” or that “the defendant denies that she used force on the complainant” is sufficient.

118. Finally, there will be some defendants who will wilfully refuse to cooperate with the issues in dispute regime and advise their counsel accordingly, or who provide instructions in such a way that the issues in dispute cannot be identified. In those cases, consistent with counsel’s obligation as an officer of the court, the appropriate course is for counsel to advise the court that the issues have not been able to be identified. The defendant’s failure to identify issues might then be cause for an adverse inference against him or her, but there is no suggestion, and no realistic prospect, that counsel will also be punished for that failure.

Other concerns

119. Key submitters also made a number of other criticisms of the issues in dispute provisions. For example, Patrick Winkler and Roderick Mulgan (43) contend that delay through last minute “surprises” has largely been addressed through the pre-

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18 Rt Hon Justice EW Thomas “The So-Called Right to Silence” (1990-91) 14 NZULR 299, 309.
19 See para 3.02 of their submission.
existing requirements under the Criminal Disclosure Act 2008. However, both requirements are limited in scope. The ability for the defence to raise previously unidentified issues still exists to a far greater extent than for the prosecution.

120. Patrick Winkler and Robert Mulgan (43) also contend that it is unnecessary, illogical and disproportionate to extend the obligation to identify issues in dispute to what are currently summary proceedings (category 1 and 2 offences under the Bill). The Criminal Bar Association (23) makes a similar point. However, that contention is fundamentally flawed. First, as discussed above, it misunderstands the nature and extent of the requirement. Secondly, given that the overwhelming majority of criminal cases disposed of fall within these categories of offence, this is where the greatest overall benefit is likely to result. While it is true that many of these cases will not give rise to the same complexity as more serious offences, nonetheless identifying issues in dispute will lead to more effective pre-trial preparation and a more focused trial.

121. Winkler and Mulgan and the Criminal Bar Association also place significance on the United Kingdom’s “overriding objective” statement under its Criminal Procedure Rules 2005, including its inclusion of the principle that “criminal cases be dealt with justly”. They note that this principle protects the defendant and is “notably lacking” from this Bill. In fact, the Bill as currently drafted does include such a principle, in clause 52. That clause requires parties to engage in case management discussions and make any arrangements necessary for a case’s “just” resolution. However, other submitters (notably James Richardson (39a)) have concerns about this requirement. In light of that concern, advisers have recommended that the reference in clause 52 to cases being resolved “justly” be deleted from the Bill. In any event, judges will interpret these provisions consistently with the NZBORA, particularly when considering whether any adverse inference can be drawn.

122. Other submitters from the defence bar argue that the identification of issues in dispute occurs now and that a mandatory requirement to identify the issues in dispute is not required. It is clear that there is significant disagreement amongst the legal profession about the extent to which issues are identified now. In this respect, the Crown Solicitors’ Network (24) contend that, with the exception of a number of Queen’s Counsel, “there has been very little buy-in by defence counsel into the current (voluntary) requirement to identify issues prior to trial”. The views in this respect are difficult to reconcile.

123. Finally, some submitters (eg, the Criminal Bar Association (23), and the New Zealand Bar Association (39b)) submit that the identification of mutually contradictory issues should not constitute a failure to adequately identify issues under clause 67. The Criminal Bar Association considered it was unnecessary because the flaws in presenting mutually contradictory issues would be obvious for all to see. The New Zealand Bar Association did not believe there to be anything wrong in principle with identifying mutually contradictory issues.

124. Allowing a defendant to raise mutually contradictory issues (in the sense that both issues could not be true) would negate the overall purpose of the provisions. This includes, in particular, ensuring more focused trials which enable the fact-finder to assess the evidence as it is presented in the context of the issues that have been identified. Advisers agree that the flaws in presenting mutually contradictory issues would be obvious. In that sense, however, the Bill simply makes it explicit (in clauses 106 and 112–114) that the obvious inference from that approach can be drawn.
Submitters’ proposals for amendment

125. The Coalition of Community Law Centres (22) submits that, if the requirement is enacted, there should be a requirement that the prosecution must finalise its case before issue identification. This would avoid the situation where the prosecution adds new evidence or amends the charge after the defence has identified the issues. James Richardson (39a) makes a similar point. The amendment proposed in Recommendation 1, to clarify that new issues may be raised at trial, may assist to address this concern. More broadly, however, requiring that the prosecution’s case be finalised does not take into account the prosecutor’s ongoing obligation of disclosure under the Criminal Disclosure Act 2008 as any new evidence comes to light. In addition, in most cases, the defendant will be aware of the nature of his or her defence without having reference to the prosecution’s case.

126. The Crown Solicitors Network (24) submits that issues not identified as being in dispute should have the status of admitted facts under section 9 of the Evidence Act 2006. That section provides that a defendant or the prosecution may admit any fact so as to dispense with proof of the fact. Advisers do not support this proposal. It may not always be evident at the outset which evidence is related to which issue. Having a deeming provision of this kind may therefore result in challenge and delay. Admissions of fact under section 9 of the Evidence Act are likely to become more common following the introduction of the issues in dispute regime. However, advisers consider that this is best left to practice, rather than being provided for in the Bill.

127. The Legislation Advisory Committee has informally raised with advisers its view that the Bill is currently not clear that the defence is not precluded from raising new issues at trial. If an issue only becomes apparent at trial, it would be unfair for the defendant not to be able to raise it or to be penalised for doing so. Advisers therefore recommend that a provision is included in the Bill to clarify that a defendant may raise a new issue during the trial that is not identified in advance under clause 64.

128. Clause 64 refers to matters that the defendant contends “cannot be proved”, whereas clause 67 refers to the identification of matters that are “in dispute”. James Richardson (39a) considers these concepts to be fundamentally different. While the difference in wording is not fundamental, advisers recommend clarifying the drafting to put the matter beyond doubt.

129. The New Zealand Bar Association (39b) also proposes two amendments to clause 64(1). First, it considers that it should be clarified whether the reference to particular elements of the offence is a reference to legal elements or whether it extends to factual matters. This is not desirable, as it is likely to lead to argument about the difference between the two and may inadvertently narrow the scope of the provision. For example, there may be some room for argument about whether a defendant who denies that he or she was the offender is disputing a legal or a factual element. Secondly, the New Zealand Bar Association considers that clause 64(1)(b) should be amended to refer to “statutory” defences. Advisers disagree. The reference to a “defence” in clause 64(1)(b) needs to extend to common law defences and so cannot be limited to statutory defences.

130. Finally, it is recommended that the issues in dispute (and adverse inference) provisions are amended to provide greater clarity about when the issues in dispute must be identified. For example, in most cases, notice of the issues in
dispute should be filed with a case management memorandum or trial calllover memorandum. It would be preferable for this to be explicit in clause 64(2).

**Recommendation 1**
Advisers recommend that:
- there be a new provision providing that a defendant may raise a new issue during the trial that is not identified in advance under clause 64;
- clause 64(1)(a) be amended to require the defendant to give notice of any particular elements of the offence that the defendant denies (or words to that effect);
- the issues in dispute (and adverse inference) provisions be amended to provide greater clarity about when the issues in dispute must be identified.

**ADVERSE INFERENCE**

131. Clauses 106 and 112 to 114 allow an adverse inference to be drawn from a defendant’s failure to adequately identify issues in dispute.

**Submissions**

132. The table below summarises the number of submissions on these clauses.

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<tr>
<th>Total commenting</th>
<th>Opposed</th>
<th>Support</th>
<th>Neutral</th>
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<tr>
<td>17</td>
<td>15</td>
<td>1</td>
<td>1</td>
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133. Submitters opposed to the requirement on the defendant to identify the issues in dispute also oppose the ability to draw an adverse inference from a defendant’s failure to do so and for similar reasons.

134. The New Zealand Police Association (41) was the only submitter to support the adverse inference provisions. This support was accompanied by a proposal to extend the adverse inferences policy to enable the court to draw an adverse inference from a defendant’s silence at a police interview or at trial. This is the approach taken in the United Kingdom.

135. The Crown Solicitors Network (24), which supports the general requirement to identify issues in dispute, has doubts about the workability of the adverse inference provisions. The District Court Judges (26) also raise workability concerns, submitting that clause 67 provides insufficient guidance about what amounts to a failure to identify the issues in dispute, that the Bill does not identify a standard of proof that must be satisfied before a failure can be found, and that the regime will create significant complications for judges when summing up and directing juries.

136. Two submitters (the District Court Judges (26) and Judith Ablett-Kerr (33)) consider that it is inappropriate to penalise a defendant in a substantive way for what amounts to a procedural error. The District Court Judges submit that doing so is “conceptually incoherent, and therefore arbitrary”. Judith Ablett-Kerr
considers that it is “unsustainable, illogical and contrary to the basis upon which Criminal Trials have been conducted and should be conducted in New Zealand”.

137. The District Court Judges are also concerned that the effect of the provisions might be to punish defendants for an omission by their counsel, and note that judges will be reluctant to draw an adverse inference in respect of self-represented defendants. Judith Ablett-Kerr considers the inevitable consequence of these provisions will be an increase in interlocutory hearings and appeals.

138. The NZLS (40), while neutral about the provisions as a matter of policy, suggest that the provisions should be extended to enable co-defendants to comment on another defendant’s failure to identify the issues in dispute.

139. As well as objecting to the provisions as a matter of principle, Patrick Winkler and Roderick Mulgan (43) consider that the Bill provides insufficient guidance about the circumstances in which an adverse inference can be drawn. This includes that, in contrast to the United Kingdom position, there is no requirement for the fact-finder, when considering whether to draw an adverse inference, to have regard to whether the defence raised at trial differs from that previously identified. They also consider that the ability, under common law, to draw an adverse inference from the defendant’s failure to give evidence, is sufficient. The Coalition of Community Law Centres (22) agrees.

Comment

140. The A-G found that the ability to draw adverse inferences from a defendant’s failure to identify the issues in dispute was not inconsistent with the NZBORA and did not infringe a defendant’s right to a fair trial. He noted that a similar conclusion had been drawn by the English Court of Appeal in relation to the United Kingdom’s more demanding pre-trial defence statement scheme.

141. As with the requirement to identify the issues in dispute, the weight of international jurisprudence suggests that the ability to draw an adverse inference from the defendant’s failure to identify the issues in dispute does not infringe the defendant’s rights in national and international rights instruments to a fair trial or to silence, and does not contravene the presumption of innocence or the burden of proof on the prosecution.

142. Some of the concerns raised by submitters reflect their assumptions about how the adverse inference provisions will work in practice. For example, the concern that these provisions will lead to collateral litigation assumes that a defendant’s failure to identify the issues in dispute will only arise at trial. It is expected that judges will raise with defendants before the trial (eg, at the case review hearing or trial callover) their failure to identify the issues in dispute and the potential consequences that may arise from that failure. This will give defendants an opportunity to rectify the failure or, at the least, proceed to trial knowing the risk that they are running.

143. In this sense, a primary purpose of the adverse inference provisions is to give judges a tool to address a defendant’s non-compliance to identify the issues in dispute before the trial. Regardless of the level of actual use, its presence will incentivise greater compliance and the culture change sought by the Bill. It is more important that the issues are identified so that trials can proceed in an environment where the fact-finder and parties are aware of what is contested between the prosecution and defence.
144. It might sometimes be difficult at trial for a judge to determine whether comment should be made to a jury on a defendant’s failure to identify the issues in dispute. That difficulty might lead to an increase in arguments to determine whether an adverse inference can appropriately be drawn. However, that difficulty is most likely to arise in cases where there has been no pre-trial discussion about the defendant’s failure to identify the issues in dispute. As noted above, the trial will not be the first time that the defendant’s non-compliance is discussed. As with any other comment or direction to the jury, judges will proceed with caution and in accordance with the NZBORA. Where there is any doubt that an adverse inference is appropriate, the court will not allow that inference to be drawn. For example, if the reason for the defendant’s failure to identify the issues in dispute was solely attributable to a procedural error (eg, an oversight by counsel).

145. However, in many cases, the defendant’s failure to identify the issues in dispute will be indicative of a substantive problem with his or her defence. In those cases, the inference that the Bill enables fact-finders to explicitly draw is the common sense inference that can be drawn from the defendant’s inability to identify a defence. It is likely that such an inference is being impliedly drawn by judges and juries now.

**Safeguards**

146. The Bill also provides a number of safeguards that must be observed before an adverse inference can be drawn. These include that:

146.1. the prosecutor must have the judge’s permission to comment to a jury on a defendant’s failure to notify adequately an issue in dispute (clause 112(1));

146.2. the defendant must have had a reasonable opportunity to be heard about whether he or she failed to adequately identify an issue (clauses 106(3) and 112(2));

146.3. the judge must be satisfied that there has been such failure and there is no reasonable explanation for it (clauses 106(1), 112(3), 113(2)); and

146.4. the defendant may not be found guilty solely on the basis of such an inference (clauses 106(5) and 114(2));

146.5. in a Judge-alone trial, the judge must identify that he or she has drawn an adverse inference and the reasons for doing so (clause 106(4));

146.6. if comment to a jury is allowed on the failure to notify issues, the judge must direct the jury that it may (only) draw any inference from that failure that appears proper in the circumstances (clause 114(2)).

147. This is in contrast to the position in the United Kingdom which, in particular, enables adverse inferences to be drawn without the leave of the court in many situations.20 (This is contrary to the view expressed by Patrick Winkler and

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20 The court’s leave is not required when the adverse inference relates to the defendant’s failure to provide a defence statement at all, the provision of a statement out-of-time, the identification of inconsistent defences, or failure to provide the particulars of an alibi. Leave is required if the “non-compliance” is because the defendant relied on a matter that was not mentioned in the defence statement and that matter is not a point of law or authority; or a witness notice was given out-of-time or a witness was called who was not included or adequately identified in the required pre-trial witness notice – see s11 of the Criminal Procedure and Investigations Act 1994 (UK).
Roderick Mulgan that the United Kingdom’s provisions provide greater safeguards than appear in the Bill or that the Bill does not allow the court to have regard to whether there is any justification for running a previously unidentified issue at trial.)

148. Given the safeguards incorporated into the Bill, leave will be given by a judge to allow the prosecutor to comment to a jury on a failure to identify an issue only if satisfied that a substantive inference may be drawn from the defendant’s failure and that its evidential value outweighs its prejudicial effect.

149. There was concern expressed by some submitters that insufficient guidance about the procedure for drawing adverse inferences was provided in the Bill. There will be some uncertainty about how the provisions are to operate until precedents have been established, particularly by the appellate courts. But this concern applies to many provisions in the Bill, and is an inevitable consequence of the inclusion of new policy in legislation.

150. In respect of the District Court Judges particular concern about the applicable standard of proof, the requirement that the judge be “satisfied” of the defendant’s non-compliance is deliberate. As established by case law, the requirement for a judge to be “satisfied” means that no standard applies.21 The judge simply has to make up his or her mind on reasonable grounds – that is, to reach a “judicial” view of the matter.

151. Self-represented defendants are likely to face particular difficulties in applying these provisions. However, as with any other defendant, if a self-represented defendant fails to identify the issues in dispute before the trial, the judge is likely to raise that failure with the defendant and give them an opportunity to rectify it.

Common law inference

152. As noted above, two submitters considered that nothing more was needed in this area given the fact-finder’s ability to draw an adverse inference from a defendant’s silence at trial. That ability arises from a Court of Appeal decision, Trompert v Police.22 It does not place any obligation on a defendant to testify but, establishes that where a prima facie case against the defendant has been established, it is reasonable and logical for the fact-finder to draw inferences from the defendant’s failure to directly advance an explanation in response to that case. However, there is a fundamental difference between not identifying issues in dispute pre-trial and a defendant’s silence at trial. Putting aside the obvious timing issue, a defendant’s silence at trial relates to his or her failure to give evidence. In contrast, there is no requirement that the defence identify any evidence as part of the issues in dispute provisions. The two situations are therefore quite different.

Police questioning

153. Nor is it appropriate to extend the adverse inference provisions to a defendant’s silence during police questioning (as is the situation in the United Kingdom). Arguably, suspects faced with allegations from the Police, potentially in a coercive or stressful environment, and not having a full appreciation of the case against them, are in a far more vulnerable position than at any other stage of the process. It would be inappropriate to provide in legislation that an adverse inference may be drawn from the defendant’s silence at that stage.

22 Trompert v Police [1985] 1 NZLR 357.
Co-defendants

154. Finally, advisers agree with the NZLS (40) that co-defendants should be able to comment to the fact-finder about another defendant’s failure to identify the issues in dispute. There is no reason why a co-defendant should be precluded from doing so. For these purposes, a co-defendant who wishes to comment about a co-defendant’s non-compliance should be treated no differently to the prosecutor, and all the same safeguards should apply (eg, leave will be required before comment can be made to a jury).

Estimated benefits

155. The provisions which allow an adverse inference to be drawn from failure to identify issues in dispute are intended to provide an incentive on defendants to comply with this requirement and to provide judges with a tool for dealing with defendants who fail to do so. Although other sanctions could apply (including the imposition of a costs order or the non-compliance being taken into account as an aggravating factor at sentence), it is likely that some level of non-compliance would result from the removal of the adverse inference provisions. Depending on the level of non-compliance, the benefits expected from requiring the defence to identify issues in dispute (see paragraph 104), including a reduction in trial time, would reduce.

**Recommendation 2**

Advisers recommend that the adverse inference provisions be amended so that a co-defendant is able to comment to the fact-finder about another defendant’s failure to identify the issues in dispute.

**PROCEEDING IN THE ABSENCE OF THE DEFENDANT**

156. Clauses 124 to 132 extend existing statutory and common law authority that enables the courts to commence or continue proceedings in the absence of the defendant in certain circumstances. The key elements of the Bill’s provisions are that:

156.1. The defendant is entitled to be present at a hearing subject to the court’s ability to excuse the defendant or remove him or her for misbehaviour (clause 124). This reflects existing provisions in the Crimes Act 1961 and Summary Proceedings Act 1957.

156.2. The defendant must be present at a hearing if they are required to be there. A represented defendant might not need to be at a hearing that is solely concerned with technical matters (clause 125).

156.3. For category 1 offences, the court has a broad discretion to try and sentence a defendant in his or her absence (clause 126).

156.4. For category 2, 3 or 4 offences:

156.4.1. the court is not able to continue in the absence of a defendant before a plea is entered (clause 127).

156.4.2. if the defendant pleads not guilty, there is a presumption that the court must continue in the absence of the defendant if not
satisfied that the defendant has a reasonable excuse for his or her absence (clause 128). Otherwise, the court has a discretion to proceed in the defendant’s absence. The court may not sentence the defendant in his or her absence in either situation.

157. A retrial may be ordered when a trial proceeds in the defendant’s absence. For category 1 offences, a retrial must be ordered if the court is satisfied that the defendant was not aware of the hearing. For category 2, 3 or 4 offences, the court may only order a retrial if satisfied that the defendant has a defence that would have had a reasonable prospect of success if he or she had attended the trial.

Submissions

General comment

158. The table below summarises the number of submissions on clauses 124 to 132.

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<th>Total commenting</th>
<th>Opposed</th>
<th>Support</th>
<th>Neutral</th>
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<td>20</td>
<td>15</td>
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159. Other than one submitter, the New Zealand Council of Women (38), who considers that disruptive defendants who are removed from court should be able to appear by audio-visual link (38), submitters’ concerns focus on the proposals in paragraphs 156.2 to 156.4 above, rather than the continuation of the court’s ability to continue in the absence of a disruptive or excused defendant. Most criticism was reserved for clauses 127, 128 and 131, which relate to the court’s ability to proceed in the absence of a defendant charged with an offence in categories 2, 3 or 4.

160. Submitters opposed to these proposals (7, 13, 18, 22, 23, 28, 29, 38, 39a, 39b, 40, 43, 53, 57, 70) consider the right for a defendant to be present at his or her trial is critical to a fair trial and that these provisions breach the NZBORA and New Zealand’s international human rights obligations. A number note and endorse the criticisms made by the A-G of these provisions in his section 7 report.

161. Two submitters (13, 22) consider that the provisions will particularly disadvantage those defendants who are vulnerable because of mental health issues, impaired literacy and other difficulties, and who find it a challenge dealing with the expectations of social systems, including the court.

Enabling the court to proceed in the absence of a defendant

162. The Human Rights Commission (28) considers that the provisions which apply to category 1 offences engage, but do not limit, the defendant’s right to be present. The Dunedin Community Law Centre (13) submits that there are risks to proceeding in the absence in category 1 offences when a defendant has committed an offence while drunk; this might mean, for example, that the defendant may forget that he or she was served with a summons because he or she was drunk at the time. The Auckland District Law Society (18) considers that an unfettered discretion to proceed in the absence of a defendant for a category 1 offence is not appropriate unless the defendant has expressly or impliedly waived his or her right to be present.
163. The NZLS (40) considers that section 25(e) of the NZBORA, which provides the defendant with a right to be present at the trial and present a defence, should be explicitly mentioned on the face of clause 126. The Criminal Bar Association (23) submits that a defendant has a right to be present if the sentence is to be imposed for any matter other than one that results in a fine.

164. In relation to category 2, 3 or 4 offences, some submitters consider that there should be a discretion that the court proceeds in absence, rather than a statutory presumption (23, 28, 39b, 43). James Richardson (39a) queries the reference to the issues in dispute in clause 128(5). He argues that the only evidence capable of being relevant to whether or not an element of the offence can be proved (and therefore whether the trial should proceed) is the evidence of the prosecution.

165. Three submitters (13, 22, 57) express concern that a court would be able to proceed in the absence of a defendant who has a reasonable excuse for his or her non-appearance. The Human Rights Commission (28) submits either that a general discretion to proceed in absence should be provided, or that section 25(e) of the NZBORA should be a mandatory consideration in deciding whether to proceed without the defendant.

166. Other submitters argue that the court should only proceed in absence if satisfied that the defendant has expressly or implicitly waived the right to be present (18, 29, 53). Edward Miller and Kris Gledhill, University of Auckland (53) consider that this waiver should be demonstrated by the prosecution, not the defence.

167. Other criticisms of these provisions include that:

167.1. the existing law is sufficient and the need to change it has not been adequately established (22, 40, 43);

167.2. defendants on bail will be subject to a double penalty – that is, they will be punished for breach of bail and will be punished by the substantive matter proceeding in their absence (22);

167.3. defence counsel will be placed in a difficult position if defendants fail to appear (which will raise professional liability and ethical issues) because they will be unable to obtain proper instructions and may feel they need to withdraw from a case, so that a defendant is not represented at trial (22, 38, 43, 57);

167.4. the benefits of these proposals are likely to be outweighed by the costs of probable retrials and/or the costs of proceeding with a trial when the defendant is likely to enter a guilty plea if brought to court (making a trial unnecessary) (23, 40, 43, 57).

168. By contrast, submitters supporting these proposals (24, 26, 34, 41) consider that they have sufficient protections associated with them and will reduce delay. The District Court Judges (26) consider the ability to have trials in the defendant’s absence as “one of the most essential and effective in the Bill”.

169. The Crown Solicitors Network (24) submits that the presumption in favour of proceeding in the defendant’s absence will help reduce unnecessary delay, while appropriately recognising the legitimate interests of participants other than the defendant and providing appropriate safeguards to ensure that the defendant’s right to a fair trial is preserved.
The remedy of a retrial

170. Seven submitters (18, 22, 23, 39a, 39b, 40, 41) submit that the grounds for a retrial should be changed or that the court should be given a greater discretion to order a retrial. Three submitters (22, 23, 40) think that a reasonable excuse for not being present should be sufficient reason for a retrial. The NZLS (40) also queries why the court does not have a discretion to order a retrial for a category 1 offence when a trial has proceeded in absence for a reason other than that the defendant did not receive a summons.

171. Three submitters (23, 39a, 39b) consider that the proposed ground for a retrial for offences in categories 2, 3 or 4 is inappropriate because it shifts the burden of proof onto the defendant or usurps the presumption of innocence. James Richardson (39a) submits that while the entitlement to a second trial should be restricted, the focus should be on the reasons for absence from the first trial. The New Zealand Bar Association (39b) proposes that the court should be able to grant a retrial if the defendant can point to a defence available on the facts. The New Zealand Police Association (41) considers that the ground for a retrial in a category 2, 3 or 4 case should include an “interests of justice” test. It considers that a retrial may not be in the interests of justice when, for example, the defence relates to technical breaches of investigative or other procedures.

172. Two submitters (18, 22) think that 10 days is too short a time to apply for a retrial under clause 131, and suggest that 21 days should be allowed. One (18) objects to the requirement on the defendant to provide formal statements and the requirement that they must be disclosed to the prosecution.

173. Other general criticisms include that retrials will be unnecessarily traumatising for victims (13) and be weighted in favour of the prosecution who will have had the benefit of a “practice run” (57).

Attorney-General’s report

174. The A-G found that the limits on a defendant’s right to be present in relation to offences in categories 2, 3 and 4 are not justified under section 5 of NZBORA. His concern focused on the fact that it is possible for a defendant to be convicted in absence and to be denied a right to a retrial even though he or she has not consciously failed to exercise, or waived, the right to be present (eg, because the defendant was not aware of the hearing). The A-G considered that the objectives of the provisions could be achieved in a rights-consistent way by the provision of an unfettered discretion to proceed in the defendant’s absence as is provided in relation to category 1 offences.

Comment: proceeding in the absence of a defendant charged with a category 1 offence

175. The provisions that enable a defendant charged with a category 1 offence to be tried and sentenced in his or her absence reflect existing provisions in the Summary Proceedings Act 1957, which the District Court Judges’ submissions note are “frequently used”. The provisions have operated effectively for at least 50 years, and there is no justification for putting in place a more restrictive approach now. In response to the NZLS’s particular concern that section 25(e) of NZBORA is not mentioned on the face of clause 126, as the courts must always have regard to the NZBORA when exercising a discretion, it is not necessary for section 25(e) to be explicitly mentioned.
Comment: proceeding in the absence of a defendant charged with a category 2-4 offence

176. The rationale for the absence provisions that apply to offences in categories 2, 3 and 4 is articulated in the submission of the District Court Judges (26). It notes:

For many years defendants wanting to avoid standing [summary] trial have absented themselves from the court on the date fixed for their trial. What then happens is that a warrant for their arrest is issued, witnesses go home having given up a day’s employment, and the case comes to a stop until the police are able to arrest the defendant. Usually the defendant is found months later, arrested, brought to court, and a new date is set for months later still. Sometimes a defendant has repeated this process. Minor charges often have a maximum penalty lower than the expected remand time for a new trial and so [defendants] cannot generally be remanded in custody. In this way savvy defendants control the process and the court is helpless.

177. The absence provisions reflect the view that, as a matter of policy, it is inappropriate for a defendant to be able to frustrate the course of justice by absconding. The alternative is to allow the defendant to dictate when the case against him or her is to proceed. In some cases, the defendant will wish to delay a trial – for example, in the hope that this will wear down one or more witnesses. In those cases, it is not in the interests of justice for the trial to be delayed.

178. There are also more practical reasons for allowing a trial to proceed. These include, for example, the inconvenience that is otherwise caused to victims, witnesses and jurors; the risk that witnesses’ memories will fade thereby reducing the reliability and credibility of the evidence they eventually give; the difficulties caused for any co-defendants, who may wish the case to proceed against them in a timely manner; and the inability for victims, particularly in serious cases, to move on from the offence. For all of these reasons, the High Court, in particular, has been prepared to proceed without an absent defendant in a number of cases.

179. An indication of the scale of the problem currently posed by absent defendants is provided by statistics on the number of warrants to arrest that are issued when a defendant fails to appear. In 2008, courts issued warrants to arrest for non-appearance in:

179.1. 18% of summary (judge alone) cases;

179.2. 16% of all jury trial cases prior to committal;

179.3. 19% of District Court jury trial cases after committal;

179.4. 10% of High Court jury trial cases after committal.

180. An unfettered discretion to proceed in the defendant’s absence is not recommended. It would provide some assistance to the District Court which, because its jurisdiction is derived entirely from statute, does not consider it can proceed in absence other than as provided in the Summary Proceedings Act. However, the Ministry of Justice estimates that a change from a statutory presumption to an unfettered discretion would reduce the benefits in terms of number of saved court events and sitting hours. A statutory presumption that the court must proceed also provides a stronger signal to the courts about their ability to proceed without a defendant than is provided by an unfettered discretion.
Even with this statutory presumption, the courts will not be able to proceed if it would be contrary to the interests of justice to do so.

181. The ability for the court to proceed even when an absent defendant has a reasonable excuse for his or her non-appearance builds on current practice. It is not expected that the court will proceed in this situation often. The two situations where advisers are aware of it occurring in New Zealand involved defendants who were ill; in both cases, the judge considered that the defendant was not prejudiced by the trial proceeding.23

182. The extent to which defence counsel will continue to appear for an absent defendant is unclear. There are examples in New Zealand of defence counsel continuing to represent absent defendants, including where the court has declined leave for a counsel to withdraw.24 If the issues in dispute are appropriately identified, the concern that counsel will be acting without instructions should carry less weight. This is because counsel will have already received instructions from the defendant about the nature of the case to be run. This is one of the reasons why the issues in dispute has been explicitly identified as a relevant factor when determining whether the court should proceed (clause 128(5)(a)).

183. On a related point, advisers disagree with James Richardson (39a) that the prosecution’s evidence will be the only relevant evidence when determining whether a trial should proceed. That will clearly not be the case, for example, when the defence rests on the defendant having a positive defence or when the offence incorporates a reverse onus that must be proved by the defendant (eg, the presumption of possession for supply).

184. The A-G and some submitters considered that the court’s focus when deciding whether or not to proceed without the defendant should be on whether there had been a conscious failure or waiver of the right to appear. However, it is not clear how the court could properly assess this in the absence of a defendant. Instead, it seems a more relevant consideration to whether a retrial should be provided. Advisers also agree with some submitters that the defendant might have a good reason for his or her absence that is not immediately apparent to the court. Again, however, given the practical difficulties in determining the reason for the defendant’s absence, that is something that is better addressed by the remedy of a retrial.

Retrials

185. Rather than changing the basis on which a court can proceed in a defendant’s absence, it is recommended that the grounds on which a retrial might be granted are widened. In particular, it is recommended that clause 131, which provides the grounds for a retrial in categories 2, 3 or 4, be amended to include the additional grounds that:

185.1. the court must order a retrial if the defendant did not have notice of the hearing;

23 R v Dunn (No. 9) CRI-2008-404-76, HC Auckland, Andrews J; R v Van Yzendoorn CA 143/02, 1 October 2002.
185.2. the court may order a retrial of the charge if the defendant had a reasonable excuse for his or her absence that was unknown to the court at the time of the trial, and it is in the interests of justice that there be a retrial.

186. The recommended new grounds aim to address the concerns about the position of defendants who either did not know a hearing was taking place or who had a reasonable excuse for their absence. In neither situation should defendants be penalised for their absence. However, defendants in these situations would not currently obtain a retrial unless the existing ground in clause 131 also applied.

187. It is also recommended that the grounds upon which a retrial may be granted for a category 2, 3 or 4 offence should also be the grounds for a retrial for a category 1 offence. As drafted, the grounds on which a retrial might be ordered for a category 1 offence are restricted to circumstances where the defendant does not receive notice of the hearing. However, there is no reason for the grounds between offence categories to differ. In addition, even though it is possible under clause 126 for a court to sentence a defendant for a category 1 offence in his or her absence, clause 130 does not enable a rehearing as to sentence to be ordered. It is recommended that this gap in clause 130 also be addressed.

188. The timeframe in which an application must be made under clause 132 is too short and should be increased to 15 working days. In light of the recommendation to align the retrial grounds for all offence categories, clause 132 should also apply to retrials ordered under both clause 130 and clause 131.

189. However, no changes are recommended to the existing ground in clause 128 for a retrial. In particular, advisers disagree with submitters’ view that the ground shifts the burden of proof or usurps the presumption of innocence. Neither is relevant given that the prosecution has already proved the offence against the defendant. The finding of guilt can only be disturbed by evidence that the defendant produces. In this sense, it is analogous to the defendant filing an appeal against conviction.

Technical and drafting matters

190. Submitters also identified some technical or drafting concerns with clauses 124 to 132. Drafting changes in response to these concerns are identified in Appendix 2.

191. On matters that are more substantive, advisers agree with the NZLS’s submission that clause 125(2)(c) should be amended so that a represented defendant is not required to be present when the hearing is solely concerned with the timing of the trial or the admissibility of evidence. However, advisers disagree with its suggestion that clause 124 should be amended to state that a defendant has a right to be present at a hearing. The provision of an unqualified right might be interpreted inconsistently with the courts’ ability to proceed in the defendant’s absence. The use of “may be present” is better aligned with the provisions that follow. The NZLS also suggests that clause 132 should be amended to specifically provide whether or not the judge, prosecution and other co-defendant can comment at the retrial on any failure by the defendant to advance the case relied on in the application for retrial. It is not clear whether the NZLS thinks comment of this sort should be able to be made. However, advisers consider it preferable that the ‘issues in dispute’ provisions are left to apply in the standard way.
Recommendation 3

Advisers recommend that:

- clause 125(2)(c) be amended so that the defendant is not required to be present when the hearing is solely concerned with the timing of the trial or the admissibility of evidence;
- clause 130 be amended so that:
  - the grounds for ordering a retrial for a category 1 offence are the same as those for an offence in category 2, 3 or 4;
  - the court may order a rehearing as to sentence if a defendant is sentenced for a category 1 offence in his or her absence;
- clause 131 be amended to provide that, in addition to the ground already provided for ordering a retrial for a category 2, 3 or 4 offence:
  - the court must order a retrial if the defendant did not have notice of the hearing;
  - the court may order a retrial of the charge if the defendant had a reasonable excuse for his or her absence that was unknown to the court at the time of the trial, and it is in the interests of justice that there be a retrial;
- clause 132 (which should apply to retrials ordered under clause 130 and clause 131) be amended to extend the timeframe in which an application for a retrial must be made from 10 working days to 15 working days.

INCENTIVES AND SANCTIONS

192. The Bill provides incentives and sanctions on the defendant, the defendant’s lawyer and the prosecutor to fulfil their obligations to progress cases (and facilitate the significant change in behaviour that will be necessary to implement the proposed reform).

193. The Bill includes provisions that:

193.1. allow the court to impose cost orders against a defendant, defence counsel, or the prosecution if satisfied that he or she failed without reasonable excuse to comply with a procedural requirement (clause 361);

193.2. allow the court or Registrar to impose bail conditions reasonably required to ensure that the defendant takes the necessary steps for the timely progress of his or her case (eg, attending an appointment with a probation officer for the purpose of preparing a pre-sentence report) (clauses 405, 407 and Schedule 2); and

193.3. require a sentencing Judge to take into account as aggravating or mitigating factors (to the extent applicable) the failure of the prosecution or the offender to comply with a procedural requirement; and positive steps taken by the offender (over and above mere compliance) to expedite or reduce the cost of proceedings (clause 431).
General Submissions
194. Twenty submitters in total comment on all or some aspect of the incentives and sanctions provisions.
195. Four submitters (24, 53, 18 and 60) comment generally on incentives and sanctions in the Bill.
196. While the Crown Solicitors Network (24) agrees “that there is generally a need for the procedural obligations to be enforceable and the subject of consequences for non-compliance”, they are concerned about mechanisms such as sentencing factors and costs orders. They highlight the experience in other jurisdictions (England, Wales, Australia), including reluctance to use such mechanisms because of concern about appeals and application time and costs. They conclude that in other jurisdictions such provisions are seen as a last resort, rarely used other than for the most obvious and extreme examples, and that this is likely to be similar in New Zealand. However, the Crown Solicitors Network did not identify any incentives and sanctions as an alternative to those in the Bill.
197. The Chief Justice (60) expresses grave concerns about sanctions and considers that they “are likely to prove to be impracticable to apply in practice”.
198. The remaining submitters do not support the sanctions provisions generally. The Auckland District Law Society (18) think that the provisions are “misconceived and will create anomalies and unfairness” and question whether this is the best way to encourage a change in behaviour. Edward Miller and Kris Gledhill, University of Auckland (53) comment that:

To make non-compliance with procedural directions punishable seems unnecessary in light of what is already available in terms of incentives. . . . In short, the question of sanctions appears both unnecessary in principle and likely to cause more practical problems than it is worth.

General Comment
199. The reforms have not been promoted or justified explicitly as a means of countering “game playing”. That is because “game playing” is a pejorative term that suggests that one or other of the parties (usually the defence) is engaged in deliberate or underhand tactics for dubious motives.
200. As evidence of “game playing” involves ascribing motives to a counsel or defendant in respect of particular behaviour, unequivocal evidence of “game playing” is difficult to produce. However, there are clearly instances where counsel or defendants manifestly fail to do something that is required of them (such as not attending the trial) or engage in questionable tactics (such as electing jury trial on the day of a defended hearing, with the effect that the trial is delayed). District Court Judges, in particular, have informed us of numerous examples of this type of behaviour.
201. Whatever the motives that underpin behaviour that leads to delay, that is not the real point. The fact is that the system as it is currently framed provides many opportunities for delay or equivocation by the parties, generally with few or no consequences when that occurs. It is difficult to blame defendants and their counsel (or even the prosecutor) for taking advantage of that. Indeed, it is a common perception (demonstrated by a number of submissions made on the Bill) that defendants have a right to exploit opportunities for delay and obfuscation that are permitted by the system where that is in the defendant’s interests.
202. Therefore, the Bill as a whole is directed towards the structural and systemic deficiencies that permit and encourage unjustified delay. It attempts to ensure that justice is delivered in a timely way, and that the system does what it can to ensure that parties cannot engage in strategies that militate against that, unless those strategies are in the overall interests of justice. The current system fails in that respect.

203. The reforms contained in the Bill will require changes to some long established and entrenched behaviours and practices. While specific aspects of this reform will in themselves drive behavioural change, the suite of incentives and sanctions in the Bill are intended to encourage parties to comply with procedural requirements. These are in addition to the incentives and sanctions that are (and will be) available elsewhere (eg, through the legal aid system and professional standards and discipline).

Costs orders (clause 361)

204. Clause 361 provides a new power for courts to make costs orders against a defendant, the defendant’s lawyer, and a prosecutor for failing to comply with a requirement imposed by or under the Bill, or rules or regulations made under it, or by the Criminal Disclosure Act 2008. The sum is required to be just and reasonable reflecting the costs incurred by the court, victims, witnesses or any other person.

Specific Submissions

205. Two submitters (26 and 34) support costs orders, while eight submitters (2A, 17, 22, 28, 39a, 39b, 53 and 57) do not.

206. Seven other submitters (23, 24, 29, 43, 18, 58 and 60) raise concerns but do not expressly state whether or not the clause is supported. For example, one submitter (43) raises a number of significant concerns but also notes costs orders may be appropriate in some rare situations. Similarly, another submitter (23) calls them “misconceived”, raises a number of concerns but also concedes that in theory it may be a good idea but only as a last resort for “repeat offenders”.

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207. Submitters’ key concerns relate to the following areas:

207.1. the need for or effectiveness of costs orders;

207.2. the potential for adverse impacts;

207.3. practical issues (eg, what constitutes “reasonable excuse”; how will costs be determined; who pays); and

207.4. the need for review or appeal of costs orders.

Need for costs orders

208. A number of submitters do not think costs orders are necessary. Many of these submitters note the availability of other remedies such as contempt (for both counsel and defendants) and professional disciplinary processes (for counsel).
Some of these submitters also note the inherent jurisdiction of the court to regulate its own processes.

209. Some submitters do not think costs orders will be an effective deterrent. The Chief Justice (60) submits that costs orders are likely to be ineffective “except in comparatively rare cases”. In contrast, the District Court Judges (26) support clause 361 and express the view that it will encourage compliance.

Potential adverse impacts

210. Submitters raise concerns about a number of potential adverse impacts from costs orders, including: on the counsel-client relationship; for fairness and related impact on fair trial rights; on the role of judges; and on court time and resources.

211. A number of submitters, such as the New Zealand Bar Association (39b), note the positive duty of defence counsel to raise challenges and that the threat of costs orders might inhibit counsel carrying out this obligation because it could be seen as causing ‘delay’. Other submitters express concern that the threat of costs orders, and the associated determination of responsibility for non-compliance, will further complicate the already difficult counsel-defendant relationship (58, 18). Further, many submitters comment on the potential interference with privileged communications when a defendant or counsel wishes to raise a reasonable excuse for the procedural non-compliance, which is covered by legal privilege.

212. Some submitters note that the threat of costs orders inhibiting defence counsels’ actions could be unfair, lead to injustices and impact on fair trial rights (eg, not raising challenges that may have been successful). One submitter (43) considers this to be a breach of Article 14 of the International Covenant on Civil and Political Rights 1966, reflected in section 24 of the NZBORA, which provides a right to “adequate time and facilities to prepare a defence” (43). Another submitter (18) comments that defendants will not be aware of the Act’s procedural requirements, so that penalising them will be unjust. This submitter is also concerned that costs orders stand even if the case is dismissed or the accused is not convicted or is discharged (clause 361(6)), finding this contrary to the interests of justice.

213. With regard to judges, one submitter (28) is concerned that costs orders will compromise the impartiality of the bench if judges effectively become prosecutors of counsel. Another submitter (39a) is particularly concerned that the ability for a judge to order costs on his or her own motion (ie, without an application from the parties) means the judge is deciding in his or her own cause.

214. Finally, a number of submissions note the potential for delays and costs created by ‘satellite litigation’ (applications for costs, appeals against orders). The Criminal Bar Association (23) also discusses the incentive for lawyers to seek protracted timetable orders to avoid the risk of being accused of delay and having costs orders imposed.

Practical issues

215. One submitter (22) comments that costs orders should not be imposed where there is a reasonable excuse for non-compliance. Some submitters query what will constitute a “reasonable excuse” (provided for in clause 361(2)).

216. Other submitters question how a judge will determine who is responsible for the non-compliance as between a defendant and their counsel or between the Police or other prosecuting agency and prosecuting counsel.
217. Submitters also raise concerns about the level and calculation of costs. Some submitters, such as the Criminal Bar Association (23), express concern about the lack of guidance or limits on the amount of costs that can be ordered. One submitter (18) suggests the amounts should be provided for in subordinate legislation. Another submitter (53) queries how a court will determine not only the actual amount of costs incurred, but also the fact that the costs would not otherwise have been incurred. However, the District Court Judges (26) view is that a scale of costs should be left to the judiciary to develop, on the basis that precedent will soon develop and statutory provisions risk becoming outdated with the passage of time.

218. Submitters also comment on the issues associated with the payment of costs, including who would pay and ability to pay. For example, one submitter (18) queries whether defence counsel who had costs imposed against them would be able to recover these costs from their clients. The Crown Solicitors Network (24) comments that the legal aid scheme does not take into account the possibility of defence counsel being responsible for the payment of costs. If not covered by legal aid, many senior legal aid lawyers may choose not to offer their services.

219. Other submitters focus on the impact on defendants with limited financial means, including their ability to obtain and retain counsel if counsel perceived a high risk of costs orders (particularly if not covered by legal aid) or if defendants could not afford to reimburse counsel for costs.

220. The Crown Solicitors Network (24) is concerned that judges may impose costs orders against prosecutors to be seen to be fair. (In contrast, another submission (43) is of the view that judges will be reluctant to impose costs orders against prosecutors as it amounts to a transfer of funds from one public body to another.) The Crown Solicitors Network (24) go on to note that costs against a prosecutor will have to be borne by the Crown Solicitor's firm. They are concerned that the current fee payment regulations and arrangements with Crown Law Office do not take account of the possibility of Crown Solicitors incurring costs orders while carrying out their statutory obligations.

Review or appeal of costs orders

221. The Coalition of Community Law Centres (22) stated that parties must have a right after the trial to request a review of all costs orders made in the course of the trial, overseen by a different judge. Another submitter, James Richardson (39a), was not able to find a right to appeal for costs orders in the Bill.

Comment

222. The District Court Judges (26), who conduct the bulk of criminal cases, support costs orders, and are of the view that the ability to impose these would incentivise compliance. Costs orders will be one of a range of options available, in addition to existing mechanisms such as contempt and professional disciplinary proceedings. Further, the ability and impartiality of judges to make such determinations is not considered to be an issue, given that they already deal with unacceptable behaviour (including of counsel) using their contempt powers.

223. A costs order will not be imposed if there is a reasonable excuse for the procedural non-compliance (clause 361(2)). As under the Costs in Criminal Cases Act 1967, clause 361 provides that the costs ordered must be “just and reasonable”. Issues such as conflict of interest and legal privilege are able to be considered as part of the court’s examination of whether there is a reasonable
excuse. If there is any doubt about who is responsible for non-compliance as between the defendant and counsel that cannot be resolved, the appropriate course is not to impose the sanction. When considering the appropriateness of imposing costs orders, there is also nothing to prevent courts taking account of other issues (eg, the defendant's ability to pay). As courts have been able to award costs in criminal proceedings under the Costs in Criminal Cases Act for many years, they should have experience dealing with many of the issues raised in submissions. As noted above, the District Court Judges (26) do not believe determination of the amount will be an issue.

224. Costs orders would not be covered by legal aid (for the defendant or for the counsel of the aided person); they would be a personal cost incurred as a result of the case and the person against whom they were ordered would be responsible for their payment. Nor could counsel bill clients for costs ordered against counsel, as the NZLS is unlikely to consider these costs properly attributable to the client.

225. This situation is appropriate, as costs orders are a sanction and therefore the personal responsibility of the person against whom the order is made. Because they are a sanction and not related to the defendant's culpability for the alleged offending, it is also appropriate that costs orders stand even if the case is dismissed or the accused is not convicted or is discharged.

226. The expectation is that such orders will not be made lightly or often. As some submitters themselves note, this expectation is supported by the experience from comparable overseas jurisdictions. However, this does not negate their incentive effect. For example, counsel seeking to avoid potential liability are likely to develop better standard letters to their clients and accurately record their instructions.

227. The right to appeal is a necessary component and already provided for in the Bill (clauses 274 – 285). Further, it is expected that there will be an initial increase in appeals on costs orders (as well as the other incentives and sanctions). This is an essential part of bedding in new provisions and establishing clear guidance, after which such appeals are expected to reduce.

228. No change is recommended in response to the submissions on this clause.

Persons to whom payment may be made

229. Clause 361(3) indicates that the amount imposed needs to reflect costs incurred by the court, victims, witnesses and any other person. However, there is no requirement that payment received for those costs must be passed on to those persons. Consistent with the principles of reparation, this oversight should be addressed.

230. Therefore, advisers recommend that clause 361 should be amended to provide that, when a costs order is made that is intended to reflect costs incurred by any person connected with the proceedings, the court may order that some or all of the amount is to be paid the affected person(s).

Compliance with regulations under the Criminal Disclosure Act 2008

231. As drafted, a costs order may be imposed for failure to comply with a requirement in the Criminal Disclosure Act 2008, but not with requirements in regulations made under that Act. In contrast, costs orders may be imposed for failure to comply with a requirement under the Bill, or its rules or regulations. There is no
reason why the costs order should not also extend to regulations made under the Criminal Disclosure Act and advisers recommend this extension.

**Recommendation 4**

Advisers recommend that the Bill be amended to provide that:

- when a costs order is made under clause 361, that is intended to reflect costs incurred by any person connected with the proceedings, the court may order that some or all of the amount is to be paid to the affected person(s); and

- a costs order can be imposed for failure to comply with regulations made under the Criminal Disclosure Act 2008.

**Bail conditions (clauses 402, 405, 407 and Schedule 2)**

232. Clauses 402, 405, 407 and Schedule 2 make amendments to the Bail Act 2000 to allow the court or Registrar to impose bail conditions reasonably required to ensure that the defendant takes the necessary steps for the timely progress of his or her case. In particular:

232.1. Clause 402 allows the court to remand a defendant in custody if there is a risk that “the defendant may fail to take the steps necessary for proceedings for the offence with which the defendant is charged to be progressed within a reasonable timeframe”. In deciding whether a risk exists, the court must take into account whether the defendant has, on more than one previous occasion, failed to take such steps.

232.2. Clause 405 allows the court to impose conditions reasonably necessary to ensure that the defendant “takes the steps necessary for proceedings for the offence with which the defendant is charged to be progressed within a reasonable timeframe”. Breach of a bail condition is a ground for the defendant to be arrested and brought back before the Court to have bail reconsidered.

**Specific Submissions**

233. Only one submitter specifically commented on these provisions. The New Zealand Law Society (NZLS, 40), recommends removing clauses 402 and 405 from the Bill. It states that the risk of a defendant failing to take the necessary steps to progress proceedings is not of sufficient social importance to outweigh the presumption of innocence and the defendant’s rights to liberty. The NZLS does not consider it appropriate to remand a defendant awaiting trial in custody on this ground, and submits that doing so may be an unreasonable limit on the rights contained in sections 22 and 24(b) of NZBORA.

234. The NZLS also considers that clause 405 is undesirable, because a defendant who failed to progress proceedings properly could be arrested without warrant, and temporarily or permanently deprived of liberty.

235. Finally, the NZLS considers that a lack of legal representation will increase the likelihood that a defendant is objectively viewed as being non-compliant with case management processes. It also notes that, on its face, clause 405 will allow the Court to insist that a self-represented defendant employ counsel so as to ensure proceedings are progressed.
Comment

236. These provisions form part of a wider package of incentives and sanctions aimed at addressing delays caused when the defendant does not take the steps necessary for the case to progress. As with costs orders, it is expected that such orders will not be made lightly or often.

237. However, upon reflection advisers think that there will be a difficulty in applying these provisions prior to conviction. Generally the steps necessary to progress the case will involve participation in the case management process through counsel. Often it will not be possible to make the required steps explicit enough to be turned into enforceable bail conditions. These steps might include, for example, making arrangements for giving instructions to counsel or communicating with counsel for the purpose of identifying the issues in dispute. Moreover, if an explicit bail condition (such as a requirement to see counsel by a specified time) could be set, its enforcement would be problematic and likely to interfere with the lawyer-client relationship and legal professional privilege.

238. Advisers therefore propose that clauses 402 and 405 should apply only to defendants awaiting sentence. In this context, it will be easier for the court to specify as a condition exactly what it is necessary for the defendant to do – for example, reporting to a probation officer, at the time and date specified by the probation officer, for the purpose of preparing a pre-sentence report. This should also go some way towards addressing the NZLS’s concerns, which are less applicable in the pre-sentence context. Pre-trial defendants will continue to be subject to the other sanctions and incentives contained in the Bill to ensure that cases are progressed in a timely manner.

239. No other changes are recommended in response to the submissions on this clause. However, advisers recommend a number of technical amendments to the provisions, in the Appendices.

Recommendation 5

Advisers recommend that clauses 402 and 405 be redrafted to apply only to defendants who have pleaded, or been found, guilty and are awaiting sentencing.

Sentencing – aggravating or mitigating factors

240. Clause 431 amends section 9 of the Sentencing Act 2002, which sets out aggravating and mitigating factors on sentencing. The amendments provide that:

240.1. A defendant’s failure to comply with procedural requirements under the Bill (including regulations) or the Criminal Disclosure Act 2008, which caused a delay in the disposition of the proceedings or had an adverse effect on a victim or witness, can be an aggravating factor. The failure may be by the defendant personally; or it may be a failure by his or her lawyer arising out of the defendant’s instructions to, or failure or refusal to co-operate with, their lawyer.

240.2. Steps taken by the defendant to shorten proceedings or reduce their cost, or non-compliance by the prosecutor that impacts negatively on the defendant, can be a mitigating factor.
Specific Submissions

241. Nine submitters (7, 17, 18, 23, 24, 34, 39b, 40, 46) expressly comment on the new sentencing factors related to procedural compliance.

<table>
<thead>
<tr>
<th>Total commenting</th>
<th>Opposed</th>
<th>Support</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>6*</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

* number of submitters opposed and in support both reflect that one submitter (34) opposed the new mitigating factor, but supported the aggravating factor.

242. A key objection to the provision is that sentencing should be based on culpability, which is determined by the defendant’s offending, rather than procedural compliance (7, 17, 18, 24, 40).

243. Several submitters also comment on the difficulties of determining whether the defendant or their counsel was responsible for the non-compliance, including failure arising out of the defendant’s instructions to counsel. Submitters are concerned that this will interfere with privileged communications between defendants and their counsel (23, 39b, 40).

244. The NZLS (40), while noting the impact on the victim is understandably objectionable, questions why the adverse impact on witnesses should be an aggravating factor.

245. The Crown Solicitors Network (24) express a number of other concerns about the proposed mitigating factor. They are concerned it could discourage early (before trial) guilty pleas. They are also concerned that the aggravating factor is punishing the defendant for the way they conducted their case. The Crown Solicitors Network also note the availability of other remedies to address any impact on the defendant for prosecutorial non-compliance, including arguing abuse of process, remedies for breach of NZBORA, disciplinary proceedings against counsel or costs awarded to the defendant.

246. Two submitters (24, 47) suggest that the parties be given an opportunity to be heard before any decision to reduce or increase a sentence on the basis of these new factors is made. One of these (47) proposes that clause 431 “should include some reference to the right of the Prosecutor or Defence Counsel having the right to comment on the presence or absence of these factors.”

247. Similar to concerns about costs orders, one submitter (39b) expresses concern that the provision could dissuade the defendant or their counsel from taking a legitimate action in the proceeding or raising a legitimate challenge, for fear of the potential impact at sentencing.

248. The New Zealand Bar Association (39b) also raises the issue of the sentencing judge being obliged to sentence having regard to compliance with requirements in subordinate legislation.

249. The Coalition of Community Law Centres (22), in commenting on costs orders, expresses the view that procedural non-compliance should not be punished twice. It suggests that the sentencing judge must be made aware of any costs orders imposed on a defendant before taking procedural non-compliance into account as an aggravating feature at sentencing and either:
249.1. state that the orders will remain and procedural non-compliance will not be a factor in sentencing; or

249.2. cancel the costs orders and take procedural non-compliance into account in sentencing.

250. One submitter (23) notes that clause 431’s new section 9(2)(fb) of the Sentencing Act is consistent with the Supreme Court’s decision in *R v Williams* [2009] 2 NZLR 750. That decision held that, where there is a breach of the right to be tried *without* undue delay (provided under NZBORA s 25(b)), a reduction of sentence can be an appropriate remedy. However, the submitter considers that the provision arguably narrows the scope of that decision, because *Williams* did not specifically require there to be an “effect on the offender” caused by the delay.

*Comment*

251. Sentencing involves judicial consideration of the parties’ arguments about appropriate and relevant aggravating and mitigating factors. Parties already have a right to be heard and there is no need to make specific provision for that in this Bill.

252. It is not clear why the New Zealand Bar Association is concerned about a sentencing judge being obliged by primary legislation to sentence having regard to compliance with requirements in subordinate legislation.

253. Advisers do not agree that culpability for the offence is the sole basis upon which offenders should be sentenced. It is already established practice (recently confirmed by the Supreme Court in *Hessell v R* [2010] NZSC 135) that offenders should receive a sentencing discount for an early guilty plea. This is on the basis not that such a plea reduces their culpability but rather that it reduces the trauma of, and inconvenience to, victims and witnesses, facilitates the timely disposition of cases and reduces the costs incurred by the State. A parallel (but much lesser) discount for particular steps taken by the defendant to shorten the trial or reduce costs is directly analogous.

254. However, it was not intended that mere compliance with procedural requirements should ever be mitigating. That would appear to be a reward to the defendant for doing what he or she is required to do. Advisers therefore recommend that new section 9(2)(fa) be reworded to make this clear.

255. In relation to the expressed concern about how the court will determine who is responsible for non-compliance, it should be emphasised that the court is most unlikely to take non-compliance into account as an aggravating factor unless that non-compliance has been drawn to the attention of both counsel and the defendant during the pre-trial process; an opportunity has been provided to remedy the non-compliance; and a record made on the court file of the nature of the non-compliance and the discussions held in relation to it. If there is any doubt about whether the defendant or his or her counsel is responsible for the non-compliance, the non-compliance will not be taken into account on sentence.

256. In relation to the Crown Solicitors Network’s concern that treating non-compliance as an aggravating factor may be seen to punish offenders for the way in which they conduct their case, if offenders are failing to comply with statutory requirements, they are not conducting the case in a lawful way and ought to be visited with the consequences of that. Moreover, whether procedural non-
compliance is defined as an aggravating factor or compliance as a mitigating factor is largely a matter of semantics. If the starting point for calculating a sentence is taken to be the non-compliant offender, procedural compliance will be treated as a mitigating factor; if it is taken to be the compliant offender, non-compliance will be treated as an aggravating factor. In the end, the result will be the same. The Bill takes the latter approach. That seems preferable. Otherwise, as noted above, there will be an implication that offenders are being rewarded for doing what they are required to do.

257. In relation to the concern that the court may take non-compliance into account as an aggravating factor and combine it with a costs order (thus engaging in double counting), that could and should be dealt with on appeal.

258. In relation to a submitter’s concern that new section 9(2)(fb) of the Sentencing Act overlaps with and narrows the Supreme Court’s decision in *R v Williams*, advisers do not think that there is any difficulty. The *Williams* decision concerned the appropriate and proportionate remedy where there has been an *undue* delay to such an extent that it is an unjustified limit on the defendant’s NZBORA rights and therefore requires a remedy. Clause 431 does not concern remedies for NZBORA breaches and does not affect (or narrow) that decision; rather clause 431 provides for remedy where the delay does not amount to a breach of NZBORA.

**Technical and drafting matters**

259. Advisers recommend that two matters are addressed in how the new aggravating and mitigating factors are expressed. First, there is a drafting inconsistency between the description of the effect on:

259.1. a victim or witness (ie, *adverse* effect) in the aggravating factor in new section 9(1)(k)(ii)); and

259.2. the defendant (ie, *any* effects) in the mitigating factor in new section 9(2)(fb).

260. Advisers therefore recommend adding “adverse” to describe the effect on the defendant in new section 9(2)(fb).

261. Secondly, as with costs orders (see paragraph 231), there is no reason why these factors should not also apply to failure to comply with requirements in regulations made under the Criminal Disclosure Act 2008.
Recommendation 6

Advisers recommend that clause 431 be amended to:

- re-draft new section 9(2)(fa) of the Sentencing Act 2002 (inserted by subclause 2) to make clear that it is only a mitigating factor if the offender has taken steps beyond that required by the Act or any other enactment to shorten the trial or reduce costs;

- add the word “adverse” to describe the effect on the defendant in the mitigating factor in new section 9(2)(fb) of the Sentencing Act 2002 (inserted by subclause 2); and

- enable the new aggravating and mitigating factors to apply to failure to comply with regulations made under the Criminal Disclosure Act 2008.
Submissions on specific clauses or parts of the Bill

262. Section 5 of the report identifies and makes recommendations on substantive comments made by submitters on particular clauses. It also includes recommendations in relation to substantive matters identified by advisers. Recommendations of a technical or drafting nature, including responses to drafting matters raised by submitters, are identified in the Appendices.

263. Given the size and scope of the Bill, it is likely that there will be additional technical drafting matters that come to the attention of advisers or Parliamentary Counsel as the revision-tracked version of the Bill is drafted. Permission is sought for Parliamentary Counsel to make any technical drafting amendments necessary to give full effect to the policy contained in the Bill. This includes making consequential amendments to other legislation as appropriate – for example, to reflect the removal of the “summary” and “indictable” language and the necessary redrafting of Parts 3 and 4 of the Bail Act 2000.

Recommendation 7

Parliamentary Counsel be given permission to make technical drafting amendments identified in consultation with advisers, in addition to the specific changes recommended in this report.

Title and commencement provisions

Clauses 1 and 2 (Title and Commencement)

264. Clauses 1 and 2 contain the title and commencement provisions of the Bill.

265. It is intended that the Bill will be divided at the Committee of the Whole stage into a substantive Bill (the ‘Criminal Procedure Bill’) and a number of amendment Bills (refer to the discussion on Part 9 of the Bill at page 240). Further, it is intended that it be brought into force in two stages.

266. The first stage is the commencement of the various provisions specified in clause 2(1). The second stage is the commencement by Order in Council of the remainder (and largest portion) of the Bill, including the considerable number of amendments to other enactments set out in Schedules 2 to 6.

267. Order in Council commencement is provided to allow time for administrative machinery, and rules and regulations necessary for the operation of the Bill, to be put in place. However, clause 2(3) provides that any provision not already in force 18 months after the Bill receives the Royal Assent comes into force then.

Comment

268. There were no submissions on this clause except one of a technical nature addressed in Appendix 2. No change is recommended in response to this submission. Advisers recommend two other amendments to clause 2.
269. Firstly, advisers recommend an amendment to subclause (1)(d) which enables powers to make rules and regulations to be exercised prior to full commencement, to include a reference to clause 400. While the Interpretation Act 1999 operates to allow certain powers (including the power to make regulations) to be exercised between the passing and commencement of legislation, the absence of a reference to clause 400, when all other regulation making powers are identified in this provision, implies that Parliament intends that the regulation making power in clause 400 should not be able to be exercised early. This would reduce significantly its effectiveness.

270. Secondly, advisers recommend the relocation of the reference to section 403 from subclause (1)(f) to subclause (1)(c). Section 403 substitutes section 19 of the Bail Act 2000 which deals with the publication of matters relating to hearing. The change to section 19 should come into force at the same time as the new regime for name suppression, which will be achieved by inclusion of section 403 in subclause (1)(c).

Recommendation 8
Advisers recommend that clause 2 (commencement) be amended to:

- include in subclause (1)(d) a reference to section 400 (regulations to make consequential amendments);
- relocate the reference to section 403 (Bail Act amendment about publication of bail hearings) from subclause (1)(f) to subclause (1)(c)

Part 1 – Preliminary provisions

271. This part contains the preliminary and interpretation provisions of the Bill.

Clause 3 – Purpose

272. Clause 3 sets out the purpose of the Bill, which is to set out the procedure for conducting criminal proceedings and allowing for electronic filing and management of the permanent court record.

Submissions

273. James Richardson (39a) submits that the Bill fails to achieve its purpose because it omits other procedural legislation, including legislation currently contained in the Criminal Disclosure Act 2008 and the Policing Act 2008.

Comment

274. James Richardson’s comments are addressed in Section III of this Report (paragraphs 18 to 29). Advisers do not recommend any changes be made to clause 3, as a result of Mr Richardson’s submission.

275. However, advisers note that current drafting of clause 3(b) could have the unintended effect of limiting the ability to utilise electronic/new technology to the permanent court record and electronic filing. This would be contrary to one of the aims of the reforms, to future proof the Act to allow, for example, electronic service of documents.

276. It is therefore recommended that clause 3 be amended to make it clear that one of the purposes of the Act is to facilitate the use of electronic technology and that this not be limited solely to the permanent court record and filing.
Clause 4 – Overview
277. This clause provides an overview of the Bill.

Comment
278. There were two submissions on clause 4 of a drafting nature, which are addressed in Appendix 2.

Clause 5 – Interpretation
279. This clause sets out definitions of some important terms in the Bill.

Comment
280. There were no submissions on this clause and advisers do not recommend any substantive changes be made to clause 5.

Clause 6 – Categories of offence defined
281. Under this Bill, offences are no longer classed as “summary” or “indictable”, but are instead grouped into 4 categories, as set out below. As discussed at paragraphs 54 to 8585 this clause has the effect of raising the threshold at which a defendant is entitled to be tried by a jury from offences punishable by more than three months’ imprisonment to those punishable by more than three years’ imprisonment. (Clause 429 makes a corresponding amendment to section 24(e) of the NZBORA to similarly raise the jury trial threshold.

Categories of offence

<table>
<thead>
<tr>
<th>Category</th>
<th>Offences</th>
<th>How tried&lt;sup&gt;25&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Not punishable by imprisonment (including infringement offences in cases where proceedings are commenced by filing a charging document, rather than by issuing an infringement notice).</td>
<td>By a judge, 1 or more Community Magistrates or 1 or more Justices of the Peace in a District Court</td>
</tr>
<tr>
<td>2</td>
<td>Punishable by not more than three years’ imprisonment.</td>
<td>By a judge in a District Court</td>
</tr>
</tbody>
</table>

<sup>25</sup> Where a set of charges or defendants are to be tried together, the process to be followed is that which applies to the lead/most serious offence.

Recommendation 9
Advisers recommend that clause 3 (purpose) be amended to make it clear that the Act is intended to facilitate/enable the use of electronic technology generally (not just filing and permanent court record).
### Submissions

282. Candor Trust (11) is concerned that impaired driving charges would fall into category 1 and be dealt with by Justices of the Peace who, the Trust submitted, are not suitably qualified to deal with what is a serious criminal and road safety problem.

283. Anne Stevens (17) says that simpler categorisation is possible. She observes that the categorisation relies on penalties which are subject to change and are somewhat arbitrary. She suggests two categories – judge alone and jury trial.

284. The District Court Judges (26) support the new categories of offence.

285. Judy Ashton (34) supports the categories of offences in the Bill. She believes that it will free up the High Court for "the more serious offences", ensuring an earlier closure to proceedings for victims.

286. Ken Evans (35) and Jardine Jamieson (62) also support the new categories as they reduce the complexity of current offence categories.

287. The Wellington Criminal Bar Association (57) observes that, under the new categorisation, the District Court will remain the principal criminal court in New Zealand with a comparatively small number of serious charges that can only be tried in the High Court. The Association proposes instead a specialist Crown Court composed of both High and District Court judges.

### Comment

288. One of the principles behind the new categories of offence is that the procedures and resources used to resolve a prosecution should be proportional to the seriousness of the alleged offending. Maximum penalty has been used as the best proxy available to determine seriousness and accordingly to categorise offences for the purpose of determining how they are to proceed within the current structure of the courts.\(^{28}\)

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\(^{26}\) With some limited exceptions.

\(^{27}\) as above.

\(^{28}\) Advisers recognise that any particular offence may cover a range of criminal behaviour. However, a system that would recognise the varying seriousness of this behaviour is likely to be too complex to be practically viable.
289. The level of maximum penalty for impaired driving is three months’ imprisonment.\(^{29}\) This penalty level places the offence in category 2, not in category 1 as stated by Candor Trust. It also places it outside the jurisdiction of Justices of the Peace.

290. Penalty levels are to some degree an arbitrary measure for the seriousness of an offence – not least because any one offence may cover a range of offending behaviour. However, the penalty level for an offence reflects the seriousness with which Parliament has regarded it and, as such, that is the best measure available. Any other measure is also likely to be arbitrary and/or require assessment on a case by case basis, which would itself be highly inefficient.

291. The structure of New Zealand’s courts currently provides for four ‘tiers’ of judicial officer (Justices of the Peace; Community Magistrates; District Court judges; and High Court judges) and two levels of court (the High Court and the District Courts). If this structure was simplified, advisers agree that it might be possible to further simplify the way in which offences are categorised. However, as indicated in the discussion above (paragraph 29), any possible restructure of the courts, including the establishment of a Crown Court, would be a major undertaking in its own right and has been outside of the scope of this Bill. Therefore, in order to ensure cases are allocated appropriately within the current structure, advisers consider that it is necessary to maintain not less than four categories of offence.

292. No substantive changes are recommended to this clause.

Clause 7 – Act subject to other enactments

293. Clause 7 provides that the procedure in the Bill is subject to that provided in other enactments. It specifically provides that nothing in the Bill applies to proceedings:

293.1. under the Armed Forces Discipline Act 1971; and

293.2. in any Youth Court (except as provided in the Children, Young Persons and Their Families Act 1989).

Comment

294. There were no submissions and no substantive changes are recommended to this clause.

Clause 8 – Act binds the Crown

295. Clause 8 provides that the Bill binds the Crown.

Comment

296. There were no submissions and no substantive changes are recommended to this clause.

\(^{29}\) Land Transport Act 1998 ss 57A(2)(a) and 58(2)(a).
Jurisdiction of District Courts to conduct criminal proceedings

Clause 9 – Jurisdiction of District Courts to conduct criminal proceedings

297. Clause 9 sets out the jurisdiction of District Courts to conduct criminal proceedings (other than on appeal, which is provided by Part 6). In general terms:

297.1. a District Court has jurisdiction to conduct the entire proceeding for an offence in category 1 or 2;

297.2. a District Court has jurisdiction to conduct the entire proceedings for an offence in category 3, unless the trial is to be in the High Court;

297.3. a District Court has jurisdiction to conduct the proceeding for a category 4 offence until the defendant pleads not guilty, at which point the proceeding will be transferred to the High Court (see clauses 52(1) and (2)).

298. These general provisions are subject to Part 7, which provides for:

298.1. the jurisdiction of Community Magistrates and Justices to preside over District Courts; and

298.2. jury trials to be conducted only at District Courts with jury trial jurisdiction and by District Court Judges with a jury trial warrant.

Comment

299. There were no submissions on this clause except one of a technical nature addressed in Appendix 2.

300. However, it is desirable to have a clear statement that, apart from jury trials, the criminal jurisdiction of the District Court can be exercised by any District Court Judge. Advisers recommend that such a provision be included. Otherwise, no substantive changes are recommended beyond those required to remove and replace the reference to designation (see Recommendation 29).

Recommendation 10

Advisers recommend that the Bill be amended to clearly state that the criminal jurisdiction of the District Court (set out in clause 9 and Part 7) can be exercised by any District Court Judge.

Who may conduct proceedings

Clause 10 – Who may conduct proceedings

301. Clause 10 deals with who may conduct proceedings.

Comment

302. As drafted, this provision does not give effect to the intended policy. It was supposed to be limited only to those who may conduct proceedings against a defendant. On that basis advisers recommend deleting subclauses (3) and (4), as they deal with who may conduct a case for a defendant. Clause 11 will be
amended to deal with that issue. A more explicit heading to clause 10 is recommended to make clear its purpose.

**Recommendation 11**

Advisers recommend that clause 10 (who may conduct proceedings) be amended by deleting subclauses (3) and (4) and by amending its heading to make explicit its purpose, being who may conduct proceedings against a defendant.

**Clause 11 – Who may appear for defendant at hearings**

303. Clause 11 sets out who may appear and conduct the case for a defendant at any hearing.

**Submissions**

304. James Richardson (39a) points out that there is unnecessary duplication between clause 11 and clause 10(3) and (4).

**Comment**

305. Advisers agree with this submission and have recommended that clauses 10(3) and (4) be deleted.

306. Clause 11 should be amended to make explicit that it is only about who may conduct a case for a defendant. In essence it need provide only that a defendant’s case may be conducted by a lawyer, the defendant personally, or a representative of a corporation, to the extent authorised by a corporation (see discussion immediately below as to corporate representatives).

**Recommendation 12**

Advisers recommend that clause 11 (who may appear for defendant at hearings) be amended to make explicit that its purpose is to provide who may conduct proceedings for a defendant.

**General issue raised in relation to representatives of corporations**

307. Clause 11(2) refers to a representative of a corporation. The existing law and the Bill as drafted allows a non lawyer to act for the corporation in only a few narrowly defined circumstances, for example to enter a plea and to make an election to be tried by a jury.

**Submissions**

308. The District Court Judges (26) submit that non-lawyer representatives should be able to defend a corporation in category 1 offences or, as an alternative, be given the same right to represent a corporation as a natural person has to represent themselves. The limitations in the Bill, say the District Court Judges, will impede access to justice, especially for small corporations. The District Court Judges also submitted that there should be a definition as to who is a corporation’s representative.

**Comment**

309. Representative in relation to a corporation is defined in clause 5 of the Bill in similar terms to the existing provision in section 361(3) of the Crimes Act 1961.
310. In developing the policy in the Bill, advisers considered whether corporate representatives should be put on the same footing as an unrepresented defendant and be able to act in any situation that a natural person is entitled to. A decision was made not to allow that, principally due to the fact that a decision made, or manner in which a case is run, by such a representative has the potential to affect many people, such as the company directors and shareholders.

311. However, there are a very large number of "one-man" companies in New Zealand (or companies with a husband and wife or a couple of friends as the only two directors) for which the cost of legal representation may be prohibitive. If these corporations wish to represent themselves, it should not be precluded.

312. It can be assumed that large corporations will have sufficiently qualified in-house legal counsel or will appoint external lawyers to safeguard the directors and shareholders’ interest in the corporation by ensuring the proceedings are only conducted by appropriately qualified legal counsel.

313. Advisers therefore recommend that the Bill be amended to allow a non-legally qualified representative to act for any purpose under the Bill that he or she is authorised by the corporation to perform. This will mean that it will be the terms of the corporation’s authorisation that will determine what a non-lawyer representative can do and the Bill will be largely silent on the issue. The representative’s authorisation to act for the corporation should be filed in court to provide assurance that the representative is acting within the terms of his or her authority.

314. This will be given effect primarily by way of amendment to the definition of “representative” in clause 5. While the scope of the amendment sought by the District Court Judges can only extend to category 1 offences (a fine only penalty is the only sentence able to be imposed on a corporation), a general amendment of the type advisers propose is the better option to give effect to this submission. It avoids the need to make a specific exemption for category 1 offences in all provisions where a representative is otherwise precluded from acting.

315. The proposed approach will require minor consequential amendment to the definition of representative in clause 5 and other amendments to clauses 10, 11, 41, 48, and 58. Substantive changes are also required to clause 10 to remove and replace the reference to “designation” (see Recommendation 29).

Recommendation 13

Advisers recommend that the Bill be amended to allow a non-legally qualified representative to act for any purpose under the Bill that he is she is authorised by a corporation to perform.
Part 2 – Commencement of proceedings and preliminary steps

SUBPART 1 – FILING A CHARGING DOCUMENT

316. This subpart replaces the provisions in the Crimes Act 1961 and Summary Proceedings Act 1957 that relate to the laying and filing of informations and the filing of indictments. The existing ability of the prosecutor to choose whether to lay an information summarily or indictably (and thus affect the course of the proceeding) is not carried forward. In addition, the Bill does not provide for the complaints procedure, or the minor offence procedure, that is currently available under the Summary Proceedings Act 1957. These procedures are to be abolished.

Clause 12 – Commencement of criminal proceedings

317. Clause 12 sets out the way in which criminal proceedings for an offence may be commenced. In general terms, a proceeding may be commenced by filing a charging document in the District Court that is nearest to the place where the offence occurred, or where the person filing the charging document believes the defendant can be found.

318. The form of the charging document and the manner of filing it (which may, in future, include filing it electronically) will be set out in court rules (see clause 382).

Comment

319. There were no submissions on this clause except one of a technical nature, which is addressed in Appendix 2. It would also be desirable to specify as a requirement for commencing proceedings that the person (usually a police officer) alleging that a defendant has committed an offence has good cause to suspect that the defendant has committed the specified offence. This reflects the current requirement for a person laying an information. The proposed amendment is related to those recommended to clauses 13 and 20, discussed below.

Recommendation 14

Advisers recommend that the Bill be amended to specify that a requirement for commencing proceedings is that the person alleging that a defendant has committed an offence has good cause to suspect that the defendant has committed the specified offence.

Clause 13 – Charging documents

320. Clause 13 provides that a charging document must contain one charge only. It also sets out certain particulars that must be contained in the charging document.

Comment

321. There were no submissions on this clause. Advisers recommend that the particulars of the person alleging that a defendant has committed an offence be specified as an additional matter that must be included in the charging document. This will enable defendants or court staff who need to contact the relevant person to do so.
Clause 14 – Content of charge

322. Clause 14 sets out the principal requirements for the content of a charge. A charge must relate to a single offence. It must contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged the defendant has committed.

Submissions

323. James Richardson (39a) asks how a defendant is to know that a charge is representative and how the defendant or court is to know what the charge is supposed to be representative of.

Comment

324. Advisers agree that a charge that is representative should be specified as such, and should contain particulars that fully and fairly inform the defendant of the nature of the conduct of which the offence is representative. It would also be desirable for the fact that a charge is in the alternative, as permitted by clause 16, to be clearly identified.

Recommendation 16

Advisers recommend that Clause 14 (content of change) be amended to:

- make it clear that a representative charge must be specified as such and should contain particulars that fully and fairly inform the defendant of the nature of the conduct of which the charge is representative, including:
  - the dates between which the conduct of which the charge is representative is alleged to have occurred;
  - the nature of the offence or offences which are representative of the conduct;
  - other particulars, such as:
    - the name of any complainant;
    - if the offence relates to the loss of or damage to property, the minimum value of the property lost or damaged;
    - if the offence is a drugs offence under the Misuse of Drugs Act 1975, the minimum quantity of drugs involved;
- clearly identify that the charge is in the alternative in accordance with clause 16.

Clause 15 – Court may order further particulars

325. Clause 15 provides that the court may ask the prosecutor for further particulars of the charge.
326. There were no submissions and no substantive changes are recommended to this clause.

Clause 16 – Charge may be worded in alternative

327. Clause 16 provides that a charge may allege several different matters, acts, or omissions in the alternative, if the relevant offence is worded in the alternative in the enactment that prescribes it. Clause 16 replaces section 16(1) of the Summary Proceedings Act 1957.

Comment

328. There were no submissions and no substantive changes are recommended to this clause.

Clauses 17-18 (Representative charges)

329. Clause 17 sets out circumstances in which a charge may be representative of more than one alleged offence. It has no counterpart in the Summary Proceedings Act 1957. There are two situations contemplated:

329.1. where multiple offences of the same type in the same circumstances are alleged and the complainant cannot reasonably be expected to particularise dates or other details of the offences (clause 17(1)). This is intended to codify the effect of an existing Practice Note relating to representative charges in sexual cases but without limiting the possibility of representative charges of this kind only to sexual cases.

329.2. where multiple offences of the same type in the same circumstances are alleged and, if the offences were to be charged separately but tried together, it would be unduly difficult for the court (including, in any jury trial, the jury) to manage the separate charges (clause 17(2)).

330. Clause 18 provides the court with the power to amend or divide a charge that is worded in the alternative (as permitted by clause 16) or is representative (as permitted by clause 17). It also allows the court to order that two or more charges be amalgamated into a representative charge. The court can do these actions on its own motion or on application of any party.

Submissions

331. Two submitters, the Crown Solicitors Network (24) and the New Zealand Police Association (41), support this clause. The Crown Solicitors Network’s view is that the proposals properly balance those [sic] public interest in prosecuting crime with the defendant’s interests and come up with a practical and workable solution which will enhance the way in which crime is prosecuted.

332. The New Zealand Police Association notes that “it is important that sentencing adequately reflects the totality of offending and not merely the number of convictions recorded”. It recommends amending the Bill to enable a schedule of individual offences to be attached to the representative charge where separate charges would be unmanageable.

333. James Richardson (39a) states that “this provision is sinister and unnecessary”. In addition to the two specific issues addressed under clause 14, he also queries
why there is no provision for how a representative charge is to be tried or how sentence is to be determined in the event of a conviction.

Comment

334. Currently in New Zealand, representative charges are already permitted in sexual cases by virtue of a judicial practice note and in other situations (eg, fraud) by common law. The Bill provides a clear statutory basis for the recognition of representative charges. The courts already hear such charges and determine sentences in respect of conviction on a regular basis.

335. Advisers do not agree with James Richardson’s concerns. Representative charges are sometimes required in the interests of justice. For example, they have proved a useful (and generally accepted) mechanism in sexual offence cases where the complainant has been subject to abuse over a substantial period of time and is unable to recall the precise number of occasions or the dates upon which the abuse occurred. They are also valuable in fraud or theft cases where there are a large number of individual transactions in a connected series.

336. Of course, as James Richardson points out, it will sometimes be possible to lay a single charge (eg, theft as a servant) that captures an ongoing course of conduct. However, it is by no means clear when this is permissible in New Zealand, and it is an artificial and unsatisfactory approach, since it alleges as a single offence conduct that actually comprises a number of discrete offences. The alternative is to charge the conduct as separate offences, providing as many particulars as possible. In the sexual offence example, that is likely to result in verdicts that do not properly reflect the extent of the offending or the culpability involved. In the fraud and theft example, it is likely to lead to unduly protracted and repetitive trials (particularly jury trials that require judicial directions and a separate verdict on each alleged offence).

337. Advisers are therefore of the view that representative charges are a fairer and more transparent method of addressing these circumstances. Defendants’ rights are protected by clause 18 empowering a court (on its own motion or on the defendant’s application) to order that a charge be amended (eg, to particularise more fully) or be divided into two or more charges where it would be in the interests of justice to do so.

338. In response to the submissions from James Richardson, advisers have recommended above an amendment to clause 14 to specify what a representative charge must contain by way of particulars. The fact-finder at trial (where the judge or jury) will need to be satisfied of those particulars beyond reasonable doubt. The precise extent of the offending of which the charge is representative will then be a matter for sentence, but in accordance with section 24 of the Sentencing Act 2002 a judge will need to base that sentence on facts that have been proved beyond reasonable doubt.

339. When developing the policy, advisers considered providing for a schedule of individual offences, as suggested by the New Zealand Police Association. However, it would often be impossible to provide such a schedule (eg, in sexual offence cases) and in any case it would introduce unnecessary complexity.

340. Advisers do not recommend any substantive changes to clauses 17 and 18.

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Clause 20 – Who can file a charging document

341. Clause 20 provides that any person may file a charging document. In contrast to the current requirements with respect to the laying of informations, the person who files the charging document is not required to swear the truth of its contents. However, this clause provides that it is an offence to file a charging document containing any false or misleading information.

Comment

342. There were no submissions on this clause. However, advisers recommend that the intent of clause 20(2) be clarified to ensure that only those responsible for providing the particulars included in a charging document are caught by the scope of offence. As currently worded, it may inadvertently apply to data-entry operators who electronically file a charging document.

Recommendation 17

Advisers recommend that the intent of clause 20(2) be clarified to ensure that only those responsible for providing the particulars included in a charging document are caught by the scope of offence.

Clause 21 – Endorsement of consent

343. Clause 21 applies where the consent of the A-G or any other person is required for the filing of the charging document. It deals with the endorsement and proof of that consent.

Comment

344. There were no submissions and no substantive changes are recommended to this clause.

Clause 22 – Time for filing charging document

345. Clause 22 sets out time limits for commencing proceedings in relation to offences in each category.

346. As a result of this clause, the time limit for commencing proceedings in relation to many offences will change. Section 14 of the Summary Proceedings Act 1957, which is the default position unless any other enactment applies, requires that an information must be laid within 6 months. However, the existing time limit for commencing proceedings indictably is either unlimited, or 10 years (in respect of offences to which section 10B of the Crimes Act 1961 applies).

Submissions

347. Patrick Winkler and Roderick Mulgan (43) submit that the period for filing a charging document should be 6 months for a category 1 and 2 offence, rather than the 12 months proposed in the Bill.

Comment

348. This submission has some force in highlighting that for less serious offences a defendant’s and the community’s expectation is that the matter should be prosecuted in a reasonably short period of time. There is less public interest in the prosecution of such “minor” offences after the passage of a significant period of time, compared to the most serious offences, such as murder or sexual
violation, where there is a high public interest in their prosecution even many years after they are committed, and for which no limitation period applies.

349. However, the submission overlooks several important factors that were fundamental to the changes to limitation periods in the Bill:

349.1. it was not possible to leave limitation periods for category 1 and 2 offences unchanged, as proposed in this submission. The range of offences falling within these categories of offence is greatly increased from the present “summary” offence classification for which the present 6 month limitation applies;

349.2. given 349.1, an appropriate period had to be developed to cover a wide range of offences currently having limitation periods ranging from up to 6 months to up to 10 years;

349.3. in a number of instances the time for filing charges for some offences has been reduced to accord with the new limitation regime;

349.4. some Crown Solicitors and Police pointed to the increased complexity in proof of even some relatively minor offences (in terms of penalty) since the present 6 month limitation period was set, due to the need for eg, scientific analysis;

349.5. allowing greater time for investigation of the less serious offences and for preparation of cases should result in higher quality charges proceeding and less likelihood of charges before the court falling over due to inadequate analysis etc, as a result of the requirement to meet the 6 month limitation.

350. In proposing the new 12 month limitation period, advisers were mindful of the fact that defendants should not have the prospect of prosecution for relatively low level offences hanging over them for an unreasonable period of time. However, having regard to the new categorisation of offences and the factors identified above advisers are confident that the correct balance has been struck in formulating the new limitation regime.

351. Advisers recommend no substantive change to clause 22.

Clause 23 – Manner of authentication and filing charging document

352. Clause 23 has no direct equivalent in the Summary Proceedings Act 1957. It provides that the manner of authentication of a charging document (eg, a signature) and the manner of filing it will be prescribed in rules of court.

Submission

353. The NZLS (40) suggests that the Bill could be made more accessible by indicating where the prescribed requirements and manner referred to in clause 23(1) and (2) respectively can be found.

Comment

354. Advisers recommend this clause be deleted, as part of the group of technical amendments outlined in Appendix 1 (Approach to Electronic Management of Documents).
Clause 24 – Power or Registrar to compile charging information

355. Clause 24 also has no direct equivalent in the Summary Proceedings Act 1957. It provides that nothing in the Bill prevents the Registrar of a court from compiling the information contained in charging documents in any manner or form. This is intended to facilitate the increasing use of electronic technology in criminal proceedings. For example, Registrars may compile charging information in relation to a proceeding into a form that reflects decisions of the court (eg, to amend a charge or to deal with more than one charge in a trial).

Comment

356. There were no submissions on this clause and no substantive change is recommended.

SUBPART 2 – NOTIFYING DEFENDANT OF COURT APPEARANCE

357. The clauses in this subpart replace sections 19, 19A, 19B, and 150 of the Summary Proceedings Act 1957, but in a number of substantial respects are different from those provisions.

Clause 25 – Summons in relation to charge may be served

358. Clause 25 replaces sections 19 and 19A of the Summary Proceedings Act 1957. It provides that a constable, or any other person who has commenced or who is proposing to commence a prosecution (other than a private prosecution, see clause 5), may issue and serve a summons on a person if that constable or other person:

358.1. has good cause to suspect that the person has committed an offence; and

358.2. has filed, or intends to file, a charging document in respect of that offence.

359. This is different from the existing provisions of the Summary Proceedings Act 1957, where the court issues the summons to a defendant if an information has been laid.

360. Under section 19A of the Summary Proceedings Act 1957 a constable may release an arrested person on a summons to answer a charge. Clause 25 differs in three further respects from section 19A in that:

360.1. the ability to issue a summons under clause 25 is not limited to constables – any person, except a private prosecutor, who is commencing or proposing to commence proceedings for an offence may issue a summons to the defendant;

360.2. the ability under clause 25 to issue a summons to a person in respect of an offence is not limited to cases where the person has been arrested and is not limited to any particular category of offence;

360.3. clause 25 is not restricted to situations where the defendant cannot practicably be brought before a court.

Submissions

361. The New Zealand Bar Association (NZBA, 39) submits that clause 25(1)(a) should refer to “the” offence and not “an” offence. They say that the suspicion
must be expressed to relate to the offence for which the summons is being sought.

Comment

362. NZBA’s submission overlooks that under the Bill a charging document may be issued subsequent to the summons being issued. The offence for which the summons is issued may be different from that which is eventually included in the charging document. The use of “an” preserves the validity of the summons where the offence is changed.

363. No substantive changes are recommended.

Clause 26 – Summons following evidential breath test

364. Clause 26 provides for the service of a summons on a defendant by an enforcement officer (within the meaning of section 2(1) of the Land Transport Act 1998) following an evidential breath test.

Submission

365. Winkler and Mulgan (43) contend that this clause makes changes to the existing law in respect of the time between summons and required appearance of a defendant.

Comment

366. Under both the existing law and under the Bill (clause 28), the defendant must appear no later than two months after the date of the summons. Clause 28 does change the time within which a charging document must be filed, from seven days after the summons is issued (under the existing law) to seven days before the defendant appears in court. However, that difference is not considered to be material. There is no additional information provided in the summons as compared to the charging document. The filing of the charging document therefore only confirms that a charge is to proceed. There is also a new requirement, in light of the longer period allowed for filing a charging document, that the prosecutor take all reasonable steps to inform the defendant of any decision to not proceed with the charge or to change the charge (clause 29).

367. Advisers do not recommend substantive changes to this clause.

Clause 27 – Provisions relating to summons issued under section 25 or 26

368. Clause 27 sets out requirements about the content, and service, of a summons issued under clause 25 or 26.

Comment

369. There were no submissions on this clause and no substantive changes are recommended.

Clause 28 – Charging document must be filed promptly

370. Clause 28 provides that if a summons is issued before a charging document is filed, the charging document must be filed promptly afterwards, and in any event not less than 7 days before the date on which the defendant is required by the summons to appear in court.
Comment
371. There were no submissions and no substantive changes are recommended to this clause.

Clause 29 – Decision to change charge following summons
372. Clause 29 is new. It applies if a summons is issued before the charging document is filed. It requires that notice be given to the defendant if the person who issued the summons decides that:

372.1. a charging document in respect of the summons will not be filed; or

372.2. a charging document in respect of the summons will be filed but will contain a charge that is different from that for which the person was summoned.

Comment
373. There were no submissions and no substantive changes are recommended to this clause.

Clause 30 – Private prosecutions
374. Clause 30 relates to private prosecutions and has no counterpart in the Summary Proceedings Act 1957. If a person seeks to file a charging document for a proceeding that would be a private prosecution (see clause 5), the court has a discretion as to whether to accept it. Under this discretion the person proposing to commence the proceeding may be asked to file formal statements (see clause 5), and the exhibits referred to in those statements. A judge must then consider whether:

374.1. the evidence provided by the private prosecutor in accordance with subclause (1)(b) is insufficient to justify a trial; or

374.2. the proposed prosecution is otherwise an abuse of process.

375. If the judge or Registrar accepts the charging document for filing, they will issue a summons to the defendant.

Submissions
376. Two submitters, the NZLS (40) and the New Zealand Police Association (41), support this clause because private prosecutions can be taken inappropriately and clause 30 allows a check on this.

377. The working group of Hamilton Legal Practitioners (58) also supports clause 30 but wants it strengthened by making private prosecutors subject to the Solicitor-General’s Prosecution Guidelines.

Comment
378. Private prosecutors, when represented by counsel, are already subject to the Solicitor-General’s Prosecution Guidelines in a limited sense outlined in the Guidelines themselves, as follows:

32 Although section 147 of the Summary Proceedings Act 1957 has been interpreted as allowing a discretion to decline to issue a summons for abuse of process and other reasons (see, for example, Re: Alan Vivian Brogden, Wellington District Court, Walker DCJ, 17.11.2005, CRI-2003-085).
[The Solicitor-General would expect law practitioners acting for an informant in a private prosecution, to adhere to the Law Society’s general rules of professional conduct and to all relevant principles in these Guidelines.]

379. Further, clause 147 allows for the dismissal of a charge. Defendants in private prosecutions may apply for dismissal if the conduct of the prosecutor amounts to an abuse of process. If such an application is made, the guidelines can be referred to as a way of checking the conduct of the private prosecutor against what is expected of state prosecutors.

380. No substantive changes are recommended.

Clause 31 – Warrant may be issued if summons cannot be served

381. Clause 31 provides for the issue of a warrant to arrest the defendant in certain circumstances where a summons has been issued.

Comment

382. There were no submissions on this clause and no substantive changes are recommended.

Subpart 3 – Court dealing with proceeding before trial

Clause 32 - Court dealing with proceeding before trial

383. Clause 32 sets out the court that will deal with the proceeding before the trial as follows:

383.1. in the case of a category 1 or 2 offence, the proceeding will be dealt with by the District Court in which the charging document was filed;

383.2. in the case of a category 3 offence, the proceeding will be dealt with by the District Court in which the charging document was filed until it is designated under clause 74 as ready to proceed;

383.3. in the case of a category 4 offence, the proceeding will be dealt with by the District Court in which the charging document was filed until it is adjourned to a case review date and transferred to the High Court under clause 52.

384. These provisions are subject to the power of the court to transfer the proceeding to another District Court and the provisions enabling the trial of defendants and charges together.

Comment

385. There were no submissions on this clause. Advisers do not recommend any substantive changes be made to it, beyond those required to remove and replace the reference to designation (see Recommendation 29).

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33 Paragraph 3.5.
34 This use of the guidelines was anticipated in R v Barlow (No.2) (1996) 3 HRNZ 57.
Part 3 – Procedure before trial

SUBPART 1 – PLEAS

Entering plea

386. Clauses 33 to 41 replace the sections in the Summary Proceedings Act 1957 and section 356 of the Crimes Act 1961 dealing with pleas. In broad terms, the clauses aim to provide the defendant with an opportunity to enter a plea at an early stage and to require the defendant to plead if certain conditions are met.

387. Only five submissions were made in relation to these clauses. Changes to the clauses that were proposed by submitters were largely of a drafting nature.

388. However, advisers recommend that a number of changes be made to these clauses to clarify their application and better reflect how they will work in practice. These recommendations are identified under the relevant clause below.

Clause 33 – Right to plead to category 1 offence by notice to Registrar

389. Clause 33 provides that a person charged with a category 1 offence may enter a plea by notice to the Registrar. Currently, section 41 of the Summary Proceedings Act 1957 allows a defendant charged with a summary non-imprisonable offence to plead guilty by written notice to the Registrar.

Submissions

390. The New Zealand Bar Association (39b) proposes that subclause (5) should be amended to require notification of the date of trial to be given to the defendant’s lawyer when notice has been given by the lawyer in accordance with clause 33(2). It also considers that the reference to “amending” a plea in subclause (6) should be a reference to “changing” a plea.

Comment

391. Both issues raised by the New Zealand Bar Association are drafting matters, which are being addressed (see Appendices 1 and 2). In particular, as discussed in Appendix 1, it is recommended that a provision be included in the Bill to the effect that a reference to the “defendant” in provisions like these includes a reference to the defendant’s lawyer. This will address the New Zealand Bar Association’s comment on subclause (5).

392. However, there are a number of aspects of clause 33 that advisers consider require clarification. Substantive changes include that:

392.1. clause 33(1) should be amended to reflect current practice that a notice is filed in court rather than “given” to the Registrar;

392.2. it would be desirable to codify current practice that a defendant who pleads guilty by notice is able to:

392.2.1. indicate in the notice whether he or she wants to appear at court for sentencing;

392.2.2. provide written submissions to be taken into account at sentencing.
393. Subclauses (3) and (5) are unnecessary given current practice that a notice is filed in court and dealt with in court at the defendant’s next appearance.

**Recommendation 18**

Advisers recommend that clause 33 (right to plead to category 1 offence by notice to Registrar) be amended to:

- reflect current practice that a notice is filed in court rather than “given” to the Registrar (including deleting subclauses 33(3) and (5));
- provide that a defendant who pleads guilty by notice is able to indicate whether he or she wants to appear at court for sentencing and to provide written submissions to be taken into account at sentencing.

**Clause 34 – Registrar may receive not guilty plea**

394. Clause 34 allows a Registrar to receive a not guilty plea (for any offence) if satisfied that the defendant has had access to legal advice (subclause (2)).

395. The matters in subclause (2) are similar but not identical to those in section 41A of the Summary Proceedings Act 1957, on which this clause is based. The existing requirement in section 41A that the Registrar be satisfied that the defendant has been informed of the substance of the charge is not carried forward as a requirement in all cases. Instead, there is a requirement that the substance of the charge must be read to the defendant before entering a plea if he or she is not represented by a lawyer (see clause 36).

**Submissions**

396. James Richardson (39a) and the New Zealand Bar Association (39b) query why there is no guidance provided about how a plea is to be received. In addition, James Richardson queries what criteria the Registrar is to consider when exercising his or her discretion to receive a plea. He also considers that it is not clear enough that the Registrar must satisfy himself or herself about the matters in subclause (2) before receiving a plea from an unrepresented defendant. Finally, he considers that clause 34 should be made expressly subject to clause 36.

**Comment**

397. A Registrar will receive pleas as part of a Registrar’s list court, which typically is held during the administrative phase of a case when defendants have their first or second appearance. There seems no need to explicitly make provision for this practice.

398. Advisers consider that some amendments are required to clause 34 to clarify and improve its application. For example, as drafted, there is no ability for a defendant to plead guilty before being required to under clause 35, and no provision for the court to accept a plea. It is preferable that explicit provision is made for defendants to plead (guilty or not guilty) at any time.

399. Also, in light of the approach to Registrars’ powers (see Recommendation 111), it is proposed to prohibit Registrars from accepting not guilty pleas to category 4 offences. Given the seriousness of these offences, pleas should only ever be accepted by the court.
Recommendation 19
Advisers recommend that clause 34 (Registrar may receive not guilty plea) be amended to ensure that:
• a defendant can plead (before the court or a Registrar) before being required to under clause 35 (requirement on defendant to plead);
• a Registrar can accept not guilty pleas only to an offence in categories 1, 2 and 3 (if the defendant indicates the wish to plead guilty, the matter will need to be put before a judge).

Clause 35 – Requirement on defendant to plead
400. Clause 35 allows the court to require the defendant to plead if satisfied that the defendant has had the opportunity for legal advice.

Submissions
401. The Coalition of Community Law Centres (22) supports the requirement in the Bill that the defendant receive legal advice before being asked to plead.
402. Judy Ashton (34) considers that requiring defendants to plead at an early stage will streamline the process and reduce additional stress for victims.
403. James Richardson (39a) considers that the power of the court to require the defendant to plead should be predicated on the court being satisfied that the prosecutor has made appropriate disclosure.
404. The New Zealand Police Association (41) considers that a defendant is currently being asked to plead too early in large cases. It considers that a defendant should not be required to plead until six months from first call, after police investigations are completed.

Comment
405. It is intended that, in the normal course of events, the court will require a defendant to plead at his or her second appearance. In most cases, defendants will be able to make an informed decision about plea at this stage.
406. However, it would be desirable to include a reference to the prosecutor’s obligations under the Criminal Disclosure Act 2008, to make clear that a defendant should not be required to plead until initial disclosure under section 12(1) of the Act has been made. Initial disclosure includes a summary of facts; advice of the defendant’s right to apply for further information; the maximum (and minimum) penalty for the offence with which the defendant is charged; and information on the defendant’s criminal history. It must be provided within 21 days of the commencement of criminal proceedings. The provision of this material will ensure that the defendant has some basic information about the case against him or her before being asked to plead.
407. As a consequence of the inclusion of this reference to section 12(1) of the Criminal Disclosure Act in clause 35, it is necessary to clarify the defendant’s right, under section 12(1)(b), to apply for further information before entering a plea. Case law and expert commentary indicate that the courts have not interpreted section 12(1)(b) as providing the defendant the ability to refuse to enter a plea until the requested further information is provided. The courts have preferred to consider in each case whether the defendant has received sufficient disclosure to enter a plea. This determination is now intended to take place
under clause 35 of the Bill, and therefore the words “before entering a plea” should be removed from section 12(1)(b) of the Criminal Disclosure Act 2008.

408. In some cases, particularly in those that are more serious or complex, it might be appropriate to delay the entry of a plea at this stage or to enter a not guilty plea in the expectation that this might change during the case management process. The only prejudice to the defendant from doing so is if sentencing judges equate a requirement to plead under clause 35 with the “first reasonable opportunity” for entering a guilty plea to a charge. This could affect the sentencing discount available to a defendant for the plea. However, there is no logical link between the “first reasonable opportunity” to plead guilty for sentencing purposes and clause 35. In addition, the Supreme Court’s decision in Hessell v R [2010] NZSC requires that the appropriate sentencing discount must be determined following a broad assessment of the circumstances of the plea, of which the timing of the plea is only one factor. That decision needs to be interpreted on its own terms.

409. In light of the recommended changes to Registrars’ powers (and consistent with the proposed amendment to clause 34), advisers also recommend that Registrars be able to require a defendant to plead. However, Registrars should only be able to do so if a defendant is charged with an offence in category 1, 2 or 3. Advisers also recommend that clause 35 be amended to provide that the court (or Registrar) only needs to inquire into matters in clause 35(1) when an unrepresented defendant is entering a plea; when the defendant is represented, it is self-evident that all three matters are satisfied.

**Recommendation 20**

Advisers recommend that:

- clause 35 (requirement on defendant to plead) be amended to:
  - provide that the defendant should only be required to plead if the prosecutor has made initial disclosure in accordance with section 12(1) of the Criminal Disclosure Act 2008;
  - enable a Registrar to require a defendant who is charged with an offence in category 1, 2 or 3 to plead (if the defendant indicates he or she wishes to plead guilty, the matter will need to be put before a judge);
  - provide that the court (or Registrar) needs to inquire into the matters in clause 35(1) only when an unrepresented defendant is entering a plea;
- section 12(1)(b) of the Criminal Disclosure Act be amended to remove the words “before entering a plea”;

**Clause 36 – Entry of plea**

410. Clause 36 sets out who may enter the plea and the requirement to read the charge to an unrepresented defendant.

**Submissions**

411. James Richardson (39a) considers that clause 36 is badly drafted. In particular, subclause (1) declares that the clause applies “if the defendant enters a plea under clause 34 or...” but subclause (2) then says that a plea must be entered by a lawyer on the defendant’s behalf. However, the premise is that the defendant
has (already) entered a plea. The New Zealand Bar Association (39b) considers that clause 36 should be clearer about how a plea is to be entered and whether a hearing will be required.

Comment

412. As discussed at paragraph 391, it is recommended that a provision should be included in the Bill to the effect that a reference to the “defendant” in provisions like these includes a reference to the defendant’s lawyer. This will mean that subclause (2) can be deleted.

413. Advisers do not consider that any specific changes to clause 36 are required in response to the New Zealand Bar Association’s comments. Some of its concerns might be addressed as a result of the redrafting of clauses 34 and 35. However, it does not seem necessary to provide that a hearing will be required for the entering of a plea. That is simply how the process will work as a matter of practice.

414. Advisers do not recommend any substantive changes be made to clause 36.

Clause 37 – Defendant who refuses or fails to plead under section 35

415. Clause 37 is new. It provides that if a defendant fails or refuses to plead when required to do so, the proceedings must be continued as if the defendant had pleaded not guilty.

Comment

416. There were no submissions on this clause and no substantive changes are recommended.

Clauses 38 to 39 (Process for changing a plea)

417. Clauses 38 and 39 outline the process for when a defendant wishes to change a plea of not guilty to guilty.

Comment

418. There were no submissions on this clause, except one of a technical nature addressed in Appendix 2.

419. Advisers recommend that some other changes be made to clause 38 and related provisions to ensure that the Bill adequately deals with all the situations in which a defendant might change his or her not guilty plea. This includes, for example, ensuring that clause 38 applies to the rare situation when a defendant wishes to change a plea of not guilty to a special plea. In addition, the protections provided in clause 39(2) for defendants who indicate they wish to plead guilty but then do not do so should also apply to defendants who indicate a desire to plead guilty at the outset.
Recommendation 21

Advisers recommend that:

- clause 38 (defendant may amend plea to guilty) and related provisions be amended to ensure that the Bill adequately deals with all the situations in which a defendant might change his or her not guilty plea;
- the protections provided in subclause (2) of clause 39 (procedure if defendant makes request under section 38) for defendants who indicate they wish to plead guilty but then do not do so should also apply to defendants who indicate a desire to plead guilty at the outset.

Clause 40 – Plea where charge alleges previous conviction

420. Clause 40 applies if a charge contains an allegation that the defendant has been previously convicted. The defendant is not required to plead to the allegation unless he or she pleads guilty to the rest of the charge. This clause is based on section 341(1)(a) of the Crimes Act 1961.

Comment
421. There were no submissions and no substantive changes are recommended to this clause.

Clause 41 – Entry of plea by representative of corporation

422. Clause 41 relates to the entry of a plea by the representative of a corporation.

Comment
423. There were no submissions on clause 41. If the Committee accepts the recommended approach to corporate representatives (see Recommendation 13), clause 41 will be deleted from the Bill.

Special pleas

Clauses 42 – 47 (special pleas)

424. Clauses 42 to 47 relate to the entry of pleas of previous conviction, previous acquittal, and pardon. They replace sections 357 to 360 of the Crimes Act 1961 in a modernised and simplified form.

425. The purpose of both the existing law and the proposed provisions is to ensure that persons finally convicted or acquitted may not be charged with the same offence or a sufficiently related offence, however defined.

426. The test for when a plea of previous conviction, previous acquittal, or pardon is available differs from that under the existing law. The new test (see clauses 43 and 44) is intended to bring greater certainty as to the availability of the special pleas.

427. The drafting of clause 44 and clause 147 (relating to dismissal of charges) is intended to provide that if a charge is dismissed under clause 147, that will form the basis of a plea of previous acquittal.
Submissions

428. James Richardson (39a) is generally opposed to the provisions. He contends that the proposed “same factual circumstances” test is “extremely vague” and notes that it could cover different offences in different categories. He further submits that clause 45 is incorrectly drafted, that a definition of pardon is required for clause 46, and that the burden of proof needs to be specified for the special pleas.

429. The New Zealand Bar Association (39b) generally supports the provisions, but queries the purpose of clause 42(3) and suggests the drafting of clauses 43, 44 and 46 could be improved by omitting references to the same offence or any other offence (arising from the same factual circumstances).

430. The Crown Solicitors Network (24) raises concern that the special pleas provisions may preclude the laying of more serious charges which could not reasonably have been filed at the time of the original charge.

431. The NZLS (40) does not comment on the special pleas provisions other than to propose a small drafting amendment in clause 44, which is addressed in Appendix 2.

Comment

432. The proposed provisions are designed to ensure, subject to the amendment proposed below, that the Crown cannot later charge an offender with another offence for which a legal and factual basis existed at the time of the initial charge. The “same factual circumstances” test will provide far greater certainty than the existing law, which relies on “substantial similarity” between the original offence for which the defendant was convicted or acquitted and the offence for which that person is facing a further charge. The related New Zealand Bar Association submission (39b) applauds the intent of providing greater certainty.

433. However, advisers recommend that it would be clearer to substitute "factual circumstances" with "facts". This will ensure that a more serious charge can be laid following an earlier conviction or acquittal if it is based on essentially a different set of facts, even if part of the same series of events. For example, it would enable a defendant acquitted of assault subsequently to be charged with murder if the victim dies after the acquittal and the defendant is found to have been a party to the events leading to the murder, although not an active participant in it.

434. Advisers also consider that another issue, raised by the Crown Solicitors Network (24), should be addressed. Crown Solicitors are concerned that, if a defendant is charged with an initial “holding” charge and pleads guilty promptly to that charge, it may then preclude more serious charges from being filed.

435. Advisers recommend that a new provision be included to the effect that nothing in clause 43 requires a court to dismiss a charge arising from the same facts as those for which a person has been convicted if the court is satisfied that evidence of a more serious charge with which the person is subsequently charged was not readily available at the time of the original charge. This will allow for a new charge arising from the same facts to be filed where, for example, a death follows an assault or where further forensic or medical or legal analysis is required following the filing of the original charge, to determine whether more serious charges should be laid.
436. James Richardson (39a) submits that clause 44 could lead to unmerited acquittals if an inappropriate charge has been laid. Better Police charging practice and earlier Crown solicitor involvement should reduce the prospect of inappropriate charges being laid. However, in the event that inappropriate charges are still laid and lead to a dismissal or an acquittal, it is the policy intent of these provisions that the prosecution cannot then have a further run at the case using a different charge. That policy intent is consistent with the underlying rationale of the common law rule against double jeopardy and with section 26(2) of the Bill of Rights Act 1990.

437. James Richardson also has concerns about the drafting of clause 45. It is a simplified version of current section 359(3) of the Crimes Act. Its effect is that an acquittal or conviction of an offence punishable by three years’ imprisonment or more bars a subsequent charge of murder, manslaughter or infanticide if the victim dies as a result of the conduct constituting the offence previously charged.

438. Advisers note that this clause is inconsistent with the recommended redraft of clause 43. The redrafted clause 43 is narrower than clause 45, in that it requires that evidence of the more serious charge was not readily available at the time of the original charge, whereas clause 45 has no such limitation. However, this is irrelevant to the situation covered by clause 45, since that clause requires the death of the person that is now the subject of the homicide charge to have occurred after the trial on which the defendant was convicted or acquitted. By definition, evidence of the death will not have been available at the time of the original charge, so that the redrafted clause 43 will enable the homicide charge to be laid and clause 45 will not be needed for that purpose.

439. Clause 45 is drafted differently from clause 43 in one other respect that has substantive consequences: it enables a charge of murder, manslaughter or infanticide to be laid when the maximum penalty for the previous offence of which the defendant was convicted was less than three years’ imprisonment. However, so long as the evidence upon which the homicide charge is laid was not available at the time of the original charge (eg, because the person had not yet died), there is no reason to limit the ability to lay charges in this way. Clause 45 is therefore redundant and advisers recommend its deletion.

440. For completeness, it should be noted that clause 45 covers pleas of previous acquittal as well as pleas of previous conviction. In contrast, clause 43 as redrafted will allow charges to be relaid only in situations where there has been a previous conviction. However, for example, in the event that somebody has been acquitted, say, on a charge of assault or grievous bodily harm, it would never be legitimate to charge them with a homicide caused by the assault or other act in respect of which they have already received an acquittal. No provision therefore needs to be made to enable homicide charges to be laid after an earlier acquittal, unless those charges are based upon different facts (in which case clause 43 will apply).

441. As to James Richardson’s point about decisions of foreign courts (eg, where a person who has been convicted or acquitted of an offence in another jurisdiction is then charged with an offence in New Zealand that arises from the same factual circumstances), this issue is not covered by the current double jeopardy provisions and is best dealt with by the courts as an abuse of process.

442. James Richardson contends that it would be preferable to define what a pardon is for the purpose of clause 46. A pardon is not defined under the current
provisions. It is a well understood term (largely covering cases in which the Royal prerogative of mercy has been exercised) and there is no need to define it.

443. The final point made by James Richardson relates to the burden of proof in cases where a special plea is made. Section 139 of the Evidence Act 2006 provides that a certificate from a Judge or Registrar under that section in relation to a conviction or an acquittal “is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate”.

444. The related New Zealand Bar Association submission (39b) raises an issue as to the drafting of clause 42(3). Advisers agree that it is unclear whether the defendant is merely required to specify which of the pleas is relied on in relation to the charge in question, or to provide information about the conviction, acquittal or pardon upon which the plea is based. The latter is intended, since the defendant should carry an evidential burden in relation to any such plea. Advisers recommend that the provision be amended to make this clear.

445. The New Zealand Bar Association raises a further drafting issue in relation to clauses 43, 44 and 46. It submits that references to the same offence or any other offence are not required and the reference should simply be to any offence arising from the same factual circumstances. Advisers consider that the current drafting in the Bill is preferable, to make explicit that the plea is based upon the same facts rather than the nature of the charge.

Recommendation 22

Advisers recommend that, in relation to special pleas (clauses 42 – 47):

- the phrase “factual circumstances” in clauses 43, 44 and 46 be substituted with "facts";
- a new provision be included in clause 43 to the effect that nothing in that clause requires a court to dismiss a charge arising from the same facts as those for which a person has been convicted, if the court is satisfied that evidence of a more serious charge with which the person is subsequently charged was not readily available at the time of the original charge;
- clause 45 be deleted as it is already addressed by clause 43 (including the new provision above);
- clause 42(3) be redrafted to make clear that a person who enters a special plea must provide information as to the conviction, acquittal or pardon upon which the plea is based.

SUBPART 2 – DECISION REGARDING TRIAL BY JURY FOR CATEGORY 3 OFFENCES

Clause 48 – Defendant charged with category 3 offence may elect trial by jury

446. Clause 48 provides that a defendant who is charged with a category 3 offence may elect to be tried by a jury. If the defendant does not make an election, he or she will be tried by a Judge-alone. This clause gives effect to the policy discussed at paragraphs 54 to 85 to raise the jury threshold from offences punishable by more than three months’ imprisonment to those punishable by more than three years’ imprisonment.
Comment

447. The substantive discussion on this provision is provided above paragraphs 54 to 85. No substantive changes are recommended to this clause, other than the amendment discussed in relation to corporate representatives.

Clause 49 – Timing of election

448. Clause 49 provides that the defendant’s election must be made at the time that he or she enters a not guilty plea. However, the court may grant leave to make an election at a later time, if the Judge-alone trial has not begun, and if there has been a change in the defendant’s circumstances that might reasonably affect his or her decision. Under current processes, a defendant may elect jury trial at any time.

Submissions

449. The Criminal Bar Association (23), James Richardson (39a) and the New Zealand Bar Association (39b) are concerned that defendants may be asked to make an election without sufficient disclosure from the prosecution. The Criminal Bar Association and New Zealand Bar Association also consider that there is no evidence to suggest that the current provision, which allows the defendant to elect jury trial at any time up until the defended hearing commences, is misused.

450. The District Court Judges (26) support the constraints posed by clause 49.

Comment

451. As noted in relation in the commentary to clause 35 (paragraph 405), it is intended that the court will normally require a defendant to plead at his or her second appearance. In category 3 cases, defendants will also be required to make an election at their second appearance as election must be made at the same time as the “not guilty” plea is entered.

452. In most cases, defendants will be able to make an informed decision about election at this stage because they will have initial disclosure under section 12(1) of the Criminal Disclosure Act 2008. The recommended amendment to clause 35 (recommendation 18) will further ensure this. In some cases, particularly in those that are more serious or complex, it might be appropriate to delay the entry of a plea and election at this stage. The court has a discretion to do this under both clause 35(1) and 49(2).

453. There is abundant anecdotal evidence to suggest that the current ability of the defendant to elect jury trial at any time is being abused. For example, in Police v Wallace, the Judge said that the existing statutory provisions created a situation which “is pregnant with opportunities for abuse”.35 A further example can be found in Police v Edwards.36 In addition, there are reported cases of elections of trial jurisdiction being granted when proceedings are at an advanced stage and even on the day on which a summary defended hearing is to have taken place with all the attendant inconvenience to the court, prosecution and witnesses.

454. Advisers recommend no change to this clause.

Clause 50 – Judge and Registrar may receive elections

455. Clause 50 provides for either a Judge or a Registrar of a District Court to receive elections.

Submissions

456. The District Court Judges (26) submit that clause 50 be amended to enable Justices of the Peace and Community Magistrates to receive defendants’ elections to be tried by jury, where appropriate.

Comment

457. This issue, and other issues about the powers available to Community Magistrates and Justices of the Peace, is discussed under clauses 353 – 358.

Clause 51 – Withdrawal of election

458. Clause 51 sets out the circumstances in which a defendant who has elected to be tried by a jury may withdraw that election. An election may only be withdrawn with the leave of the court, that may only be granted if:

458.1. there has been a change in the defendant’s circumstances that might reasonably affect his or her decision; or

458.2. the withdrawal is unlikely to delay the conclusion of the defendant’s trial; or

458.3. the defendant is being tried with another person, and that other person is no longer to be tried by a jury.

Comment

459. There were no submissions and no substantive changes are recommended to this clause.

SUBPART 3 – CASE MANAGEMENT

General comment on clauses 52–57

460. Clauses 52–57 set out the case management processes that apply to charges for offences in categories 2, 3 and 4. These clauses do not correspond to any existing provisions in the Summary Proceedings Act 1957 or the Crimes Act 1961.

Submissions

461. The Royal Federation of NZ Justices Association (10), District Court Judges (26) and Judy Ashton (34) support the introduction of a case management system.

462. The Coalition of Community Law Centres (22) queries why the timeframes for disclosure have not been modified to align with the new case management scheme. It argues that, without sufficient disclosure, defence discussions with the prosecutor “will be pointless for most defence lawyers and impossible for anyone trying to represent themselves”. The Coalition also questions whether there is any evidence of the effectiveness of the case management proposals.

463. The NZLS (40) consider that clauses 52–57 are overly prescriptive and would be more appropriately contained in an appendix to the Bill with a mechanism facilitating amendment (as is the case with High Court Rules), regulations or practice notes issued by Heads of Bench. Similarly, the Auckland District Law
Society (18) argues that the proposed case management regime is an unwarranted intrusion upon the judiciary’s discretion and would impinge on fundamental rights and lead to complication. It thinks that going down this track could be “disastrous” and believes that the judiciary should be left to make its own rules.

464. Patrick Winkler and Roderick Mulgan (43) consider expectations in relation to case progression are unrealistic. They submit that pre-hearing investigations and negotiations should not be compressed. Rather, active judicial case management, and consultation and cooperation between parties, will assist to reduce the number of cases that progress to trial, and reduce delay.

465. Two submitters (James Richardson (39a) endorsed by the New Zealand Bar Association (39b), and Edward Miller and Kris Gledhill, University of Auckland (53)) note comparable provisions in the United Kingdom, asserting that, as these have failed, the Bill’s provisions are also likely to fail. James Richardson (39a) also notes that requiring case management discussions following entry of a not guilty plea presupposes the system has failed – if a not guilty plea has been entered he suggests it should be assumed that the defendant intends to go to trial to defend the charge. He considers that case discussions should occur before a plea is entered.

466. The Chief Justice (60) notes that the provisions contain a number of gaps and that the judiciary has been in consultation with advisers in relation to these provisions. She asks that the Committee make new drafts of these provisions available for further consideration with the judiciary. The revised draft provisions that the Committee has since provided to the Chief Justice incorporate the recommendations below.

Comment

467. Although some submitters assume that the case management provisions were based on provisions in other jurisdictions, particularly the United Kingdom, the Bill instead reflects operational practices that have been piloted for selected police charges in the summary jurisdiction at Manukau and Tauranga District Courts since mid-2008. Over 5000 summary cases have progressed through the pilots since they began. On the basis of evaluations of the pilots, it is expected that the case management processes in the Bill will:

467.1. reduce the time taken for cases to be resolved;

467.2. better focus the next court appearance after the defendant enters a plea;

467.3. increase the proportion of cases in which pleas are entered or charges are withdrawn as a result of out-of-court discussions.

468. Accordingly a direct comparison with other jurisdictions in this context is not useful. While other jurisdictions (eg, the United Kingdom, New South Wales and Victoria) have some version of a case management process, there is no equivalent in any other jurisdiction to the provisions in the Bill. In addition, the different culture, traditions and practice of other jurisdictions makes any comparison with New Zealand difficult. With regard to the United Kingdom’s experience, for example, the United Kingdom appears to have had significant difficulty finding incentives and sanctions that work and that its courts are prepared to use. The fact that it has a split bar (with distinct roles for barristers and solicitors) may also have had an impact. Advisers therefore consider it
preferable to consider effectiveness with reference to current good practice in New Zealand and experience with the pilot process. On the basis of both aspects, advisers expect the case management process to be effective.

469. It is intended that the timeframes for the case management process will be provided in Rules. Although the actual timeframes will be a matter for the rules committee, it is expected that the timeframes will align with relevant timeframes in the Criminal Disclosure Act 2008. In addition, the recommended amendment to clause 35 will ensure that the case management process will not ordinarily begin until initial disclosure under the Criminal Disclosure Act 2008 has been completed. Advisers do not agree with James Richardson’s view that case discussions should occur before a plea is entered. That approach would require a case review process in every case, regardless of whether or not the charge is contested.

470. Following consultation with key stakeholders, including the judiciary (who indicated concern regarding the amount of procedural issues to be addressed in secondary legislation) it was agreed just before introduction of the Bill to include case management in the Bill itself. Advisers have subsequently identified a number of refinements to improve their comprehensibility and to give full effect to the agreed policy. Most of these are refinements of a technical or drafting nature. These are reflected in the revised provisions that the Committee provided to the Chief Justice on 5 May 2011. They include, for example, changes to simplify the provisions, more clearly set out the respective powers of the court and Registrars, and remove provisions that are either unnecessary or better dealt with in other provisions in the Bill.

471. Refinements that are more substantive are identified under the relevant provisions below.

Clause 52 – Adjournment for case management

472. Clause 52 provides that if a defendant pleads not guilty to an offence in category 2, 3 or 4, the court must adjourn the proceedings to a case review date. A case that relates to a category 4 offence must also be transferred to the High Court.

473. Unless the defendant is unrepresented, the prosecutor and defendant must, before the case review date, engage in case management discussions and complete a case management memorandum. After the defendant files the case management memorandum, the Registrar will determine whether or not a case review hearing in front of a judge is required (see clause 54).

Submissions

474. James Richardson (39a) queries the requirement in clause 52(3)(a) that the parties must make any arrangements necessary for the proceeding’s “just and expeditious resolution”. He argues that the parties cannot agree arrangements for a “just” disposal, as they will be asserting diametrically opposite outcomes. He provides the example of a defendant admitting guilt to his lawyer but instructing his lawyer to put the prosecution to the proof. James Richardson queries how a defence lawyer is required to act in this situation given the duty to make arrangements for a “just” resolution of the case.

475. The New Zealand Bar Association (39b) agrees with James Richardson that clause 52(3) is flawed. It also notes that the identity of the trial prosecutor in
cases that are proceeding to a jury trial may not be clear at the case review stage, and that police prosecutors may be reluctant to make important decisions about the case.

**Comment**

476. Requiring parties to make arrangement for a proceeding’s “just” resolution is problematic. In particular, the use of “just” might imply that both parties, including the defence, must do all that they can to convict the guilty and acquit the innocent. This is not what is intended.

477. A qualifier still seems required to describe the nature of the resolution at which case management discussions is aimed. Reference to a “fair and expeditious” resolution does not appear to raise the same concerns as use of the word “just”. It also provides a counter-balance to the use of “expeditious”, which is intended to signal that neither party should delay resolution of a proceeding unnecessarily.

478. It is intended that cases which are to be tried by the Crown will be identified at an early stage (eg, the Crown may assume responsibility for a category 4 offence when the defendant enters a plea). This means that there is likely to be some involvement by the Crown in these cases at the case review stage or, at least, oversight of the decisions that are being made.

479. As drafted, clause 52(1) implies that, when a number of charges are filed together (eg, because they relate to the same incident), separate case management memoranda are required for each charge. This is unnecessary and would make the process unwieldy. Advisers recommend the inclusion of a provision to the effect that, when notification has been given under clause 140(1)(a) that charges are to be tried together (and the charges are not severed under clause 140(4)), a case management memorandum may cover all joined charges.

480. No other substantive changes are recommended to clause 52.

**Recommendation 23**

Advisers recommend that clause 52 (adjournment for case management) be amended to:

- require parties to make arrangements for “fair” resolution of proceedings, rather than “just” resolution as currently;
- provide that when a notice has been given under clause 140(1)(a) that charges are to be tried together (and the charges are not severed under clause 140(4)), a case management memorandum may cover all joined charges.

**Clause 53 – Information to be provided in case management memorandum**

481. Clause 53 lists the information that must be set out in the case management memorandum. Additional information must be provided if the case is proceeding to a Judge-alone trial (clause 53(2)).

**Submissions**

482. Alan Monk (47) notes that clause 53 appears to leave open the question of whether there can be a series of case review dates.
483. James Richardson (39a) raises a number of discrete issues with the matters listed in clause 53(1). This includes:

483.1. requiring a defendant to indicate whether he or she wishes to change a not guilty plea (clause 53(1)(a)) legitimises pleading not guilty and then changing the plea;

483.2. good practice requires that the matters listed in clause 53(1)(b) and (c) be resolved before a plea is entered;

483.3. the defence, as well as the prosecutor, should be able to identify under clause 53(1)(e) that an offence is a protocol offence and the court should be given a power to rule on the matter.

484. James Richardson also queries why clause 53(2) is limited to Judge-alone trials.

485. The New Zealand Bar Association (39b) considers the matters listed in clause 53(1) to be generally non-contentious, subject to its opposition to the requirement to identify issues in dispute.

Comment

486. It is intended that there will be only one case review hearing in most cases. In some cases, however, it may be necessary for the parties to appear in front of a judge more than once before a case can proceed to the next phase. This might occur when, for example, a judge considers that further discussion between the parties as to the appropriate charges would be beneficial. A further hearing might also occur if the judge does not have sufficient information to determine the matter in front of him or her.

487. Enabling a defendant to change a not guilty plea does not legitimise the practice of pleading not guilty and then changing the plea. It simply reflects the reality that a defendant’s view as to his or her position will change as the case progresses. In addition, the key consequence of a not guilty plea under the Bill is to enable the case to move into the case review phase so that discussions between the prosecutor and defence can commence. Requiring that a not guilty plea is entered before case management discussions commence avoids the need to have these discussions in cases where the defendant pleads guilty at the first or second appearance.

488. The matters in clause 53(1)(b) (amendment or withdrawal of charges) and in clause 53(1)(c) (sentence indication) should not be dealt with before the defendant is required to enter a plea. There is little to be gained in either situation from having discussions about charges, or from a sentence indication being given, if the defendant is willing to plead guilty without either of those things occurring.

489. The matters in clause 53(2) are limited to Judge-alone trials because the trial is generally the next event in cases that are being heard by a judge alone. Identification of those matters in the case management memorandum therefore enables arrangements to be made for the trial. In jury trial cases, these matters have been left until the trial callover stage (see clause 88). This enables the parties to consider those matters with the benefit of formal statements.

490. The remaining issue raised by James Richardson, as outlined in paragraph 484 above, is discussed further in the discussion on clauses 68 to 72 below.
491. No substantive changes are recommended to clause 53.

Clause 54 – Case review hearing

492. Clause 54 sets out the criteria that the Registrar must use to determine whether a case review hearing is required. Essentially, a Registrar must arrange a hearing if there is some matter for the judge to decide or, in a case that is proceeding to a Judge-alone trial, if the defendant is unrepresented.

Submissions

493. Alan Monk (47) believes that clause 54 could be improved if the parties had the ability to seek an earlier case review date.

494. James Richardson (39a) queries the use of the word “review” given that, if a defendant changes his plea to guilty or the prosecution withdraws all charges, the case will be listed for disposal. He also objects to the requirement in clause 54(3) for unrepresented defendants to inform the court of matters that would otherwise be included in a case management memorandum under clause 53(1). Finally, he notes in relation to clause 54(4)(c) that there is no provision for the court to determine whether an offence is, in fact, a protocol offence.

495. The New Zealand Bar Association (39b) proposes that clause 54(1)(e) should be amended to include a failure of the prosecutor to file a case management memorandum.

Comment

496. In light of experience with the summary jurisdiction pilots, it is expected that there will be at least a five-week period from the time a case is adjourned for case review to a case review hearing. Although it is not explicitly provided for in the Bill, there is nothing to prevent the parties from seeking an earlier case review hearing if they consider it desirable to do so.

497. Advisers do not consider the use of the word “review” to be problematic. The purpose of this stage of the proceeding is to review progress on the case to date with a view to agreeing appropriate next steps.

498. Advisers also do not consider there to be anything problematic in requiring an unrepresented defendant to provide the judge with the information specified in clause 54(3). The information is required regardless of whether or not a defendant is represented. Judges deal with unrepresented defendants on a regular basis and are well able to make appropriate allowances for the fact that these defendants appear without legal representation. The alternative is to require defendants to participate in case management discussions with the prosecutor. This is not appropriate given the prejudice that might result to the defendant from those discussions (because the defendant might inadvertently disclose something without realising that they are doing so) and the fact that judges would likely feel compelled to check a completed case management memorandum with a defendant anyway.

499. However, under the Bill as introduced, an unrepresented defendant is only required to appear at a case review hearing to ensure that the trial is ready to proceed, when he or she is to be tried by a judge. On reflection, advisers consider that there would be benefit in all unrepresented defendants appearing in front of a judge at this point, to ensure that the case is broadly on track.
Finally, there is no purpose in amending clause 54(1)(e) to require a case review hearing to be held if the prosecutor fails to file a case management memorandum. There is only one memorandum (which is jointly completed by the prosecutor and the defendant) which must be filed by the defendant (clause 52(4)).

**Recommendation 24**

Advisers recommend that clause 54 (case review hearing) be amended to require an unrepresented defendant to appear at a case review hearing regardless of whether a case is proceeding to a Judge-alone trial or a jury trial.

**Clause 55 – Procedure if no review hearing**

501. Clause 55 sets out what must happen if no case review hearing (in front of a judge) is scheduled.

**Submissions**

502. The District Court Judges (26) consider that clause 55(4)(a) is ambiguous as to whether a Registrar is able to remand a defendant in custody.

503. James Richardson (39a) considers that subclauses (1) and (2) appear contradictory. He considers the drafting to be “inelegant and confusing”. He also notes that there appears to be no provision for notifying the defendant of the date of the appearance before a Registrar.

**Comment**

504. The matters raised by the District Court Judges and James Richardson are matters of drafting, which have been addressed in the recommended revisions in relation to the powers of Registrars (see Appendix 1, 2. Adjournments and bail powers) and the revised case management provisions provided to the Chief Justice.

505. Advisers do not recommend any substantive changes to clause 55.

**Clause 56 – Court may authorise departure from case management procedure**

506. Clause 56 provides that the court may authorise a departure from any case management provisions if it considers that doing so will facilitate the resolution of the proceedings, or is otherwise in the interests of justice.

**Comment**

507. No submissions were made on clause 56 and no substantive changes are recommended.

**Clause 57 – Court may direct case management procedures apply to charges for category 1 offences**

508. Clause 57 provides that the court may direct parties to comply with the case management provisions in proceedings relating to an offence in category 1, and that it may give other directions in relation to the management of the case.

**Comment**

509. No submissions were made on clause 57 and no substantive changes are recommended. (The discussion at clauses 87 to 89 is also relevant to case management.)
Sentence indications

510. Clauses 58 to 63 relate to sentence indications and have no existing statutory counterpart. Related matters are dealt with at clauses 121-122 and 249. Sentence indications are currently given in District Courts. The intention is to provide a statutory basis for all courts to give sentence indications.

General submissions

511. Judy Ashton (34) states that no discount should be given for an early guilty plea.

512. The Coalition of Community Law Centres (22) opposes the provisions, questioning whether cases are resolved more promptly by the use of sentence indications and arguing that there is no evidence to suggest that the practice of giving sentence indications increases the number of early guilty pleas. James Richardson (39a) also opposes the provisions. He suggests that either the innocent may plead guilty or that a sentence that does not reflect the gravity of the offending may be imposed as a result.

513. The District Court Judges (26), the New Zealand Bar Association (39b) and the NZLS (40) support the provisions. The District Court Judges note an internal inconsistency between the use of “judicial officer” and “court” in this part of the Bill, which advisers recommend be rectified (see Appendix 1 (4. Use of “court” etc.).

Comment

514. Section 9(2)(b) of the Sentencing Act 2002 provides that the court must take into account a guilty plea as a mitigating factor. It is beyond the scope of this Bill to consider the appropriateness of a discount for plea.

515. There is ample evidence that the practice of giving sentence indications has led to more early guilty pleas and a consequential reduction of defended matters. At Manukau District Court, during testing of the new case management pilot process, 76% (121) of the cases in which a sentence indication on a case management memorandum was requested resulted in the entry of a guilty plea to one or more charges at a status hearing or a subsequent event. At Tauranga District Court, the proportion was 58% (14 cases).

516. There is no evidence that sentence indications place undue pressure on defendants to plead guilty. Rather, it enables them to make decisions about plea on a more informed basis. To the extent that the sentence is reduced because it is indicated by the judge at an early stage, that is simply as a result of the discount for an early guilty plea (which, as noted above, is beyond the scope of this Bill to reconsider).

Clause 58 – Meaning of sentence indication and application to corporations

517. Clause 58 defines a sentence indication. Broadly, a sentence indication is a statement by a judicial officer of the sentence that it is likely to impose if the defendant pleads guilty to the offence alleged in the charge, or any other specified offence, at that time.

Comment

518. No submissions were received on this clause and no substantive changes are recommended, beyond the drafting changes required as a result of Recommendation 13 (representatives of corporations).
Clause 59 – Giving sentence indication

519. Clause 59 provides that a court may, at the request of the defendant made at any time before the trial, give a sentence indication. It sets out a non-exhaustive list of the information the court may rely on in giving a sentence indication.

Submissions

520. Candor Trust (11) supports the use of victim impact statements to assist the judicial officer in giving a sentence indication, but recommends that clause 59 be amended to include a requirement that victims be advised of the date of any sentence indication. It also says that clear guidelines are needed to govern when sentence indications may be given.

521. The Coalition of Community Law Centres (22) submits that clause 59 should be amended to provide that a sentence indication may only be given after the defendant has received legal advice (or has been given that opportunity).

522. The NZLS (40) proposes that the court should be required to give a sentence indication on the first occasion it is requested by the defendant, with subsequent indications being at the court’s discretion. It also proposes that there should be an ability to give a sentence indication during the trial.

Comment

523. The District Court Bench Book currently provides that sentence indications at status hearings are to be given under structured guidelines including that consultation with all parties – Police, victims, and the defendant – is essential. Guidelines exist in both judicial Practice Notes and case law.

524. In relation to the specific recommendation that there be a requirement that victims be advised of the date of any sentence indication, section 12 of the Victims’ Rights Act 2002 already provides that a victim must, as soon as practicable, be given information by investigating authorities, court staff or the prosecutor about a range of matters, including certain court hearings and the final disposition of all proceedings, such as convictions or guilty pleas entered and sentences imposed. The Victims’ Rights Act review will consider the extent to which that section should be amended to include matters relating to sentence indications. Other more general comments from the Candor Trust about the preparation and use of victim impact statements will also be considered in that review.

525. There is no purpose in having a provision that defendants must have had an opportunity to receive legal advice before they request or are given a sentence indication. There are provisions under the Bill requiring defendants to be informed of the right to legal representation and to have a reasonable opportunity to exercise that right before entering a plea (clauses 34 and 35). Accordingly, defendants will not be able to act on a sentence indication until they have had a reasonable opportunity to obtain legal representation. The only situation in which a defendant is not required to have this opportunity is when a defendant chooses to plead guilty to a category 1 offence by providing a notice under clause 33. However, defendants are not required to plead in this way and, in any event, are unlikely to have requested or been given a sentence indication when pleading by notice, given the intention of clause 33 that a defendant’s case can be dealt with without an appearance.

526. Advisers do not agree with the NZLS’s proposals. There are a number of situations where the court may consider it inappropriate to give a sentence
indication – for example, if the defendant appears to be under pressure to plead guilty, or if there are a number of defendants and an indication given to one defendant may create pressure on another defendant.

527. On the NZLS’s second proposal, while allowing a guilty plea to be entered during the trial may, in some circumstances, bring the case to a conclusion more quickly, the disadvantages in permitting a sentence indication during the trial outweigh the advantages. Delaying seeking a sentence indication until the trial, with the prospect of an adjournment and delay in the court process, does not best serve the aims of the Bill to encourage defendants to enter pleas at an early stage. There may also be difficulties, particularly in Judge-alone cases, with a judge who is presiding over the trial obtaining additional information for the purpose of the indication which then must be disregarded for the rest of the trial (assuming it continues).

528. Advisers do not recommend any substantive changes to clause 59.

Clause 60 – Further provisions relating to giving sentence indication

529. Clause 60 provides restrictions on the giving of more than one sentence indication in a proceeding. It also provides that there is no right of appeal against a decision to give or not give a sentence indication.

Submission

530. The New Zealand Bar Association (39b) submits that there is a drafting error in clause 60(1). The Sensible Sentencing Trust (Napier) (37) submit that clause 60(1) appears to add an additional hearing stage.

Comment

531. Advisers recommend that clause 60(1) be deleted from the Bill. It provides that the prosecutor and defendant must be given the right to be heard before a sentence indication of type and quantum is given. On reconsideration, advisers do not consider that this subclause is necessary. Where a specific quantum of sentence has been indicated, natural justice will require judges to hear from the parties in any event, and it is important not to imply that the judge does not need to hear from the parties when less specific sentence indications are being given. It is therefore recommended that this subclause be deleted.

Recommendation 25

Advisers recommend that clause 60 (further provisions relating to giving sentence indication) be amended by deleting the requirement for parties to be heard when sentence indication proposed for type and quantum (subclause (1)) because it is both unnecessary and implies a hearing is not necessary for other types of sentence indications.

Clause 61 – Further provisions relating to giving and reporting sentence indication

532. Clause 61 provides that a sentence indication must be given in open court. However, no person may publish any information about the request for a sentence indication or any indication that has been given until after the defendant has been sentenced or the charge has been dismissed.
Submission

533. The NZLS (40) contends that clause 61(2) should be repealed. It argues that it is not necessary for category 1 and 2 offences (since these offences cannot be tried by jury) and that an absolute prohibition is unnecessary in respect of matters to be heard by jury. However, the NZLS notes that, if this clause is to remain, an offence should be provided for contravention of clause 61(2).

Comment

534. The prohibition on publication is consistent with the leading United Kingdom case on sentence indications, R v Goodyear [2005] 3 All ER 117, which stipulates that, if a case may yet proceed to trial, reporting restrictions about sentence indications should normally be imposed and only lifted if the defendant pleads guilty or is found guilty. The fact of requesting a sentence indication could be interpreted as an admission of guilt and prejudice the right to a fair trial. This risk overrides any possible infringement on the right to freedom of expression that the NZLS considers might arise from the prohibition on publication of information about the request. The A-G’s report on the Bill did not identify any Bill of Rights concern arising from the prohibition.

535. However, advisers agree with the NZLS that it should be an offence to contravene clause 61(2). Otherwise, the prohibition is unenforceable. Advisers recommend the inclusion of a new offence of knowingly publishing information about a request for a sentence indication or about an indication that has been given prior to sentencing or dismissal of a charge, with a maximum penalty of three months’ imprisonment for individuals and a $50,000 fine for a body corporate. The recommended maximum penalty is half that which is recommended under clause 215 for knowingly or recklessly publishing suppressed information. A lesser maximum penalty in the sentence indication context can be justified on the basis that the harm arising from a breach of a suppression order may be more far-reaching and less capable of remedy than publication of a sentence indication.

Recommendation 26

Advisers recommend that, consistent with the prohibition on publishing sentence indications in clause 61 (further provisions relating to giving and reporting sentence indication), it should be an offence to knowingly publish information about a request for a sentence indication or about an indication that has been given prior to sentencing or dismissal of a charge, with a maximum penalty of three months’ imprisonment for individuals and a $50,000 fine for a body corporate.

Clause 62 – Duration of sentence indication

536. Clause 62 provides that a sentence indication has effect until the close of the date specified by the court or, if no date is specified, until the expiry of 5 working days after the date on which it was given.

Comment

537. No submissions were received on this clause and no substantive changes are recommended.
Clause 63 – Request for sentence indication not admissible in proceedings

538. Clause 63 provides that the fact that a defendant made a request for a sentence indication is not admissible in evidence in any proceedings.

Comment

539. No submissions were received on this clause and no substantive changes are recommended.

Notification of issues in dispute (clauses 64 – 67)

540. Clauses 64 to 67 impose an obligation on the defendant to give notice before trial of the issues in dispute and outlines procedure for doing so.

Comment

541. The substantive discussion on these provisions is provided above from paragraph 86 t to130.

SUBPART 4—DETERMINATION OF LEVEL OF TRIAL COURT FOR CATEGORY 3 OFFENCES

542. Clauses 68 to 72 set out the process for determining whether a category 3 offence is tried in the District Court or the High Court. The default position is that category 3 cases are tried in the District Court. However, certain category 3 offences will be routinely considered for transfer to the High Court, in accordance with a protocol to be developed between the Chief High Court Judge and the Chief District Court Judge. In the case of all other category 3 offences, both the prosecutor and the defence will have the right to apply for an order that the case be tried in the High Court.

General submissions on protocol and application process

Submissions

543. Anne Stevens (17) argues that a process which requires the court to consider where the case should be heard is a “complete waste of time”. She points to experience with the current middle band process, where cases are “invariably” transferred back to the District Court. She suggests that either the Bill should identify which trials should be heard in the High Court or all trials should be in the District Court.

544. The Coalition of Community Law Centres (22) considers that the Bill’s process for determining whether a category 3 offence is tried in the District or High Court is likely to introduce further delay and complexity. It does not consider it appropriate for judges to decide the level of trial court. It proposes that the legislation should simply state what court has jurisdiction over what offence, with parties left to apply in a particular case to have a trial removed to the High Court.

545. Judy Ashton (34) supports the majority of cases being held in the District Court, with the High Court freed up to deal with more serious offences.

546. The NZLS (40) considers the protocol and application process to be unnecessarily cumbersome and prescriptive. It considers it preferable for the District Court to have the power, on application by either party, to refer a matter to the High Court for determination of the appropriate trial court.
General approach to protocol and application process

The protocol and application process provided in clauses 68 to 72 replaces current provisions which:

547.1. require the High Court to determine on a case-by-case basis whether a specified list of offences (“middle band” offences) should be tried in the High Court (section 184Q of the Summary Proceedings Act 1957);

547.2. enable indictable offences to be transferred to the High Court on the application of either party (section 28J of the District Courts Act 1947).

The principal reason for the creation of the middle band category in 1990 was to alleviate pressure on the High Court, which at the time was facing a significant increase in the number of criminal jury trials. In essence, it was a flexible mechanism to enable workload to be allocated between the High Court and the District Court so as to ensure that there was an appropriate distribution of workload between them, and to ensure that cases with a high level of seriousness, complexity or public profile were retained by the High Court.

Consideration was given during the Bill’s development to whether the middle band could be abolished altogether. However, it was decided that there remained a need for a flexible mechanism of this sort for three reasons:

549.1. The arbitrary allocation of offences to the High Court or the District Court by reference to their offence type or their maximum penalty would often be inappropriate – most offences with high maximum penalties cover a wide breadth of behaviour and are suitable for trial in either the District Court or the High Court depending upon the circumstances. Flexibility in the system is therefore required to take into account a range of other factors such as the public importance of the case, the seriousness of the particular offence or the complexity of the issues. This can only be achieved if the appropriate jurisdiction for trial in relation to some offences is left to judicial determination.

549.2. A rigid division between High Court and District Court offences would not be sufficiently responsive to fluctuating caseload and would unduly impact on the extent to which there are delays before a trial. Defendants have the right to trial without undue delay, and an allocation of work between the courts that resulted in such delay would be detrimental to the overall interests of justice.

549.3. The process of allocating cases between the Courts should ensure that the High Court maintains a critical mass and range of High Court work to attract suitable candidates to the High Court bench and to ensure it retains experience to fulfil its appellate function. This cannot be achieved by a diet of cases drawn only from a very small category of High Court only offences.

Some of the considerations identified in paragraph 549 could be addressed by simply enabling the prosecutor or defendant to apply to have a trial in the High Court in appropriate cases. For example, the defendant could make an application if there were substantial delays in the District Court where he or she would otherwise be tried. Arguably, however, there is a wider public interest in
where cases are heard, beyond the interests of the prosecutor and defendant. On that basis, it is not appropriate for the consideration of the appropriate trial court to depend solely on whether one or other of the parties considers that to be a live issue.

551. Despite our view that a mechanism like the middle band should be retained, the process that applies to middle band offences has been the subject of extensive criticism. Under that process, all cases involving middle band offences are automatically transferred from the District Court to the High Court following committal for trial. A High Court judge then decides, on the basis of statutory criteria, whether the case should be heard in the District Court or the High Court. In summary, the problems with this process are that:

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

551.2. 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 (over 90% of middle band cases are routinely returned to the District Court);

551.3. the sequence of events around middle banding leaves court customers (particularly victims and defendants) with an impression of poor service – for example, most will be informed that the next appearance following committal for trial is in the High Court only to then be told that they must instead appear in the District Court;

551.4. it imposes avoidable administrative costs upon the High Court and District Court registries (in particular, the entire file is usually transferred to the High Court only for it to be transferred back again in most cases).

552. These problems have led to the development of the protocol and application process provided in the Bill. It enables the District Court judiciary to have input into the identification of offences as protocol offences (clause 68) and into individual decisions about whether protocol offences should be transferred to the High Court (clause 69). However, it maintains some deference to judicial hierarchy by providing that the transfer decision rests finally with the High Court. In addition, unlike the current middle band process, cases will be retained in the District Court and not transferred to the High Court unless an order is made that the trial is to take place in the High Court.

553. The protocol and application process has been the subject of extensive consultation with the judiciary and has been accepted as appropriate by both the District Court and High Court benches. 

Extension of protocol and application process to category 2 offences

554. The protocol and application process currently only applies to category 3 offences. A small number of offences that are currently heard in the High Court will become category 2 offences under the Bill and be heard in the District Court. This is because these offences have maximum penalties of imprisonment that are three years imprisonment or less. However, some category 2 offences have characteristics that, in some circumstances, may suggest a High Court trial is more appropriate. In particular, some category 2 offences could involve complex
commercial prosecutions (eg, offences under the Securities Markets Act 1988, which have maximum penalties of three years’ imprisonment).

555. Advisers therefore recommend that the Bill be amended to extend the protocol/application process to category 2 offences. As currently under the Bill, category 2 offences would remain Judge-alone trials, even if transferred to the High Court.

**Recommendation 27**

Advisers recommend that the Bill be amended to extend the protocol/application process, which currently applies only to category 3 offences, to category 2 offences.

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**Determination of level of trial court for protocol offences**

**Clause 68 – Establishment of protocol**

556. Clause 68 provides for the Chief High Court Judge and Chief District Court Judge to establish a protocol that identifies which category 3 offences are “protocol offences”. That protocol may list specific offences that are to be protocol offences, or may identify offences where certain circumstances are present (eg, offences that cause a particular level of harm or that are prosecuted by a particular agency).

**Submissions**

557. The NZLS (40) considers that the status of the protocol as a form of delegated legislation is unclear.

558. The Legislation Advisory Committee (69) considers that the protocol process delegates what is arguably a legislative function to the Chief Justice and the Chief District Court Judge. It notes that there is no requirement for the protocol to be publicly notified and no criteria to guide the judges in determining what offences should be protocol offences. The Legislation Advisory Committee considers both matters should be dealt with in primary legislation. It recommends that the Select Committee carefully consider whether the determinations now to be included in the protocol involve matters of judgement of a policy kind that are more appropriate for the legislative or executive branch of government.

**Comment**

559. The protocol does not have the status of delegated legislation. It is instead in the nature of a judicial practice note.

560. Whether the protocol should be a document that is developed by the judiciary or provided in primary or secondary legislation was given careful consideration during the Bill’s development. Providing the list of protocol offences in primary legislation was not considered to provide sufficient flexibility to enable the protocol to be amended to reflect experience with its application, including changing perceptions about the cases that should be considered for transfer and each Court’s workload.

561. Including the protocol in secondary legislation was also discounted. This was for two reasons. First, the judiciary is arguably in the best position to identify those cases that should be routinely considered against those criteria. Currently, what
offences should be placed in the middle band category and routinely transferred to the High Court is an executive/legislative responsibility. The vast majority of middle band offences, which are automatically transferred to the High Court, are then transferred back to the District Court. This indicates that the Executive/Legislature is not well-suited to identifying those cases that should be considered for transfer to the High Court.

562. Secondly, the policy component of transfer decisions is represented in the criteria that govern those decisions. These criteria, which are provided in clause 69(5), will be set by Parliament (as the middle band criteria are now). The protocol itself will not dictate which cases should be heard in which court but, rather, those cases to which the criteria are to be applied. Once Parliament has set the criteria, it can be left to the judiciary to determine how the criteria are given effect.

563. The protocol will be made publicly available, in the same way as for any other judicial practice notes or guidance (which are routinely posted on the Ministry of Justice or courts’ website). However, a statutory requirement that the protocol be made publicly available provides additional certainty that this will occur. Advisers therefore recommend that clause 68 be amended to require that the protocol, and any changes made to it, be notified in the New Zealand Gazette. This will bring the protocol in line with other judicial guidance about the allocation of cases – in particular, the requirement to notify in the Gazette the Court of Appeal’s process for determining whether an appeal should be heard by a division or full court (see section 58E(2) of the Judicature Act 1908).

**Recommendation 28**

Advisers recommend that clause 68 (establishment of protocol) be amended to require the Chief High Court Judge and Chief District Court Judge to publish in the New Zealand Gazette the protocol and any changes made to it.

**Clauses 69-70 (Determination of level of trial court for protocol offence)**

564. Clause 69 provides that a District Court judge may, on receipt of notification that an offence is a protocol offence, consider and make a recommendation whether the trial is to be held in the District Court or the High Court. This recommendation is to be made against statutory criteria, which are broadly equivalent to the current criteria that apply to middle band decisions. Clause 70 requires a High Court judge to determine whether the trial is to be held in the District Court or the High Court.

**Submissions**

565. James Richardson (39a) notes that clause 69(1) gives the District Court judge discretion to make a recommendation to the High Court about the appropriate trial court. He queries what process is followed if the judge declines to make a recommendation. He also considers that it is unclear how an offence is to get before a High Court judge if the prosecutor has not identified an offence as a protocol offence or the District Court judge has not made a recommendation under clause 69. Finally, he notes that it is the prosecutor alone who can say whether an offence is a protocol offence. He considers that the equality of arms should require the defence to have an equal right to argue that an offence is a protocol offence. He also considers that the court should have the power to rule on whether an offence is a protocol offence. (A drafting error identified by James Richardson is addressed in Appendix 2.)
Comment

566. The role of the District Court in protocol decisions attempts to balance the desirability of District Court involvement in protocol decisions, without imposing too great an administrative burden on the judges involved. Therefore, the District Court is only required to make a recommendation in cases when one or other of the parties seeks a High Court trial or the judge considers that the workload of the District Court is a relevant factor in a transfer decision. Although the District Court judge is not required to make a recommendation in all cases, all protocol offences will still be referred to a District Court judge before being passed on to a High Court judge for determination of the trial court under clause 70.

567. Sole responsibility has been given to the prosecutor to identify protocol offences in order to avoid duplication of effort between the prosecutor and defence. The prosecutor and defendant will discuss, as part of case management discussions, whether an offence is a protocol offence. If there is disagreement, the defendant could either raise this at the case review hearing or make an application for transfer under clause 72. The defendant will therefore not be disadvantaged by not having formal responsibility for identifying that an offence falls within the protocol.

568. However, the District Court judge should have the ability to decline to refer a case on to a High Court judge if he or she considers that an offence does not fall within the protocol. This would not preclude either party from making a separate application to transfer the case to the High Court under clause 72.

569. Advisers do not consider that any other changes are required to clause 69 in light of James Richardson's comments.

Recommendation 29

Advisers recommend that the Bill be amended to enable the District Court judge to decline to refer a case to a High Court judge under clause 69 if he or she considers that an offence does not fall within the protocol.

Clause 71 – Proceedings not invalid

570. Clause 71 provides that no proceeding for a protocol offence is invalid only because it failed to be identified as such and considered in accordance with clauses 69 and 70.

Comment

571. There were no submissions and no substantive changes are recommended to this clause.

Order that proceeding for category 3 offence be tried in High Court

Clause 72 – High Court judge may order proceedings for category 3 offence be tried in High Court

572. Clause 72 provides that either the prosecutor or the defendant may apply to have a category 3 offence transferred to the High Court which has not been considered for transfer under clauses 69 and 70. The right to apply under this clause arises whether or not the offence is a protocol offence.
SUBPART 5—TRIAL COURT, PLACE OF TRIAL, TRANSFER OF CASES TO TRIAL COURT, AND PROCEDURE FOR TRIAL

574. Clauses 73 to 77 set out the applicable trial procedure (Judge-alone or jury trial) and the level and location of the trial court for each category of offence.

Clause 73 – Category 1 and 2 offences

575. Clause 73 sets out the applicable trial procedure (Judge-alone or jury trial) and the level and location of the trial court for category 1 and 2 offences.

Comment

576. There were no submissions and no substantive changes are recommended to this clause.

Clause 74 – Designation of proceedings for category 3 offences as ready to proceed

577. Clause 74 provides that the court that is dealing with the pre-trial matters must designate the proceedings as being ready to proceed once it is satisfied that all matters set out in subparts 1 and 4 have been completed as far as possible. At that stage, if the designating court will not be the trial court, the Registrar must transfer the proceeding to the trial court.

Comment

578. There were no submissions on this clause. However, while preparing the Chief Justice’s submission on the Bill, senior members of the judiciary raised with advisers their concern that the designation procedure envisaged by clause 74 is complex and difficult to understand.

579. Like all other offences, category 3 offences commence in a District Court. However, some category 3 offences will need to transfer to a trial court – for example, if the defendant elects jury trial and the District Court dealing with the proceeding does not have jurisdiction to conduct jury trials, or if an order is made under clause 70 or 72 that a case should be heard in the High Court.

580. The purpose of the designation procedure in clause 74 was to ensure that cases did not transfer to a trial court until all administrative and case review matters were dealt with. It provided a point in the process at which transfer to the trial court took place.

581. However, on further consideration, clause 74 appears to create an overlay of complexity that is unnecessary. In particular, as drafted, the designation procedure applies to all category 3 offences even though the trial court will not usually change. It is therefore recommended that the concept of designation is removed from the Bill, in favour of a simpler transfer process. This will require some amendments to the Bill’s provisions dealing with the jurisdiction and place of trial, as well as changes to some consequential amendments made to the Bail Act 2000 and Children, Young Persons and Their Families Act 1989 which refer to the designation process.
**Recommendation 30**

Advisers recommend that clause 74 (designation of proceedings for category 3 offences as ready to proceed) be replaced with a simpler provision that enables offences to be transferred to the trial court when required (the references to designation in other clauses will also need to be removed and replaced).

**Clause 75 – Category 3 offences**

582. Clause 75 sets out the applicable trial procedure (Judge-alone or jury trial) and the level and location of the trial court for category 3 offences.

**Submissions**

583. James Richardson (39a) submits that clause 75 should spell out that the right to elect jury trial is subject to an order being made under clause 102 or 103 for a Judge-alone trial.

**Comment**

584. The relationship between clause 75 and clauses 102 and 103 should be clarified.

585. Otherwise, no changes are recommended to clause 75, beyond those required to remove and replace the reference to designation (see Recommendation 29).

**Recommendation 31**

Advisers recommend that clause 75 (category 3 offences) be amended to clarify that, despite an election of jury trial, the trial must be dealt with by a judge alone if an order to do so is made under clauses 102 or 103.

**Clause 76 – Category 4 offences**

586. Clause 76 sets out the applicable trial procedure (Judge-alone or jury trial) and the level and location of the trial court for category 4 offences.

**Comment**

587. There were no submissions on this clause and no substantive changes are recommended.

**Clause 77 – Notice that defendant to be tried in High Court**

588. Clause 77 provides the procedure for dealing with a defendant, following an order under clause 70 or 72 that a trial is to be in the High Court.

**Comment**

589. There were no submissions on this clause. Some changes are required to clause 77 to remove and replace the reference to designation (see Recommendation 29). Otherwise, no substantive changes are recommended.

**SUBPART 6—PROVISIONS APPLYING ONLY TO JUDGE-ALONE PROCEDURE**

**Clauses 78 – 80 (provisions applying to judge alone procedure)**

590. This subpart contains provisions that apply only in the case of a proceeding for which the trial will be before a judge alone.
591. Clauses 78 to 80 relate to pre-trial admissibility orders in Judge-alone proceedings. The clauses are, to some extent, derived from section 344A of the Crimes Act 1961, which currently allows pre-trial admissibility orders to be made in indictable proceedings. The clauses broaden the scope of that existing process in the indictable jurisdiction, by allowing it to also be used in Judge-alone proceedings. (Clause 101 is a corresponding provision that allows pre-trial admissibility orders to be made in jury-trial cases.)

**Submissions**

592. The NZLS (40) is concerned that clause 79(2) gives a judge the power to order that evidence is admissible, but no power to order that evidence is inadmissible. No other submissions were received on these clauses.

**Comment**

593. The wording regarding an order that the evidence is admissible is comparable to that currently used in section 344A of the Crimes Act. Advisers are not aware of any difficulties with this wording.

594. No substantive changes are recommended to these clauses.

**SUBPART 7 – PROVISIONS APPLYING ONLY TO JURY TRIAL PROCEDURE**

**Application of this subpart**

**Clause 81 – Application of this subpart**

595. Subpart 7 applies to category 3 offences where a defendant has elected jury trial and to category 4 offences. In process terms, it will apply once a case has been adjourned for a trial callover on the completion of the case management process. The pre-trial procedures in this subpart will be conducted by the trial court, whether that be a District Court or the High Court.

**Comment**

596. There were no submissions on clause 81. Advisers recommend no substantive changes, beyond those required to remove the reference to “designation” (see Recommendation 29).

**General comment on clauses 82–86, 92–100**

**Submissions**

597. Anne Stevens (17) is disappointed that the Bill continues the process, introduced in 2008, of automatic committal to trial without a preliminary hearing. She considers that deposition hearings were a major filter of cases. She notes the statutory review of the removal of depositions (required by section 19 of the Summary Proceedings Act (No 2) 2008) has not yet taken place.

598. The New Zealand Bar Association (39b) expresses its concern about the removal in 2008 of a defence right to an oral deposition hearing. It is concerned that the Bill is making further changes to the committal process without the statutory review taking place. It has reservations about whether the 2008 changes have enhanced the efficiency of the jury trial process and recommends that the 2008 changes should be confirmed in the Bill or that the Bill should be deferred while the review takes place.
Comment

599. There is no equivalent in the Bill of the current step of committal for trial as provided for by Part 5 of the Summary Proceedings Act 1957.

600. The primary function of committal proceedings is to act as a means of establishing whether a prima facie case exists – that is, whether there is sufficient evidence to put the defendant on trial. In other words, it acts as a filter protecting defendants from unwarranted prosecution and preventing the expense of unwarranted trials.

601. The 2008 changes to the committal process took effect from 29 June 2009. They abolished the use of oral preliminary hearings in favour of a paper-based process. The prosecutor is now required to file formal written statements within 42 days of the date of election of trial by jury or the laying of an indictable charge. Committal is then automatic unless the defence applies for an oral hearing within 14 days and the hearing is granted.

602. The new process has largely made the step of committal redundant. Most cases are committed to trial automatically without an application for an oral evidence order being made or granted. Between July 2009 and February 2011, 301 applications for oral evidence orders were filed, equating to approximately 3% of the total number of qualifying cases. Where an application for an oral evidence order was filed, just over a quarter were granted.

603. The requirement for the prosecutor to file formal statements, the possibility of oral evidence orders and the availability of section 347 discharges (now dismissals under clause 147 of the Bill) are all that is necessary to filter out cases where there is insufficient evidence to put the defendant on trial. Committal does not of itself add to the process. However, it results in delay because a callover cannot be arranged until the expiry of the 14 day period for making an oral evidence application at the earliest and, if the application is granted and the evidence heard, considerably later.

604. The Bill therefore abolishes committal as a formal step in the process. However, the critical elements of committal (the filing of formal statements and oral evidence orders) have been retained. These elements, along with the ability for the defence to apply for a dismissal of the charge on the basis of the formal statements or oral evidence, will continue to be key mechanisms in filtering out cases that should not proceed to trial.

605. The 2008 changes to the committal process were a long time in germination. The arguments for and against the changes were well-traversed at the time. Since then, a number of other jurisdictions such as the United Kingdom, have abolished committal and/or preliminary hearings altogether. Given the comprehensive nature of this Bill, it was appropriate for the role of committal to be reconsidered, as it has been.

606. Section 19 of the Summary Proceedings Amendment Act (No 2) 2008 requires the Solicitor-General to conduct a review of the operation of Part 5 of the Summary Proceedings Act 1957 two years after the commencement of that Part. The review is due to commence in June 2011. However, given that the Bill abolishes the formal step of committing a case for trial, the Solicitor-General considers that the review required by section 19 of the Summary Proceedings Amendment Act (No 2) 2008 has been overtaken by the Bill and would serve no useful purpose.
**Filing of formal statements**

**Clause 82 – Requirements for formal statements**

607. Clause 82 sets out the requirements for formal statements. It is based on existing law with two differences:

607.1. formal statements no longer have to be in written form – they might instead take the form of a video record;

607.2. clause 82(1)(b) introduces a new requirement that the formal statements must contain the witness’s admissible evidence. However, they may also contain inadmissible evidence so long as the prosecutor indicates, at the time a formal statement is filed under clause 85, what evidence he or she considers to be admissible and intends to rely upon at trial (clause 82(5)).

**Submissions**

608. Judy Ashton (34) supports the ability provided in the Bill for formal statements to be in any form (that is, paper-based or electronic).

609. The Coalition of Community Law Centres (22) queries why formal statements are still required in category 3 or 4 cases being tried by juries but not in category 3 or 4 Judge-alone trials, when the committal process has gone entirely.

610. James Richardson (39a) notes that clauses 82 to 86 appear to be the first time that the prosecutor is required to serve evidence on the defence. It notes that this would “be complete anathema to lawyers brought up under the English and Welsh system, where all prosecution evidence must be served at a much earlier stage”.

611. The NZLS (40) argues that the ability for formal statements to include inadmissible evidence under clause 82(5) is highly problematic, both as a matter of principle and because of the evidential status given to formal statements by clause 86. It argues that the prosecutor should never be able to file inadmissible evidence in court.

**Comment**

612. The requirement that the prosecutor file formal statements in category 3 or 4 cases that are to be tried by a jury reflects the existing requirement in relation to indictable cases. They will remain key mechanisms in jury trial cases for setting out the evidence against the defendant and providing the defence with the basis of making a pre-trial application to dismiss the charge. In response to James Richardson’s concern, the requirement to serve and file formal statements is additional to the prosecutor’s ongoing disclosure obligations under the Criminal Disclosure Act 2008. It is therefore not correct that the formal statements will provide the first indication of the prosecutor’s case against the defendant.
In respect to the NZLS’s concern, the provisions of the Evidence Act 2006 mean that evidence will only ever be able to be used against the defendant when it is admissible in accordance with that Act. However, on reflection, advisers consider that issues of admissibility are best left to clause 86, which deals with the evidential status of formal statements. Problems might also arise from requiring admissibility issues to be considered by the Police at this relatively early stage in the proceeding against the defendant. Advisers therefore recommend that clause 82(1)(b) and clause 82(5) are deleted.

As drafted, clause 82 enables the Police to make greater use of video recording and to put in place a more efficient process for preparing formal statements. Currently, the Police prepare a written statement based on the initial interview with a witness and then must contact the witness, which is usually some time after the initial interview is given, to arrange for the written statement to be signed. The Bill removes the need for the statement to be edited or rewritten and for the witness to be contacted for a second time. Instead, the formal statement can be the recording of the original police interview accompanied, under clause 82(5), with an indication from the Police about what parts of the interview it intends to rely on. The witness will be required to make a declaration, at the time the interview was given, that the statement was true and that he or she knew it was to be used in court proceedings (see clause 82(1)(c)).

Given the likely time and cost savings, it is important that the Police’s ability to use the original evidential video interview as the formal statement is preserved. It is also desirable, for the assistance of the court and the defence, to provide a mechanism by which Police can indicate what parts of the interview it intends to rely on. Advisers therefore recommend that clause 82(5) be replaced with a provision that enables the Police to file a summary of the evidential interview, which will identify the material from the interview that the Police considers is sufficient to justify a trial.

Recommendation 33

Advisers recommend that clause 82 (requirements for formal statements) be amended to:

- delete clause 82(1)(b), as issues of admissibility are best left to clause 86, which deals with the evidential status of formal statements;
- replace clause 82(5) with a provision to the effect that, when filing a formal statement that is a recording of the evidential interview, the Police may also file a summary of the interview which identifies the material from the interview that the Police considers is sufficient to justify trial.

Clause 83 – False statement in formal written statement deemed perjury

Clause 83, which reflects existing law, provides that a formal statement is treated as evidence given on oath for the purpose of section 108 of the Crimes Act 1961 (which relates to perjury).

Comment

No submissions were made on clause 83 and no substantive changes are recommended.
Clause 84 – Persons who may give evidence under an assumed name

618. Clause 84, which reflects existing law, provides for certain witnesses to give formal statements anonymously and for undercover Police officers to give formal statements other than in their own names.

Comment

619. No submissions were made on clause 84 and no substantive changes are recommended.

Clause 85 – Prosecutor must file formal written statements

620. Clause 85 requires the prosecutor to file in court the formal statements that form the evidence for the prosecution that the prosecutor proposes to call at trial, or such part of that evidence as the prosecutor considers is sufficient to justify a trial (clause 85(1)(a)). Along with subclause (5), this links the evidence contained in the formal statements to the test in clause 147 for dismissing a charge. Formal statements (and oral evidence if an order is made under clause 92) will be considered by the court if an application for dismissal is made.

Submissions

621. The New Zealand Police Association (41) queries the likely timeframe within which formal statements must be filed, particularly given the prospect of charges being dismissed if formal statements are not filed (under clause 85(4)). It notes that a standard timeframe is unlikely to be met in relation to major crime investigations and argues that a filing timeframe should be set on a case-by-case basis.

622. The New Zealand Bar Association (39b) argues that clause 85(2) should prescribe the timeframe within which the prosecutor must file formal statements. It considers that the timeframe between first appearance and designation under clause 74 or transfer under clause 52(2) is unclear. It also suggests that clause 85(3) be amended to permit service on the defendant’s lawyer if a defendant is represented by counsel.

623. Sensible Sentencing Trust (Napier) (47) queries why clause 85(4) makes no reference to the process in the event that the offender “does a runner”.

Comment

624. It is not clear what the Sensible Sentencing Trust (Napier) has in mind, given that the filing of formal statements does not require the defendant’s presence in court.

625. In accordance with the general approach to timeframes in the Bill, it is intended that the timeframe for filing formal statements will be provided in Rules. The actual filing timeframe will therefore be a matter for the rules committee, in consultation with relevant agencies, including the Police and Crown Law Office. The Bill would allow different timeframes to apply to different types of proceedings, if the rules committee considered it was appropriate to do so.

626. Similarly, as discussed in paragraph 869, it is intended that Rules, rather than the primary legislation, will provide the requirements around service of documents that are filed in court. Advisers therefore do not recommend any changes to clause 85, beyond the drafting changes identified in Appendix 1 that are required as a result of other recommendations.
Clause 86 – Evidential status of formal statements
627. Clause 86 deals with the evidential status of formal statements filed under clause 85.

Comment
628. No submissions were made on clause 86 and no substantive changes are recommended.

Clause 87 – Trial callover memoranda to be filed in trial court
629. Clause 87 requires the prosecutor and defendant to file a trial callover memorandum in the court, unless the defendant is unrepresented.

Comment
630. No submissions were made on clause 87.
631. Clause 87 as introduced only requires the prosecutor to file a trial callover memorandum if the defendant is represented. On reflection, there is no reason to limit the prosecutor's responsibility to file a memorandum in this way. Unlike the preparation of a case management memorandum, the preparation of a trial callover memorandum does not rely upon discussions between the parties. The trial callover memorandum can be completed by the prosecutor independently of the defendant and the information in it will be required regardless of the defendant's representation arrangements.

Recommendation 34
Advisers recommend that clause 87 (trial callover memoranda to be filed in trial court) be amended to require the prosecutor to file a trial callover memorandum whether or not the defendant is represented.

Clause 88 – Information to be provided in trial callover memoranda
632. Clause 88 sets out the information that the prosecutor and defendant (if represented) must provide in trial callover memoranda.

Submissions
633. The New Zealand Bar Association (39b) queries clause 88(1)(c) and (2)(e) and considers that any information to be included within the memoranda should be prescribed within clause 88. It also considers that the requirement in clause 88(2)(d) to identify the number of witnesses offends the presumption of innocence and the right to silence.

Comment
634. The New Zealand Bar Association’s comment on clauses 88(1)(c) and (2)(e) has been superseded by the recommended approach to rule-making (see the discussion in paragraphs 1341 to 1365).
635. Advisers disagree that a requirement to identify the number of witnesses offends the presumption of innocence and the right to silence for the same reasons that the requirement to identify issues in dispute does not offend these rights. The purpose of this information is to enable a trial time to be scheduled that accurately reflects the trial’s likely length. The obligation is not onerous and there is no requirement to identify who the witnesses are.
636. No substantive changes are recommended to clause 88.

Clause 89 – Unrepresented defendants

637. Clause 89 requires the Registrar to convene a trial callover hearing if the defendant is unrepresented. At the hearing the defendant must inform the court of the matters set out in clause 88 unless the defendant changes his or her plea to guilty.

Submissions

638. James Richardson (39a) considers the requirements on unrepresented defendants in clause 89(2) to be “wholly unwarranted” and “intolerable”. He considers that there is a real risk of defendants being forced to make admissions that will be held against them or that compromise their position.

Comment

639. As with the discussion in relation to clause 54, advisers do not consider there to be anything problematic in requiring an unrepresented defendant to provide the judge with the information specified in clause 89. The information is required to ensure that the case is ready to proceed for trial and to make arrangements for the trial. It is required regardless of whether or not a defendant is represented. The alternative, of requiring a defendant to complete a trial callover memorandum, seems unduly onerous on an unrepresented defendant.

640. No substantive changes are recommended to clause 89.

Application for oral evidence order

Clause 90 – Application for oral evidence order

641. Clause 90, which largely reflects existing law, provides that either party may apply to a trial Judge for an oral evidence order, which will enable the oral examination of a potential witness.

Comment

642. No submissions were made on clause 90 and no substantive changes are recommended.

Clause 91 – Application for leave to question undercover police

643. Clause 91, which reflects existing law, makes special provision for dealing with applications to take oral evidence from an undercover police officer.

Comment

644. No submissions were made on clause 91 and no substantive changes are recommended.

Oral evidence orders

Clause 92 – Making oral evidence order

645. Clause 92 sets out the grounds for making an oral evidence order. The grounds differ depending on whether or not the witness has provided a formal statement.
Submissions

646. Anne Stevens (17) argues that an oral evidence order should be available on request. This would reduce the number of cases going to trial and give counsel and clients the ability to hear critical witnesses and so make informed decisions.

647. The New Zealand Bar Association (39b) queries whether an application must be made for an oral evidence order before a witness may give evidence as part of an evidence admissibility hearing. It notes that, if this is the case, it unnecessarily complicates the process. It also queries why an "interests of justice" test has been omitted from clause 92(2).

Comment

648. Advisers disagree that oral evidence orders should be available on request. Prompt disclosure (as is now occurring) and a systematic and effective case review process can achieve at least the same resolution rate, if not a higher rate, and will do so much more efficiently. As noted above, there has been only a small number of applications for oral evidence orders since the 2008 reforms came into force in 2009. This demonstrates that, to the extent that there are grounds for seeking a dismissal due to weaknesses in the prosecution’s case, written statements almost always suffice for that purpose and that most defence counsel do not view the hearing of oral evidence as necessary.

649. The Bill requires that an application for an oral evidence order must be made to enable a witness to give evidence at an admissibility hearing (or as part of an application to dismiss charges). This is not unnecessarily complicated. Most admissibility and dismissal applications will be able to be dealt with without hearing from a witness. The Bill’s approach ensures that oral evidence will only be taken from a witness once (currently, it is possible for a witness to be required to give evidence under an oral evidence order as part of the committal process and then again at a later date for the purposes of an admissibility application or an application to discharge the defendant).

650. However, in light of the New Zealand Bar Association’s submission, advisers agree that some changes are required to the grounds on which an oral evidence order can be made. In particular, clause 92(1) unnecessarily limits an oral evidence order to the witnesses for whom a formal statement has been filed. As the prosecution is not required to file all formal statements (see clause 85(1)), this restriction excludes the possibility of an oral evidence order being made in respect of all prosecution witnesses. There is no reason for the ground to be limited in this way.

651. Advisers also agree with the New Zealand Bar Association that the “interests of justice” test that is included in clause 92(1) should apply more widely than only to witnesses for whom formal applications have been filed. That is the approach currently taken in section 180 of the Summary Proceedings Act 1957. While there have been applications made under section 180 on the basis that an oral evidence order is in the interests of justice, that ground has been interpreted narrowly by the courts as to require some special or exceptional reason as to why oral evidence must be heard.37 A restrictive approach to that ground would continue.

Recommendation 35

Advisers recommend that clause 92 (making oral evidence order) be redrafted to provide the following grounds for making an oral evidence order:

- it is necessary to take the oral evidence of the witness in order to determine a pre-trial application on any matter;
- a witness has been requested to give evidence in the form of a formal statement and has refused or failed to do so; and the anticipated evidence is relevant to the charge against the defendant;
- it is otherwise in the interests of justice to take the oral evidence of the witness.

Clause 93 – Further consideration if application for oral evidence order for complainant in case of sexual nature

652. Clause 93 identifies further considerations before an oral evidence order can be made in certain sexual cases.

Submissions

653. James Richardson (39a) queries the requirement in subclause (2) that the judge consider, in addition to the matters listed in clauses 92(1) and (2), “the particular vulnerability of the complainant”. He considers that this “begs the question in a wholly unacceptable way”.

Comment

654. Clause 93, together with clauses 96, 97 and 98, replace Part 5A of the Summary Proceedings Act 1957, which deals with the committal process in cases of a sexual nature. Part 5A is currently not well integrated with Part 5 or with sections 103 to 105 of the Evidence Act 2006, which deal with the giving of evidence in an alternative way.

655. James Richardson’s objection is that the provisions appear to imply that an offence has been committed (otherwise a complainant would not be particularly vulnerable and there would be little impact on him or her of giving evidence). However, the need to protect complainants in sexual cases is well-established in New Zealand. It does not assume that an offence has always been committed but, rather, recognises the sensitive nature of the evidence likely to be given and the fact that complainants in these cases may therefore find giving evidence particularly difficult.

656. Advisers do not recommend any substantive changes to clause 93.

Clause 94 – Withdrawal of charge if oral evidence order made for examination of undercover police officer

657. Clause 94, which reflects existing law, allows the prosecutor to withdraw the charge if an oral evidence order is made in respect of an undercover police officer.
Comment
658. No submissions were made on clause 94 and no substantive changes are recommended.

Procedure for taking oral evidence (clauses 95 – 100)
659. Clauses 95 to 100 specify the procedure for taking oral evidence. This includes:

659.1. who may take oral evidence (clause 95);
659.2. special provisions dealing with cases when oral evidence is taken in a case of a sexual nature (clauses 96 to 98);
659.3. a requirement to record and authenticate oral evidence (clause 99);
659.4. enabling the court to continue if a witness fails to appear (clause 100).

660. These clauses represent a change in practice to the way in which evidence is currently given under an oral evidence order. In particular, they do not require that oral evidence always be given in a courtroom in front of a judicial officer. Instead, greater flexibility is provided to enable oral evidence to be taken by a Registrar or judicial officer outside of the courtroom (in a similar way to a civil deposition process).

Comment
661. No submissions were made on these clauses and no substantive changes are recommended.

Pre-trial orders as to admissibility of evidence: jury trial procedure
Clause 101 – Pre-trial order relating to admissibility of evidence: jury trial
662. Clause 101 provides for pre-trial orders in relation to the admissibility of evidence. It is substantially similar to section 344A of the Crimes Act 1961. The main difference is the requirement that an application in respect of evidence obtained under an order made, or warrant issued, by the High Court, must be made to the High Court.

Comment
663. No submissions were made on this clause and no substantive changes are recommended.

Trial before Judge alone may be ordered (clauses 102 – 104)
664. Clause 102 provides that a judge may order that a defendant be tried by a Judge without a jury if the trial is likely to exceed 20 sitting days and, in the circumstances of the case, the defendant’s right to trial by jury is outweighed by the likelihood that the potential jurors will not be able to perform their duties effectively. The clause does not apply to offences that are punishable by imprisonment for life or for 14 years’ imprisonment or more.
Clause 103 provides that a judge may, on an application by the prosecutor, order that the defendant be tried by a Judge without a jury if the case involves intimidation or potential intimidation of persons who may be selected as jurors.

Clause 104 provides the procedure to apply if an order is made under clause 102 or 103.

**Submissions**

The Coalition of Community Law Centres (22) argues that clause 102 is seriously flawed and should not be implemented in any form. It queries aspects of the test for ordering a Judge-alone trial under clause 102, including the “arbitrary” exclusion of offences with maximum penalties of 14 years or more and the reliance on the likely length of the trial for determining whether a jury will be able to perform its functions effectively. It considers that clause 102 represents a serious encroachment by the state on defendants’ rights.

James Richardson (39a) opposes clause 102 on the grounds that it constitutes a grave inroad into the right to trial by jury. He also queries the basis on which a judge will be able to say that a jury will not be able to perform their function effectively (as required by subclause (4)(b)). He considers that it is conceivable that judges will take this to mean cases where there is a perception that jurors are reluctant to convict.

The NZLS (40) acknowledges the potential need for Judge-alone trials for long and complex cases. However, it recommends that clause 102 be limited to serious fraud cases and to any cases where the defendant applies for a Judge-alone trial.

In respect of clause 103, the Law Society (40) argues for its deletion on the basis that there is no evidence to suggest that it is warranted in New Zealand and that there are other steps available to the court to address juror intimidation if it does occur. If clause 103 is retained, the Law Society recommends that it be redrafted because it currently applies to every jury trial, no matter how minor or serious, and it is ineffective, extremely limited in scope and does not address in an effective way the issues that are likely to occur.

**Comment**

Clauses 102 and 103 carry over sections 361D and 361E of the Crimes Act 1961, which were enacted in 2008. Arguments for and against the existence and scope of sections 361D and 361E were well-traversed at the time. The only substantive change made to these sections is that an order under the current section 361D can be made only upon application by a prosecutor, whereas an order under clause 102 may be made on the judge’s own motion. That change has been made because there is no reason why the determination as to whether the criteria for a Judge-alone trial are met should be dependent upon a prosecution application.

Advisers do not recommend any substantive changes to clauses 102 to 104.
Part 4 – Trial

SUBPART 1 – PROVISIONS APPLYING TO JUDGE-ALONE TRIALS

Clause 105 – Conduct of Judge-alone trial

673. Clause 105 sets out the procedure for the conduct of a Judge-alone trial. It replaces aspects of section 67 of the Summary Proceedings Act 1957 dealing with a defended hearing in a summary case. The clause is drafted so that it is consistent with clause 110 (which deals with jury trials); that is, so that aspects of procedure that are similar in both types of trial are described in similar ways.

Submissions

674. James Richardson (39a) considers it “extraordinary” that the defendant’s right to address the court on the facts is a matter for the court’s discretion. He predicts that this will lead to appeals and possible retrials.

675. The New Zealand Bar Association (39b) supports clause 105(1). However, it considers that the parties should be entitled to make submissions on the facts and to address the court on the evidence. It also considers that section 67(6) of the Summary Proceedings Act 1957, which provides that the parties may examine, cross-examine and re-examine witnesses, should be included in clause 105.

676. In light of the fact that clause 105 will apply to more serious offences than section 67 of the Summary Proceedings Act 1957, the NZLS (40) recommends that:

676.1. clause 105 should require the prosecution to indicate the nature of the evidence to be called and the matters put in dispute by the defence;

676.2. clause 105 should provide that parties have a right to make submissions on the facts and address the court on the evidence;

676.3. if it is considered necessary, the judicial officer should be given a residual discretion to limit or prohibit submissions, but only if doing so is consistent with a fair trial;

676.4. clause 105 should provide the order in which co-defendants are to make submissions, call evidence and cross-examine witnesses;

676.5. consideration should be given to dealing with these matters in regulations/rules or as an appendix to the Bill.

Comment

677. Advisers do not agree that clause 105 should provide parties with a right to address the court on the facts and evidence. The changed approach to offence categories means that clause 105 needs to be able to apply to offences of widely varying seriousness. Most offences that will be dealt with by a judge alone will be category 1 and 2 offences where, as now, it will be unnecessary for parties to address the court on the facts or evidence via opening and closing addresses. In more serious and complex category 3 cases, where such addresses might be
desirable, clause 105 enables the court to order, on a case-by-case basis, that they be provided.

678. There is no need to explicitly provide that the parties may examine, cross-examine and re-examine witnesses. The parties' ability to do so is provided by section 84 of the Evidence Act 2006. Its repetition in clause 105 would be unnecessarily duplicative.

679. Advisers do not agree with the NZLS that clause 105 should deal with the order of co-defendants' submissions and evidence. This will be case dependent and, as now, should be left to practice.

680. Advisers also do not agree that the matters contained in clause 105 are better covered in secondary legislation or in an appendix to the Bill. There is no real benefit in doing so, and it seems inappropriate given the fundamental nature of the conduct of the trial.

681. However, advisers consider that some amendment to clause 105 is desirable. In particular, it would be preferable to integrate the rule in section 98 of the Evidence Act 2006, which is referenced in clause 105(4), into the order of events specified in clause 105(2). Section 98 enables a party, with the court's leave, to give further evidence after the closure of its case. As clause 105 is currently drafted, it is not clear how clause 105(2) and section 98 inter-relate.

Recommendation 36
Advisers recommend that clause 105 (conduct of Judge-alone trial) be amended to better integrate the rule in section 98 of the Evidence Act 2006 (enabling a party, with the court's leave, to give further evidence after the closure of its case) with the order of evidence specified in clause 105(2).

Clause 106 – Inference from failure to notify adequately issues in dispute
682. Clause 106 is new. It enables a judge to draw an adverse inference from a defendant's failure to identify the issues in dispute before the trial.

Comment
683. The substantive discussion on this clause is provided earlier in the report, at paragraphs 131 to 154.

Clause 107 – Decision of court
684. Clause 107 provides for the decision of the court. It is substantially similar to section 68 of the Summary Proceedings Act 1957.

Submissions
685. Don Mathias (2) proposes that clause 107 be amended to require that reasons for the decision must always be provided. The NZLS (40) agrees as that requirement is imposed on appeal courts.

686. The Law Society (40) also proposes that the possibility of a verdict of "not guilty by reason of insanity" should be specifically provided for in clause 107(1).

687. The New Zealand Bar Association (39b) opposes this clause because the court's power to "find the defendant guilty or not guilty" under subclause (1) is more limited than the court's existing power under section 68 of the Summary Proceedings Act 1957 to "convict the defendant or dismiss the information, either
on the merits or without prejudice to its again being laid, or deal with the
defendant in any other manner authorised by law”.

688. The New Zealand Bar Association also opposes the removal of the right to a
judgment being delivered orally where a sentence of imprisonment is being
imposed, as currently provided for by section 68(2).

Comment

689. Advisers agree that clause 107 should require the court to give reasons for its
decision that a defendant is guilty or not guilty. As noted by the NZLS, the Bill
imposes that requirement on appeal courts (clause 340). Although trial courts
give reasons as a matter of course, there is no reason for the Bill to distinguish
between trial courts and appeal courts in this respect. In both contexts, providing
reasons is in the interests of justice.

690. Advisers do not consider that it is necessary to make special provision for a
verdict of “not guilty by reason of insanity”. That verdict is still a not guilty verdict.
The ability to find a defendant not guilty by reason of insanity is also clearly
covered by the Criminal Procedure (Mentally Impaired Persons) Act 2003.

691. In response to the New Zealand Bar Association’s comments, the court will still
have power to dismiss the charge, but this is provided separately under clause
147. The ability to “deal with the defendant in any other manner authorised by
law” is also provided in clause 120.

692. There is no need for clause 107 to require that a sentence be delivered orally
when a sentence of imprisonment is being imposed. Under clauses 128 and 129
of the Bill, the courts cannot sentence a defendant convicted of an offence in
categories 2 to 4 in his or her absence. As a consequence, a sentence or
imprisonment will always be imposed (orally) in the defendant’s presence.

693. However, on reflection, advisers consider that it is desirable for the Bill to be
explicit that, except for category 1 offences (under clause 126), the court cannot
sentence a defendant in his or her absence. If a defendant does not appear for a
sentencing hearing, the court must adjourn the hearing. It should also have the
ability to issue a warrant for the defendant’s arrest.

Recommendation 37

Advisers recommend that:

- clause 107 (decision of court) be amended to require the court to give
  reasons for its decision that a defendant is guilty or not guilty;
- the Bill be amended to:
  - explicitly state that a court cannot sentence a defendant convicted
    of an offence in category 2, 3 or 4 in his or her absence;
  - enable a court to issue a warrant for the arrest of a defendant who
    fails to appear at a sentencing hearing.

Retrials

694. Clauses 108 and 109 carry forward section 75 of the Summary Proceedings
Act 1957. Section 75 provides a mechanism for the trial court to correct errors in
cases it considers appropriate. The power is discretionary and there are no
statutory grounds or guidance that the court must follow.
695. Principally, section 75 enables the judge who heard a case to have the matter reheard in whole or part so that the error or deficiency can be quickly cured. This avoids the need for an appeal. In practice, the power has been exercised in a range of situations, for example:

695.1. the trial judge realised he/she made an error of law;

695.2. a new witness or other evidence relating to guilt became available shortly after the decision;

695.3. the defendant felt pressured to enter guilty plea or was not fully informed;

695.4. the defendant was wrongly denied an opportunity to give evidence;

695.5. new information relating to sentence became available;

695.6. the prosecution sought a rehearing after successful police diversion.

696. Section 75 currently applies to summary proceedings only, there being no corresponding power for the trial court to order a retrial in indictable cases. Clauses 108 and 109 draw a similar distinction: the clauses apply to Judge-alone cases only.

Clause 108 – Judicial officer may order retrial or rehearing as to sentence

697. Clause 108 provides that, following conviction in a Judge-alone case, a judicial officer may order a retrial of a charge, or a rehearing as to sentence. The ability to seek a retrial where the case has proceeded in the absence of the defendant (section 75(1A) of the Summary Proceedings Act 1957) is dealt with separately under clauses 130 and 131.

Submissions

698. James Richardson (39a) notes that clause 108 is silent as to the basis on which a retrial can be ordered and queries whether it is intended to give judges “unfettered discretion to order a retrial”. The New Zealand Bar Association (39b) submits that an inclusive list of factors relevant to the exercise of the court’s discretion could be included.

699. The New Zealand Bar Association (39b) also suggests that where the prosecutor consents to an application for retrial, a Registrar should be able to deal with the matter without reference to a judge.

700. The NZLS (40) recommends that clause 108 be deleted from the Bill. It considers that, as a matter of principle, retrials should not be available except by way of the appeal process and notes that clauses 131 and 185 cover some of the same ground.

Comment

Scope

701. As noted above, the current section 75 (of the Summary Proceedings Act) confers a general discretion on the trial court and can apply in a much wider range of situations than clauses 130-131 (conviction in the defendant’s absence) and clause 185 (erroneous sentence). It has performed a useful ‘error correction’ function in summary cases that should continue to be available.
Clause 108, like section 75, is silent as to the basis on which a retrial may be ordered. The case law shows that the courts can be expected to have regard to the overriding principle of fairness in dealing with applications for a retrial or rehearing. Beyond that, however, it is difficult to extract useful principles from the cases that would help judges decide when a retrial or rehearing was more suitable than an appeal and vice versa. The courts have tended to take a pragmatic case-by-case approach. Accordingly, advisers do not consider that a list of factors should be included in the clause.

Advisers have, however, reviewed the scope of clause 108 and consider that it should be tightened.

The retrial procedure was first used only for low-level summary cases heard by Justices of the Peace. It was extended by the Summary Proceedings Act 1957 to apply to any case heard summarily, including a summary hearing of any indictable offence listed in Schedule 1 of that Act. In practice, however, the prosecutor’s charging discretion in respect of these offences means that the less serious cases proceed down the summary path and the more serious cases are charged indictably.

However, clause 108 applies to any Judge-alone trial. This covers all category 1 and 2 offences and category 3 Judge-alone trials in the District Court and High Court. In summary, the effect of the Bill’s changes to the jury trial threshold and categorisation of offences is that retrials could be sought and ordered in many more serious cases tried by Judge-alone in both the District Court and High Court. That would expand the use of the procedure well beyond current practice. There is also a risk that it may become more routine for defence counsel to apply for a rehearing prior to exercising appeal rights.

The ‘error correction’ function of clause 108 should continue to be available in lower level cases. In more serious cases, the power to order a retrial should be reserved for the appeal courts. Defining the scope of clause 108 by seriousness of offence will achieve this purpose. Advisers therefore propose that clause 108 apply to category 1 and 2 offences only. This reflects the original focus of the retrial power on low level offending and best approximates the operation, in practice, of section 75 of the Summary Proceedings Act 1957. On 2009 figures, over 90% of applications for a rehearing related to offences that would be classed under the Bill as category 1 or 2 offences.

One other change is recommended to clause 108 to remedy an oversight. Clause 108 allows a rehearing as to sentence when a person is convicted. However, the existing law also applies to orders made against a defendant who is discharged without conviction under section 106 of the Sentencing Act 2002. Such orders, under section 106(3), can include orders as to costs, restitution of property and compensation. Advisers therefore propose that clause 108 be extended to allow a rehearing of a section 106(3) order made against a defendant who is discharged without conviction.

Finally, under the Children, Young Persons and their Families Act 1989, there are currently powers to order a rehearing in any case determined in the Youth Court. These powers are preserved in the Bill and no substantive change is proposed to them.
Registrars

709. While registrars currently have the ability to order a retrial if the prosecutor consents under section 75(1AA) of the Summary Proceedings Act 1957, this has not been carried through into the Bill. Advisers do not consider that it is appropriate for a court official to exercise a general discretion whether a judge should rehear a case under this clause. Such decisions are of a judicial rather than administrative character, analogous to an appeal court granting leave to appeal.

Relationship to clauses 130 and 131

710. The relationship between clause 108 and the retrial provisions relating to a conviction in the defendant’s absence in clauses 130 and 131 is not as clear as it could be in the Bill. The policy intent is that:

17.1 clauses 130 and 131 provide the basis on which a retrial can be ordered when the reason for applying for a retrial relates to the defendant’s absence;

17.2 clause 108 enables a retrial for category 1 and 2 offences when the reason for applying for a retrial is unrelated to the defendant’s absence;

17.3 retrials for category 3 and 4 offences that are unrelated to the defendant’s absence are only available via a full appeal.

711. Advisers consider that clause 108(5) should be amended to make it clear that a defendant may not apply for a retrial or rehearing under clause 108 if the reason for the application is that the original hearing proceeded in the defendant’s absence.

Recommendation 38

Advisers recommend that clause 108 (judicial officer may order retrial or rehearing as to sentence) be amended to:

- restrict its scope to category 1 and 2 offences;
- allow a rehearing to be sought in respect of an order made against a defendant under section 106(3) of the Sentencing Act (which allows discharge without conviction);
- ensure the powers to order a retrial or rehearing continue to be available in respect of any offence heard and determined in the Youth Court;
- clarify in subclause (5) that a defendant may not apply for a retrial or rehearing under clause 108 if the reason for the application is that the original hearing proceeded in the defendant’s absence.

Clause 109 – Procedure if retrial or rehearing ordered

712. Clause 109 sets out the procedure that applies if a retrial or rehearing is ordered. Any pre-trial decisions made in the proceeding continue to apply, and otherwise the court has the same powers and must follow the same procedure as if the retrial was the first trial. If it is impracticable for the judicial officer who presided at the first trial to determine the application, another judge may do so.
Submissions

713. The New Zealand Bar Association (39b) generally supports this clause.

Comment

714. When a retrial or rehearing is ordered, the conviction, sentence or order ceases to have effect (subclause (1)). But subclause (5) provides that if the defendant fails to appear at the retrial or rehearing, the court must direct that the original conviction, sentence or order be reinstated. Consistent with other provisions in the Bill about proceeding in the defendant’s absence, the underlying policy was to place the onus on the defendant to appear.

715. However, a mandatory rule would be unjust. There are straightforward cases where the judge and the prosecutor agree that an error has been made and the conviction or sentence should be set aside. In such cases, the defendant's absence, whether or not explicable, should not prevent the error being corrected. It would be wrong to maintain a plainly erroneous decision simply because the defendant was not in court. It is therefore recommended that an amendment be made to subclause (5) to revert to the existing law giving the court discretion to reinstate the original conviction, sentence or order.

716. There are a number of provisions in the Bill that provide the courts (whether a trial court or an appeal court) with the ability to order a retrial or a rehearing as to sentence (in addition to clause 108 see, for example, clauses 130, 131, 187, 237, 255 and 304). However, the powers available to the courts for dealing with a defendant when a rehearing is ordered are not always clear or comprehensive. For example, the Bill (and existing law) does not always provide the courts with an ability to require a defendant’s attendance at a rehearing ordered by a trial court. Clause 109(2) is an example. It provides for the defendant to be remanded in custody or bailed but, unlike clause 187, contains no power to bring a defendant before the court by summons or warrant to arrest.

717. It would be desirable for the Bill to cover the powers available to the courts in these situations in a more consistent and comprehensive way.

Recommendation 39

Advisers recommend that:

- clause 109 (procedure if retrial or rehearing ordered) be amended to provide, in subclause (5), that if the defendant does not appear at the retrial or rehearing, the court has discretion to restore the original conviction, sentence or order;
- the Bill be amended to clarify the powers available to the trial and appeal courts for dealing with a defendant when a retrial or rehearing as to sentence is ordered.

Subpart 2 – Provisions Applying to Jury Trials

Conduct of jury trial

Clause 110 – Conduct of jury trial

Section 367(1B) of the Crimes Act 1961 is not carried forward. It provides that nothing in an opening statement by the defendant for the purpose of identifying issues at the trial limits the defendant’s ability to raise other issues at the trial. A provision such as this would be inconsistent with the new provisions in the Bill about identifying issues in dispute.

Submissions

For the same reasons that he objects to the proposed requirement on the defence to identify the issues in dispute, James Richardson (39a) considers that clause 110(2), which requires the defendant to give an opening statement, is “wholly indefensible in an adversarial system”. He also objects to clause 110(3), which specifies the order of evidence, on the basis that it provides the court with the ability to direct that the defendant give his or her evidence before the prosecution. Finally, he queries the use of the word “may” in clause 110(3)(a) on the basis that the prosecution must always lay the evidence in support of the charge before the court.

The NZLS (40) recommends that clause 110 should deal with the order of co-defendants’ submissions and evidence. It also recommends that clause 110(4) should be amended to apply to the prosecution as well as the defence.

Comment

The response to James Richardson’s broader concerns about the issues in dispute policy is set out in Section II of this Report.

The requirement for the defence to provide an opening statement identifying the issues in dispute is a natural consequence of the pre-trial identification of issues in dispute. An important aspect of that policy is ensuring that the fact-finder has some clarity about the issues that are contested between the prosecution and defence. It would be anomalous for all actors in the trial, other than the jury, to know what the issues in dispute are. However, independently of its relationship with pre-trial arrangements, opening statements have the potential to provide valuable assistance to the fact-finder. For example, research suggests that opening statements assist the jury by enhancing the jury’s ability to comprehend, assimilate and evaluate the evidence, and by giving the jurors a contextual framework.  

Advisers do not consider that there is any realistic prospect that a court would make directions, under clause 110(3), which led to a defendant giving evidence before the prosecution gave its evidence or to the prosecution providing no evidence at all. In respect of James Richardson’s latter point (the use of the word “may” in clause 110(3)), the relevant provisions in the Summary Proceedings Act 1957 and the Crimes Act 1961 take a similar approach. Some discretion in this respect needs to be provided to enable a prosecutor to elect to call no evidence on the basis that there is no case to answer.

As with clause 105, it is preferable for the order of co-defendants’ submissions and evidence to be dealt with as a matter of practice. The NZLS’s recommendation in relation to clause 110(4) is covered by the reference to section 98 of the Evidence Act 2006 in clause 110(5). As with clause 105, advisers recommend amending clause 110 to better integrate section 98 with the order of events in clause 110.

38 New Zealand Law Commission Juries in Criminal Trials (NZLC R69, 2001) para 211.
Recommendation 40

Advisers recommend that clause 110 (conduct of jury trial) be amended to better integrate the rule in section 98 of the Evidence Act 2006 with the order of evidence specified in clause 110(3).

Clause 111 – Procedure if charge alleges previous conviction

726. Clause 111 relates to the procedure that must be followed if a charge alleges that the defendant has relevant previous convictions.

Comment

727. There were no submissions on this clause, except for the drafting matter addressed in Appendix 2.

Provisions relating to identification of issues in dispute (clauses 112 – 114)

728. Clauses 112 to 114 deal with how any failure by the defendant to identify adequately issues in dispute before the trial may be dealt with in a jury trial.

Comment

729. The substantive discussion on these clauses is provided above from paragraph 86 to 130.

Discretion to keep jury together

Clause 115 – Discretion to keep jury together

730. Clause 115 provides that a trial must proceed continuously from the time when the defendant is given in charge to a jury, subject to the power of the court to adjourn it. If the court adjourns the trial it may direct that during the adjournment the jury must be kept together. It is substantially similar to section 373 of the Crimes Act 1961.

Comment

731. There were no submissions and no substantive changes are recommended to this clause.

Part of murder charge proved

Clause 116 – Part of murder charge proved

732. Clause 116 provides that on a charge of murder, the jury may, in certain circumstances, find the defendant guilty of an attempt to murder or of manslaughter. It is substantially similar to section 339(2) of the Crimes Act 1961.

Submissions

733. The NZLS (40) submits that clause 116 should be deleted. It argues that this clause is based upon an old rule that an indictment should not include other counts when it includes a count of murder – a rule that has “long been abrogated”. It submits that it would make better sense not to have this rule in light of the court’s general power to convict on any offence included in the indictment that is proved. The New Zealand Bar Association (39b) made a drafting suggestion, which is addressed in Appendix 2.
Comment
734. The Law Society’s contention that this provision has been “abrogated” is unclear. This provision is useful, as it concentrates the jury’s attention on making a choice between murder and manslaughter without being distracted by the need or encouraged to consider lesser charges, thereby ensuring a ‘clean’ verdict. No substantive changes are recommended to this clause.

SUBPART 3 – PROVISIONS APPLYING TO BOTH JUDGE-ALONE AND JURY TRIALS

Clause 117 – Alibi

Comment
736. There were no submissions and no substantive changes are recommended to this clause.

Clause 118 – Court may dismiss charge in certain cases
737. Clause 118 applies if leave is given to the defendant to question an undercover Police officer. This clause allows the prosecutor to inform the court that the charge will not be proceeded with. The court must dismiss the charge. It replaces section 369A of the Crimes Act 1961.

Comment
738. There were no submissions on this clause except the drafting addressed in Appendix 2.

Witnesses

Clause 119 – Adjourning trial for witness
739. Clause 119 provides for the course the court may take if:

739.1. the defendant is taken by surprise by the production of a prosecution witness without sufficient notice; or

739.2. the court’s opinion is that a witness not called for the prosecution should be called.

Submissions
740. The NZLS (40) suggests that clause 119 should also apply when a prosecution case is prejudiced by the production of a defence witness without sufficient notice.

741. The Criminal Bar Association (23) submits that clause 119 ought to be amended to allow the court, as an alternative to delaying the trial, to hold that the evidence is inadmissible.

Comment
742. Advisers do not support a broad power for the court to adjourn in all circumstances where the prosecution has been taken by surprise. It is difficult to
see how such a provision would operate in the absence of a requirement in the Bill for the defence to identify all witnesses. However, there should be a power to adjourn when the defence has not complied with its current obligations to disclose alibi or expert evidence under the Criminal Disclosure Act 2008.

743. This arises from time to time and makes it difficult for the prosecution to adequately respond to defence evidence. Failure of the defence to disclose at all is covered by section 34 of the Criminal Disclosure Act 2008, which allows an adjournment. However, section 34 does not apply when the defence discloses the information but discloses it outside the time required. Advisers therefore recommend that section 34(1)(b) of the Criminal Disclosure Act 2008 be amended so that section 34 also applies when the information is disclosed but outside the time required.

744. Advisers do not support the proposal from Criminal Bar Association of New Zealand. The court is already empowered to exclude evidence in some circumstances under section 34 of Criminal Disclosure Act 2008 and it would cut across the fundamental principle of the Evidence Act 2006 that relevant evidence is admissible.

745. Advisers do not recommend any substantive changes to clause 119.

<table>
<thead>
<tr>
<th>Recommendation 41</th>
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<tbody>
<tr>
<td>Advisers recommend that section 34(1)(b) of the Criminal Disclosure Act 2008 be amended so that section 34 (which allows for an adjournment when the defence has not disclosed required information) also applies when the information was disclosed but outside the time required by section 22 (for alibi) or section 23 (for expert evidence).</td>
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39 By section 22 (for alibi) or section 23 (for expert evidence).
40 Section 7 of the Evidence Act 2006.
Part 5 – General provisions

SUBPART 1 – CONDUCT OF PROCEEDING

Defendants who plead guilty or are found guilty

Clause 120 – Procedure after defendant pleads or is found guilty

746. Clause 120 sets out the procedure to be followed if a defendant pleads guilty or is found guilty. It enables the District Court to enter a conviction for any offence, but requires it to transfer a proceeding to the High Court if the sentences of life imprisonment or preventive detention might be imposed, or if the offence is a category 4 offence.

747. The three circumstances specified in clause 120(2) represent the only restrictions on the sentencing jurisdiction of a District Court. Under the Bill, generally a District Court that has jurisdiction to try a proceeding has jurisdiction to sentence the defendant according to the maximum penalty provided for the offence.

Submissions

748. The New Zealand Bar Association (39b) expresses concern that the reference in clause 120 to the court being able to deal with a defendant “immediately” might enable the court to bypass requirements under the Sentencing Act 2002.

Comment

749. Advisers do not consider that any changes to clause 120 are required in light of the New Zealand Bar Association’s comments. The Sentencing Act 2002 applies to any sentencing exercise, regardless of the context in which the sentencing occurs.

750. No substantive changes are recommended to clause 120.

Clause 121 – Plea of guilty may be withdrawn by leave of court

751. Clause 121 provides for the circumstances in which a plea of guilty may be withdrawn. It carries across section 42 of the Summary Proceedings Act 1957 and adds a new subclause (2) which specifies when the court must allow a defendant to withdraw a guilty plea that has been entered on the basis of a sentence indication.

Comment

752. There were no submissions and no substantive changes are recommended to this clause.

Clause 122 – Effect of sentence indication

753. Clause 122 deals with the effect of a sentence indication if a defendant pleads guilty to the offence during the period that the sentence indication has effect. The sentence indication is binding on the judicial officer that gave it, unless new information becomes available to the court that materially affects the basis on which it was given. The sentence indication is not binding on a judicial officer other than the one who gave it.
Submissions

754. The NZLS (40) submits that it would be desirable for the safeguard of withdrawing a guilty plea (under clause 121) to be available in cases where a different sentencing judge departs from the sentence indication given earlier by another judge. This submission also proposes a minor drafting change to clause 122(2)(b), which is addressed in Appendix 2.

Comment

755. On the point of substance, nothing more is required in this regard than already provided by clause 121(2)(b). That clause requires the judicial officer to give the defendant the opportunity to withdraw a plea of guilty if the sentencing judicial officer proposes to depart from the sentence indication given by another judicial officer. This appears to deal directly with the concern raised in this submission.

Representatives of corporations

Clause 123 – Representatives of corporation

756. Clause 123 provides requirements for the appointment of a representative of a corporation for the purposes of the Bill.

Comment

757. This clause is discussed above, under clause 11 (who may appear for the defendant, paragraphs 303 to 316).

Presence of defendant at hearings (clauses 124 – 125)

758. Clauses 124 and 125 set out when a defendant is entitled to be present, or must be present, at a hearing.

Comment

759. The substantive discussion on these provisions is provided above from paragraph 156 to 191.

Powers of court when defendant does not appear (clauses 126 – 129)

760. Clauses 126 to 129 give courts authority to proceed in the absence of the defendant in particular circumstances and, in some cases, require courts to proceed in the absence of the defendant.

Comment

761. The substantive discussion on these provisions is provided above from paragraph 156 to 191.

Retrial of defendant found guilty in his or her absence (clauses 130 – 132)

762. Clauses 130 to 132 set out the circumstances in which a person who has been found guilty in his or her absence may be granted a retrial.

Comment

763. The substantive discussion on these provisions is provided above from paragraph 156 to 191.
Powers of court when prosecutor does not appear

Clause 133 – Power of court when prosecutor does not appear

764. Clause 133 corresponds to section 62 of the Summary Proceedings Act 1957 and sets out what must happen if the defendant attends at a hearing, but the prosecutor fails to attend.

Submissions

765. The NZLS (40) recommends that clause 133(2) should be amended to provide that the court must adjourn the hearing when the prosecutor has a reasonable excuse for his or her non-appearance and that, in all other cases, the court must dismiss the charge.

Comment

766. The NZLS’s recommendation could be seen as complementary to the Bill’s provisions relating to the absence of the defendant. However, there is a wider public interest in the prosecution of crime that should not be prejudiced by the actions of an individual prosecutor. Accordingly, advisers do not recommend any amendment.

Powers of court when neither party appears

Clause 134 – Powers of court when neither party appears

767. Clause 134 corresponds to section 63 of the Summary Proceedings Act 1957 and sets out what must happen if neither party appears at a hearing.

Comment

768. There were no submissions on clause 134 and no substantive changes are recommended.

Amendment of charge

769. Clauses 135 to 138 provide for the amendment of charges before and during trial. The clauses modernise and integrate relevant provisions of the Summary Proceedings Act 1957 and the Crimes Act 1961, so that there is a single set of provisions applicable to all offence categories.

Submissions

770. James Richardson (39a) considers that these provisions should come earlier in the Bill (rather than after provisions dealing with retrials) to more closely reflect the ordering of events at trial.

Comment

771. This is a drafting matter, which is addressed in Appendix 2.

Clause 135 – Amendment of charge

772. Clause 135 confers a general power on the court to amend a charge at any stage in a proceeding before the delivery of the verdict or decision of the court. It is subject to clause 138.
Comment

773. There were no submissions on clause 135, except the drafting matter noted in Appendix 2. Advisers consider that it would be useful to include a provision to clarify that a charge may be amended on the application of either party or on the court’s own motion. For consistency, a similar change should be made to clause 138. Otherwise no substantive changes are recommended.

Recommendation 42

Advisers recommend that clause 135 (amendment of change) and clause 138 (procedure if charge amended during trial) be amended to provide that a charge may be amended on the application of either party or on the court’s own motion.

Clauses 136 and 137 (Procedure if charge is amended before trial)

774. Clause 136 deals with the procedure if a charge is amended before the trial. Clause 137 deals with the situation where a charge is amended before the trial and an order under clause 70 or 72 determining the level of trial court has already been made.

Comment

775. There were no submissions on clauses 136 and 137. However, substantive amendments to these clauses are recommended in respect of two issues.

776. First, it is recommended that clause 136 is amended to provide that the case management process (clauses 52 to 57) does not apply when a defendant pleads not guilty to an amended charge, unless the court orders otherwise. Under the Bill as drafted, a second round of case management would be required upon the entry of a not guilty plea to the amended charge. This will be unnecessary in most cases.

777. Secondly, it is recommended that greater flexibility is provided in clause 137 to enable a proceeding to be considered for transfer to the High Court before the trial but after an order has been made for a District Court trial under sections 70 or 72. Currently, clause 137(2) provides that, if one category 3 offence is amended for another category 3 offence, an order under clause 70 or 72 that the trial be held in the District Court stands. However, in some cases, the amendment will substantially change the nature and seriousness of the case against the defendant to the point where a High Court trial might be more appropriate. In those cases, it is desirable that transfer to the High Court can be considered. It is recommended that, in those cases, the District Court judge be able to refer the offence for consideration of the level of trial court under clause 69 and the parties be able to apply for a transfer of the offence under clause 70.
Recommendation 43
Advisers recommend that:

- clause 136 (procedure if charge is amended before trial) be amended to provide that the case management process (clauses 52 to 57) does not apply when a defendant pleads not guilty to an amended charge, unless the court orders otherwise;
- clause 137 (procedure if charge amended after order made under section 70 or 72), which relates to a decision about District Court or High Court trial for category 3 offence, be amended to provide greater flexibility to enable a proceeding to be considered for transfer to the High Court before the trial but after an order has been made for a District Court trial under sections 70 or 72.

Clause 138 – Procedure if charge amended during trial
778. Clause 138 relates to amendments during the trial. It restricts the circumstances in which a charge may be amended during the trial to substitute one offence for another, and provides that the court may adjourn the trial if the effect of any amendment to a charge made during the trial misleads or prejudices the defendant in his or her defence.

Submissions
779. The NZLS (40) proposes that clause 138 should be amended to make it clear that in the circumstances identified, the Court must amend the charges. This would make the clause consistent with section 335 of the Crimes Act 1961.

Comment
780. Section 335 of the Crimes Act provides that the court may amend the charge in the circumstances provided in clause 138(1)(a) and (b) and that the court must amend the charge if of the opinion that the amendment would not mislead or prejudice the defendant in his or her defence (clause 138(1)(c)). There is no reason why section 335 should not be repeated in the Bill in its current form (that it is not appears to be an oversight).

Recommendation 44
Advisers recommend that clause 138 (procedure if charge amended during trial) be amended to provide that the court must amend a charge to which clause 138(1)(a) and (b) applies if of the opinion that the amendment will not mislead or prejudice the defendant in his or her defence.

Proceedings conducted together

Clause 139 – Proceedings against parties to offences, accessories and receivers
781. Clause 139 applies to persons charged as parties or accessories, or with receiving, and provides that they may be proceeded against and convicted for that offence whether or not the principal offender or any other party has been proceeded against.
Submissions

782. The NZLS (40) recommends that the words “stolen” should be inserted before “dishonestly obtained” in each case where they appear, to ensure that clause 139 applies to receivers. It also recommends that the new section 243A of the Crimes Act 1961 should be subsumed into clause 139.

Comment

783. Amending clause 139 to refer to property that is “stolen” or “dishonestly obtained” is consistent with the wording of the receiving offence provided in section 246 of the Crimes Act 1961. Advisers therefore agree with the Law Society’s suggestion in this regard.

784. New section 243A of the Crimes Act 1961 replicates section 344AA (indictment of money launderers) of the Crimes Act. Advisers have previously considered subsuming section 344AA into clause 139 but opted not to do so. Separate rules apply to the money laundering context, and it is clearer for those rules to be presented separately. Its placement as new section 243A means that it will appear directly after the money laundering offence in section 243 of the Crimes Act.

785. However, advisers recommend that the Bill be amended to carry forward section 343 of the Crimes Act 1961. Section 343 essentially provides that a defendant can be convicted as a party even if he or she is not charged as a party. If section 343 is not carried forward, its removal might give rise to some doubt about whether this remains the case. It is essential that a person can be convicted as a party even though he or she have not been charged on that basis. This is because it will not always be apparent at the time of charge, or even at the time of conviction, whether a person is guilty as a principal or a party.

Recommendation 45

Advisers recommend that:

- clause 139 (proceedings against parties to offences, accessories and receivers) be amended to insert the words “stolen or” before “dishonestly obtained” in each case where they appear;
- the Bill be amended to carry forward section 343 of the Crimes Act 1961 (which provides that a defendant may be convicted as a party even if not charged as a party).

Clauses 140 and 141 – Trial of different charges together

786. Clause 140 allows the prosecution to notify the court that it proposes to try two or more charges together, or to try the charges against more than one defendant together. The charges must be tried in accordance with the prosecutor’s notice unless the court, in the interests of justice, orders otherwise.

787. Clause 141 sets out the procedure if two or more charges (or one or more defendants) are to be tried together. The general rule is that the procedure that applies to the most serious charge applies to all of the charges. That is, if one charge is to be tried by a jury, all charges must be tried by a jury; if one charge is to be tried in the High Court, all charges must be tried in the High Court. In the case of co-defendants, the court may order otherwise in the interests of justice.
Comment

788. There were no submissions on clauses 140 and 141. However, advisers recommend some changes to the Bill to clarify the pre-trial procedures that apply when a new charge is joined to one or more existing charges, following the prosecutor giving notice under clause 140. This includes that:

788.1. if the defendant pleads not guilty to a charge that is joined to an existing charge for which case review is underway or has been completed, there is no requirement to undertake case review on the new charge unless the court orders otherwise;

788.2. clauses 69 and 70 (if the offence is a protocol offence) and clause 72 (if the offence is not a protocol offence) apply when a new charge that is a category 3 offence (and category 2, if the recommendation to extend the transfer process to these offences is accepted) is or will be joined to an existing charge that is in the District Court. (It will not be necessary to reconsider the level of trial court when a new charge is joined with a charge that is in the High Court because, regardless of the new charge, the existing charge will still justify a High Court trial);

788.3. there is no requirement to file formal statements for a new charge that is joined to an existing charge after the time for filing formal statements has passed;

788.4. there is no requirement to prepare a trial callover memorandum for a new charge that is joined to an existing charge at or after trial callover (that is, after the time for filing a trial callover memorandum for the existing charge(s) has passed);

788.5. other pre-trial processes should continue to apply to the new, joined charge as a matter of course – for example, the defendant should be required to identify the issues in dispute for the new charge and should also have an opportunity to plead, elect and obtain a sentence indication for the new charge.

Recommendation 46

Advisers recommend that the Bill be amended to clarify the approach that applies when a new charge is joined to one or more existing charges, following the prosecutor giving notice under clause 140 that he or she proposes to try two or more charges together or to try charges against more than one defendant.

Clause 142 – Conviction where alternative allegations proved

789. Clause 142 provides that if a charge includes alternative allegations, the court can only convict the defendant of one of the alternatives.

Submissions

790. The NZLS (40) recommends that clause 142 should be limited to Judge-alone trials, or that it should be substituted with a provision that charges should not contain alternative allegations and that alternative allegations should be made in alternative charges.
Comment
791. The extension of clause 142 to jury trials is a drafting error, which is addressed in Appendix 2.

Clauses 143–145 – Further provisions relating to charges
792. Clauses 143 to 145 are further provisions on charges.

Comment
793. There were no submissions on these clauses and no substantive changes are recommended.

Clause 146 – Withdrawal of charge
794. Clause 146 provides that the prosecutor may, with the leave of the court, withdraw a charge before the trial. The withdrawal of the charge is not a bar to any other proceeding in the same matter.

Submissions
795. The NZLS (40) recommends that clause 146 should be made subject to clause 196 (power of Solicitor-General or Crown prosecutor to withdraw charge). More substantively, it recommends that there should be a restriction on the ability to withdraw a charge when dismissal of the charge is already under consideration.

Comment
796. Advisers do not recommend any change to clause 146 as a result of the NZLS’s submission. A cross-reference to clause 146(1) is already provided in clause 196, and it is not necessary for there to be a cross-reference in the other direction. On the substantive issue, restricting the prosecutor’s ability to withdraw a charge when the charge’s dismissal is under consideration is contrary to the policy that all dismissals under clause 147 amount to acquittals. It is intended that if a judge, when considering an application to dismiss, considers that the prosecution ought to be able to lay a charge again, he or she will be able to invite the prosecution to withdraw the charge. That would not be possible if an application to dismiss precluded a withdrawal.

Clause 147 – Dismissal of charge
797. Clause 147 provides for the circumstances in which a court may dismiss a charge. It replaces section 347 of the Crimes Act 1961, but applies to all categories of offence and differs from that section in some other respects as well.

Submissions
798. The NZLS (40) submits that the Bill be amended to give the court the power to enter a discharge after verdict. The NZLS also submit that the Bill should clarify the status of discharges: whether they can be revoked prior to trial and whether they amount to prior acquittals for the purposes of the double jeopardy rules.

799. The Crown Solicitors Network (24) submits an amendment is required to focus the pre-trial discretion to discharge on whether or not the prosecution will be in a position to present admissible evidence at trial, not on whether there is admissible evidence contained in the formal written statements. This is a technical amendment, which is addressed in Appendix 2.
Comment

800. The current ability to discharge after verdict is an anomaly that has been removed in the Bill. If the judge believes that there is not sufficient evidence to convict the defendant, he or she should not allow the case to be put to the jury. If subsequent evidence arises that calls the verdict into question, the judge should grant a rehearing or the matter should be dealt with on appeal. If for some other reason the judge wishes to discharge the defendant, he or she should use section 106 of the Sentencing Act 2002.

801. Advisers do not think any amendment is required to clarify the status of discharges. As the intention is not to change the case law, there is no need for legislative change in this area.

802. Advisers agree with the submission of the Crown Solicitors Network and this technical amendment is addressed in Appendix 2.

Clause 148 – Prosecutor must notify court if defendant completes programme of diversion

803. Clause 148 requires the prosecutor to ensure that the court is notified if a defendant has successfully completed a Police programme of diversion. If notification is given, the court must dismiss the charge. This differs from the current position under section 36 of the Summary Proceedings Act 1957 in that, under that section, the court is not required to dismiss the charge if a programme of diversion is completed, but is empowered to grant leave for the information to be withdrawn (and the Registrar may grant that leave). Also, the withdrawal of the information under section 36 is not a bar to further proceedings in the same matter. Because under clause 148 the charge must be dismissed, this will be deemed to be an acquittal.

Submissions

804. The NZLS (40) submits that the Bill be amended to provide that the power to discharge on completion of diversion should remain a discretion.

Comment

805. The approach taken in the Bill reflects the established approach to diversion and advisers do not recommend amendment.

806. However, the current provision is limited to completion of Police diversion. It would be desirable for clause 148 to be more broadly drafted so that it can apply to other public prosecutors in the event that they implement a similar diversion programme.

Recommendation 47

Advisers recommended that clause 148 (prosecutor must notify court if defendant completes programme of diversion) be amended so that it applies to a diversion programme conducted in relation to a public prosecution.

Attempts

Clauses 149 and 150 – Attempts

807. Clauses 149 and 150 carry over existing law from the Crimes Act 1961 and deal with conviction of a defendant for an attempt offence.
Submissions

808. The NZLS (40) considers that clause 150 should be amended to make clear that the power to amend a charge may only be exercised where the defendant is not prejudiced or misled in his or her defence.

Comment

809. Advisers agree.

Recommendation 48

Advisers recommend that clause 150 (offence proved when attempt is charged) be amended to make clear that the power to amend a charge may only be exercised when the defendant is not prejudiced or misled in his or her defence.

Retrial of previously acquitted person

810. Clauses 151 to 156 provide for retrials in two circumstances:

810.1. where a person was acquitted at the first trial but subsequently convicted of an offence against the administration of justice, and the High Court is satisfied that it is more likely than not that the administration of justice offence was a significant factor in the acquittal:

810.2. there is a discovery of new and compelling evidence.

811. These clauses are substantially the same as sections 378A to 378F of the Crimes Act 1961 except in the following respects:

811.1. in clauses 151 and 152 the definition of acquittal is redrafted to reflect changes made by the Bill in other respects (in particular see clauses 118 and 147).

811.2. the definition of retrial in section 378A of the Crimes Act 1961 is not necessary due to changes in terminology made by the Bill.

811.3. in clauses 151(5) and 154(6) there are references to the date of 26 June 2008. This is the date on which sections 378A to 378F of the Crimes Act 1961 came into force. Sections 378A and 378D expressly state that they do not apply if the acquitted person was acquitted before that date. The references in clauses 151(5) and 154(6) preserve that position.

811.4. there is no equivalent in clause 155 of section 378E(2) and (3) of the Crimes Act 1961 (exclusion of persons from the hearing, prohibition of reports of proceedings, etc). These matters would now be governed by subpart 3 of Part 5 of the Bill.

Submissions

812. Four submitters, Coalition of Community Centres (22), Human Rights Commission (28), James Richardson (39a) and the NZLS (40), comment on clauses 151 to 156. Most submitters commenting on these provisions note they are restating positions they had previously taken in relation to the Criminal Procedure Bill 2004, which originally implemented them. All submitters (22, 28, 39, 40) oppose the exception in clause 154 (discovery of new and compelling evidence) as they do not consider it a justifiable limitation on the right in section
26(2) of the NZBORA, that no one who is finally acquitted or convicted of, or
pardoned for an offence should be tried or punished for it again. Two submitters
(39, 40) oppose clause 151 (tainted acquittal) for the same reason, while two (22,
38) consider this exception is justifiable.

813. Submitters further note that Section 7 Reports prepared for both the Criminal
Procedure Bill and the current Bill conclude that the tainted acquittal exception is
a justified limitation but the new and compelling evidence exception is not.

Comment

814. The retrial provisions in clauses 151 to 156 are existing law, which was
considered by Government as recently as 2008 when the Criminal Procedure Bill
was enacted by Parliament. Consequently no change is recommended to this
clause, including in response to a submission on a technical matter addressed in
Appendix 2.

Transfer of proceedings to court at different place

Clause 157 - Transfer of proceedings to court at different place or different sitting

815. Clause 157 allows a District Court or High Court to transfer proceedings to a
court of the same jurisdiction at a different place or to a different sitting. A
transfer may be ordered on the court's own motion, or following an application by
the prosecutor or the defendant. In addition, if the parties consent, a Registrar
may also make the order.

816. The general test for transfer is that the court is satisfied that the proceedings
could be “more conveniently or fairly heard” at that other place. The test has its
origins in section 4A of the District Courts Act 1947 and section 34 of the
Summary Proceedings Act 1957, which both describe a broad discretion to
transfer proceedings to another place.

817. In the case of a jury trial, subclause (3) provides that a different test applies from
the point at which the proceeding is transferred to the trial court. The statutory
test is whether it is “expedient for the ends of justice” that the defendant be tried
at the other place or sitting. In such a case, only a judge can order a change of
venue. These rules have been carried through from section 322 of the Crimes

Comment

818. There were no submissions on this clause. However, advisers consider that the
clause can be simplified.

819. It had been thought that the Crimes Act provision imposed a stricter test for
change of venue in jury trial cases. However, review of the case law shows that
despite the current differences in statutory language between the summary and
indictable jurisdictions, the courts apply similar principles in all cases. The key
points are as follows.

819.1. In both jurisdictions, the presumption is that justice should be done in the
community in which the alleged offence has occurred. However, in the

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41 The Criminal Procedure Bill was split prior to enactment. The provisions in sections 378A to 378F
of the Crimes Act 1961 relating to retrial were introduced by the Crimes Amendment Act (No 2) 2008.
circumstances of the particular case, the interests of justice may dictate a change of venue.

819.2. In the case of a jury trial, the presumption is underlined by section 5(5) of the Juries Act 1981, which refers to the principle that so far as practicable a jury should be drawn from the community in which the alleged offence occurred.

819.3. The strongest reason for changing venue is prejudice to a fair trial.

819.4. Other considerations can also come into play. They can include the convenience of the defendant (allied to the presumption of innocence). They can also include the interests of victims, complainants and their families.

819.5. However, the convenience of judges and counsel are only a consideration in exceptional cases.

819.6. The overall assessment must be of the ends, or interests, of justice.

820. In light of the above, advisers consider it is unnecessary to retain a separate change of venue test for jury trials. The cases show that an "interests of justice" test is broad enough to deal with all relevant considerations while preserving the current presumption in favour of trying the case in the local community. Advisers therefore recommend that the statutory test for change of venue in all cases should be that it is in the interests of justice to transfer the proceedings to another place.

821. It is appropriate to retain a limit on the classes of case that may be transferred by order of a Registrar. Even though the parties might agree to a change of venue, there is a broader public interest at stake. In the more serious cases, it is preferable that a judge, rather than a Registrar, decide whether the interests of justice dictate a change of venue. In line with the proposal (see clause 108 below) that registrars have powers to order a retrial in respect of category 1 and 2 offences, advisers recommend that a Registrar’s power to order a change of venue with the consent of the parties apply to the same categories of offence.

Recommendation 49

Advisers recommend that clause 157 (transfer of proceedings to court at different place or different sitting) be amended to provide that:

- in any case, the court can order that proceedings be transferred if satisfied that it is in the interests of justice that the proceedings be heard at that other place or sitting;
- in the case of proceedings for a category 1 or category 2 offence, the Registrar of the court may make an order, if the parties consent.

Clause 158 – Attendance of witness at substitute court

822. Clause 158 corresponds to section 324 of the Crimes Act 1961. It provides that if a proceeding is transferred, the Registrar of the transferring court must ensure that any witness who has been summoned to attend the proceeding is given notice of the transfer.
Comment
823. There were no submissions on this clause and no substantive changes are recommended.

Special provisions for taking evidence

Clauses 159 to 162 (provisions for taking evidence)

824. Clauses 159 to 162 carry forward sections 31, 32, 164, and 166 of the Summary Proceedings Act 1957, that relate to taking the evidence of witnesses who are at a distance, about to leave the country, or dangerously ill.

Submissions

825. The New Zealand Bar Association (39) submits that clause 159(1) and (2) should be re-ordered to better reflect the burden of proof; clause 161 should be silent about the right of the parties to be present; and clause 162 implies that there is a notice-giving regime under clause 161 but the Bill is silent about this.

826. The NZLS (40) submit, in a general sense, that sections 159-162 are inconsistent with similar provisions in the Evidence Act 2006. For instance, they suggest it is undesirable to have slightly different legal tests for the same procedure.

Comment

827. Advisers agree with the NZLS submission that the situations clauses 159 to 162 are directed towards are largely catered for by provisions in the Evidence Act 2006 and the Corrections Act 2004.

828. In particular, sections 103 and 105 of the Evidence Act 2006, which enable the court to order that evidence be given in an “alternative way”, provides that evidence may be given outside the courtroom or by a video record made before the hearing of the proceeding. These provisions generally provide a more flexible mechanism than that provided in clauses 159 to 161 for the taking of evidence of witnesses who are at a distance, about to leave the country, or dangerously ill. In the same way as is contemplated by clause 162, section 65 of the Corrections Act 2004 enables a prison manager to be directed to bring a prisoner before the court or to arrange the prisoner’s attendance for “judicial purposes”.

829. Sections 103 and 105 of the Evidence Act 2006 are more restrictive in two respects than the Bill’s provisions. First, the Bill would enable a written record of the evidence or an audio recording to be provided, whereas the Evidence Act generally contemplates the video recording of evidence. However, this should not cause any difficulties. Video recording technology is widely available and is generally the method by which evidence is recorded when it will comprise the evidence-in-chief.

830. Secondly, the Evidence Act provisions only apply to an extant proceeding and do not apply when a statement is to be taken from a potential witness in proceedings that have not yet commenced. In contrast, clause 161 of the Bill, which enables the statement of a dangerously ill witness to be taken, explicitly applies to statements both before and during the course of proceedings. However, advisers do not consider this to be problematic. Statements from a dangerously ill person before the commencement of proceedings may be admissible as hearsay under section 18 of the Evidence Act 2006 if the person is not available as a witness and there is reasonable assurance as to the reliability of the statement. If there
was any concern that the reliability of the statement might be challenged, the police could arrange as a matter of practice for an independent person such as a Justice of the Peace to be present when the statement is taken, without the need for any statutory provision.

831. As two sets of provisions which cover much the same situations, but with slightly different test and parameters, are a barrier to the law’s accessibility and transparency, it is recommended that clauses 159 to 162 are deleted. This would also obviate the need for the amendments submitted by the New Zealand Bar Association.

Recommendation 50

Advisers recommend that clauses 159 to 162 (relating to taking the evidence of witnesses who are at a distance, about to leave the country, or dangerously ill) be deleted because the Evidence Act already addresses these situations.

Proving previous convictions on sentencing

Clause 163 – Proving previous convictions on sentencing

832. Clause 163 states that if the prosecutor is required to prove a previous conviction, that is not required to be done until the issue of penalty arises. Clause 163 also contains a procedure whereby the defendant must give advance notice if he or she disputes a previous conviction alleged in the charge. Failure to do so means the previous conviction can be taken into account as if it had been admitted by the defendant. This procedure replaces a notice provision in the existing law (section 69A of the Summary Proceedings Act 1957) of much more limited application – the court can only take the conviction into account if the conviction has not been disputed in writing and the defendant is not present before the Court.

Comment

833. As drafted, clause 163 anticipates that the defendant would be required to dispute a previous conviction prior to sentencing. However, this conflicts with the policy intent that proof of previous convictions is not required until sentencing. The longstanding position (reflected in subclause (5) as well as clauses 40, 111 and 145) is that the defendant is not required to plead to an allegation of a previous conviction until he/she has pleaded or been found guilty. Accordingly, advisers recommend that the advance notice proposal be omitted from the Bill. As the remainder of clause 163 is adequately covered by clause 145, the whole clause can be deleted.
**Recommendation 51**

Advisers recommend that clause 163 (proving previous convictions on sentencing), which requires the defendant to give advance notice if disputing a previous conviction prior to sentencing, be deleted because it conflicts with the policy intent that defendants are not required to do this until having pleaded or been found guilty.

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**Obtaining attendance of witnesses**

834. Clauses 164 to 166 deal with the issuing of summons and warrants to obtain the attendance of witnesses, carrying over and combining section 351 of the Crimes Act 1961 and aspects of section 20 of the Summary Proceedings Act 1957.

**Submissions**

835. The NZLS (40) suggested adding a further subclause to clause 165 (Summons to witness to non-party disclosure hearing) to provide for the possibility of the non-party appearing by video-link.

**Comment**

836. The possibility of non-parties appearing by video-link is already addressed under the Courts (Remote Participation) Act 2010. No substantive changes are recommended to these clauses.

**Provisions relating to warrants to arrest defendant or witness (clauses 167 – 169)**

837. Clauses 167 to 169 apply to any warrant issued for the arrest of a defendant or witness.

**Submissions**

838. The NZLS (40) submits that a regime should be included in the Bail Act 2000 to allow those arrested under section 166 to apply for bail.

**Comment**

839. The Bill provides the ability for bail to be granted to those arrested under section 166, and no substantive amendments are necessary to these clauses.

**Dealing with witnesses at the court**

**Clause 170 – Witness refusing to give evidence may be imprisoned**

840. Clause 170 provides that any person present in court may be required to give evidence. It further provides for dealing with witnesses who refuse to be sworn, give evidence, or answer questions and allows a court to detain a witness in custody if he or she refuses in this way.

**Submissions**

841. The NZLS (40) submits that clause 170 should expressly restrict remanding children or young people in custody. It also raises a drafting matter, which is addressed in Appendix2
Advisers agree that protections for the custody of young people are necessary and the Bill provides for this (see clauses 178 to 180). Consistent with this approach, advisers recommend that the Bill be amended to qualify the use of contempt powers against children and young people by allowing the use of youth justice residences.

**Recommendation 52**

Advisers recommend that clause 170 (witness refusing to give evidence may be imprisoned) should be amended to allow a witness aged under 20 years of age to be remanded in the custody of the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and their Families Act 1989.

**Clause 171 – Witness at hearing**

Clause 171 provides that the court may order a witness to leave the courtroom until required to give evidence.

**Comment**

There were no submissions and no substantive changes are recommended to this clause.

**Adjournments and bail**

**Clause 172 – Power to adjourn**

Clause 172 confers a general power on judicial officers to adjourn any proceeding.

**Comment**

There were no submissions on this clause. However, there are likely to be a number of amendments to this clause and to clauses 173 and 175 as a result of the recommended approach to adjournments and bail in Appendix 1 (2. Adjournments and bail powers).

**Clause 173 – Dealing with defendant on adjournment or pending sentence**

Clause 173 sets out what happens to the defendant when a proceeding is adjourned.

**Comment**

There were no submissions on this clause except one of a technical nature, which is addressed in Appendix 2.

**Clause 174 – Warrant for detention of defendant in hospital or secure facility**

Clause 174 corresponds to section 184T(2) and (3) of the Summary Proceedings Act 1957, and allows the court to order a defendant be detained in a hospital or secure facility pending trial in certain circumstances.
Comment
850. There was one submission on this clause, identifying a drafting error, which is addressed in Appendix 2. Advisers recommend further technical amendments to this clause in Appendix 1 (2. Adjournments and Bail Powers).

Clause 175 – Power of Registrar to adjourn
851. Clause 175 confers a general power on Registrars to adjourn any hearing if the defendant is not in custody, and the application is made before the hearing begins.

Comment
852. There were no submissions on this clause. However, under the recommended approach to adjournments and bail powers in Appendix 1 (2. Adjournments and Bail Powers), this clause may be deleted.

Clause 176 – Defendant in custody may be brought up before expiry of period of adjournment
853. Clause 176 carries forward section 59 of the Summary Proceedings Act 1957 and provides that a defendant who has been remanded in custody on a charge may be brought before a court at any time to be dealt with, even if the period of remand has not expired.

Comment
854. There were no submissions and no changes are recommended to this clause.

Mode of issuing summons and warrants issued under this Act (clause 177)
855. Clause 177 provides for the possibility of issuing a summons or warrant in electronic form. It also provides that prescribed requirements for authentication must be used.

Submissions
856. The NZLS (40) submits that clause 177(2) requires that the warrant be authenticated but subclauses (3)(b) and (c) treat an unauthenticated version as valid.

Comment
857. This clause has been included in the Bill to facilitate the electronic management of summons. However, advisers recommend that the drafting approach to facilitate the electronic management of documents be changed in Appendix 1 (1. Approach to Electronic Management of Documents). Under the recommended approach, this clause would be deleted. This would address the submitter’s concern.
Recommendation 53

Advisers recommend that clause 177 (mode of issuing summons and warrant issued under this Act) be deleted in light of recommended changes to facilitate electronic management of documents.

Special provisions applying to defendants under the age of 20 pending hearing or sentence (clauses 178-182)

858. Clauses 178-182 provide a range of age-related protections and qualifications to the general ability to remand defendants in custody pending hearing or sentence. They prohibit remand in custody for under 16 year olds to anywhere other than a police jail; prohibit remand in custody for 16 year olds to anywhere other than a police jail (except in cases of very serious offending); allow for under 17 year olds to be remanded to the custody of the chief executive of the Ministry of Social Development where they may undergo assessment under the Criminal Procedure (Mentally Impaired Persons) Act 2003; and allow for 17 to 20 year olds to be remanded to the custody of the chief executive of the Ministry of Social Development in certain circumstances. These provisions carry forward section 142 of the Criminal Justice Act 1985, which is repealed by the Bill.

Submissions

859. Both the Children’s Commissioner (20) and Youth Law (67) express concern that the Bill continues to allow for the remand of young people aged under 18 to adult prisons.

860. The NZLS (40) also notes that clauses 178 and 179 restrict the ability of young people to be remanded in custody while clause 173 provides a general ability for courts to remand defendants in custody.

861. James Richardson (39a) raises a drafting matter, which is addressed in Appendix 2.

Comment

862. The protections extended to under-17 year olds in clauses 178 and 179 are consistent with the jurisdiction of the adult courts. This jurisdiction will not be changed by the Bill. Any change to the upper age of New Zealand’s youth justice system would need to be made by way of primary amendment to the Children Young Persons, and Their Families Act 1989. The Bill simply reflects the law as expressed in the primary legislation governing the upper age of New Zealand’s juvenile justice system and it would be inappropriate to change this via this vehicle.

863. The specific provisions in clauses 178-182 override the general clause in 173. For that reason, it is unnecessary to either include or cross-reference these clauses.

864. No substantive change is recommended to these clauses.

Stay of proceedings

Clause 183 – Stay of proceedings

865. Clause 183 provides for the ability of the A-G to stay proceedings.
Submissions

866. The NZLS (40) submits that clause 183 be amended to include provision for the A-G’s direction to be in writing, as it submits is the current requirement; and for provision to be made for whether and, if so how, a stay can be lifted.

Comment

867. Clause 183 is designed to reflect the current stay powers (sections 77A of Summary Proceedings Act 1957 for summary or indictable matters prior to committal, respectively and section 378 of the Crimes Act 1961 for matters following committal). These current sections provide that, following the A-G’s direction, the stay be entered in the official record. In the summary jurisdiction, that is the Criminal Record. In the indictable jurisdiction, it is the Crown Book. While the removal of the summary/indictable distinction, allows the creation of a single provision to cover the stay process, advisers agree that the A-G’s current practice of notifying courts of the stay should continue. Accordingly, advisers recommend that clause 183 be amended to provide that the A-G will notify the court of the stay of proceedings, but that failure to notify the court shall not affect the stay.

868. A power to lift a stay is not needed because a stay does not finally determine the proceedings. It is simply a direction that no further steps be taken. Advisers have concluded in consultation with the Crown Law Office that there is no bar to the A-G lifting a stay. In practice what would probably happen is that fresh charges would be laid. There could be no double jeopardy argument or plea of autre fois acquit because a stay is not a discharge or acquittal. There may be arguments of abuse of process, undue delay or unfairness (depending on the circumstances) but that would be the case in any event.

Recommendation 54

Advisers recommend that clause 183 (stay of proceedings) be amended to provide that the Attorney-General will notify the court of the stay of proceedings, but that failure to notify the court shall not affect the Attorney-General’s stay.

Mode of service

Clause 184 – Service of documents

869. Clause 184 provides that summons, notices, and other documents that are required to be served or given, must be served or given in the manner prescribed in rules.

Comment

870. There were no submissions on this clause. The rules contemplated by clause 184 would only apply to those documents for which the Bill explicitly indicates service is required. This is a comparatively small number of documents and is not dealt with consistently throughout the Bill.

871. As a matter of good practice, a party that files a document in court will also serve that document on the other party. However, advisers consider that it would be

43 See Daemar v Gilliand [1979] 2 NZLR 7 (SC) at 26.
desirable to codify this good practice to ensure that there is no unnecessary delay from one party not having had an opportunity to consider material filed by the other side but not served. This is a matter best addressed in rules, rather than in primary legislation. Rules will be flexible enough to apply different approaches depending on what is to be served, who is to be served, and who has to serve. It is therefore recommended that clause 382(2) is amended to enable rules to be made about service. As a consequence, most requirements for service in the Bill itself will be able to be deleted.

872. Further, as a result of the recommended approach to subordinate legislation (see Recommendation 86), clause 184 is no longer required.

**Correction of erroneous sentence**

**Clauses 185 – 187 (Correction of erroneous sentence)**

873. Clauses 185 to 187 allow for the court to correct erroneous sentences. The clauses, which reflect existing law, are intended to enable courts to rectify sentencing errors without invoking the appeals process. The clauses also extend the existing law, by enabling the chief executive of the Department of Corrections to apply for a sentence to be corrected.

**Submissions**

874. The NZLS (40) recommends that clause 185 should include provisions similar to those in clause 109, which provide for the consequences for defendants sentenced to imprisonment when a resentencing is ordered under clause 108.

**Comment**

875. Advisers do not consider that any changes to clause 185 are required in response to the NZLS’s submission. When a resentencing is ordered under clause 108, the original sentence immediately ceases to have effect. There is therefore a need to deal with the status of a prisoner while the resentencing exercise is undertaken. The same does not apply to applications made under clause 185, where the sentence continues in force.

876. However, advisers recommend that an amendment is made to these clauses to enable a judge to correct an erroneous sentence on his or her own motion. Clause 185 replaces section 77 of the Summary Proceedings Act 1957 and section 372 of the Crimes Act 1961. Judges are able to correct sentences on their own motion under the former, but not the latter. The Summary Proceedings Act approach provides greater flexibility and is preferable.
Recommendation 56

Advisers recommend that clauses 185 to 187, which relate to the correction of erroneous sentences, be amended to enable a judge to correct an erroneous sentence on his or her own motion.

Transfer to wrong court (clause 188)

877. Clause 188 provides for the process to be followed when a proceeding is transferred to the wrong court.

Comments

878. There were no submissions on this clause except the drafting addressed in Appendix 2.

Permanent Court record (clause 189)

879. Clause 189 replaces section 71 of the Summary Proceedings Act 1957 and section 353 of the Crimes Act 1961. It recognises the obligation on courts to maintain a permanent record of proceedings, and provides that the record must be maintained in the manner prescribed by court rules.

Submissions

880. The Legislation Advisory Committee (69) offer, as an example of a matter that could be provided in primary legislation rather than in court rules, the requirement to keep court records (refer to the discussion at paragraphs 1341 to 1365).

881. The NZLS (40) submit that it might be helpful for clause 189 to specifically provide for a hard copy and/or electronic form of the court record.

Comment

882. Following consultation with the Chief Justice and Heads of Bench, the Bill provides for the permanent court record by way of recognising the common law duty on courts of record to maintain a permanent record of their proceedings; providing that the record is conclusive evidence of the matters that are contained in it,44 and requiring the record to be maintained in accordance with rules of court. Given that the obligation at common law is that of the court, advisers consider that it is appropriate for the judiciary through the rules committee to lead work on defining the scope of and manner of maintaining the permanent court record.

883. Consistent with the approach taken in regard to the management of information throughout the Bill, the form of the record has been left for rules. This allows flexibility for the courts to take advantage of the relevant technologies as appropriate.

884. No substantive changes are recommended to this clause.

Clauses 190-191 (Role of Solicitor-General)

886. Clauses 190-191 recognise that the Solicitor-General has general oversight of public prosecutions. This role includes the maintenance of the Prosecution Guidelines published by the Crown Law Office.

Comment

887. There were no submissions on these clauses except the drafting addressed in Appendix 2.

Clauses 192-197 (Role of Crown)

888. Clauses 192-197 provide that the Solicitor-General or a Crown prosecutor will assume responsibility for specified Crown prosecutions from a certain stage in proceedings. The provisions correspond to the existing law under which the Solicitor-General or a Crown Solicitor may present an indictment following a defendant’s committal for trial.

889. Consistent with the existing law, the policy is that the Crown should be able to reframe the charges without the leave of the court. Clauses 195 and 196 provide for both amendment and withdrawal of charges.

Submissions

890. Judy Ashton (34) supports these provisions. The Crown Solicitors Network (34) notes that there is no provision expressly allowing the Crown to add new charges when it takes over a Crown prosecution. As the Crown can do this under existing law when it presents an indictment, there should be a provision to this effect in the Bill. The NZLS (40) recommends amendments to clause 195 to clarify that the power to amend a charge under that provision should not apply once the trial has started and to provide for a power of adjournment if the defendant is prejudiced by the amendment.

Comment

891. As the Bill stands, the Crown could add new charges to an existing proceeding by filing a charging document for any new charge under clause 12 and then seeking to join the charge(s) to the existing proceeding under clause 140(1) or (2). However, it would be more expedient if the new charges could be entered directly in the court that is hearing the proceeding. Accordingly, it is proposed that a new clause be added to this subpart. It would provide that:

891.1. On taking over a Crown prosecution under clause 194, the Crown prosecutor, by a notice to the court hearing the proceeding, could add a new charge or charges without leave of the court.

891.2. To mesh with the rest of the Bill, the new charges would be treated as if charging documents had been filed in the normal way and the charges had been joined to the existing proceeding by way of a clause 140(1) notice.
891.3. Relevant time limits under clause 22 for filing charges would apply to the new charges.

892. As to the timing of amendments by the Crown, the Bill provides that they can be made without leave within a prescribed period after the Crown takes over a prosecution. It is not intended that the powers under this subpart should be exercisable after the trial starts, and advisers recommend that this be clarified in the Bill.

893. It is not necessary to provide a specific power of adjournment if the defendant is prejudiced by the amendment given the general power described in clause 172.

### Recommendation 57

Advisers recommend that clauses 192-197 (role of Crown in prosecutions) be amended to provide that:

- on filing a notice under clause 194, or within the prescribed period after filing that notice, the Solicitor-General or Crown prosecutor can give a notice to the court hearing the proceeding to add a new charge or charges to that proceeding without leave of the court;
- the new charges will be treated as if charging documents had been filed under clause 12 and a notice had been given under clause 140(1) joining the new charges to the existing proceeding;
- clause 22 (time for filing charging document) applies to the new charges;
- the Crown’s ability to amend, withdraw or add charges without leave of the court does not apply once the trial has started.

### Subpart 3 – Public Access and Restrictions on Reporting

894. This subpart relates to public access to court proceedings, and when restrictions on reporting the proceedings apply or may be ordered. 33 submitters commented on this subpart of the Bill.

#### Terms used in this subpart

**Clause 198 – Interpretation**

895. Clause 198 defines the terms “identifying information” and “suppression order” which are used in the clauses that follow. Identifying information “means the person’s name, address, and occupation, and any other information that is likely, of itself or in conjunction with other publicly available information, to lead to the identification of that person.”

**Submissions**

896. The Royal Federation of NZ Justices Association (10) supports the inclusion of identifying information in what can be suppressed, noting that New Zealand’s size means that publication of descriptors can quickly lead to identification.

897. Television New Zealand (52) submits that occupation should be removed from the definition of identifying information, to allow them to continue to use this as an identifier. For example, a defendant is described as “a 24 year old builder from Wellington”.

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898. The Media Freedom Committee (37) and Tech Liberty (50) have concerns over part of the definition of identifying information “in conjunction with other publicly available information”. They submit it is unworkable as it is not always possible or practicable to know what other information concerning an individual is publicly available.

899. It was also submitted that the media cannot always collaborate regarding what information is to be published about an individual. Further, there are various social media websites and other blogs that may provide other information about an individual. These sites may include information that is connected with the criminal proceedings, as well as other more personal information that may still lead to identification, for example birth date and family status.

Comment

900. Advisers agree that the Bill as currently drafted places too onerous an obligation on publishers. Prohibiting the publication of other particulars likely to lead to identification is intended to reduce the risk of “jigsaw identification”. Separately, small pieces of information may not lead to identification; however, if all this information is put together, identification may be possible. “Jigsaw identification” should be prevented as much as possible (by prohibiting publication of information likely to lead to a person’s identification), but without placing an unworkable burden on those seeking to publish information to discover all other information in the public domain.

901. Advisers recommend that the definition of “identifying information” in clause 198 be deleted. A new definition of “name” should be included instead, which includes any particulars that are likely to lead to the person’s identification.

902. It is also recommended that the references to “name” and “any other identifying information” in clauses 204, 205, 206, 207, 208, 213 and 215 be replaced with “name, address or occupation”.

Recommendation 58

Advisers recommend that clause 198 (interpretation), which defines terms for the purposes of the suppression provisions, be amended to:

- delete the definition of “identifying information”;
- define “name” to mean name and any particulars that are likely to lead to the person’s identification; and that
- clauses 204, 205, 206, 207, 208, 213 and 215 be consequentially amended to replace the references to “name” and “any other identifying information” with “name, address or occupation.”

Clause 199 – Context in which publication prohibited

903. Clause 199 describes the context in which publication will breach a suppression provision or a suppression order. It provides that publication means publication in the context of any report or account relating to the proceeding in respect of which the suppression provision or order applies.

904. This clause is necessary to ensure, for example, that publication of a suppressed name in a birth notice, or in the phone book is not a breach of a suppression order. A breach only occurs where the report or account relates to the proceeding.
905. This is not intended to be a definition of the terms “publication” or “publish”, as it is considered preferable that the meaning of those terms continue to be developed at common law rather than specified in the legislation.

Submissions

906. Tech Liberty (50) is concerned about the uncertainty created by not defining publication and letting it develop at common law.

Comment

907. Advisers consider that this has not caused any problem under the existing law, where “publish” is not defined. For example, Judge Harvey in Police v Slater (Auckland District Court, 14 September 2010, Judge Harvey) found no difficulty with the lack of definition. Including a definition may create more problems than it solves.

908. Advisers do not recommend changes to this clause.

Court proceedings generally open to the public

Clause 200 – Court proceedings generally open to the public

909. Clause 200 expresses the general rule that every hearing is open to the public. This general rule is equivalent to section 138(1) of the Criminal Justice Act 1985, and is subject to the provisions that follow.

Submissions

910. The NZLS (40) submits that this clause is inconsistent with section 18 of the Bail Act 2000 and section 329 of the Children, Young Persons, and Their Families Act 1989, and recommends amending this clause to make it subject to these other statutes.

Comment

911. Such an amendment is not necessary as clause 7(1) of the Bill states that the Act is subject to any special provisions in any other enactment; and clause 7(3) provides nothing applies to proceedings in the Youth Court.

912. However, to ensure clarity and accessibility of the law advisers recommend an amendment to the clause recognising that it is subject to other enactments.

913. Clause 97 deals with who can be present if evidence is taken under an oral evidence orders from a complainant in a case of a sexual nature. Advisers recommend an amendment so that the general rule in this clause is subject to clause 97 (persons who may be present if oral evidence is taken from complainant in sexual cases).

Recommendation 59

Advisers recommend that clause 200 (court proceedings generally open to public) be amended to provide that it is also subject to clause 97 (persons who may be present if oral evidence is taken from complainant in cases of a sexual nature) and “any other enactment”.

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**Power to clear court**

**Clause 201 – Power to clear court**

914. Clause 201 is based on section 138(2)(c) of the Criminal Justice Act 1985. It confers a power to clear the court (apart from specifically listed persons), if doing so is necessary to avoid certain specified risks.

915. In addition, the court must be satisfied that making a suppression order will not be sufficient to avoid the relevant risk. This makes the test for clearing the court more stringent than it is currently.

916. Even if the court is cleared, the announcement of the verdict or decision of the court, and the passing of sentence, must take place in public. This corresponds to section 138(6) of the Criminal Justice Act 1985.

**Submissions**

917. Judy Ashton (34) submits that the immediate victim and support person should be able to remain in court when the court is closed.

918. The NZLS (40) submits that the term “any Police employee”, in respect of who can remain in a cleared courtroom, is too wide, and should be “any Police employee whose duties require his or her presence at the hearing”.

919. Generally, the NZLS is supportive of the clarity given to the circumstances in which a courtroom may be cleared. However, it seeks retention of the following current grounds to clear the court: the reputation of any victim of any alleged sexual offence or offence of extortion. To achieve this it submits that a further ground for closing the court should be “undue hardship to a witness, victim or connected person”.

920. The NZLS also submits that express reference should be made to the principles of open justice and freedom of expression in this clause.

**Comment**

921. If the court excludes people under this section, it has discretion to allow others, including a victim and support person, to remain. This should remain as a discretion. There may be occasions when victims should be excluded for one of the specified reasons (eg, disruption of proceedings).

922. Although this clause restates the existing law (section 138(2)(c) of the Criminal Justice Act 1985), it is broad. Advisers therefore recommend that it is amended to “the Police employee in charge of the case”. This is the terminology used in clause 203(1) which identifies who is able to stay in court when the complainant in cases of a sexual nature is giving evidence. As noted above, the judge will retain discretion to allow other police employees to stay if appropriate in a particular case.

923. Advisers do not agree with the NZLS proposal to retain current grounds to clear the courtroom. It is unnecessary for victims of alleged sexual offending as the court is always closed in such cases when the complainant gives evidence (clause 203). With respect to others, including extortion victims, there are other protections available where hardship will be caused to witnesses and victims. The court may suppress names or evidence. If the concern is the stress of giving evidence in court, an application can be made to give evidence in an alternative way, for example, behind a screen or via audio-visual link. But closing the court is a matter of last resort. It is appropriate that the threshold remains high.
924. It is not necessary to refer to the principles of open justice and freedom of expression in this clause as clause 200 recognises these principles in the statement “every hearing is open to the public”.

**Recommendation 60**

Advisers recommend that clause 201 (power to clear court) be amended to replace “any Police employee” in subclause (1)(f) with “the Police employee in charge of the case”.

**Clause 202 – Exception for members of media**

925. Clause 202 provides that an order clearing the court may not exclude members of the media, unless it is necessary to do so to avoid prejudicing the security or defence of New Zealand. This corresponds to section 138(3) of the Criminal Justice Act 1985.

926. It also defines who is a “member of the media” for the purposes of this clause. It means a media reporter who is subject to a code of ethics, and the complaints procedures of the Broadcasting Standards Authority or the Press Council, or any other person reporting on the proceedings with the permission of the court.

**Submissions**

927. The Media Freedom Committee (37) supports the definition of media in this clause.

928. Television New Zealand (52) and the Press Council (71) submit that the definition of media requires amendment. First, Television New Zealand submits the term reporter should be replaced with the broader term journalist. Secondly, Television New Zealand and the Press Council advise that it is the organisation that employs the journalist that is subject to the regulatory bodies referred to, not the individual concerned. Television New Zealand submits that individual employees may not be subject to a code of ethics.

929. Tech Liberty (50) submits that the traditional media should not have a special exception. Television New Zealand point out that TVNZ.co.nz and tv3.co.nz are not subject to the regulatory bodies referred to, so would not come within the definition of media.

**Comment**

930. Advisers agree that the definition needs amendment. The term “media reporter” was not intended to narrow the definition. The main criteria are the applicability of the regulatory bodies and code of conduct. Advisers therefore recommend that “media reporter” is replaced by “journalist”.

931. The point is that the organisation that employs the journalist is subject to the regulatory body concerned, and advisers recommend the definition be amended. However, the definition should also leave open the possibility that an individual journalist might operate as a one person medium, and be subject to the regulatory regimes referred to.

932. Media who do not come within the definition can still be present in a closed court with permission.
Recommendation 61

Advisers recommend that clause 202 (exception for members of media) be amended to:

- replace “media reporter” with “journalist”;
- change the definition of “member of the media” to mean a journalist who is subject to, or is employed by an organisation that is subject to, a code of ethics and also the complaints procedure of the Broadcasting Standards Authority or the Press Council.

Clause 203 – Court must be cleared when complainant gives evidence in cases of sexual nature

933. Clause 203 replaces section 375A of the Crimes Act 1961. It provides that the court must automatically be cleared when the complainant gives oral evidence in cases of a sexual nature.

Comment

934. There were no submissions and no substantive changes are recommended to this clause.

Suppression of names

Clause 204 – Court may suppress identity of defendant

935. Clause 204 corresponds to section 140(1) of the Criminal Justice Act 1985, by allowing orders to be made suppressing the identity of the defendant. Unlike section 140(1), which confers a very broad discretion to suppress the defendant's identity, clause 204 specifies a list of grounds on which the court may make such an order.

936. The court may suppress publication of identifying information about a person who is charged with, or convicted or acquitted of, an offence, if publication would be likely to:

936.1. cause extreme hardship to the defendant, or any person connected with the defendant; or
936.2. cast suspicion on another person that may cause undue hardship to that person; or
936.3. cause undue hardship to any victim of the offence; or
936.4. create a real risk of prejudice to a fair trial; or
936.5. endanger the safety of any person; or
936.6. lead to the identification of another person whose name is suppressed by order or by law; or
936.7. prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
936.8. prejudice the security or defence of New Zealand.

937. Subclause (3) specifically provides that the fact that a defendant is well known does not, of itself, constitute extreme hardship.

938. Subclause (4) provides that when a defendant first appears before the court, a suppression order may be made if the defendant advances an arguable case that one of the grounds for making an order exists. That interim order will expire at the defendant's next court appearance, and it may only be renewed if the court is satisfied that one of the grounds exists.

939. Subclause (5) corresponds to section 140(4A) of the Criminal Justice Act 1985. It provides that if the court is considering making a permanent suppression order, it must take into account the views of any victim of the offence.

Submissions

940. There were a number of people who thought that name suppression should only be for the protection of victims (John Lee (5), Christopher Burke (21), Judy Ashton (34), Ken Evans (35), Rebecca and Andrew Templeman (44), Sensible Sentencing Trust (46), Sharlene and Malcolm Barnett (48), and Jardine Jamieson (62)).

941. There were also those who thought that defendants and/or those found guilty should not have access to name suppression (John Lee (5), Christopher Burke (21), and Rita Croskery (65)). The New Zealand Police Association (41) submits there are very few situations where suppression should be granted after conviction.

Grounds for suppression

Submissions

942. Judge David Harvey (14) supports the following grounds of suppression: undue hardship to a victim; endangering the safety of any person; leading to the identification of another person whose name is suppressed by order or by law; prejudice to the maintenance of law etc; and prejudice to the security or defence of New Zealand. However, the Judge does not agree with the proposed ground of the risk of suspicion being cast on others. Television New Zealand (52) also questions when this ground would be used.

943. Judge Harvey submits that it should be clarified that extreme hardship does not equate with extreme embarrassment, and hardship is an issue that is capable of objective identification by evidence. Further, the Judge submits that the requirement for an evidential foundation should be specified. The Criminal Bar Association (23) and the NZLS (40) submit that "extreme" hardship is too high a threshold and it should be changed to "undue" hardship. They argue that this will better reflect the presumption of innocence. The Media Freedom Committee (37) supports the need to show "extreme" hardship and "real risk" of prejudice to a fair trial, stating that suppression is currently too easily granted.

944. Television New Zealand (52) is concerned about the broadness of the term "maintenance of the law", stating that it may be relied on by a defendant searching for a catch-all ground.

945. Adam Edwards (16) and the Criminal Bar Association (23) submit that the presumption of innocence needs to be taken into account in considering name suppression applications. The NZLS (40) submits that the principles of open justice and freedom of expression should be expressly included in the clause.
Adam Edwards (16) and the Criminal Bar Association (23) submit there should remain a residual discretion to grant suppression if it is in the interests of justice. This is to ensure flexibility to deal with unique cases which may arise.

Comment

It is intended that the ground of “risk of suspicion being cast on others” will be used to suppress identifying information, such as occupation. So, for example, a person’s occupation may be suppressed, because only a very small number of people in the locality have that occupation and another innocent person may lose business, or suffer other harm, because others wrongly believe he or she is the offender.

As highlighted in the Law Commission’s report, the test of extreme hardship recognises that suppression of the defendant’s name should be exceptional. It will be available where the harm which would be caused is disproportionate to the public interest in open justice and the freedom to receive information.

The court may make an order only if it is satisfied that at least one of the grounds applies. Evidence of the particular ground, for example, extreme hardship to the defendant, will need to be presented to the court in order for it to be satisfied that an order should be made.

It is unnecessary to expressly include the principles of open justice and freedom of expression in the Bill. The underlying principle of the provisions is open justice. As recognised in the Bill of Rights vet, the power to make an order is discretionary, and judges who exercise this discretion will do so in a manner that is consistent with freedom of expression in section 14 of the NZBORA. Further, the Law Commission noted that the presumption of innocence is not relevant to name suppression decisions – it is a rule about how trials are run. The fact that a charge has been laid does not carry with it any legal implication that an accused person is guilty. It follows that publishing the fact of a legal charge could not offend the presumption of innocence.

One of the purposes of this reform was to make it clear what the grounds are on which suppression can be granted. Retaining a residual discretion undermines that purpose.

Comment

Advisers agree with the NZLS submission as to redrafting and recommend accordingly.
Interim suppression

Submissions

955. The Criminal Bar Association (23) supports the lower threshold required for name suppression on first appearance. However, Television New Zealand (52) is concerned about the lower threshold for interim suppression, arguing it is easier for a person to get name suppression on first appearance than it is now. It argues this could potentially put the media off covering a story.

956. The District Court Judges (26) submit that in subclause (5) “must expire” should be amended to “shall expire” so that interim orders expire automatically without judicial intervention.

Comment

957. The aim of having a lower threshold on first appearance is to provide for a special procedure that takes into account the pressures in the court list and the lack of time for the defence to gather evidence in support of an application. It preserves for a limited time the court’s ability to make an order suppressing the defendant’s name when more information is available. Advisers consider that the correct balance has been achieved.

958. Advisers agree that interim orders should expire automatically without judicial intervention and recommend amendment.

Victims

Submissions

959. Judy Ashton (34) submits that the Judge must hear directly from the victim on his or her views and the onus must be on the offender to show extreme hardship.

960. The New Zealand Bar Association (39b) objects to the term “victim of the offence” being used in subclause 6. It argues that the clause should reflect the fact that it covers alleged offending, as well as proven offending.

Comment

961. Subclause (6) requires the court to take into account the views of any victim when determining whether to make a permanent order for suppression, which may include hearing from the victim if appropriate. In applying for suppression, it will be up to the offender to satisfy the court that one of the grounds applies.

962. This change is not necessary given the recommendation in Appendix 1 that there is a definition of “victim” that links to the definition in section 4 of the Victims’ Rights Act. That definition takes into account alleged offending. As identified in Appendix 1, other changes will be required to clause 204 to reflect the recommended approach to “victim”.

Defendants under 18

Submissions

963. The Children’s Commissioner (20) and Youth Law (67) submit that automatic suppression should be provided to all defendants under 18 years appearing in the District Courts or High Court. Those 12-16 year olds appearing in the Youth Court will be subject to the Children, Young Persons, and their Families Act 1989 which has its own provisions regarding publication. However, if the matter is transferred to the adult jurisdiction, the usual rules apply. The Children’s Commissioner argues that this is inconsistent with United Nations Convention on
the Rights of the Child (UNCROC) which provides for children to have their privacy fully respected at all stages during criminal proceedings.

Comment

964. Advisers do not agree that automatic suppression should exist. If a defendant under 18 is appearing in the adult court they should be treated as adults. In such a case there may be an argument to be made for name suppression on the ground that publication will cause extreme hardship. In addition, if the matter has been transferred from the Youth Court, this is one of the matters that could have been considered as part of the decision on transfer.

Recommendation 62

Advisers recommend that clause 204 (Court may suppress identity of defendant) be amended:

- to clarify the wording in subclause (3) so that the fact that a defendant is well known does not of itself mean that publication of his or her “name” (as per the new definition recommended in clause 198) will result in extreme hardship for the purposes of that ground of suppression in subclause (2)(a);
- so that interim orders expire automatically without judicial intervention (subclause (5)).

Clause 205 – Automatic suppression of identity of defendant in specified sexual cases

965. Clause 205 replaces section 139(1AA), (2), (2A), and (2B) of the Criminal Justice Act 1985. It provides that the identity of the defendant is automatically suppressed if the defendant is accused or convicted of incest or sexual conduct with a dependent family member, unless the court makes an order permitting publication.

966. Subclause (4) enables a victim who is aged 18 years or over (even if he or she was younger at the time of the offence) to apply to the court for an order permitting publication.

Submissions

967. The Media Freedom Committee (37) submits that this automatic suppression should be reconsidered. It makes it difficult to alert the community to potential offenders, resulting in other victims not coming forward. It objects to “changes” to the existing law in clauses 205(4)(c) and 205(5) which it sees as rendering the victim’s interest subservient to those of the defendant.

968. The NZLS (40) submits that the age at which victims can apply for publication should be 16 years (this is the current age in section 139(2A) of the Criminal Justice Act 1985).

Comment

969. Automatic suppression under this clause is to protect the identification of the victim. Clauses 205(4) and 205(5) reflect the existing law – orders permitting publication of the name of an offender in these sorts of cases are already overridden by an order prohibiting publication of the name of the person convicted of the offence for other reasons.
The existing law has inconsistent age requirements for different parts of the regime. The age of under 18 years was chosen to reflect the definition of a child in UNCROC.

No substantive changes are recommended to clause 205.

**Clause 206 – Court may suppress identity of witnesses, victims, and connected persons**

Clause 206 allows orders to be made suppressing the identity of a witness, a victim, or a person who is connected with the defendant or the proceedings. This clause replaces the powers currently contained in section 138(2)(b) of the Criminal Justice Act 1985 (which relates to witnesses) and section 140(1) of that Act (which relates to connected persons), and is extended to also allow the suppression of identifying information about victims.

The grounds on which a suppression order may be made under clause 206 differ from those that apply under section 138(2)(b). Under that section a suppression order may be made on grounds relating to the interests of justice, public morality, the reputation of a victim of a sexual offence or extortion, and the security or defence of New Zealand.

Under clause 206 the court may make an order in cases where publication of the identity of the witness, victim, or connected person would cause that person undue hardship. It may also make an order under this clause on any of the final five grounds on which the identity of the defendant may be suppressed under clause 204.

**Submissions**

Adam Edwards (16) supports the inclusion of “others connected with the proceeding”, as this clarifies that suppression is available for these people. However he argues that the grounds for suppression should differ for victims, witnesses and others.

Graeme Moyle (27) submits that there should be mandatory name suppression for 5 days for victims of murder to allow the family to inform the extended family, friends, and to arrange the funeral, without being harassed by the media. He also submits that a victim should have name suppression for as long as a defendant.

The Media Freedom Committee (37) submits that the test for suppression should be “extreme hardship” rather than “undue hardship”.

The NZLS (40) submits that it would be desirable to make reference to automatic suppression rules.

**Comment**

With regard to having different grounds of suppression for different groups of people, while some of the grounds may arise more often in relation to some groups than others, the grounds should nevertheless have general applicability.

Having a mandatory name suppression period could in fact prevent wider family and friends learning of a victim’s death and may hinder investigations where the offender has not been identified or apprehended. Further, it appears one of the main concerns here is an issue of media behaviour rather than the actual name being publicised.
981. Victims should not have name suppression for as long as a defendant. A victim in a particular case may not want name suppression and, if they do, there are specific grounds on which suppression can be sought.

982. The lower standard of undue hardship is appropriate in recognition of the fact that victims, witnesses and connected persons generally do not have a choice about becoming involved in the criminal justice system.

983. Such cross referencing to the automatic suppression rules is not necessary, as the automatic suppression provisions immediately precede and follow this clause.

984. No substantive changes are recommended to clause 206.

Clause 207 – Automatic suppression of identity of victim in specified sexual cases

985. Clause 207 replaces section 139(1AA), (1), and (1A) of the Criminal Justice Act 1985. It provides that the identity of a victim of certain sexual offences is automatically suppressed, unless the victim is aged 18 years or older and the court makes an order permitting publication. The purpose of the clause is to protect the victim of the offence.

986. Subclause (4) enables a victim who is aged 18 years or over (even if he or she was younger at the time of the offence) to apply to the court for an order permitting publication.

Submissions

987. The Media Freedom Committee (37) submits that this automatic suppression should be reconsidered. It submits that such suppression can distort the public understanding of a crime and court case.

988. The NZLS (40) submits that the age at which victims can apply for publication should be 16 years.

Comment

989. Automatic name suppression for victims of sexual crimes is carried over from the existing law (section 139 of the Criminal Justice Act). As the Law Commission noted, sexual offences are a special category because of their highly personal and sensitive nature. Identification of victims also provides a disincentive to reporting, in an area where there is already concern about the low reporting rates for sexual crimes. Further, suppression does not stop the media from reporting on the case but only prevents them from identifying the victim.

990. The existing law has inconsistent age requirements for different parts of the regime. The age of under 18 years was chosen to reflect the definition of a child in UNCROC.

991. No substantive changes are recommended to clause 207.

Clause 208 – Automatic suppression of identity of child victims and witnesses

992. Clause 208 replaces section 139A of the Criminal Justice Act 1985, which protects the identity of children called as witnesses in criminal proceedings.

993. Clause 208 extends the existing protection to child victims (whether or not they are called as a witness). It provides that identifying information about a child witness or a child victim is automatically suppressed, unless the court specifically makes an order permitting publication. However, it does not apply to a child victim who dies as a result of the offence.
Again, subclause (4) enables a victim who is aged 18 years or over (even if he or she was younger at the time of the offence) to apply to the court for an order permitting publication.

Submissions

The Children’s Commissioner (20) and YouthLaw (67) welcome the provision of automatic name suppression for all child victims and witnesses under 18, noting that this brings the law more into line with UNCROC.

The Media Freedom Committee (37) does not support the extension of the law to child victims, as this would significantly constrain current reporting.

The NZLS (40) submits that the age for automatic suppression should be under 17 years, as currently applies for witnesses.

Comment

Child victims and witnesses have a special vulnerability that should be protected by law. Appearing in court can be a stressful experience, and children may be especially vulnerable in this regard. Further, even in non-controversial cases or those involved in minor offending, a child victim or witness may still be intimidated and overwhelmed. It is not necessary for open justice that the name of the child victim or witness be published.

The existing law has inconsistent age requirements for different parts of the regime. The age of under 18 years was chosen to reflect the definition of a child in UNCROC.

No substantive changes are recommended to clause 208.

Suppression of evidence and submissions

Clause 209 – Court may suppress evidence and submissions

Clause 209 replaces section 138(2)(a) of the Criminal Justice Act 1985. It provides that the court may forbid publication of a report of any evidence given or submissions made in criminal proceedings. Again, the grounds on which the court may make such an order differ from those set out in the Criminal Justice Act 1985. The grounds on which a court may suppress evidence and submissions under clause 209 are that publication would be likely to:

1001.1. cause undue hardship to any victim of the offence; or
1001.2. create a real risk of prejudice to a fair trial; or
1001.3. endanger the safety of any person; or
1001.4. lead to the identification of a person whose name is suppressed by order or by law; or
1001.5. prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
1001.6. prejudice the security or defence of New Zealand.
1002. The District Court Judges (26) recommend that the ground relating to endangering the safety of any person should be endangering the health or safety of any person. They submit this will expand the discretion of the court to protect the interests of sensitive witnesses.

1003. The Media Freedom Committee (37) submits that the ground for suppression should be “extreme hardship” rather than “undue hardship”.

1004. Robert Terry (45) asks with reference to “prejudice the security and defence of New Zealand”: whose interests does the Bill serve, as it is not binding on the military.

Comment

1005. The proposal to add a ground for suppression “endangering the health or safety of any person”, is only suggested in respect of suppression of evidence – not for any of the name suppression provisions. It would significantly broaden the ability to suppress evidence. Health concerns alone should not override the principles of open justice and freedom of expression. The ground of undue hardship to victims will be sufficient to capture health concerns of victims in appropriate cases.

1006. The lower standard of undue hardship is appropriate in recognition of the fact that victims, witnesses and connected persons generally do not have a choice about whether they become involved in the criminal justice system. A lower standard of undue hardship is therefore appropriate.

1007. The ground “prejudice the security or defence of New Zealand” is in the public interest.

1008. No substantive changes are recommended to clause 209.

Powers of Registrar

Clause 210 – Power of Registrar to make and renew interim suppression orders

1009. Clause 210 gives a Registrar who is adjourning a proceeding the power to make a suppression order, for a limited period of up to 28 days, if the parties agree. This power may be exercised only once in relation to any particular charge.

1010. Registrars may also renew suppression orders made by the court until the date on which the defendant will next appear.

1011. This clause replaces section 46A of the Summary Proceedings Act 1957 which also gives Registrars a limited power to make a suppression order for up to 28 days.

Submissions

1012. The Media Freedom Committee (37) submits this clause should reflect the existing law which is limited to name suppression. As drafted, this clause also allows a temporary order to be made by a Registrar in respect of evidence and submissions.

1013. The Media Freedom Committee also submits that the reference to an adjournment pursuant to clause 172 is an error, as clause 172 does not give the Registrar this power. The NZLS (40) submits that the current ability for the
Registrar to make an order where the defendant is remanded in custody is not included.

1014. Television New Zealand (52) argues that it is never appropriate for a Registrar to make suppression orders.

Comment

1015. This clause does extend the current power of Registrars. This was unintentional and the clause should be amended to confine the Registrars’ power to orders under clause 204 (name suppression for defendants). Linking the power to clause 204 will also explicitly provide the requirement that the Registrar needs to be satisfied that there is an arguable case that one of the grounds for name suppression exist before granting an interim order.

1016. It was not intended to change the current circumstances when Registrars can grant suppression. Registrars often deal with defendants at first hearing. If they were unable to make suppression orders, all applications would need to be referred to a judge. In smaller courts this would cause problems, as judges are often not present. In larger courts, it would still delay the progress of the case. The Registrar’s power is limited as both parties must consent, the order is for a maximum of 28 days, and can only be made once in a particular case.

Recommendation 63
Advisers recommend that clause 210 (Registrar’s power to make and renew interim suppression orders) be amended to:

- confine this power to making only name suppression orders under clause 204 and only on the defendant’s first appearance;
- simplify the wording in subclause 210(1)(b) to simply require that both parties consent.

General provisions relating to suppression orders

Clause 211 – Court must give reasons

1017. Clause 211 does not have an existing statutory counterpart. It provides that the court must give reasons for any decision to make, vary, or dismiss a suppression order. However, if the court is satisfied that exceptional circumstances exist, the court may decline to state the reasons in public.

Submissions

1018. The Media Freedom Committee (37) and Television New Zealand (52) welcome judges having to give reasons for granting orders.

Comment

1019. No substantive changes are recommended to this clause.

Clause 212 – Duration of suppression order and right of review

1020. Clause 212 corresponds to sections 138(4) and 140(2) of the Criminal Justice Act 1985. It provides that a suppression order may be made permanently, or for a limited period. Suppression orders may be reviewed and varied by the court at any time.
Submissions

1021. The Media Freedom Committee (37) is pleased that the law explicitly states that orders are reviewable at any time. The Criminal Bar Association (23) objects to the ability to review or revoke an order at any time, stating that this creates an undesirable uncertainty and lack of finality.

1022. The Media Freedom Committee (37), Tech Liberty (50) and Television New Zealand (52) submit that all suppression orders should be for a limited time. Subclause (2) provides that if the term of the order is not specified, it has permanent effect. Submitters argue that permanent suppression should be a conscious decision, not a potential oversight.

1023. The NZLS (40) submits that this clause entitles media to be heard, but does not make it clear that they can initiate proceedings. This is dealt with in the recommendations made in relation to clause 214 below.

1024. The NZLS also submits that a suppression order for the identity of a defendant should lapse on death, unless it would lead to identification of victims where their names have been suppressed.

Comment

1025. A court can currently review at any time the suppression of evidence or submissions, but not the suppression of names. There is no apparent reason for this difference. This clause allows all suppression orders to be treated in the same way.

1026. While permanent suppression should result from a conscious decision, it is undesirable that, where the grounds for suppression have been established, a suppression order can lapse because through an oversight no decision is made. If a name remains suppressed through an oversight, it is possible for a variation or revocation of the suppression order to be sought at any time. Therefore, there is no disadvantage created by retaining the current drafting.

1027. A defendant’s name suppression should not lapse on death. Any revocation of an order should be as a result of positive court action. The ground(s) on which suppression was granted will not always cease to apply on death of the defendant, for example, identification of the defendant may still cause undue hardship to the victim.

1028. No substantive changes are recommended to this clause.

Clause 213 – Publication by or at request of Police, etc.

1029. Clause 213 provides that nothing in the preceding clauses prevents the publication of identifying information at the request of the Police for particular purposes, and to certain other persons who require the information for official purposes.

1030. This clause replaces section 141 of the Criminal Justice Act 1985.

1031. The only substantive difference is that this clause is extended to cover the publication of identifying information about a person to a Crown prosecutor, or any officer or employee of a department of state, who requires that information for the purposes of deciding whether or not to prosecute that person for an offence.
Submissions

1032. The Criminal Bar Association (23) considers clause 213 too broad. This allows publication of suppressed details of a person who escapes from custody or fails to attend court. The Criminal Bar Association suggests the inclusion of protections such as a stand down period and a requirement to give notice of the intention to publish.

1033. The Media Freedom Committee (37) states this clause could apply to media and then asks what level of proof of certain matters will be required.

Comment

1034. Publication of suppressed details of a person who escapes from custody or fails to attend court is carried over from the previous law. Further, as the purpose of publishing the information is to facilitate recapture or arrest, details that are irrelevant for that purpose may not be included in any subsequent publication. A mandatory stand down period may also cause unnecessary or unwarranted delays in some situations where time may be of the essence.

1035. Advisers are unaware of any problems with the operation of the existing law which is carried over into this clause. If the media published information at the request of the Police, which was in breach of a suppression order, in the event of prosecution they could plead total absence of fault, which would protect them from liability.

1036. No substantive changes are recommended to this clause.

Clause 214 – Standing of members of media

1037. Clause 214 provides that a member of the media who is subject to a code of ethics, or the complaints procedures of the Broadcasting Standards Authority or the Press Council, has standing to be heard in relation to any application for a suppression order, and any application to renew, vary, or revoke a suppression order. The question of whether or not a member of the media has standing is currently governed by case law.

Submissions

1038. The Media Freedom Committee (37) welcomes this clause. Tech Liberty submits that the traditional media should not have special standing.

1039. David Farrar (25) submits that it is not necessary to restrict standing in suppression cases as it is unlikely that people who do not have a legitimate interest in the case would want to be heard.

1040. David Farrar (25) and the NZLS (40) submit that this clause should be in line with clause 202. Under clause 202 the court has the ability to give permission to remain in a closed court to those who are reporting but do not fall within the definition of media.

1041. As with clause 202, Television New Zealand (52) and the Press Council (71) submit that the definition of media requires amendment.

1042. The NZLS (40) raises a question as to whether it is clear that the media can initiate proceedings, as well as simply be heard.
Comment

1043. Advisers consider that it is necessary to restrict standing in suppression cases. Advisers note that if David Farrar is incorrect about who would want to be heard, the implications for the courts in terms of time would be of concern.

1044. Advisers agree that the court should have the discretion to grant standing to others who do not fall within the definition of media in clause 202, but are reporting on the case. It is recommended that there be an amendment to align the clause with clause 202.

1045. Advisers also recommend that section 214 be amended to make it clear that the media can initiate proceedings, not just be heard on existing proceedings.

**Recommendation 64**

Advisers recommend that clause 214 (regarding standing of members of media), which relates to suppression order applications, be amended to:

- bring the definition of media into line with the definition proposed in clause 202;
- make it is clear that the media can initiate proceedings, not just be heard on existing proceedings.

**Offences relating to breach of suppression provisions and orders**

**Clause 215 – Offences and penalty**

1046. Clause 215 makes it an offence to publish any name, identifying information, or other information, in breach of a suppression order, or in breach of any of the automatic suppression provisions. The offence is punishable by:

1046.1. in the case of an individual, a term of imprisonment not exceeding 6 months; or

1046.2. in the case of a body corporate, a fine not exceeding $100,000.

1047. These penalties are significantly higher than the penalties that currently apply under the Criminal Justice Act 1985. Under that Act the highest penalties apply in relation to breach of section 139A (which relates to the protection of child witnesses). The maximum penalty for breaching that section is a term of imprisonment not exceeding three months or a fine not exceeding $1,000 in the case of an individual, and a fine not exceeding $5,000 in the case of a body corporate. The penalty for breaching a suppression order under either section 138 or 140 of the Criminal Justice Act 1985, or for breaching section 139 (Prohibition against publication of names in specified sexual cases) is a maximum fine not exceeding $1,000.

**Submissions**

1048. Adam Edwards (16) and the Criminal Bar Association (23) welcome the increased penalties. David Farrar (25) considers any penalty of imprisonment is excessive in this area.

1049. There is concern about the lack of monetary alternative to 6 months imprisonment for individuals, including from Adam Edwards (16). Currently there
is a $10,000 limit in a District Court, but this limit will be removed once the Bill comes into force.

1050. The Media Freedom Committee (37) believes any increase in penalties should be in respect of deliberate or unreasonable breaches of court orders, not inadvertent breaches. Adam Edwards (16), New Zealand Legal Information Institute (72) and Television New Zealand (52) similarly argue that penalties should vary depending on the level of culpability.

1051. The NZLS (40) recommends that this clause clarify that it is a strict liability offence and the defendant will not be liable if he or she has acted in reliance on information provided by a court official or has otherwise taken all reasonable steps to ensure compliance with all existing suppression orders.

1052. Tech Liberty (50) submits that the focus of the offence should be the purpose of the offending (breach of the order) rather than the fact of publication. This will introduce a knowledge requirement.

Comment

1053. Following submissions and further consideration, advisers consider there is scope for a two tiered approach to penalties. This would create two offences:

1053.1. an offence of knowingly or recklessly publishing suppressed information (new); and

1053.2. a strict liability offence (ie, no intent required, but defendant able to prove total absence of fault) for publishing suppressed information (existing law and in the Bill).

1054. Advisers recommend that the current penalties in the Bill – a maximum fine of $100,000 for a body corporate and a maximum term of 6 months’ imprisonment for an individual - be reserved for the more serious of the two offences (ie, deliberate or reckless publication of suppressed information). The lower level, strict liability offence should have penalties of a maximum fine of $50,000 for a body corporate, and a maximum fine of $25,000 for an individual.

1055. These lower level offence penalties are still higher than those in the Criminal Justice Act 1985; however, the current penalties have not changed since they were first enacted in the 1980s. As noted in the Law Commission report, the current penalties are considered inadequate and do not act as a meaningful deterrent.

1056. Although these matters could be left to judicial sentencing discretion, two tiers of offence in legislation will send a clear message to the public regarding the culpability for publishing suppressed information.
**Clause 216 – Liability of Internet service providers**

1057. Clause 216 does not correspond to any existing provision in the Criminal Justice Act 1985. It relates to the liability of an internet service provider (ISP). It provides that an ISP is not guilty of an offence unless it knows, or has reason to believe, that it is hosting material that breaches a suppression order or provision, and fails to delete or prevent access to that material as soon as possible after becoming aware of the infringing material.

1058. It also provides that when an ISP deletes or prevents access to a user's material because it has reason to believe it breaches a suppression order or provision, it must notify the user of the action it has taken.

**Submissions**

1059. This clause attracted substantial comment, the majority of which was negative. However, the Criminal Bar Association has no objection to this clause to maintain the integrity of suppression orders made.

1060. Other submitters favour deleting the clause (Judge David Harvey (14), David Farrar (25), InternetNZ (30), NZICT (42), Tech Liberty (50), Telecommunications Carriers Forum (51), Trade Me (55)). Comments include the following:

1060.1. Judge David Harvey: the area of regulation is the content of the website. The responsibility for this lies with the person who makes the content accessible; in this context the ISP is completely neutral.

1060.2. InternetNZ, NZICT, Trade Me: the focus should be on the person who has breached the order.

1060.3. InternetNZ: the clause will be ineffective to prevent the most likely way in which a suppressed name will spread, via sites hosted by overseas ISPs – for example, all major social networking sites (eg; Facebook, Twitter, MySpace, Bebo) are hosted overseas.

1060.4. Trade Me: caching will mean that even if content is removed it could still be available. Even if removed in New Zealand, it could already be copied overseas.

1061. However, amendments were also suggested in the event that the clause remains:

1061.1. the definition of ISP is too broad and this should focus on internet content hosts, not those who transmit, route or provide connections
the offence covers where an ISP knows or has “reason to believe” that material breaches a suppression order. The offence should require knowledge (Judge David Harvey, David Farrar, InternetNZ, Telecommunications Carriers Forum, Trade Me).

knowledge that material breaches a suppression order should be as a result of official notification of that breach (Judge David Harvey, David Farrar, InternetNZ, Telecommunications Carriers Forum, Television New Zealand, and Trade Me).

the notification needs to include the specific page on which the infringing material is located (David Farrar, InternetNZ, Telecommunications Carriers Forum, and Trade Me).

the requirement for the ISP to notify a user if material has been deleted should only be “if practical” (David Farrar).

ISPs should be able to recover costs if necessary and be given protection from liability (Telecommunications Carriers Forum).

Comment

Substantial concerns have been raised about the need for and drafting of this provision. Even if amendments are made to the drafting, some concerns will not be able to be addressed. On balance, advisers recommend that this clause be deleted.

As raised in submissions, concerns about this provision include:

the overly broad definition of ISP (capturing content hosts and those who transmit, route or provide connections);

the effectiveness of this clause; and

the appropriateness of criminal liability in this area.

Even if the definition of ISP were narrowed to content hosts, the provision would still only cover onshore content hosts. Many social media sites and a number of websites for New Zealand companies are hosted offshore and would not be subject to this potential liability.

In addition, caching and copying to other websites may result in this clause being ineffective. Even if one ISP takes down, or blocks access to, information, that information may have already been copied, or may still be available via a cache. A cache stores data so that future requests for that data can be served more quickly. Caches can occur at various levels, for example, computer, web browser and ISP.

The focus of law enforcement and criminal liability in this area should be on the person who publishes the suppressed information (already addressed in clause 215), rather than the host of that content. Under clause 215, it is an offence to make suppressed information available on the internet from New Zealand, regardless of where that website is hosted. This focus on the publisher
will ensure that the offending behaviour is directly targeted. As discussed under clause 215, the penalties for these offences are substantially increased.

1067. Advisers therefore agree with submitters that this clause should be removed. The Law Commission is currently conducting a review of regulatory gaps in new media, and regulation of media on the internet will be looked at in that context.

**Recommendation 66**

Advisers recommend that clause 216, concerning liability of onshore Internet service providers, be deleted as the focus of law enforcement and criminal liability in this area should be on the person who publishes the suppressed information (already addressed in clause 215), rather than the host of that content.
Part 6 – Appeals

1068. This Part sets out appeal pathways and consolidates current appeal provisions in the Crimes Act 1961 and the Summary Proceedings Act 1957 to provide one set of coherent provisions that applies to each appeal category.

1069. The appeal provisions broadly reflect existing law, with some modifications to reflect changes made by the Bill in other areas. Where appeal provisions in the two Acts that deal with the same matter differ, the Crimes Act model has generally been preferred to the Summary Proceedings Act model.

GENERAL SUBMISSIONS ON PART 6

General

Submission

1070. The New Zealand Bar Association (39b) considers that the appeal provisions are unnecessarily complicated. It suggests that this complexity may have stemmed from the Bill’s attempt to merge the appeal provisions in the Crimes Act 1961 and the Summary Proceedings Act 1957.

Comment

1071. Advisers disagree that the appeal provisions are unnecessarily complicated. The New Zealand Bar Association may have reached this view because of the category-by-category approach to the presentation of the appeal categories in Part 6. This has contributed to the length of Part 6 and has resulted in some repetition between subparts. However, this was considered a preferable approach to a shorter set of provisions that required users to continually cross-reference to provisions throughout Part 6 to get a complete picture of the provisions that applied to a particular appeal. That approach, in essence, is the approach taken currently in the appeal provisions in the Crimes Act 1961 and Summary Proceedings Act 1957. It has resulted in appeal provisions that are difficult to understand and navigate.

Appeal paths

1072. The appeal paths provided in the Bill largely reflect current arrangements, subject to some changes that were consequential to other changes in the Bill (eg, the abolition of committal). In particular, the appeal paths maintain the High Court’s jurisdiction over first instance appeals in Judge-alone cases and the Court of Appeal’s jurisdiction over first instance appeals in jury trial cases. The appeal paths reflected in the Bill, by offence category are as follows:

<table>
<thead>
<tr>
<th>Category 1</th>
<th>1st instance</th>
<th>2nd instance</th>
<th>Further appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any decision by a Community Magistrate or Justice of the Peace</td>
<td>DC</td>
<td>HC (with leave)</td>
<td>N/a</td>
</tr>
<tr>
<td>Any decision by a District Court judge</td>
<td>HC</td>
<td>CA (with leave)</td>
<td>SC (with leave)</td>
</tr>
</tbody>
</table>
### APPEAL PATHS

<table>
<thead>
<tr>
<th>Category 2</th>
<th>1st instance</th>
<th>2nd instance</th>
<th>Further appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any decision in the DC</td>
<td>HC</td>
<td>CA (with leave)</td>
<td>SC (with leave)</td>
</tr>
<tr>
<td>Any decision in the HC</td>
<td>CA</td>
<td>SC (with leave)</td>
<td>N/a</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 3</th>
<th>1st instance</th>
<th>2nd instance</th>
<th>Further appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any DC decision when jury trial not elected</td>
<td>HC</td>
<td>CA (with leave)</td>
<td>SC (with leave)</td>
</tr>
<tr>
<td>DC decisions when jury trial elected:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Sentence of 5 years or less imposed following guilty plea entered before trial</td>
<td>HC</td>
<td>CA (with leave)</td>
<td>SC (with leave)</td>
</tr>
<tr>
<td>• Bail, name suppression and contempt in the face of the court</td>
<td>HC</td>
<td>CA (with leave)</td>
<td>SC (with leave)</td>
</tr>
<tr>
<td>• All other decisions</td>
<td>CA</td>
<td>SC (with leave)</td>
<td>N/a</td>
</tr>
<tr>
<td>Any HC decision</td>
<td>CA</td>
<td>SC (with leave)</td>
<td>N/a</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Category 4</th>
<th>1st instance</th>
<th>2nd instance</th>
<th>Further appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA</td>
<td>SC (with leave)</td>
<td>N/a</td>
<td></td>
</tr>
</tbody>
</table>

### Submissions

1073. Don Mathias (2) considers that the first appeal court for appeals in all category 3 cases against conviction or sentence or on a question of law should be the Court of Appeal and the second appeal court should be the Supreme Court. This is because the errors in these cases are likely to be the same, regardless of whether a case is heard by a judge or by a jury. They therefore warrant attention from the same level of appeal court.

1074. A similar point was made by the New Zealand Bar Association (39b) and the NZLS (40), which consider that the Court of Appeal should be the first appeal court for all appeals in category 3 cases. The Bar Association considers that not doing so provides a disincentive for defendants to elect to be tried by a Judge-alone (because appeals in those cases would be heard by a single judge in the High Court in the first instance rather than three judges in the Court of Appeal). The Law Society considers that the approach in the Bill risks inconsistency given that the same types of legal issues will be dealt with by a single High Court Judge on appeal in some cases but three judges in the Court of Appeal in other cases. The consequence will be the development of two bodies of jurisprudence on the same issues on appeal.

1075. The Royal Federation of New Zealand Justices Association (10) expresses some reservations about the change in appeal paths for decisions from Justices of the Peace. Under the Bill, first-instance appeals from Justice of the Peace decisions will be heard in the District Court, rather than in the High Court as currently. The Royal Federation considers that this change is inconsistent with the right provided in section 25(g) of the NZBORA for an appeal to a “higher court” and that it equates an appeal to “almost a “peer review” of colleagues”. The District Court
Judges (26) query why the Bill does not change the appeal paths for decisions by Justices of the Peace on bail, which are still to the High Court in the first instance.

1076. The Wellington Criminal Bar Association (57) considers that greater structural change is required to the appellate structure. In particular, it considers that a consequence of the current approach is that the Court of Appeal is inundated with criminal appeals both against conviction and sentence. The operation of the Criminal Appeal Division, which was established to deal with this workload, is unsatisfactory. It suggests that the Bill’s approach is “tinkering around the edges” and more fundamental change is required.

Comment

1077. Specific issues that arise with the appeal paths for appeals against pre-trial decisions and appeals against sentence are discussed below (at paragraphs 1105 and 1170 respectively).

1078. The key principles underlying the overall approach to appeal paths are as follows:

1078.1. appeal paths for bail decision and name suppression decisions should remain unchanged – that is, they should continue to follow a hierarchical approach;

1078.2. appeal paths for decisions by Justices of the Peace should be aligned with appeal paths for decisions by Community Magistrates – that is, both should be appealed to a Judge in the District Court in the first instance;

1078.3. the High Court should continue to have first-instance jurisdiction over the equivalent of the District Court’s summary jurisdiction – category 1 and 2 offences, and category 3 offences when jury trial is not elected;

1078.4. the Court of Appeal should continue to have a supervisory jurisdiction in jury trial cases and should maintain its central role as an appellate court in New Zealand’s criminal justice system.

1079. At the time the Bill was being developed, consideration was given to whether more substantial change was required to appeal paths in light of proposed changes to the election threshold and offence categorisation. Together, these changes are likely to mean that a District Court judge sitting alone will deal with more serious and complex cases than currently (i.e., cases that would previously have been dealt with in the indictable jurisdiction and been appealed to the Court of Appeal in the first instance). However, it was considered that no further changes to appeal paths were required. The primary rationale behind current appeal arrangements is to maintain the Court of Appeal’s oversight of jury trial cases. This rationale is not affected by the Bill.

1080. In response to the specific concerns raised by submitters, the approach to appeal paths does mean that the appeal paths for a category 3 offence will generally depend on whether a defendant has elected to be tried by a jury. It will also mean that the same issue might be dealt with in different appeal courts. However, just as there is no evidence that current appeal paths affect a defendant’s decision about whether or not to elect, it is not expected that this will influence a defendant’s election decision in the future. The Court of Appeal will still maintain some first instance oversight of Judge-alone cases in relation to cases that are transferred to the High Court for trial. It is more likely to be these cases where
Court of Appeal guidance is required in first instance appeals, given the nature of the cases that are likely to be transferred. Dealing with these appeals will also enable the Court of Appeal to set precedents that can then be applied by the High Court in the appeals it deals with. The system of precedent will mitigate the risk of inconsistency in decisions.

1081. Advisers do not recommend any changes be made overall to the appeal paths in the Bill. However, as noted by the District Court Judges, an amendment is required to ensure that appeal paths for bail decisions by Justices of the Peace are the same as for Community Magistrates. Failure to make this change in the Bill as introduced was an oversight.

<table>
<thead>
<tr>
<th>Recommendation 67</th>
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<tbody>
<tr>
<td>Advisers recommend that the Bail Act 2000 be amended so that appeal paths for bail decisions by Justices of the Peace are aligned to the appeal paths for bail decisions by Community Magistrates (both should be appealed to a judge in the District Court in the first instance).</td>
</tr>
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</table>

Second appeals

Submissions

1082. The Chief Justice (60) suggests that consideration be given to dropping the requirement that second appeals to the High Court and the Court of Appeal be confined to a question of law. She notes that the requirement does not apply to second appeals to the Supreme Court. However, all second appeals are by leave and the main basis for granting leave in that Court is that a “substantial miscarriage of justice” may have occurred. She considers that it should be possible to hear and determine any appeal where there may have been a substantial miscarriage of justice, though it will be rare for such cases not to involve a question of law. Further, undeserving appeals can simply be declined leave.

Comment

1083. The Bill preserves existing differences between second appeals heard by the High Court and the Court of Appeal, on the one hand, and second appeals heard by the Supreme Court, on the other.

1084. The longstanding position has been that a second appeal to the High Court and the Court of Appeal may only be brought, with leave, on a question of law. Leave may only be granted if the second appeal court is satisfied that the question of law should be considered by the court “because of its general or public importance or for any other reason” (eg, clause 227(4)).

1085. A second appeal to the Supreme Court also requires leave but is not confined to questions of law. Under section 13(2) of the Supreme Court Act 2003, the applicable grounds for granting leave in criminal cases are that:

1085.1. the appeal involves a matter of general or public importance; or

1085.2. a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.
1086. It is anomalous for there to be different second appeal rights, depending on the court appealed to. Advisers propose that there should be a consistent approach to the determination of second appeals and it should follow the Supreme Court model. Experience in the Court of Appeal under the existing law is that the question of law limitation is more theoretical than real. Competent counsel will shape the proposed appeal grounds as questions of law and, as the Chief Justice comments, there is sometimes room for debate over whether an issue gives rise to a point of law. It is better to rely on the leave process to filter out appeals that lack merit.

1087. Advisers therefore recommend that Part 6 of the Bill dispense with the question of law requirement for second appeals to the High Court and Court of Appeal and align the grounds on which leave may be granted with the Supreme Court criteria specified above in 1085.1 and 1085.2.

**Recommendation 68**

Advisers recommend that the provisions in Part 6 that govern second appeals to the High Court and Court of Appeal be amended to:

- remove the requirement that the appeal be on a question of law; and
- provide that leave may be granted for a second appeal only if the court is satisfied that:
  - the appeal involves a matter of general or public importance; or
  - a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.

**Relationship to Supreme Court Act 2003**

**Submissions**

1088. The Legislation Advisory Committee (69) suggests further consideration be given to the interrelationship between rights of appeal under the Bill and the powers of the Supreme Court under the Supreme Court Act 2003. No specific problems are identified.

**Comment**

1089. The Supreme Court Act 2003 specifies the constitution of the Court, the appeals that may be heard by the Court and certain powers and procedures that apply to such appeals. The design of the Act is that these provisions, which are specific to the Court and apply in the main to both criminal and civil appeals, interact with other statutes that govern the determination of specific rights of appeal. At the time of enactment, this interface was addressed by consequential amendments to the other statutes.

1090. The Bill does not propose substantive change to the Supreme Court Act 2003. The Bill has been carefully drafted to preserve a smooth interface between that Act and criminal procedure legislation. Clause 218 highlights that all rights of appeal to the Supreme Court are subject to the Supreme Court Act 2003, in particular sections 12 to 14 of the Act, which govern leave to appeal. As recommended above, advisers consider that harmony with the Act can be improved by adopting the Supreme Court leave criteria for second appeals to the other criminal appeal courts. Similarly, advisers recommend (see the discussion...
of clause 236 below), that a “substantial miscarriage of justice” remain the core
ground for allowing an appeal against conviction in order to line up with section
13(2)(b) of the Supreme Court Act 2003.

1091. As to matters of general procedure (subpart 11), provisions are largely the same
in all appeal courts, with differences mainly relating to the nature of appeal and
the constitution of the court. Some additional refinements are recommended
below. Otherwise, advisers consider the interface between the Bill and the
Supreme Court Act 2003 is clear and a significant improvement on the existing
law.

SUBPART 1 – GENERAL MATTERS

1092. Subpart 1 (clauses 217 to 219) covers general matters including:

1092.1. definitions of the terms used in this Part (clause 217);

1092.2. leave to appeal requirements (the existing requirements in the
Supreme Court Act 2003 relating to leave to appeal to the Supreme
Court are not changed by this Bill) (clause 218); and

1092.3. procedural requirements (clause 219).

Comment

1093. There were no submissions on these clauses. Advisers do not recommend any
changes be made to them, except those arising from the recommended approach
to rules (see Recommendation 86).

SUBPART 2 – APPEALS AGAINST PRE-TRIAL DECISIONS

First Appeals

Clauses 220 and 221 (Right of appeal by prosecutor or defendant against pre-trial
admissibility decision in Judge-alone case)

1094. Clauses 220 and 221:

1094.1. give the prosecutor and the defendant a right of appeal against a
court’s decision to make or refuse to make an order under clause 79
about the admissibility of evidence in a case to be tried by a judge
alone (clause 220); and

1094.2. provide that the appeal court may refuse to give leave if it considers it
expedient for the issue under appeal to be determined by way of an
appeal at the conclusion of the trial (clause 221).

Submissions

1095. The NZLS (40) argues that clause 220 removes some current pre-trial appeal
rights where a defendant chooses a Judge-alone trial. It considers that the
clause should be expanded to enable a party to appeal against the same matters
that are able to be appealed against pre-trial in jury trial cases (see the list of
matters in clause 222(2)).
Comment

1096. There is currently no ability to appeal decisions made before the trial (eg, about amendments to charges, change of venue etc) in Judge-alone cases. The traditional view has been that the ‘balance of convenience’ in these cases favours continuing with the trial and, if the defendant is convicted, addressing any residual issues about pre-trial decisions as part of the appeals process.

1097. In contrast, in cases that are to be tried by a jury, it is important to ensure that issues that arise before the trial are resolved as much as possible before a trial begins. This is to avoid the cost and inconvenience of jury trials progressing unnecessarily or on a disputed basis so that a retrial might be required. The majority of pre-trial appeals are likely to involve questions of evidence admissibility.

1098. There is currently no ability in Judge-alone cases to make a pre-trial application about evidence admissibility. However, because the approach taken in the Bill to offence categories means that there will be more serious and complex cases dealt with by a judge alone, the ability to make a pre-trial admissibility application in Judge-alone cases was included in the Bill on a limited basis (see clause 79). It was appropriate for a pre-trial appeal right in this context to also be provided.

1099. Advisers therefore disagree with the NZLS view that the full list of matters than can be appealed pre-trial in jury trial cases (see clause 222) should also be able to be appealed pre-trial in Judge-alone cases. However, it is recommended that pre-trial rights in Judge-alone cases be extended to enable either party to appeal:

1099.1. an order made under section 44 of the Evidence Act 2006 giving or refusing permission to question a complainant in a sexual case about his or her sexual experience;

1099.2. an order giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 to question an undercover police officer, or give evidence about, his or her true name and address;

1099.3. making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006.

1100. All three matters can be appealed pre-trial in jury trial cases (clause 222(1)(i)–(k)). They are all related to issues of evidence admissibility and, in the event of an erroneous decision being made, cannot be remedied after trial. In addition, the changed approach to offence categories means that orders under all three sections will be possible in both a Judge-alone and jury trial context. There is no principled reason for the appeal rights in respect of these orders to differ depending on whether a case is to be heard by a judge or by a jury.
Advisers recommend that clause 220 (right of appeal by prosecutor or defendant against pre-trial admissibility decision in Judge-alone case) be extended to enable the following matters to be appealed before the trial in a Judge-alone case:

- an order made under section 44 of the Evidence Act 2006 giving or refusing permission to question a complainant in a sexual case about his or her sexual experience;
- an order giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 to question an undercover police officer, or give evidence about, his or her true name and address;
- making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006.

Clauses 222 and 223 (Right of appeal by prosecutor or defendant against pre-trial decisions in jury trial cases)

1101. Clauses 222 and 223:

- give the prosecutor and the defendant a right of appeal against various pre-trial decisions in a case to be tried by a judge sitting with a jury (clause 222); and
- give the defendant the right of appeal against an order about the prosecutor’s failure to provide particulars or to transfer the proceedings to another venue, in a case to be tried by a judge sitting with a jury (clause 223).

Comment

1102. There were no submissions on these clauses, which largely reflect existing law. Advisers do not recommend any substantive changes be made to them.

Clause 224 – First appeal courts

1103. Clause 224 specifies the first appeal courts for pre-trial appeals.

Submissions

1104. The NZLS (40) suggests that the first appeal court for appeals against pre-trial decisions about evidence admissibility in category 3 cases should be the Court of Appeal, regardless of whether the decision was made in a Judge-alone case or a jury trial case.

Comment

1105. The general approach to appeal paths was discussed above at paragraphs 1077–1081. Specific consideration was given to the appropriate appeal path for the new right of appeal against pre-trial admissibility decisions in Judge-alone cases as the Bill was being developed. It is true that the issues that are likely to arise in these appeals are unlikely to differ materially between elected and non-elected cases (or between the District and High Court). However, appeals against pre-trial admissibility decisions were not considered so distinct that their appeal path should differ from any other appeal arising in a non-elected case. As
in paragraph 1079, cases that are transferred to the High Court for trial are more likely to be the cases where Court of Appeal guidance on any pre-trial appeal is required in the first instance.

1106. Advisers do not recommend any changes be made to clause 224.

Clause 225 – How to commence first appeal

1107. Clause 225 provides for the way in which a first appeal against a pre-trial decision must be commenced.

Comment

1108. There were no submissions on this clause and no substantive changes are recommended.

Clause 226 – First appeal court to determine appeal

1109. Clause 226 provides how a first appeal court must determine an appeal.

Comment

1110. There were no submissions on this clause and no substantive changes are recommended.

Clauses 227 – 232 (Further appeals)

1111. Clauses 227 to 232 provide for second and further appeals against a determination by a first appeal court.

Comment

1112. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67 above), advisers do not recommend any substantive changes be made to them.

SUBPART 3 – APPEALS AGAINST CONVICTION

1113. Every convicted person can appeal against his or her conviction as of right. The rights of appeal are currently in section 115 of the Summary Proceedings Act 1957 (for summary cases) and section 383 of the Crimes Act 1961 (for indictable cases).

1114. In indictable cases, the appeal lies to the Court of Appeal or the Supreme Court and is disposed of on one of the grounds specified in section 385(1) of the Crimes Act 1961. The Summary Proceedings Act 1957 states that the High Court will deal with an appeal in a summary case by way of rehearing. However, the Act specifies no grounds on which an appeal may be allowed. In practice, however, the High Court applies similar principles as the senior appellate courts.

1115. Consistent with the general approach to appeals, the Bill proposes that all conviction appeals should be heard and determined on the same grounds. Further discussion can be found below under clause 236.
First appeals

Clause 233 – Right of appeal against conviction

1116. Clause 233 gives a defendant a right of appeal against conviction for an offence. No leave is required to bring the appeal.

Comment

1117. There were no submissions on this clause and advisers do not recommend any substantive changes be made to it.

Clause 234 – First appeal courts

1118. Clause 234 specifies the first appeal court for appeals against conviction, as follows.

1118.1. appeals from convictions entered by Community Magistrates or Justices of the Peace must be heard by a District Court Judge in the District Court;

1118.2. appeals from convictions by a District Court Judge in relation to a category 1 or 2 offence, or a category 3 offence when jury trial was not elected, must be heard in the High Court;

1118.3. appeals from any other conviction must be heard in the Court of Appeal or Supreme Court.

Submissions

1119. Don Mathias (2) considers that the first appeal court for appeals in all category 3 cases against conviction or sentence or on a question of law should be the Court of Appeal and the second appeal court should be the Supreme Court.

Comment

1120. The approach to appeal paths generally is discussed in paragraphs 1077–1081. In line with that discussion, advisers do not recommend any changes to clause 234. In particular, the Bill preserves the Court of Appeal's jurisdiction over first instance appeals in jury trial cases.

Clause 235 – How to commence first appeal

1121. Clause 235 provides for an appeal to be commenced by filing a notice of appeal in the first appeal court within 20 working days after the date of sentence.

Comment

1122. There were no submissions on this clause and advisers do not recommend any substantive changes be made to it.

Clause 236 – First appeal to determine appeal court

1123. Clause 236 specifies the grounds on which an appeal may be allowed, based on a modified version of section 385 of the Crimes Act 1961. Apart from any necessary distinctions between Judge-alone trials and jury trials, the policy is that the same statutory principles should apply to all appeals against conviction. The other policy objectives are to improve the clarity of the law and to do so in such a way as to maintain the continuity of the law.
In this regard, a key issue was to address difficulties associated with the proviso to section 385(1). The proviso states that where the appeal court concludes that the point raised on an appeal should be decided in an appellant’s favour, the court may nevertheless dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. This captures the idea that although something may have gone wrong in a trial, it should not necessarily lead to an appeal being upheld if it has not actually affected the outcome.

In practice, the interaction between the proviso and the specified appeal grounds has not been straightforward. Under subsection (1)(c) of section 385, an appeal can be granted on the ground of a “miscarriage of justice”, but can then be dismissed under the proviso if no “substantial miscarriage of justice” has actually occurred. The law therefore requires the appeal courts to explain the distinction between a miscarriage of justice and a substantial miscarriage of justice, which has caused the courts considerable difficulty. In its most recent decision addressing this issue, the Supreme Court described the proviso as a “troublesome provision”.

In addition, the proviso does not apply to all grounds of appeal. The courts have ruled that the proviso cannot be employed to uphold a conviction resulting from a fundamentally unfair trial, and also does not apply to subsections (1)(a) – unreasonable jury verdict – and subsection (1)(d) – conviction a nullity. In these cases, the ground of appeal, if made out, will in itself constitute a substantial miscarriage of justice and consequently there is no scope to apply the proviso.

Against this background, the approach adopted in the Bill is to integrate the proviso into the grounds of appeal, making it clear that the ultimate test for allowing an appeal remains a “substantial miscarriage of justice”, as that term is currently understood. This approach follows section 276 of the Criminal Procedure Act 2009 (Vic.) and underlines the policy intent to make the law more coherent and simpler to apply without changing the core principles.

Clause 236(3) provides that an appeal must be allowed if the first appeal court is satisfied that:

1128.1. in the case of a jury trial, having regard to the evidence, the jury’s verdict was unreasonable; or

1128.2. in the case of Judge-alone trial, the judge erred in his or her assessment of the evidence to such an extent that a substantial miscarriage of justice has occurred; or

1128.3. in any case, a substantial miscarriage of justice has occurred as a result of:

1128.3.1. an error in or in relation to the trial, which error may be an error of law or any other error; or

1128.3.2. an irregularity in or in relation to the trial; or

1128.4. in any case, a substantial miscarriage of justice has occurred for any other reason.

\[\text{45} \quad \text{Matenga v R [2009] NZSC 18.}\]
1129. The only distinction maintained between Judge-alone alone and jury trials relates
to determinations of fact. While appellate courts are generally reluctant to
interfere with the trial court’s findings of fact, in Judge-alone cases, closer
scrutiny of a judge’s reasoning is possible and the appeal court can come to its
own decision on the facts. The distinction is captured in subclause (3) of clause
236 by retention of the unreasonable jury verdict ground46 and in subclause (2) of
that clause by retention of the summary ‘rehearing’ procedure47 for Judge-alone
cases.

Submissions

1130. Submissions focused on the use and meaning of “substantial miscarriage of
justice”. A range of modifications or alternatives were canvassed.

1131. Don Mathias (2) and the Auckland District Law Society (18) consider that a fair
trial should be the benchmark and suggest that the test for allowing an appeal
should be that “there is a real risk that the trial was unfair”. James Richardson
(39a) is also critical of the term “substantial miscarriage of justice” and refers to
the English test that the conviction is “unsafe”. The New Zealand Bar Association
(39b) considers the meaning of “substantial miscarriage of justice” is elusive and
considers that the Supreme Court’s approach – a miscarriage of justice that
affects the result of the trial – interferes with the right to a fair trial.

1132. The NZLS (40) and the Wellington Criminal Bar Association (57) do not support
removal of the proviso. They consider an appellant should not have to establish
that a substantial miscarriage of justice has occurred.

1133. Finally, the Chief Justice (60) supports the reframing of appeal grounds because
of the complications inherent in the existing law. She considers clause 236 can
be simplified further by amalgamating paragraphs (c) and (d), by dropping the
term “substantial” and by defining “miscarriage of justice”. The Chief Justice
suggests the latter term may be better understood by the general public.

Comment

1134. Several of these proposals would not achieve or would run counter to the policy
objectives relating to this clause. Replacing clause 236 with a single criterion
based on an “unsafe conviction” or an “unfair trial” would introduce too much
uncertainty. It would be unclear whether Parliament intended to change the
existing law or confirm its essentials. It would be left entirely to the courts to flesh
out the principles that apply to conviction appeals. On the other hand, the
operation of the law will continue to be unnecessarily complex if some version of
the proviso (with its miscarriage/substantial miscarriage dichotomy) is retained.

1135. Parliament’s intention should be clear. Using the term “substantial miscarriage of
justice” emphasises that the ultimate benchmark for allowing a conviction, and
the application of established principles, should not change.

1136. However, advisers consider that clause 236 can be made simpler and clearer. It
is proposed that clause 236(3) be simplified by amalgamating paragraphs (c) and
(d) and separately defining “substantial miscarriage of justice”. In line with
current case law, the definition would include any error or irregularity that –

1136.1. has created a real risk that the outcome of the trial was affected; or

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46 Section 385(1)(a) of the Crimes Act 1961.
47 Section 119(1) of the Summary Proceedings Act 1957.
1136.2. has resulted in an unfair trial or a trial that was a nullity.

1137. This approach addresses concerns about the meaning of “substantial miscarriage of justice” and is more transparent than either the Bill or existing law.

1138. Advisers also agree that, in principle, it would be better to refer just to a miscarriage of justice. However, it is not proposed to dispense with the term “substantial” at this time. As noted earlier in this report, section 13 of the Supreme Court Act 2003 uses “substantial miscarriage of justice” as a key ground for granting leave to appeal in that court, and it is proposed that this test should apply in respect of leave for all second appeals. It would introduce a fresh complexity to require appeal courts to apply a “substantial miscarriage of justice” test when granting leave but a bare “miscarriage of justice” test for deciding the appeal, particularly as it would suggest a higher test for leave than the appeal itself.

1139. While consideration could be given in the future to dropping the term “substantial” in the Supreme Court Act 2003, the Bill is not a suitable vehicle for such a policy change, especially given that section 13 applies to both civil and criminal appeals.

1140. Finally, clause 236(2), which provides that conviction appeals from Judge-alone trials should proceed by way of rehearing, should be deleted. It implies that appeals from jury trials do not proceed by way of rehearing, which is not an accurate statement of the law. In particular, section 24 of the Supreme Court Act 2003 provides that all appeals to that Court are by way of rehearing. The distinction regarding scrutiny of fact-finding in Judge-alone and jury trials is adequately captured by clause 236(3)(a) and (b).

Recommendation 70
Advisers recommend that clause 236 (first appeal court to determine appeal) be amended to:
- delete subclause 236(2), because it erroneously suggests only Judge-alone trials proceed by way of a rehearing; and
- amalgamate and re-draft subclauses (3)(c) and (d) to define “Substantial miscarriage of justice” to include any error or irregularity that –
  - has created a real risk that the outcome of the trial was affected; or
  - has resulted in an unfair trial or a trial that was a nullity.

Clause 237 – Orders, etc, on successful appeal
1141. Clause 237 provides which orders can be made by the first appeal court if it allows an appeal, such as directing an acquittal or a retrial.

Comment
1142. There were no submissions on this clause and advisers do not recommend any substantive changes be made to it.
Clause 238 - Conviction and sentence for different offence may be substituted

1143. Clause 238 provides that a first appeal court can convict the convicted person of a different offence in certain circumstances.

Comment

1144. There were no submissions on this clause and advisers do not recommend any substantive changes be made to it.

Clause 240 - Confirmation or substitution of sentence for another offence

1145. Clause 238 provides that on a successful conviction appeal, the first appeal court can enter a conviction for a different offence if certain conditions apply. Clause 240 provides that if a conviction is overturned and that conviction had influenced a sentence passed for a different offence, the first appeal court may amend that other sentence accordingly.

Comment

1146. There were no submissions on these clauses. However, advisers recommend amendments to address small gaps in the current provisions.

Clause 238 – substitution of conviction

1147. Clause 238 is modelled on section 386(2) of the Crimes Act 1961. It enables the first appeal court, when allowing an appeal against conviction for one offence, to direct that a conviction for a different offence be substituted if the court is satisfied that the person could have been found guilty at the person’s trial of a different offence and the jury or judge must have been satisfied of facts that proved the defendant guilty of that offence.

1148. The power to substitute a conviction for a related offence on a successful appeal avoids the inconvenience and expense to the courts and the parties of ordering a new trial. It can be justified where the appeal court is satisfied that the substituted offence has been proved (clause 238(1)) or that the appellant admits that he or she is guilty of the substituted offence.

1149. However, a recent Court of Appeal case (Watts v R\(^{48}\)) has highlighted that section 386(2) does not appear to allow substitution of a conviction where the conviction resulted from a guilty plea rather than a finding of guilt at trial. By contrast, section 132 of the Summary Proceedings Act 1957 allows the appeal court to substitute a conviction for a different offence, whether the conviction resulted from a guilty plea or finding of guilt.

1150. To address the guilty plea situation, it is proposed that clause 238 be amended to add that where the successful appellant had pleaded guilty to the original charge, the appeal court can, with the appellant's agreement, substitute a conviction for a different offence based on facts admitted in relation to that original charge.

Clauses 238 and 240 – power to remit sentence to sentencing court

1151. When it exercises the powers to substitute a conviction under clause 238, the appeal court can impose any sentence for that offence that is allowed by law. The appeal court has similar power when it allows a conviction appeal and decides to amend an affected sentence under clause 240. These provisions reflect the existing law.

\(^{48}\) CA 225/2010, 4 October 2010.
Advisers propose that the appeal court should also have the option of remitting the matter to the sentencing court. While the need to re-sentence following a conviction appeal is likely to arise in only a few cases, there are sound reasons for including a remittal power.

Although an appeal court that is undertaking a re-sentencing exercise has all the powers of a sentencing court, it may not always be in the best position to determine the appropriate sentence. Although the appeal court might canvas with the parties the question of sentence in the event of a conviction being amended or set aside, the focus of the appeal hearing will be on the conviction appeal itself. Re-sentencing may require an additional hearing with submissions from the parties, particularly if the question of sentence is contentious. The appeal court may take the view in some cases that it is desirable for the trial judge who heard the evidence at trial to impose the new sentence.

Further, enabling the appeal court to remit the case to the trial court for sentence is consistent with its ability to do so in an appeal against sentence. There seems no reason in principle why the same power should not be available following an appeal against conviction.

**Recommendation 71**
Advisers recommend that:

- clause 238 (conviction and sentence for different offence may be substituted) be amended to enable the appeal court, on determining a conviction appeal by a person who pleaded guilty, to substitute a conviction for a different offence based on facts admitted in relation to the original charge, if the appellant agrees; and
- clauses 238 and clause 240 (confirmation or substitution of sentence for another offence) be amended to allow an appeal court, instead of exercising its power to re-sentence under those clauses, to remit the matter to the trial court for sentencing.

**Clauses 239 – Acquittal on account of insanity**

Clauses 239 provides for acquittal on account of insanity.

**Comment**

There were no submissions on this clause and no substantive changes are recommended.

**Further appeals (clauses 241-247)**

Clauses 241 to 247 provide for second and further appeals against a determination by a first appeal court.

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49 For example, it can order a pre-sentence report under section 389 of the Crimes Act 1961 and/or sections 26 and 33 of the Sentencing Act 2002.
Comment

1158. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67), no substantive changes are recommended.

SUBPART 4 – APPEALS AGAINST SENTENCE

First appeals

Clause 248–250 (Rights of appeal against sentence)

1159. Clauses 248 to 250:

1159.1. give a convicted person a right of appeal against sentence as of right, unless the sentence is fixed by law (clause 248);

1159.2. provide that a right of appeal against sentence is not affected by the fact that a defendant received a sentence indication (clause 249);

1159.3. give the prosecutor a right of appeal against sentence, with the Solicitor-General’s consent (clause 250).

Clause 249 – Right of appeal against sentence not affected by sentence indication

1160. Clause 249 provides that the right to appeal against sentence is not abrogated for either the defendant or the prosecutor by reason of the defendant having received a sentence indication. This preserves the right of the Crown to appeal against an unduly lenient sentence, and the right of the defendant to appeal against an unduly harsh one.

Submissions

1161. While neither of the submitters who comment on this clause (James Richardson (39a) and the New Zealand Bar Association (39b)) are opposed to it, they query whether there should be a legislative requirement to tell a defendant in advance of plea that a sentence imposed in accordance with a sentence indication is appealable.

Comment

1162. Advisers do not consider this to be necessary. Any judicial decision as to conviction or sentence is potentially subject to an appeal. While it is true that some defendants may think that a sentence imposed in accordance with a sentence indication is non-appealable, it is equally likely that some may consider any sentence imposed, without a sentence indication having been given, to be non-appealable.

1163. If the legislation was to be so prescriptive as to require, in legislation, every aspect of the sentence indication regime that is not binding (eg, the fact a sentence indication does bind another judicial officer) to be conveyed to a defendant the Bill could become unduly detailed.

1164. Further, any failure to comply with a statutory requirement of the type these submitters propose is not amenable to any meaningful sanction, especially if the responsibility to do so were to fall on a judicial officer. The right for the prosecution to appeal would have to stand in any event.
1165. The submitters suggest, as an alternative, that the prosecutor should be required to indicate, in advance of any plea being entered in reliance of an indication, that the prosecutor considers the sentence indicated to be unduly lenient and that they will consider appealing any sentence imposed in accordance with the indication. There is nothing to preclude that happening without a statutory requirement.

1166. But, as James Richardson’s submission on point indicates, at that stage of proceedings the best that the prosecution could do is likely indicate is that they will consider appealing if such sentence is imposed. It is unclear how helpful that would be to a defendant’s consideration of whether to plead guilty on the basis of the sentence indication.

1167. Advisers consider that this is a matter best left to lawyers to advise their clients as a matter of course. It may also be that judicial guidelines or a practice note may appropriately cover what directions, if any, are appropriate in this regard. Advisers recommend that no change be made to clause 249.

**Clause 251 – First appeal courts**

1168. Clause 251 provides the appeal paths for first appeals against sentence. They are as follows:

1168.1. appeals from sentences imposed by Community Magistrates or Justices of the Peace must be heard by a District Court Judge in the District Court;

1168.2. appeals from sentences imposed by a District Court Judge in relation to a category 1 or 2 offence, or a category 3 offence when jury trial was not elected, must be heard in the High Court;

1168.3. appeals from sentences imposed by a District Court Judge in relation to a category 3 offence when jury trial was elected must be heard in the High Court if the sentence was five years or less and was imposed following a guilty plea entered before trial;

1168.4. appeals from any other sentence must be heard in the Court of Appeal or Supreme Court.

**Submissions**

1169. Don Mathias (2) considers that the first appeal court for appeals against sentence in all category 3 cases should be the Court of Appeal. The NZLS (40) considers that the first appeal court for sentences in category 3 cases of more than 5 years imprisonment should be consistently the High Court or the Court of Appeal and should not depend on whether the sentence arose from a Judge-alone or a jury case.

**Comment**

1170. The general approach to appeal paths is discussed in paragraphs 1077–1081. Except for the change in appeal paths for sentences imposed by Justices of the Peace (which will be heard in the District Court rather than the High Court), these appeal paths largely reflect existing law.

1171. As discussed above at paragraph 1078, a primary principle that drove the approach to appeal paths was to ensure that the Court of Appeal maintained its
supervisory jurisdiction over jury trial cases. The key risk with this approach is the potential increase in the Court of Appeal’s workload if the Court were to deal with all sentence appeals arising from jury trial cases. Currently, the Court does not deal with first instance appeals against sentences of five years’ imprisonment or less that are imposed in indictable cases, if the sentence was imposed following a guilty plea being entered before a case is committed for trial.50 (The Court would hear the appeal if it was combined with another appeal – eg, an appeal against sentence.)

1172. Ministry of Justice figures indicate that the High Court dealt with approximately 116 of these appeals in 2008. Without a sentencing limit, these appeals would be dealt with in the Court of Appeal. Arguably, it is not a good use of the Court of Appeal’s resource and expertise to deal with appeals of this nature.

1173. On the other hand, it would not be appropriate for the High Court to deal with all appeals against sentence in category 3 cases when the sentence was imposed by the District Court. Doing so would hinder the Court of Appeal’s ability to provide sentencing guidance and set sentencing tariffs.

1174. The reason for the retention of a sentencing limit for appeal purposes is therefore purely pragmatic – it is to prevent the Court of Appeal becoming over-burdened with minor sentence appeals and to ensure an appropriate allocation of workload between it and the High Court. There is no particular reason to choose a limit of five years’ imprisonment, except that it is the current limit and appears to allocate sentence only appeals appropriately between the two courts. The Court of Appeal will maintain oversight of sentences under the limit when those sentences are appealed as part of an appeal against conviction and sentence (or as part of a sentence only appeal when a guilty plea is entered during the trial).

1175. Advisers do not recommend any changes be made to clause 251.

Clause 252 – How to commence first appeal

1176. Clause 252 provides for the way in which a first appeal against sentence must be commenced.

Comment

1177. There were no submissions on this clause. However, it is recommended that an amendment be made to clause 252 to enable the appeal court to extend the time within which the document evidencing the Solicitor-General’s consent to the appeal must be filed. As long as this document is filed before an appeal hearing, there is no reason why it must always accompany the notice of application for leave to appeal.

Recommendation 72

Advisers recommend that, in relation to appeals against conviction, subclause (4) of clause 252 (how to commence first appeal) be amended to enable the first appeal court to extend the time within which the document evidencing the Solicitor-General’s consent must be filed.

50 This is because these cases are essentially treated as arising from the summary jurisdiction rather than the indictable jurisdiction.
Clause 253–256 – (how first appeals must be dealt with)

1178. Clauses 253 to 256:

1178.1. provide that an appeal by a prosecutor must be treated as having been dismissed if the appeal is not heard before the relevant sentence is completed (clause 253);

1178.2. set out the grounds on which a first appeal court must determine an appeal (the court must allow the appeal if it thinks there is an error in the sentence and that a different sentence should be passed) (clause 254);

1178.3. provides which orders can be made if a first appeal court allows an appeal (clause 255);

1178.4. provides that a defendant who has received a sentence indication may not withdraw a guilty plea after a more severe sentence is imposed on appeal except with the leave of the court (clause 256).

Comment

1179. There were no submissions on these clauses. Advisers do not recommend any substantive changes be made to them.

Further appeals

Clause 257 – Right of appeal against determination of first appeal court

1180. Clause 257 provides the prosecutor and defendant with rights of appeal, with leave, against a determination of a first appeal court.

Submissions

1181. The NZLS (40) notes that clause 257 restricts second appeal rights by only allowing a party to appeal against a determination made on their own appeal. This means, for example, that a convicted person could not appeal against a first appeal court’s decision to increase his or her sentence if that decision arose from a first appeal by the prosecutor.

Comment

1182. The intention was to reflect the approach taken in the Crimes Act 1961 to sentence appeals. Under section 383A of the Act, the Solicitor-General may only take a further appeal in relation to a first appeal that he or she has brought. However, a convicted person may take a further appeal whether or not he or she brought the first appeal. Clause 257(1) is therefore in error. (An amendment to clause 257 will also be required in light of the recommended approach to leave grounds for second appeals. See Recommendation 67.)
**Recommendation 73**

Advisers recommend that, in relation to appeals against a sentence, subclause (1) of clause 257 (right of appeal against determination of first appeal court) be amended to enable a convicted person to appeal, with leave, against a determination by the first appeal court, regardless of whether he or she brought the first appeal.

**Clauses 258–263 (other provisions relating to further appeals)**

1183. Clauses 258 to 263 describe remaining provisions relating to second and further appeals.

**Comment**

1184. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67), advisers do not recommend any substantive changes be made to them.

**Orders made on discharge without conviction**

1185. Advisers recommend the inclusion of an appeal right that was inadvertently omitted from the Bill.

1186. Under section 115 of the Summary Proceedings Act 1957, there is a right of appeal against sentence and any other order made against a defendant on the determination of a charge. While it is settled law that a discharge without conviction under section 106 of the Sentencing Act 2002 is neither a sentence nor an order made "against the defendant", if the court discharging the defendant also makes an order under section 106(3), that order is appealable under existing law.51 Section 106(3) orders can include costs, restitution and compensation (analogous to reparation).

1187. To remedy the omission, it is proposed that a provision be added to the effect that a person against whom an order is made under section 106(3) of the Sentencing Act may appeal against the order as if the order were a sentence imposed on conviction and subpart 4 of the Bill should apply with all necessary modifications.

**Recommendation 74**

Advisers recommend that, in relation to appeals against a sentence, the Bill include a right to appeal an order made against the defendant under section 106(3) of the Sentencing Act (discharge without conviction).

**Subpart 5 – Appeals against finding of or sentence for contempt of court**

1188. Clauses 264 to 273 provide for rights of appeal against a finding of criminal contempt and any sentence imposed for criminal contempt, whether the contempt is committed in the face of a court or otherwise. Currently, sections 115B of the Summary Proceedings Act 1957 and 384(2) of the Crimes Act 1961 provide rights of appeal against a sentence for contempt in the face of a court, and

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51 See the Commentary on section 106 in Hall’s Sentencing at SA106.6.
section 384(4) of the Crimes Act 1961 provides a right of appeal against the finding or the sentence in other cases.

**Clause 264 – Right of appeal against finding of or sentence for contempt of court**

1189. Clause 264 gives a person guilty of criminal contempt a right of appeal against the finding of contempt, or any sentence imposed, or both.

**Submissions**

1190. The NZLS (40) notes that persons guilty of civil contempt of court are potentially liable to similar consequences, including imprisonment, to persons found guilty of criminal contempt. The NZLS recommends that consideration be given to simplifying the rules and appeal processes for all contempts.

**Comment**

1191. Though the distinctions between criminal and civil contempt of court have narrowed, they remain. It is beyond the scope of the Bill to reform the law governing contempt of court. Appeals from a finding of civil contempt are currently heard in the civil jurisdiction in accordance with the District Courts Act 1947 and the Judicature Act 1908. So long as there is a separate branch of the law recognised as civil contempt of court, advisers do not consider that the relevant appeal rights should be located in a criminal procedure statute. No change is recommended.

**Clauses 265–273 (Further provisions dealing with appeals against contempt)**

1192. The remaining clauses in subpart 5 provide for appeals to be determined as if a finding of contempt of court were a conviction and a sentence for contempt court were a sentence passed on conviction. Subparts 3 (conviction appeals) and 4 (sentence appeals) will apply accordingly.

**Comment**

1193. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67), advisers do not recommend any changes be made to them.

**SUBPART 6 – APPEALS AGAINST DECISIONS ON COSTS ORDERS**

1194. Clauses 274 to 285 provide for appeals against costs orders made under clause 361 (which establishes a new costs order relating to a failure to comply with procedural requirements) or the Costs in Criminal Cases Act 1967. Existing rights are in section 115DA of the Summary Proceedings Act 1957 and section 379CA of the Crimes Act 1961.

**Comment**

1195. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67), advisers do not recommend any changes be made to them.
**SUBPART 7 – APPEALS AGAINST SUPPRESSION ORDERS**

**Clauses 286–298 (suppression orders)**

1196. The Bill enables a court to make orders for the suppression of names and evidence (subpart 3 of Part 5). Rights of appeal against these orders are also provided. The appeal provisions largely codify existing law, with the following exceptions:

1196.1. the Bill also closes two gaps in current appeal rights in relation to orders made by the High Court. There is currently no ability to appeal a suppression order made during a High Court trial, or to appeal the High Court’s refusal to impose name suppression if a defendant is acquitted. Both orders can currently be appealed if they are made in the District Court.

1196.2. the Bill gives the media (as defined in clause 214(1)) standing to appeal.

**Comment**

1197. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67 above), advisers do not recommend any changes be made to them.

**SUBPART 8 – APPEALS ON QUESTION OF LAW**

**General submissions on subpart 8**

1198. Clauses 299 to 313 aim to provide a coherent set of provisions that replace various existing provisions that enable a case to be stated for an appeal court on a question of law. The case stated procedure, which is overly complex and antiquated, is replaced by an appeal right that proceeds in the same way as an appeal under other subparts. An appeal under this subpart will involve a question of law that arises in the proceedings used to determine a charge against the defendant or in the final determination of that charge. Excluded from such appeals are questions of law that arise from a jury verdict or pre-trial questions already determined by an appeal court.

**Submissions**

1199. James Richardson (39a) queries the necessity of retaining appeals on a question of law. He considers that the appeal rights already provided in Part 6 are adequate and that enabling appeals on a question of law “seems calculated to maximise the chances of the criminal process being brought to a halt by excessive appeals”.

**Comment**

1200. The aim of this appeal category is to enable questions of law to be determined in cases where an appeal would not otherwise be available. This might include, for example, an appeal on a question of law that arises in a pre-trial decision in a case proceeding by way of Judge-alone. The ability to bring an appeal on a question of law ensures that the outcome of proceedings rests on a correct application of the law.
1201. It is likely that the complexity of the process surrounding the case stated procedure acts as a barrier to bringing more appeals currently on questions of law.\textsuperscript{52} The concern that removal of the case stated procedure will lead to an influx of appeals has been addressed in two ways. First, leave of the court appealed to will always be required before an appeal on a question of law can be heard. Second, there is provision for the trial to continue despite the fact that an appeal has been filed. In some cases, the outcome of the trial will make the question of law redundant.

1202. No changes are recommended to subpart 8.

\textit{First appeals}

\textbf{Clause 299 – Right of appeal}

1203. Clause 299 gives a prosecutor or a defendant a right of appeal on a question of law against the ruling by a trial court. Leave of the first appeal court is required to bring the appeal.

\textit{Comment}

1204. There were no submissions on clause 299. Advisers do not recommend any changes be made to it.

\textbf{Clause 300 – First appeal courts}

1205. Clause 300 specifies the first appeal courts as follows:

\begin{itemize}
\item \textbf{1205.1.} appeals from a ruling made by Community Magistrates or Justices of the Peace must be heard by a District Court Judge in the District Court;
\item \textbf{1205.2.} appeals from rulings by a District Court Judge must be heard in the High Court, except if the proceedings relate to a category 3 offence and the defendant has elected jury trial, or the proceedings relate to a category 4 offence;
\item \textbf{1205.3.} appeals from any other ruling must be heard in the Court of Appeal or Supreme Court.
\end{itemize}

\textit{Submissions}

1206. Don Mathias (2) considers that the first appeal court for all rulings made in category 3 cases should be the Court of Appeal.

\textit{Comment}

1207. The approach to appeal paths generally is discussed in paragraphs 1077–1081. In line with that discussion, advisers do not recommend any changes be made to clause 300.

\textsuperscript{52} Ministry of Justice estimates are that, in the three years from 2006–2008, seven case stated appeals were heard in the Court of Appeal (0.5\% of all appeals in the Court over that period) and 62 case stated appeals were heard in the High Court (1.7\% of all appeals in the High Court over that period).
Clauses 301–302 – (commencement of first appeal)

1208. Clauses 301 and 302:

1208.1. provide for the way in which an appeal on a question of law must be commenced and includes a requirement for the question of law to be stated (clause 301); and

1208.2. set out the powers of the first appeal court to amend or restate any question of law to be determined (clause 302).

Comment

1209. There were no submissions on these clauses and no substantive changes are recommended.

Clause 303 – Deferral or adjournment of trial if notice of application for leave to appeal filed

1210. Clause 303 provides that:

1210.1. if an appeal on a question of law is filed before the trial, the trial must not start until the appeal is determined unless doing so is in the interests of justice;

1210.2. if an appeal on a question of law is filed during the trial, a jury trial must continue but a Judge-alone trial may be adjourned.

Submissions

1211. The NZLS (40) recommends that clause 303 be amended to enable a jury to be discharged when an appeal on a question of law is filed during the trial.

Comment

1212. Clause 303(4)(a) was intended to reflect existing law as it applies in jury trial cases. Under section 380(1) of the Crimes Act 1961, either party may ask the court to reserve a question of law that arises during the trial. That question may then be the subject of an appeal at the trial's conclusion.

1213. Unlike Judge-alone trials, the presence of a jury means it is not practicable to adjourn a jury trial while the question of law is determined. The choice is either between the trial being continued or the jury being discharged. In most cases, the 'balance of convenience' will favour continuing with the trial. This is because if the defendant is acquitted, the question will become moot. In addition, the length of most trials means that it will not be practicable for an appeal to be filed until the trial has concluded.

1214. However, there will be some situations where it will be desirable for the question of law to be resolved before any further progress is made in a jury trial. This could occur where, for example, the question of law is critical to whether or not a trial is required at all.

1215. Advisers therefore recommend that some limited ability is provided to enable the court to discharge a jury where an appeal on a question of law is filed during the trial. However, the presumption in these cases should clearly be that the trial must continue.
Recommendation 75

Advisers recommend that subclause (4) of clause 303 (deferral or adjournment of trial if notice of application for leave to appeal filed) be amended to provide that, where an appeal on a question of law is filed during the trial, the trial must continue unless the court considers it in the interests of justice for the jury to be discharged.

Clause 304 – First appeal court to determine first appeal

1216. Clause 304 sets out the power of the court to determine an appeal on a question of law. It enables the appeal court to:

1216.1. confirm the ruling appealed against;

1216.2. set aside the conviction, enter an acquittal or direct a new trial if satisfied that an erroneous ruling has resulted in a substantial miscarriage of justice;

1216.3. vary, substitute or remit a sentence to the sentencing court;

1216.4. remit the matter to the trial court;

1216.5. make any other order that justice requires.

Submissions

1217. The NZLS (40) considers that the language of a “substantial wrong”, which appears in section 382(2) of the Crimes Act 1961 on which clause 304 is based, should be included in clause 304(1)(b). This is because the use of “substantial miscarriage of justice” on its own is not apt to deal with cases where, for example, a charge has been dismissed.

Comment

1218. Clause 304 is a simplified version of section 382 of the Crimes Act 1961, which deals with the Court of Appeal’s powers when determining a question of law. Essentially, section 382 uses “substantial miscarriage of justice” to refer to cases where the error is one that affects the defence and “substantial wrong” to refer to cases where the error is one that affects the prosecution. However, advisers consider that “substantial miscarriage of justice” is appropriate to cover both situations. No change is recommended.

Clause 305 – How determination of appeal affects outcome of trial

1219. Clause 305 sets out what is to happen if the trial is concluded before a first appeal on a question of law is determined.

Comment

1220. There were no submissions on clause 305 and no substantive changes are recommended.

Further appeals (clauses 306 to 313)

1221. Clauses 306 to 313 provide for second and further appeals against a determination by a first appeal court.
Comment

1222. There were no submissions on these clauses. With the exception of the recommendation in relation to the grounds on which second appeals may be taken (see Recommendation 67), advisers do not recommend any substantive changes be made to them.

SUBPART 9 – APPEALS RELATING TO PEACE BOND DECISIONS

Clause 314 – Right to appeal

1223. The Bill enables a court to make orders for bonds to keep the peace. Clause 314 (the only clause in this subpart) provides a right of appeal to the High Court against:

1223.1. an order under clause 364 that a person enter into a peace bond:

1223.2. an order under clause 369 that a peace bond be forfeited:

1223.3. an order under clause 367 committing a person to prison for refusing to enter into a bond or failing to obtain a surety.

1224. An appeal against an order requiring a person to enter into a bond or against forfeiture of a bond follows the procedure for an appeal against a costs order. An appeal against imprisonment follows the procedure for an appeal against sentence.

Comment

1225. There were no submissions and no substantive changes are recommended to this subpart.

SUBPART 10 – SOLICITOR-GENERAL’S REFERENCES

1226. Subpart 10 provides a new right of appeal for the Solicitor-General in the form of a reference to the Court of Appeal or to the Supreme Court. The reference procedure is based on similar provisions in the Supreme Court Act 1933 (ACT) and the Criminal Justice Act 1972 (UK). The reference—

1226.1. requires the leave of the Court appealed to; and

1226.2. must be confined to a question of law;

1226.3. may be directed to:

1226.3.1. the Court of Appeal, if the question arose in or in relation to the trial of a defendant in a District Court or the High Court that has been completed (eg, because the defendant has been acquitted);

1226.3.2. the Supreme Court, if the question arose in or in relation to a defendant’s successful first appeal to the Court of Appeal against conviction or sentence and the prosecutor has no right of appeal against that Court’s determination.
1227. A reference determined by the Court of Appeal may be appealed to the Supreme Court, with that Court’s leave. The determination of a question referred under this subpart will not disturb the outcome of the proceedings in which the question arose.

Submissions

1228. Judy Ashton (34) and the New Zealand Police Association (41) support subpart 10.

Comment

1229. The availability of a reference procedure to the Supreme Court under clause 318 for questions of law that arise in appeals against conviction or sentence to the Court of Appeal raises the question of whether there should be an equivalent reference procedure to the Court of Appeal for questions of law that arise in appeals to the District Court or High Court.

1230. The changed approach to offence categories means that there are likely to be District Court Judge-alone trials in more serious and complex cases than currently, including cases that would previously have been heard by a jury. In category 3 cases, election of jury by the defendant is not determinative of the seriousness or complexity of the issues that a case raises. (In some cases, a defendant will not elect jury trial precisely because the case is complex.) It is, therefore, possible that a High Court appeal decision may also give rise to an important question of law that would benefit from the reference procedure. There is no principled basis why the reference procedure should not apply in such cases.

Recommendation 76

Advisers recommend that the new Solicitor-General’s reference procedure in clauses 315 to 319 be extended to enable the Solicitor-General to refer a question of law to the Court of Appeal which arises in or in relation to a defendant’s appeal to the High Court against conviction or sentence where the prosecutor has no right of appeal against that Court’s determination.

Clauses 315–317 – (Solicitor-General’s right to refer question of law to Court of Appeal)

1231. Clauses 315 to 317:

1231.1. set out the procedure for the way in which the reference procedure is commenced and how it is dealt with in the Court of Appeal (clause 315);

1231.2. provide a right of appeal to the Supreme Court against a decision of the Court of Appeal to refuse leave to appeal (clause 316);

1231.3. provide a right of appeal to the Supreme Court against the Court of Appeal’s determination of the question (clause 317).

Submissions

1232. The NZLS (40) proposes some changes to the reference procedure set out in clauses 315 to 317. The NZLS considers that the Court should have the ability to allow any other person, including the defendant, to be heard on the appeal and to
appeal against the Court’s determination on the reference question. It also considers that there should be a requirement for the reference to be dealt with by a full court (that is, five permanent judges of the Court of Appeal).

Comment

1233. The approach taken in the Bill to the defendant’s role in the process differs to that taken in some other jurisdictions. For example, in the United Kingdom, the Court of Appeal may hear from the defendant’s counsel or, with leave, the defendant personally. The defendant may also appear as of right in Victoria, Scotland, and Queensland.

1234. However, given that the determination of the reference procedure will not affect the outcome of the trial, an acquitted or convicted person arguably has no further interest in the issue before the courts. Even if legal aid or other funding were made available, the defendant is unlikely to be motivated to participate and would have no real ability to give instructions on a matter which is moot in respect of him or her. As a matter of practice, it is anticipated that the court will wish to appoint as amicus the person who represented the defendant at trial. However, that is a matter that seems better left to the court’s discretion.

1235. Under section 58D of the Judicature Act 1908, the Court of Appeal must sit as a full court to hear and determine:

- cases that are considered, in accordance with the procedure notified in the Gazette, to be of sufficient significance to warrant the consideration of a full court;
- cases that are referred for consideration of the full court by a division of three judges;
- appeals from the Court Martial Appeal Court under the Court Martial Appeals Act 1953.

1236. It is not considered necessary to include an explicit provision that appeals under the reference procedure must be heard by a full court. Under the Gazette procedure to which (a) above applies, a case will be heard by a full court if it involves the establishment or revision of sentencing tariffs, or involves issues that are of major significance to other cases. By definition, therefore, appeals under the reference procedure are likely to be heard by a full court. Counsel are also able to seek a direction that an appeal be heard by a full court.

1237. As a separate matter, Crown Law has raised concern that clause 315(1) is ambiguous about when criminal proceedings end for the purpose of the reference procedure – that is, it does not clearly provide that a question of law can be referred even though an offender’s appeal against conviction or sentence has yet to be dealt with. The policy intent is that the end of a criminal proceeding in this context is the end of the trial. It would be desirable to clarify the drafting in this respect.

54 Criminal Procedure Act 2009, section 308(3).
55 Criminal Procedure (Scotland) Act 1995, section 123(2).
56 Criminal Code, section 668A.
57 New Zealand Gazette No. 48, 9 April 2009 p.1172.
**Recommendation 77**

Advisers recommend that subclause (1) of clause 315 (Solicitor-General’s right to refer question of law) be clarified to provide that the Solicitor-General can refer a question of law to the Court of Appeal even though an offender’s appeal against conviction or sentence has yet to be dealt with.

**SUBPART 11 – FURTHER PROVISIONS**

1238. Subpart 11 deals with aspects of appeal procedure that apply to all appeal categories.

**Clauses 320–321 – (procedure for determining jurisdiction where appeals lie to different appeal courts)**

1239. Clauses 320 to 321 set out the procedure for determining which appeal court has jurisdiction where appeals arising from the same incident or series of incidents lie to different courts.

**Submissions**

1240. James Richardson (39a) considers these clauses are too complex and comments that this is a result of the Bill providing for four categories of offences and jury trials in both the District and High Courts.

**Comment**

1241. The clauses ensure related appeals are heard together in the Court of Appeal and Supreme Court. They are not unduly complex and are a necessary feature in any criminal procedure statute where appeal paths vary depending on the seriousness of the offence, the trial procedure that is adopted and the level of trial court. Section 384A of the Crimes Act 1961 performs exactly the same function in the existing law.

1242. Advisers do not recommend any substantive changes to these clauses.

**Clause 322 – Duty of Solicitor-General**

1243. Clause 322 provides that the Solicitor-General must represent the Crown on every first appeal to the Court of Appeal and every first and second appeal to the Supreme Court against conviction or sentence or involving oral submissions. This duty can be carried out by another lawyer employed or instructed by the Solicitor-General.

**Submissions**

1244. The NZLS (40) considers that it is unnecessary for the Solicitor-General’s duty to be prescribed in statute but that, if it is to remain, the duty should extend to all pre-trial and question of law appeals and also apply to appeals heard by the High Court.

**Comment**

1245. Clause 322 carries forward section 390 of the Crimes Act 1961. It provides for the Solicitor-General to represent the Crown in New Zealand’s highest courts, reflecting the Solicitor-General’s constitutional role in the criminal justice system. (The Bill also recognises the Solicitor-General’s role at the trial stage - see clauses 192-197.)
Advisers do not, however, consider that the statutory recognition of this duty should be extended to appeals in the High Court. The existing law, and the Bill, focus on representation in the senior appellate courts and on the matters of most significance, conviction and sentence appeals and appearance at oral hearings. The Solicitor-General will not always represent the Crown in the High Court – for example, when an appeal arises from a departmental prosecution. No changes are recommended.

**Clauses 323–324 – (Registrar of appeal court to arrange appeal)**

Clauses 323 to 324 set out the functions of Registrars to arrange the appeal, obtain all necessary documents and inform the parties.

**Submissions**

The NZLS (40) notes that the Bill does not include the current statutory duty to prepare the case on appeal in indictable cases and recommends this be dealt with in rules or in an appendix to the Bill.

**Comment**

It is intended that rules will deal with the detail of Registrars' duties in connection with appeals. An amendment to clause 382 is recommended below to clarify that there is adequate rule-making power. Accordingly, advisers do not recommend any changes to clauses 323 and 324.

**Clauses 325–326 – (Rights of representation and attendance at hearing of appeal or application for leave to appeal)**

Clauses 325 to 326 set out the rights of representation and attendance at the hearing of appeals.

**Submissions**

The NZLS (40) suggests it would be desirable to consider the possibility of providing for a party in custody to be present at appeals and applications for leave to appeal via video-link.

**Comment**

The Courts (Remote Participation) Act 2010 applies to appeal hearings. That Act enables a participant in a criminal proceeding to appear via an audio-visual link provided the criteria in that Act are met. In light of the application of that Act to appeal hearings, advisers do not recommend any changes be made to clauses 325 and 326 in response to the NZLS submission. On a separate matter, advisers recommend that clause 326(2)(a) be deleted. Although this provision reflects existing law as it applies to the Court of Appeal, the Court has not made any rules about the presence of a party who is in custody. Leave is instead granted on a case-by-case basis. It is difficult to envisage what the rules would comprise.
Recommendation 78

Advisers recommend that clause 326 (right of attendance at hearing) be amended to delete subclause 326(2)(a), regarding court rules (which are not required).

Clauses 327–330 – How applications and appeals are to be heard

1254. Clauses 327 to 331 set out how applications and appeals are to be heard. This includes that:

1254.1. applications for leave to appeal or to extend time for appeal (where applicable) may be dealt with orally or on the papers (clauses 327 and 328);

1254.2. appeals in the Court of Appeal or Supreme Court must be heard orally unless the court directs otherwise (clause 329);

1254.3. appeals in the District Court and High Court must be heard orally (clause 330).

Comment

1255. There were no submissions on these clauses and no substantive changes are recommended.

Clauses 332 – Powers exercisable by Judge of Supreme Court

1256. Clause 332 sets out matters that can be dealt with by one or two Judges of the Supreme Court.

Comment

1257. There were no submissions on clause 332, which reflects existing law. Advisers do not recommend any changes be made to it.

Clause 333 – Powers exercisable by Judges of Court of Appeal

1258. Clause 333 sets out matters that can be dealt with by one or two Judges of the Court of Appeal.

Comment

1259. There were no submissions on this clause.

1260. Clause 333 largely reflects existing law. However, a key change from the status quo is reflected in clause 333(1) which enables two Court of Appeal judges to decide applications for leave to appeal and applications to extend the time within which a leave application or notice of appeal must be filed. Currently, both matters can be decided by a single Judge of the Court, but the appellant may have the application re-determined by the Court if the Judge refuses to exercise a power in the appellant’s favour.\(^{58}\)

1261. There is a question about the approach that should be taken to deciding extensions of time. It appears that the Court regularly extends time for appealing or seeking leave to appeal because it considers it in the interests of justice to do so. Extensions of time are also often dealt with as part of the substantive appeal.

\(^{58}\) Section 393(3) of the Crimes Act 1961.
There is therefore little likelihood that a decision on an application by a single judge will need to be reconsidered by the Court (and little burden on the Court from reconsidering these decisions). Requiring that extensions be dealt with by two judges rather than one might increase the resources required for dealing with extensions of time rather than reduce them. Advisers therefore recommend that clause 333(1) should be amended to revert to the current position in section 393(2) of the Crimes Act 1961 – that a single Judge may determine applications to extend time, but with recourse to the Court if the decision is not in the appellant’s favour.

Recommendation 79

Advisers recommend that subclause (1) of clause 333 (powers exercisable by Judges or Court) be amended to revert to the current position in section 393(2) of the Crimes Act – that a single Judge may determine applications to extend time, but with recourse to the Court if the decision is not in the appellant’s favour – instead of two Judges without recourse to the Court, as in the Bill currently.

Clauses 334–336 (power to receive and hear evidence)

1262. Clauses 334 to 336 set out the powers of appeal courts to receive and hear evidence, including the power to order the attendance of a witness.

Comment

1263. There were no submissions on these clauses and no substantive changes are recommended.

Clause 337 – Abandonment of an appeal by the appellant

1264. Clause 337 provides for the abandonment of an appeal by an appellant.

Comment

1265. There were no submissions on clause 337 and no substantive changes are recommended.

Clauses 338 to 339 (Abandonment of an appeal by the appeal court)

1266. Clauses 338 to 339 provide for the dismissal of an appeal by an appeal court where the appellant fails to comply with a timetable or other procedural order. An appeal against the dismissal is also provided.

Submissions

1267. Judy Ashton (34) supports clause 338. The Coalition of Community Law Centres (22) opposes clauses 338 and 339. It considers that the right to appeal is a fundamental legal right and removal of that right undermines the whole justice system and public confidence in it. The Coalition argues that the ability to dismiss appeals for procedural non-compliance should be retained as an internal court process rather than be the subject of legislation. If the proposed change is enacted, the Coalition recommends that the appeal court should be required to give 28 working days notice of its intention to dismiss the appeal.

Comment

1268. Clauses 338 and 339 build on the current approach taken in the High Court and Supreme Court. Under section 133(1) of the Summary Proceedings Act 1957, the High Court can dismiss an appeal if the appellant fails to appear at the hearing or
is in custody and fails to make written submissions or otherwise fails to prosecute the appeal. Under rule 38(4) of the Supreme Court Rules 2004, the Supreme Court may treat an appeal as abandoned if the appellant fails to comply with a timetable fixed for the appeal.

1269. A decision of the Supreme Court in August 2010 highlighted that there are no similar powers in either the Crimes Act 1961 or rules of court that can be exercised by the Court of Appeal. In Petryszick v R\textsuperscript{59}, the Court of Appeal had dismissed an appeal against conviction after lengthy delays attributable to the appellant. The Supreme Court ruled that in the absence of express authority, the Court of Appeal could not dismiss the appeal for procedural non-compliance. Once a conviction appeal had been properly constituted, the appellant was entitled to a determination of its merits, based on consideration of the material before the appeal court including the trial transcript and the judge’s summing up.

1270. Rather than retain different approaches between courts (which is itself unsatisfactory), it was decided to include in the Bill robust abandonment provisions that apply to all appeals and appeal courts. These provisions recognise that the dismissal of an appeal exhausts appeal rights and should therefore only be done with good reason and with notice to the appellant. However, an appellant should not be able to delay or frustrate the hearing of an appeal and still expect to be accommodated by the appeal court. The Bill enables an appeal to be filed against the dismissal, which provides an additional safeguard to ensure that the court only abandons appeals in appropriate cases.

1271. The notice period of 10 working days is considered sufficient time for the appellant to rectify the non-compliance. Currently, the High Court and Supreme Court may dismiss appeals for non-compliance without any notice to the appellant. It is likely that an appeal court will not invoke clause 338 until there has been repeated non-compliance by the appellant. In those cases, the appellant will have been aware for some time of what the court requires of him or her.

1272. Advisers do not recommend any changes be made to clauses 338 and 339.

**Clauses 340 to 342 (Judgment of appeal court)**

1273. Clauses 340 to 342 provide for the delivery of appellate judgments.

**Comment**

1274. There were no submissions on these clauses. However, it is recommended that clause 340 be amended to enable the appeal court to give reasons for its decision at a different time from the judgment. The ability to do so would be useful, for example, when a judgment is required urgently but more time is required to formally prepare reasons.

**Recommendation 80**

Advisers recommend that clause 340 (judgment to be accompanied by reasons) be amended to enable an appeal court to give reasons for its decision at a different time from the judgment.

**Clauses 343 to 352 (How appeal affects decision under appeal)**

1275. Clauses 343 to 352 set out the effect of the appeal on the decision under appeal.

\textsuperscript{59} [2010] NZSC 105.
Submissions

1276. The District Court Judges (26) raised several issues about clauses 343-348, which govern whether or not a sentence is suspended pending the outcome of an appeal. The Judges expressed concern that the suspension of community-based sentences and non-association orders were open to abuse. Their submission:

1276.1. proposes that non-association orders not be suspended unless the appeal court expressly directs;

1276.2. proposes that community-based sentences should resume if an appeal does not proceed diligently;

1276.3. queries whether clause 344 should refer to home detention.

1277. Clause 350 provides that an appellant who has paid “a fine or other monetary amount” in accordance with a sentence, and is successful on appeal, is entitled to the return of the money paid. The NZLS (40) queried whether it was sufficiently clear that “other monetary amount” included payments by way of reparation.

Comment

Clauses 343-348

1278. The general rule while an appeal is pending (clause 343) is that sentences are not suspended unless the statute specifically provides otherwise or the appeal court so directs. Under the Bill, this rule applies in particular to the custodial sentences of imprisonment and home detention.

1279. However, the longstanding position has been that community-based sentences are suspended pending an appeal and resume if the appeal is unsuccessful. Non-association orders were introduced as a stand-alone sentence in 1989 and have, for consistency, always been treated the same way as the community-based sentences (see section 28D of the Criminal Justice Act 1985 (repealed); section 116 of the Sentencing Act 2002). The Bill continues existing law.

1280. So far as non-association orders are concerned, on recent figures around 100 orders were made each year between 2004 and 2009. However, in that time, only a few orders have been suspended as a result of an appeal. Given the low number of appeals, and the lack of evidence that the suspension of the order on appeal has in fact caused problems, advisers do not consider there is currently justification for changing the law on non-association orders. It is proposed that they should continue to be treated the same as community-based sentences on appeal.

1281. More generally, the risk of an appellant not prosecuting an appeal diligently is dealt with expressly by clause 338, which enables an appeal court to dismiss an appeal for procedural non-compliance if an appellant, having been warned by the court, persists. On dismissal of an appeal under clause 338, a community-based sentence or non-association order will resume (see clauses 345(2) and 348(2)).

1282. Finally, clause 344 is a specific rule governing issue of a committal order pending appeal in the case of a person sentenced to imprisonment. It does not refer to a sentence of home detention because that sentence does not require the issue of a committal order.
Clause 350

1283. Clause 350 is based on and uses the same language as rule 46 of the Supreme Court Rules 2004. The formula “a fine or other monetary amount in accordance with a sentence” clearly includes reparation. It can be contrasted with rule 38 of the Court of Appeal (Criminal) Rules 2001, which refers only to return of a fine. Crown Law has advised it is not aware of any problems with the interpretation of the current Supreme Court rule.

1284. In summary, advisers do not recommend any substantive changes to clauses 343-352.
Part 7 – Provisions concerning jurisdiction of District Courts

Clauses 353 – 358 (Jurisdiction of Justices of the Peace and Community Magistrates)

1285. Clauses 353 to 358 deal with the jurisdiction of Justices of the Peace and Community Magistrates.

1286. Clause 353 replaces section 9A of the Summary Proceedings Act 1957 and sets out the jurisdiction of a District Court presided over by one or more Justices of the Peace. Clauses 354 to 358 replace sections 9B to 9F of the Summary Proceedings Act and set out the jurisdiction of Community Magistrates. These provisions are substantially the same as those they replace, with changes to reflect the new terminology used in the Bill.

Submissions

1287. The District Courts Judges (26) and the Coalition of Community Law Centres (22) submit that these provisions could be expressed with greater clarity. The District Courts Judges also submit that the jurisdiction of Justices of the Peace and Community Magistrates could be expanded.

Comment

1288. Advisers agree that aspects of the jurisdiction of Community Magistrates and Justices of the Peace could be clarified, particularly in relation to their jurisdiction to deal with certain matters in cases outside of their trial and sentencing jurisdiction (eg, their ability to take pleas, receive elections and order name suppression). Advisers therefore recommend various amendments to the Bill to clarify these powers.

1289. Some expansion of the jurisdiction of Community Magistrates may also be appropriate. Community Magistrates are paid judicial officers, who undertake training under the supervision of the Chief District Court Judge. They can preside over less serious criminal cases, which frees up time for judges to hear more serious cases. This in turn reduces the time taken for cases to be heard.\(^6\) Increasing their jurisdiction would be a cost effective way of increasing judicial capacity and the community’s involvement in the justice system. Advisers do not agree that the jurisdiction of Justices should be extended, noting that they are not paid for their judicial work and do not undertake the same training.

1290. Advisers therefore recommend an amendment to the Bill that would provide an ability to extend the range of offences that may be heard by a Community Magistrate by regulation to (in addition to their current jurisdiction) any other category 1 (non-imprisonable) offence with a maximum fine of up to and including $40,000. Advisers consider this limit appropriate to accommodate what are considered to be ‘lower level’ offences both now and in the future. It is also proposed that any regulations to extend the jurisdiction of Community Magistrates require judicial concurrence (from the Chief District Court Judge and the Chief

\(^6\) A pilot of Community Magistrates began in the Hamilton, Huntly, Tauranga and Whakatane District Courts on 1 February 1999. The key objectives were to increase community involvement in the justice system, to relieve pressure on District Court Judges by reducing delays and backlogs, and to better utilise the skills and experience of District Court Judges in more serious cases. An independent evaluation of the pilot for the period 1 February 1999 to 31 January 2000 found that generally the Pilot met these objectives.
Justice), noting, in particular, the Chief District Judge’s leadership role in regard to the District Courts in which Community Magistrates sit.

1291. It is also recommended that the ability to order costs under section 4(3) of the Costs in Criminal Cases Act 1967 be added to the ancillary powers in clause 357. Section 4(3) of this Act allows the court to recover fees from a convicted defendant under the Summary Proceedings Regulations 1958 schedule 2. Typically these are the fee for filing a prosecution ($30) and having a charge heard ($100) and it is appropriate that Community Magistrates be able to deal with these matters.

1292. Finally, under clause 353, Justices of the Peace have jurisdiction over all infringement offences. However, this jurisdiction is not reflected in clause 354 for Community Magistrates. There is no reason for the jurisdiction to differ. It is therefore recommended that clause 354 is amended to make it clear that Community Magistrates have jurisdiction over infringement offences.

**Recommendation 81**

Advisers recommend that:

- the jurisdiction of Community Magistrates’ and Justices of the Peace be clarified to ensure that they can deal with matters outside their trial and sentencing jurisdiction in respect of:
  - taking pleas;
  - receiving elections for trial by jury.

- the Bill be amended to enable Community Magistrates and Justices of the Peace to make suppression orders on the following basis:
  - on first appearance: order may be made after an opposed application or by consent for all matters (ie not just identity) on a time limited or interim basis only;
  - on subsequent appearances: order may be made by consent for all matters (ie not just identity) on a time limited or interim basis only;

- Community Magistrates’ jurisdiction be able to be extended to any category 1 offence with a maximum fine of up to $40,000 that is specified in regulations (including adding to the Bill a regulation making power, requiring the concurrence of the Chief District Court Judge and the Chief Justice, for such regulations);

- Community Magistrates’ ancillary powers (clause 357) include the ability to make orders under section 4(3) of the Costs in Criminal Cases Act 1967;

- clause 354 be amended to provide Community Magistrates with jurisdiction over infringement offences (to align their jurisdiction in that respect with the jurisdiction provided to Justices of the Peace).

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**Transfer to District Court presided over by District Court Judge**

**Clause 359 – Power to transfer matter to District Court presided over by District Court Judge**

1293. Clause 359 replaces section 9G of the Summary Proceedings Act 1957. It allows a District Court Judge to order that any matter being dealt with by Justices or
Community Magistrates be transferred to a District Court presided over by a District Court Judge.

Comment
1294. There were no submissions on this clause and no changes are recommended.

Clause 360 - Jurisdiction of District Courts in relation to jury trials
1295. Clause 360 replaces sections 28A and 28B of the District Courts Act 1947. It provides that only specifically appointed District Courts, and only District Court Judges that have a jury warrant, have jurisdiction to conduct jury trials.

Comment
1296. There were no submissions on this clause and no substantive changes are recommended.
Part 8 – Miscellaneous and transitional provisions

SUBPART 1 – COSTS ORDERS AND CONTEMPT

Clauses 361 – Costs orders

1297. Clause 361 provides a new power for courts to make costs orders against a defendant, the defendant’s lawyer, or a prosecutor for failing to comply with a requirement imposed by or under the Bill or rules or regulations made under it, or the Criminal Disclosure Act 2008.

Comment

1298. The substantive discussion on this provision is provided above (paragraphs 204 to 230 and one substantive change recommended, accordingly.

Clause 362 – Contempt of court

1299. Clause 362 gives courts the power to arrest and sentence a person for contempt of court if he or she wilfully insults certain persons involved in the court proceedings, or wilfully interrupts those proceedings or otherwise misbehaves in court, or wilfully disobeys any order or direction of the court.

1300. Clause 362 replaces both section 401 of the Crimes Act 1961 and section 206 of the Summary Proceedings Act 1957, which each confer power on courts to deal with behaviour that constitutes contempt of court. The existing Crimes Act 1961 provision differs slightly from the equivalent provision in the Summary Proceedings Act 1957, in that it also covers assaults of, threats to, and intimidation of those involved in the court proceedings. These additional grounds of contempt are not carried forward in clause 362.

1301. The maximum sentence that may be imposed for a contempt remains unchanged (imprisonment for a term not exceeding three months, or a fine not exceeding $1,000 for each offence).

Submissions

1302. Two submissions were received on clause 362. The NZLS (40) suggested that, consistent with international best practice, the judge sentencing someone for contempt should be different from the judge against whom the contempt was committed.

Comment

1303. Clause 362 is one aspect of the courts’ wider contempt powers. The courts have always had inherent power to punish as a criminal contempt of court any conduct which has a tendency to interfere with the due administration of justice. ‘Contempt of court’ is not confined to behaviour against a judicial officer; it includes actions against a Registrar, any officer of the court, any juror, or any witness. There is no evidence (eg, from concerns raised in appeals against contempt orders) of any difficulties with a judge sentencing someone for contempt committed against that same judge.

1304. No substantive changes are recommended to this clause.
SUBPART 2 – CONSERVATION OF THE PEACE

Clauses 363 to 369 (bonds to keep the peace)

1305. Bonds to keep the peace are an old common law process, expressed in modern New Zealand law in the Summary Proceedings Act 1957. These provisions have been carried over to clauses 363 to 369 of the Bill.

Submissions

1306. The Legislation Advisory Committee (69) submits that the conservation of the peace regime is “archaic” and that the relationship between conservation of the peace and other more commonly used protective regimes such as the Domestic Violence Act 1995 is unclear. If the regime is to be used as a “catch all” for undesirable behaviour, it should be replaced by a more “targeted” regime. The Legislation Advisory Committee suggests that advisers be asked to report on the feasibility of replacing the conservation of the peace provisions.

Comment

1307. Advisers do not agree that the conservation of the peace regime overlaps with the Domestic Violence Act 1995, the Harassment Act 1997 and other legislation to such an extent that the provisions are not required. The conservation of the peace regime covers a much wider range of behaviour. For example, it does not require “domestic violence” or a pattern of conduct.

1308. In addition, conservation of the peace is a procedurally more accessible process for dealing with antisocial behaviour than other protective legislation. Bonds to keep the peace may simply be sought by an application via complaint – a written form defined by the Summary Proceedings Act 1957. Applications with supporting affidavits are not required.

1309. Advisers acknowledge that the regime might be seen as antiquated. However, feedback from the Chief District Court Judge during the development of the Bill indicated that the regime has proven useful in addressing minor disputes (such as disputes between neighbours) where more serious criminal sanctions are unwarranted.

1310. Advisers do not recommend any substantive changes be made to this subpart.

SUBPART 3 – MISCELLANEOUS PROVISIONS

Clause 370 – Registrar who is also constable

1311. Clause 370 is a new provision. It provides that a Registrar who is also a constable has no jurisdiction to exercise any power or take any step in his or her capacity as a Registrar in a proceeding in which he or she has exercised any power or taken any step in his or her capacity as a constable. It is intended to replace references in the existing law to actions being taken by a Registrar “who is not a constable”.

62 Harassment Act 1997, section 3(1).
63 Schedule 2, form 1.
Comment
1312. There were no submissions and no substantive changes are recommended to this clause.

Clause 371 – Witnesses’ expenses
1313. Clause 371 replaces section 73 of the Summary Proceedings Act 1957 and provides for the court to order the payment of witnesses’ expenses.

Comment
1314. There were no submissions and no substantive changes are recommended to this clause.

Clause 372 – Conviction not to be recorded for infringement offences
1315. Clause 372 carries forward section 78A of the Summary Proceedings Act 1957 by providing that a person who is found guilty or pleads guilty to an infringement offence, may be ordered to pay a fine and costs, but must not have a conviction entered against them.

Comment
1316. There were no submissions and no changes are recommended to this clause. However, the Legislation Advisory Committee (69) and the Coalition of Community Law Centres (22) do raise the issue of incorporating the entire infringement offence regime from the Summary Proceedings Act 1957 into the Bill. This submission is discussed earlier in the report at paragraphs 18 to 29.

Clause 373 – Person sentenced, etc, deemed to be convicted
1317. Clause 373 is a new provision. It provides that except as otherwise ordered by the court or provided by any other provision of the Bill, if a court proceeds to sentence a defendant or make certain other orders, but does not make an order convicting the defendant, the defendant is deemed to be convicted.

Comment
1318. There were no submissions and no substantive changes are recommended to this clause.

Clause 374 – Restitution of property
1319. Clause 374 replaces section 404 of the Crimes Act 1961 and provides for the restitution to its proper owner, by order of the court, of property in the possession of the offender.

Comment
1320. There were no submissions and no substantive changes are recommended to this clause.

Clause 375 – Who may take affidavit
1321. Clause 375 replaces section 202 of the Summary Proceedings Act 1957. It sets out who may take affidavits for the purposes of the Bill.

Comment
1322. There were no submissions and no substantive changes are recommended to this clause.
Clause 376 – Proceedings not to be questioned for want of form

1323. Clause 376 replicates section 204 of the Summary Proceedings Act 1957 and provides that proceedings may not be dismissed, set aside, or held invalid merely by reason of a defect, irregularity, omission, or want of form unless there has been a miscarriage of justice.

Comment
1324. There were no substantive submissions and no changes are recommended to this clause.

Clause 377 – Proceedings not invalid because defendant should have been dealt with in Youth Court

1325. Clause 377 carries forward section 205 of the Summary Proceedings Act 1957. It provides that no proceeding is invalid only because it ought to have been dealt with in the Youth Court because of the defendant’s age. It also allows for retrials in such situations on application of either party. Subclause (3) provides that, if, at the time appointed for the retrial, the defendant is still a child or young person, the court must remit the proceedings to a Youth Court to be reheard in that court.

Comment
1326. No submissions were made on this clause. However, advisers recommend an amendment to replace the word “reheard” with a wider phrase along the lines of “dealt with” as subclause (3) could imply that proceedings must be reheard when this may not be necessary. This would make it clear that dealing with the matter may not require that it be reheard.

Recommendation 82
Advisers recommend that clause 377 be amended to replace the word “reheard” with a wider phrase along the lines of “dealt with”, as subclause (3) could imply that proceedings must be reheard when this may not be necessary.

Clause 378 – Payment of costs orders

1327. Clause 378 provides for the manner of payment of a costs order made under clause 361. In particular, it provides that section 208 of the Summary Proceedings Act 1957 applies to all money paid under a costs order that is not ordered to be paid to a third party (eg, a victim or witness).

Comment
1328. No submissions were made on this clause. Nevertheless, advisers recommend an amendment.
1329. Currently, section 208 of the Summary Proceedings Act 1957 requires that all court fees, costs, etc are paid into a trust account. In other words, the money is required to be paid to the court and can then be on-paid to the person indicated in the costs order. However, the wording in subclause (1) regarding money “that is not ordered to be paid to some other person” implies that section 208 of the Summary Proceedings Act does not apply to money ordered to be paid to a third party. Therefore, advisers recommend deleting this wording.
1330. In addition, clause 378 raises the question of what should be done with any money other than costs orders ordered to be paid by the court. Advisers recommend expanding clause 378 to apply, not just to costs orders, but to all
District Court-ordered court fees, fines, reparation, costs, and other money payable on a charge or on any conviction or order made by a court (based on the wording in section 208(1)(a) of the Summary Proceedings Act 1957). This would ensure continuation of the status quo; that is, that any money payable under an order imposed by the District Court must be paid first into the trust account and then can be paid out to any person entitled to it (including third parties such as under clause 361(8)).

Recommendation 83
Advisers recommend that clause 378 (payment of costs orders) be amended to apply section 208 of the Summary Proceedings Act to all Court fees, fines, reparation (including costs orders to be paid to a third party under clause 361(8)), costs, and other money payable on a charge or on any conviction or order made by a District Court.

Clause 379 – Payment and recovery of fees

Comment
1332. No submissions were received on this clause. However, advisers recommend that subclause (4) be amended by adding the words "Except as provided in regulations made under this Act" at the beginning of the subclause.

1333. Subclause (4) provides that no fee is payable by a constable, the Crown, any local authority or other statutory public body. At the time that this subclause was drafted, there was nothing identified that would require a fee to be charged to the Crown. However, as advisers have continued work on a project developing an electronic operating model for the courts, the possibility of cost recovery for electronic filing in the future has been raised.

1334. Adding the suggested words into subclause (4) would allow for fees to be payable by the Crown if, after the relevant analysis, this is agreed as being desirable.

Recommendation 84
Advisers recommend that clause 379 (payment and recovery of fees) be amended to add to subclause (4) words along the lines of, "except as provided in regulations made under this Act" to allow for the possibility in future of charging a fee to the Crown (eg, cost recovery for electronic filing).

Clause 380 – Enforcement of monetary penalties
1335. Clause 380 replaces section 281 of the District Courts Act 1947 but applies to all courts. It provides that, if a court orders a sum of money to be paid on a conviction or order, it may be recovered under Part 3 of the Summary Proceedings Act 1957.

Comment
1336. No submissions were received on this clause. However, by linking directly to enforcement under Part 3 of the Summary Proceedings Act, clause 380 allows any fine to be recovered pursuant to Part 3, regardless of which court imposed it
and without regard to any modifications that may be required in respect of certain fines. This interferes with the existing regime for enforcing fines in the Crimes Act (sections 19 – 19F). In particular, it does not allow High Court Judges to continue to enforce certain aspects of fines (including costs) imposed by the High Court, as currently. This was not the policy intent of clause 380. Therefore, advisers recommend that clause 380 be amended to provide that, if a fine is imposed by the High Court at first instance, then sections 19 – 19F of the Crimes Act apply.

1337. In addition, clause 380 should provide that where an appeal court imposes or varies a fine or other monetary order, the order should be enforced by the court that initially passed the sentence or made the order from which the appeal arose. That would be the District Court under Part 3 of the Summary Proceedings Act or the High Court under sections 19 – 19F of the Crimes Act 1961, as recommended above. This would be consistent with section 135(3) of the Summary Proceedings Act 1957.

1338. Finally, to ensure a clear interface between the Bill and Part 3 of the Summary Proceedings Act 1957, advisers also recommend that clause 380 be amended to make it clear that “fine” has the same meaning as in section 79 of the Summary Proceedings Act 1957 (which provides a comprehensive outline of the sums of money covered by this term). This should include renaming the clause to be “enforcement of fines”.

**Recommendation 85**

Advisers recommend that clause 380 (enforcement of monetary penalties) be amended to:

- provide that, if a fine is imposed by the High Court at first instance, then sections 19 – 19F of the Crimes Act apply;
- provide that, where an appeal court imposes or varies a fine, the order should be enforced by the court that initially passed the sentence or made the order from which the appeal arose; and
- ensure a clear interface between the Bill and Part 3 of the Summary Proceedings Act by making it clear that “fine” has the same meaning as in section 79 of the Summary Proceedings Act and any necessary changes to the name of the clause.

**Clause 381 – Application of section 173 during epidemic**


**Comment**

1340. There were no submissions and no substantive changes are recommended to this clause.

**Clauses 382 and 383 – Rules and regulations**

1341. Clause 382 sets out the rule making authority. Rules made under clause 382 will apply to any criminal proceedings under the Bill in the District Court, High Court, Court of Appeal and Supreme Court.
Clause 383 sets out the regulation making authority. It allows the Governor-General to make, by Order in Council, regulations for all or any of the purposes specified in that clause. This includes matters such as prescribing fees.

Submissions

The Legislation Advisory Committee (LAC, 69) suggests that the Committee should “carefully consider whether it is appropriate for so many details to be left to the rules committee”. It notes that, without rules, many of the provisions in the Bill would be unworkable and consequently a great deal of further work is required of the rules committee.

The LAC queries whether the split between primary legislation and rules strikes an appropriate balance between the powers reserved to the judiciary through the rules committee, and to Parliament through the content of primary legislation. It suggests it may be more desirable for court users if all rules were in primary legislation, as it is amended less frequently than has been the experience with rules committee rules in the civil jurisdiction.

LAC notes that the Bill allows for rules to prescribe matters which are currently dealt with in primary legislation, and calls for close scrutiny of the transfer of responsibility for these areas to the rules committee. LAC submits that it is important that the rules committee is not vested with powers that may entail public or political controversy; otherwise Parliament may come into conflict with the judiciary. LAC also queries whether it is appropriate for the bulk of provisions on the permanent court record to be left to rules.

Finally, the LAC makes a general observation that legislation such as the Bill, which has a considerable split between primary and secondary legislation, tends to be less durable than legislation that is either mostly contained in primary or secondary legislation. This arises because of potential for conflict between drafters of the primary legislation about what will be provided for in secondary legislation, and that once passed, it is frequently discovered that what was intended for secondary legislation is in fact inconsistent with or duplicates provisions in the primary legislation. The LAC notes that this risk is most apparent when there has been inadequate time to test the rule making powers against the content of the Bill.

Comment

The drafting of the Bill has proceeded broadly 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. Matters of court procedure should be included in secondary legislation. 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, future technology changes and other developments.

The approach does mean that some matters that were previously dealt with in primary legislation will now be dealt with in rules or regulations. However, advisers note that the areas reserved for court rules in the Bill are matters directly related to detailed court practice and procedure. It is therefore appropriate that

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64 clause 382(2)(b): authentication of documents; clause 382(2)(f) and (g): requirements relating to service; clause 382(2)(i): time frames for proceedings and steps in proceedings; clause 382(2)(j): time periods within which certain prosecutors may withdraw or amend charges; clause 382(2)(l): the manner in which proceedings are to be transferred between courts.
they be made under judicial leadership via the rules committee, which also includes representatives from the Ministry of Justice and members of the legal profession. If all procedural provisions were located in the primary legislation, the result would be an Act that was both unwieldy and insufficiently flexible. That rules can be amended more easily than legislation is an advantage in that it will enable the courts to respond more effectively to new pressures or opportunities (eg, new offences or changing patterns of offending).65

1349. While detailed matters of procedure and practice have been left for court rules, procedural matters which have a significant fiscal impact have been reserved for executive regulations to be made under clause 383 (eg, clause 383(d) allows regulations to prescribe court fees). This will avoid unnecessary conflict between the Executive branch of Government and the judiciary.

1350. Advisers acknowledge that, without content being prescribed in rules, some of the provisions of the Bill may be unworkable, and that a significant amount of work is required of the rules committee. However, commencement of those provisions requiring rules will be by Order in Council (or 18 months after the Bill receives the Royal Assent, if not earlier). As noted at paragraph 267, this is to enable time for required rules to be made. Advisers are confident that this will be sufficient.

1351. Advisers agree with the LAC that scrutiny of the relationship between primary legislation and secondary legislation is essential. Therefore, since introduction of the Bill, advisers have carefully considered the relationship between the intended scope of the rule making powers and the content of the provisions in the Bill that will become primary legislation. Advisers consequently recommend a number of technical changes to the manner in which the Bill interrelates with court rules that can be made under clause 382.

1352. In particular, there is currently some inconsistency in the Bill as to the way in which the rule making powers are dealt with. In some clauses, the intention that there will be rules dealing with a specific matter is made explicit (by reference to something being “prescribed”). In other clauses, notably in Part 6 of the Bill dealing with appeals, there is little reference to rules being made even though, as now, rules are likely to provide the detail of appeals procedure. Given the range of matters that it is intended that the rules cover, a more consistent approach is required.

**General approach proposed to Rules and Regulations**

1353. Advisers therefore recommend removal of references in substantive provisions of the Bill to “prescribed” requirements, and the insertion of a general provision into Part 1 stating that proceedings must be conducted in accordance with the provisions of the Bill, any Rules made under clause 382 and any Regulations made under clause 383. Explicit references to rules or regulations in substantive provisions of the Bill will be only retained where this is considered legally necessary.

1354. Advisers also recommend that clauses 382 and 383 be amended to ensure that the rule and regulation making powers they contain clearly reflect the intended scope of the rules. For example, while it is implicit throughout the Bill that there will be rules covering the procedure for making applications, there is currently no clear rule making power for that purpose. Other rule making powers are no longer required in light of other recommendations in the Bill (eg, the

65 See also discussion under clause 189, paragraph 879.
recommended removal of clauses 159 and 160 (see Recommendation 50) means that clause 382(2)(m) can also be deleted).

1355. It is also preferable that the timeframe within which the Crown may amend or withdraw charges upon taking over a case (which is specified as appropriate for rules under clause 382(2)(j)) is dealt with in regulations. This change, which will require an amendment to both clauses 382 and 383, is consistent with the scope of the current regulation making power in clause 383, which deals with other aspects of the Crown’s role in criminal proceedings.

Comment from Regulations Review Committee

1356. The Regulations Review Committee has recommended to this Committee that clause 383(g) be removed from the Bill, unless there are good reasons for its retention.

1357. Clause 383(g) allows regulations to be made amending Schedule 1 by adding offences to, or removing offences from, that schedule.

1358. Schedule 1 lists category 4 offences. These are the most serious offences on the statute book that must be tried in the High Court and by a jury (unless a Judge-alone trial is ordered (under section 102 (long and complex trials) or 103 (cases involving juror intimidation)).

1359. Advisers have considered the relevant principles relating to “Henry VIII powers” which allow regulations to amend primary legislation.

1360. The LAC Guidelines indicate that merely because something has previously been done a particular way in the past that does not, of itself, justify it being done that way again. While that is true, it is instructive to consider why it has previously been done that way.

1361. In 2008 the Law and Order Committee added a new power to section 123 of the District Courts Act 1947 allowing Schedule 1A to be amended by adding offences to, or removing offences from, Part 1 or Part 2 of that schedule by way of regulation. Those parts of that Schedule specify offences triable in either the District Court or High Court (middle band offences) or High Court only offences.

1362. The Law and Order Committee considered, that despite concerns raised by the Regulations Review Committee, the amendment was appropriate to allow offences in that Schedule to be amended more efficiently than by way of statutory amendment and the incumbent House time and delay that would necessitate.

1363. At the time the new regulation power was used to middle-band certain Class A drug offences, Justice officials considered that the regulation was being used to amend primary legislation in what is essentially a procedural or machinery manner and was therefore not offensive in the way that such power would be if it were used to affect a substantive right.

1364. There is no prospect of a defendant’s right to a fair trial being infringed by virtue of the clause 383(g) regulation-making power, as addition to Schedule 1 results in jury trial in the High Court and the likely consequence of removal would be to establish a new category 3 offence for which trial by jury would be at the defendant’s election. In other words, the regulation-making power does not affect the defendant’s substantive right to a fair trial and may affect only whether a case will be heard in the High Court or a District Court.

1365. However, advisers acknowledge that this clause is not typical. This Committee may wish to give consideration whether such any regulations made under clause...
Recommendation 86
Advisers recommend that:

- a general provision is inserted into the Bill requiring parties to conduct proceedings in accordance with the Bill and any rules or regulations made under the Bill;
- specific references in other clauses to a rule or regulation making power be removed, except where essential to meet the purpose of the power;
- clauses 382 (rules) and 383 (regulations) be amended so that the rule and regulation making powers they contain clearly reflect the intended scope of the rules and regulations;
- any necessary consequential amendments be made by Parliamentary Counsel Office to give effect to the above policy;
- clause 383(g) be retained.

SUBPART 4 – TRANSITIONAL PROVISIONS

1366. This subpart contains transitional provisions necessary to allow the new regime to be implemented in an orderly and fair way. They determine the point in time which the existing law must be followed, and when the new legislative regime must be adopted.

1367. The starting point in bridging the change from one legislative regime to another is that changes to the law should apply prospectively unless clearly stated to the contrary. Caution is required where criminal liability is concerned. However, this need not be the case where changes are of a procedural nature. Fairness to the accused and effective administration of the law are relevant.

1368. The approach adopted in the transitional provisions is based on the following principles:

1368.1. if a proceeding has not commenced, the new procedures and provisions in force at that time should apply; and

1368.2. nothing in the Act should affect any proceeding that has already commenced, unless the new provision is of a minor nature that has minimal effect on the current substantive law or on criminal procedure rights, and/or the new provision confers a benefit on the defendant.

Clause 384 – Meaning of commencement date

1369. Clause 384 defines the commencement date to be the date appointed under section 2(2) or, if no such date is appointed, the date provided in section 2(3), which is 18 months after enactment. This is relevant to subsequent transitional provisions as they use the commencement date as the trigger from which point the new legislative regime will apply, unless proceedings have already commenced (in which case the existing law continues to apply, unless there is specific provision to the contrary).
Comment

1370. No submissions were received on this clause. However, advisers have determined, in consultation with Parliamentary Counsel, that the approach adopted in the Bill for transitional provisions does not take account of all the provisions that may come into force early under clause 2(1).

1371. Of the provisions identified for early commencement, the Bill already reflects that:

1371.1. the transitional provision relating to abandonment of appeals can apply to appeals pending commencement (clause 396); and

1371.2. the amendment to the Juries Act 1981 to allow more flexibility to continue trials when jury numbers fall to 10 can apply when proceedings have already commenced, so long as the jury has not been empanelled (clause 425).

1372. Advisers propose that:

1372.1. provisions relating to sentence indications be applied retrospectively as they largely reflect the current approach and will confer a benefit on the defendant (clauses 58 – 63 and related provisions));

1372.2. there be limited retrospectivity to enable warrants to arrest, issued under the Summary Proceedings Act 1957 prior to the commencement date, to be withdrawn after early commencement (clause 435); and

1372.3. the provision in the Crimes Act 1961 enabling a copy of a warrant to be shown to a defendant rather than the original be applied retrospectively (clause 411(2)).

1373. Provisions relating to public access and restrictions on reporting (name suppression) will only apply prospectively as will provisions relating to bail.

1374. In terms of the provisions that come into force at the later date, virtually all are to apply prospectively. However, in addition to exceptions already included in the Bill, further exceptions are proposed to enable:

1374.1. warrants to arrest issued under the Bill prior to full commencement to be withdrawn after full commencement (clause 168);

1374.2. the court to deal with someone arrested under a warrant prior to commencement (clause 169); and

1374.3. erroneous sentences imposed prior to full commencement to be able to be corrected after full commencement, unless already under review at the time of commencement (clauses 185 – 187).
**Recommendation 87**

Advisers recommend that:

- clause 384 (meaning of commencement date) and associated provisions be amended to make it clear when the existing law or the new legislative regime applies in reference to the provisions set down in clause 2(1) along the lines already set down for provisions that will come into force pursuant to clause 2(2) or (3);

- legislative exceptions to the standard approach that the provisions that come into force pursuant to clause 2(1) apply only to proceedings after the date they come into force where this is not already set down in the Bill be included:
  - to allow warrants to arrest issued prior to early commencement to be withdrawn post early commencement (clause 435);
  - to allow a copy of a warrant to be shown to a defendant on request rather than the original, whether or not the proceedings to which the warrant relates commenced prior to early commencement (clause 411 (2));

- Legislative exceptions to the standard approach that the provisions that come into force pursuant to clause 2(2) or (3) apply only to proceedings commenced after the date established by clause 2(2) or (3) be included:
  - to allow warrants to arrest issued prior to full commencement to be withdrawn or to be the basis for dealing with the person arrested post full commencement (clauses 168 and 169);
  - to allow erroneous sentences imposed prior to full commencement to be corrected post full commencement unless already under review at the time of commencement (clauses 185 – 187).

**Transitional matters in relation to provisions brought into force early under section 2(1)**

**Clauses 385 – 387 (Transitional provisions)**

1375. Clause 385 describes how the new sentencing indication provisions apply in the context of current procedural provisions prior to full commencement. Clause 386 enables clause 210, which relates to suppression orders, to operate by linking back to relevant provisions of the existing law until the Bill comes fully into force. Clause 387 makes it clear that both provisions operate on a temporary basis until the Act comes fully into force.

**Comment**

1376. No submissions were made on these clauses. However, advisers seek an adjustment in respect of clause 385 to make it clear that the policy intent is that sentencing indications can be provided retrospectively (otherwise the general rule against retrospective application in section 7 of the Interpretation Act 1999 would apply).

1377. A further transitional provision is also required, either as part of clause 386 or in close association with that clause, to make it clear that the existing law relating to
name suppression (as set down in sections 138 – 141 of the Criminal Justice Act 1985, in section 46A of the Summary Proceedings Act 1957, and in section 375A of the Crimes Act 1961) will continue to apply to proceedings commenced prior to early commencement.

1378. The law as set down in subpart 3 of Part 5 of the Bill will apply to proceedings that commence once the new name suppression regime comes into force, but the new appeal paths will not be available at that stage as Part 6 of the Bill does not come into force early. The policy intent is that the media is entitled to appeal in respect of any proceedings commenced after early commencement but the media do not have the right to appeal under the current provisions.

1379. Therefore advisers recommend amendments to provide that the appeal rights in section 115C(1) of the Summary Proceedings Act 1957, in sections 379A(1)(ba) and 383(1)(b) of the Crimes Act 1961, and in section 28E of the District Courts Act 1947, may be exercised by the media in respect of any proceedings commenced after early commencement and before full commencement (at which point the new appeal regime will apply).

Recommendation 88

Advisers recommend that:

- a transitional provision be inserted into clause 385 (transitional provision for sentence indications), or be associated with that clause, to make it clear that sentencing indications can be provided in respect of proceedings already commenced;
- a transitional provision be inserted into clause 386 (transitional provision for public access and restrictions on reporting), or be associated with that clause, to make it clear that the existing law relating to name suppression will continue to apply to proceedings commenced prior to early commencement;
- the media be given the right to exercise existing appeal rights regarding name suppression in respect of proceedings commenced after early commencement and before full commencement.

Transitional matters in relation to provisions brought into force under section 2(2) or 2(3)

1380. Clauses 388 – 395 outline the approach for determining whether the existing law or the new legislative regime applies. A number of changes are recommended to clauses 388 - 395, some of which are minor or technical and are noted in the Appendices.

Clauses 389 – 390 (Proceedings commenced before and after commencement date)

1381. Clause 389 provides that the existing law will continue to apply to proceedings that have already commenced when the new Act has come into force, and lists the ways in which proceedings are ‘commenced’. Clause 390 makes it clear that proceedings commenced after the Bill comes into force must proceed under the new Act. This is regardless of when the offence was committed.
Comment

1382. No changes are sought to clause 390 but advisers propose that clause 389 be amended to include one further method of commencing proceedings – filing an indictment pursuant to section 345 of the Crimes Act in respect of an offence. While this method of commencing proceedings is extremely rare, it is possible and should be provided for.

1383. Further, the intended approach is that if proceedings are brought under the existing law, then appeals, retrials and rehearings relating to those proceedings will also need to be dealt with under that law. To ensure that the policy is clear advisers recommend an amendment to clarify that the term "proceeding" includes any appeals, retrials and rehearings arising from determination of the original charge.

Recommendation 89

Advisers recommend that:

- clause 389 (proceedings commenced before the commencement date) be amended to include proceedings commenced by filing an indictment in accordance with section 345 of the Crimes Act 1961 in respect of an offence;
- it be made clear that the term "proceeding" includes any appeals, retrials and rehearings arising from determination of the original charge.

Clauses 391 – 392 (exceptions to 389 and 390)

1384. Clauses 391 and 392 provide two exceptions to the standard approach set down in clauses 389 and 390. Clause 391 deals with the situation where the defendant absconds and is not located until at least 6 months after the new Act comes into force, in which case the new law will apply. Clause 392 deals with the situation where a defendant is charged with an offence before commencement, and additional charges are laid against that defendant or charges are brought against a co-defendant after commencement, in respect of the same offending, in which case the old law will apply.

Submission

1385. The NZLS (40) comments that the basis for not applying the new law unless an absconding defendant is not located until more than 6 months after the commencement date is not clear. They ask why this clause does not apply to an absconding defendant who is located less than 6 months after the new legislation commences, and recommend that subclause (1)(c) be removed.

Comment

1386. The six month period strikes an appropriate balance between fairness to the defendant and the desirability of all cases moving to the new procedures as soon as practicable after enactment. Advisers do not recommend changes to this clause in response to the submission.

Clause 393 – No proceeding invalid if does not comply with section 391 or 392

1387. Clause 393 ensures that if an error is made in applying clause 391 or 392 this does not by itself defeat the proceedings.
Comment

1388. No submissions were received on these provisions. However, clause 393 as currently drafted, is inadvertently cast too narrowly. This is because the provision on which it was based related only to a discrete area of court procedure. In the context of the wide range of procedural reforms in the Bill, there is a clear risk that a defendant may be dealt with under the existing law when the new procedures in the Bill should have applied. Accordingly, it is desirable that clause 393 simply ensure that if proceedings are conducted under the existing law rather than the new law then they will not be invalid only on that basis. Advisers therefore recommend that clause 393 be amended to remove specific reference to new sections 391 and 392.

Recommendation 90

Advisers recommend that clause 393 (no proceeding invalid if does not comply with section 391 or 392) be amended to remove the reference to new sections 391 and 392, so that, if any proceeding is conducted under the old law rather than the new law, then it will not be invalid only on that basis.

Other transitional matters

Clauses 396 – 398 (pending appeals, and existing regulations)

1389. Clause 396 applies to appeals to the Court of Appeal pending on the date on which this clause comes into force. Clauses 397 and 398 deal with certain matters in relation to existing regulations.

Comment

1390. There were no submissions on these clauses. However, in light of further work underway in respect of regulations and rules, advisers are of the view that it is not necessary to deem particular sets of regulations or rules to be made under the Bill (clause 397). Section 20 of the Interpretation Act 1999 already ensures that regulations made under repealed legislation have continuing validity under any other enactment that replaces the repealed legislation. If the regulations or rules listed in clause 397 are subsequently amended then this can be done pursuant to the rule making power under other Acts, or new regulations and rules can be made under clauses 382 and 383 of the Bill. Advisers therefore propose that clause 397 be omitted.

1391. Additionally, since it is not clear whether the search and tracking device provisions in the Summary Proceedings Act 1957 (sections 198 – 200P) will be repealed by the Search and Surveillance Bill prior to enactment of this Bill, clause 398 (which is primarily an avoidance of doubt provision) becomes redundant.

Recommendation 91

Advisers recommend that clause 397 and clause 398, dealing with certain transitional matters in relation to existing regulations, be omitted, because they are not necessary.
Clause 399 allows regulations to be made providing for transitional matters. Regulations made under this provision cannot continue longer than two years after the date when it comes into force.

Submissions

The Legislation Advisory Committee (69) submits that clause 399 is unusual as it applies transitional regulation-making powers enabling primary legislation to be modified by regulations. While the LAC notes that this clause is arguably consistent with the Government response to the report of the Regulations Review Committee in 1994, it suggests that, if it remains then it (as well as the regulations made under it) should expire two years after its commencement.

Comment

While clause 399 will not be operational after two years, advisers consider that the amendment suggested by the Legislation Advisory Committee would do no harm and, if Parliamentary Counsel agrees, propose that this clause be amended so that it expires at the same time as regulations made under it cease to have effect.

As drafted, this clause may have only six months in which to be of assistance in respect of the provisions likely to come into force 18 months after the Royal Assent (which is most provisions). This is because this clause is likely to come into force at an early stage when the provisions specified in clause 2(1)(d)) are commenced. Therefore, in order to allow sufficient time once the Act has come fully into force, it is proposed that the expiry timeframe should start to run from full commencement rather than early commencement.

Recommendation 92

Advisers recommend that:

- subclause (2) of clause 399 (regulations providing for transitional matters) be amended to the effect that regulations may not be made later than two years after the date on which the rest of the Act comes into force under section 2 (2) or (3) as the case may be; and

- if Parliamentary Counsel agrees, clause 399 be amended so that it expires two years after the majority of the Bill comes into force.

Clause 400 – Regulations making consequential amendments

Clause 400 allows regulations to be made to amend any enactment passed or made before the commencement of the Bill to make amendments to terminology and amend references to the Summary Proceedings Act 1957.

Submissions

The Legislation Advisory Committee (69) submits that clause 400 is highly unusual and not consistent with the Regulations Review Committee report of 1994 or the Government response to that report. However, the Committee acknowledges that approximately half the Bill (Schedules 6 and 7) is devoted to consequential amendments and it is unrealistic to expect that all amendments of the required kind can be detected (particularly in the case of legislation proceeding through Parliament contemporaneously with this Bill).

The Committee therefore concludes that an exception to the general rules regarding “Henry VIII” powers (powers to make regulations that amend statutes)
appears justified in the particular case of this Bill. However, it suggests it might be appropriate to consider whether such changes ought to be validated and confirmed by Parliament in one of the yearly Subordinate Legislation (Confirmation and Validation) Acts.

Comment

1399. Advisers acknowledge that this clause is not typical and that it does need to be tightly prescribed. Parliamentary Counsel have been asked to advise on whether validation is necessary.

1400. Advisers also recommend that the provision expire two years after the majority of the Bill comes into force.

1401. Advisers recommend two further minor adjustments to this clause to allow it to achieve its full intent. This is to include the terms “laying a complaint” (or related terminology) and “summary offence” to allow these to be treated in the same way, ie, substituted by regulations when necessary.

Recommendation 93

Advisers recommend that clause 400 (regulations making consequential amendments):

- if Parliamentary Counsel agrees, be amended so that it expires two years after the majority of the Bill comes into force (similar to clause 399, discussed above); and
- be adjusted to allow references to “laying a complaint” (and related terminology) and to “summary offence” to be amended by way of regulations and to “summary offence” to be amended by way of regulations.
Part 9 – Amendments to other enactments

1402. Part 9 makes substantive amendments to a number of Acts affected by the new legislative regime in the Bill. Many of these Acts are also amended in schedules 2 – 6, which include the consequential and ancillary amendments required to be made to a large number of Acts and Regulations to reflect the new approach reflected in the Bill, in particular in relation to the new terminology adopted.

Comment

1403. The Legislation Advisory Committee has suggested informally that it would be helpful for the substantive amendments in Part 9, together with the consequential amendments relating to those Acts set out in Schedules 2 to 6, to be split out and enacted as separate amending enactments at the Third Reading of the Bill. This would result in the following amendment Acts:

1403.1. Bail Amendment Act 2011;
1403.2. Corrections Amendment Act 2011;
1403.3. Crimes Amendment Act 2011;
1403.4. Criminal Disclosure Amendment Act 2011;
1403.5. District Courts Amendment Act 2011;
1403.6. Evidence Amendment Act 2011;
1403.7. Juries Amendment Act 2011;
1403.8. Justice of the Peace Amendment Act 2011;
1403.9. New Zealand Bill of Rights Amendment Act 2011;
1403.10. Sentencing Amendment Act 2011;
1403.11. Summary Proceedings Act Amendment Act 2011;

1404. The intention, when the Bill was introduced, was that the Bill would be divided at the Committee of the whole stage into two Bills. The first would be the Criminal Procedure Bill (which would comprise Parts 1 – 8 and associated schedules, and the second would be the Criminal Procedure (Repeals and Ancillary Amendments) Bill which would comprise Part 9 and associated schedules (of which Schedule 6 is by far the most significant in terms of length as it amends all Acts other than those separately identified). However, advisers agree that splitting the Bill in the way suggested may assist the accessibility of the resulting legislation, though this will necessitate a restructuring of Schedule 6 as well.
Recommendation 94
Advisers recommend that Parliamentary Counsel consider how Part 9 may be broken up into relevant amendment acts.

Amendments to Bail Act 2000

Clauses 401 – 407 (substantive amendments to Bail Act 2000)

1405. Clauses 401 to 407 amend the Bail Act 2000. These amendments add provisions relating to new bail conditions regarding a defendant failing to take the steps necessary to progress proceedings within a reasonable time frame (discussed in paragraphs 204 to 230). In addition, a new offence is created for a breach of the prohibition on publication of matters dealt with at a bail hearing. Finally a range of amendments are made to section 21 of the Bail Act regarding the power for Police to grant bail.

Clause 403 – section 19 substituted

1406. This clause deals with the publication of matters relating to bail hearings. It prohibits the publication of any report or account of the matters dealt with at a bail hearing, apart from the identity of the defendant, the charges he or she faces, the decision of the court on the application, and any conditions of bail, if bail is granted. The prohibition on publication applies until the conclusion of the defendant’s trial, unless the court permits earlier publication. A new offence is created for breach of this automatic suppression rule.

Submissions

1407. The NZLS (40) submits that it is not clear why the Bail Act 2000 involves different rules for suppression, and that these should be included in subpart 3 of Part 5 which deals with suppression.

1408. David White (61) submits that bail conditions should be freely available and not suppressed so that the public know what the boundaries are for those accused of crimes.

Comments

1409. Publication of matters relating to a bail hearing are located in clause 403 which is an amendment to the Bail Act. Where these provisions are located is a drafting decision which should be determined by Parliamentary Counsel.

1410. The different bail rules are intended to prevent information getting out that may prejudice trial. Information and evidence that is relevant to bail is not necessarily admissible at trial. It could be more likely than not to prejudice, giving rise to a presumption of suppression. It is therefore appropriate that different rules apply.

1411. If no suppression order is made, bail conditions are able to be published.

Recommendation 95
Advisers recommend that clause 403 (section 19 substituted), which relates to section 19 of the Bail Act 2000, be amended to mirror the changes in offences and penalties for publishing suppressed information in clause 215.
Amendments to Corrections Act 2004

Clauses 408 – 410 (detention of young persons, and subsidies)

1412. Clauses 408 – 410 amend the Corrections Act 2004. The amendments relocate sections 142A and 147 of the Criminal Justice Act 1985 as this Act is fully repealed by the Bill. Clause 409 carries forward section 142A, which provides that any child serving a sentence of imprisonment must do so in an approved residence while young persons may be so detained. This provision becomes new section 34A in the Corrections Act 2004. Clause 410 carries forward section 147 which allows the Minister of Corrections to approve subsidies for voluntary groups. This provision becomes new section 190A of the Corrections Act 2004.

Submissions

1413. The Sensible Sentencing Trust (46) is alarmed at the insertion of new section 190A as it is considered to be an open cheque with the widest possible use for the benefits of criminals, whereas victims receive little financial assistance.

Comment

1414. Section 190A is not a new provision. It simply carries forward section 147 of the Criminal Justice Act 1985. That Act could have remained without repeal but given that the name suppression provisions in the Act are repealed and replaced by the Bill, only a handful of provisions would have remained in the Act and therefore it was determined that the best approach would be to fully repeal it and find suitable Acts for the remaining provisions. The Corrections Act 2004 is considered to be the most appropriate location for this provision. Its inclusion in no way requires that subsidies be approved. Rather it provides a process for doing so.

1415. Advisers do not recommend changes to these clauses.

Amendments to Crimes Act 1961

Clauses 411 – Duty of persons arresting

1416. Clause 411 amends section 316 of the Crimes Act 1961, which relates to the duty of persons arresting. The first amendment, which can come into force earlier than the rest of the Act as it is included in clause 2(1), provides that the obligation to produce a warrant for inspection may be satisfied by the production of a copy of it. The second amendment is to make express links between the existing obligation in section 316(5) to bring an arrested person before a court as soon as possible and any actions that may be taken affecting that obligation. A new subsection provides that the obligation ceases if the person is released on a summons to appear in court, released on bail, or otherwise released from custody.

Comment

1417. No submissions were received on this provision (although the NZLS (40) does comment on a provision of the Crimes Act that is amended in schedule 6).

1418. The main purpose of the first amendment to section 316(2) of the Crimes Act 1961 is to allow a copy of an arrest warrant rather than the original to be shown. This will address current difficulties where someone is arrested (eg, in Invercargill) and asks to see the original warrant, which then has to be sent (eg,
from Auckland), whereas it would be administratively more efficient for a copy to be e-mailed or faxed either prior to the arrest or immediately afterwards.

1419. Section 316(2) applies when someone has to be arrested in respect of proceedings that have already commenced, for example for non-appearance, as well as prior to proceedings yet to commence. However, as the Bill stands, it would not apply to proceedings that commenced before the date that clause 411(2) comes into effect.

1420. This means that, for some time following commencement of this provision, Police will need to maintain two different processes and actively consider each time a warrant is requested whether the original needs to be sourced and provided, or whether a copy will suffice. This will be inefficient and raise the risk of mistakes occurring.

1421. Advisers consider that clause 411(2) should apply whether the proceedings to which the warrant relates commenced before or after the date on which clause 411(2) commences. This will have no substantive effect on the criminal procedure rights of the defendant.

Recommendation 96
Advisers recommend that the Bill be amended to make it clear that subclause (2) of clause 411 (duty of persons arresting), which will allow a copy of an arrest warrant rather than the original to be shown, applies whether the proceedings to which the warrant or process relates commenced before or after the date that clause 411(2) commences.

Amendments to Criminal Disclosure Act 2008

Clauses 412 – 415 (disclosure)

1422. Clauses 412 to 415 amend the Criminal Disclosure Act 2008. Clause 413 amends section 12 by adding a requirement that the prosecutor disclose a copy of the charging document to the defendant as part of the initial disclosure package. Clause 414 inserts a new section 14A, that requires certain information relating to identification witnesses to be supplied to the defendant, on request. Clause 415 amends section 17 by removing the existing ability to disclose the address of a witness or informant with the consent of that witness or informant.

1423. The changes outlined in clauses 414 and 415 are made in order to align the test for disclosure under the Criminal Disclosure Act 2008 with the equivalent tests for disclosure of addresses in the Victims’ Rights Act 2002 and the Evidence Act 2006 (namely, only with the leave of the court).

Submissions

1424. The Sensible Sentencing Trust (46) considers that there is a better way to handle the disclosure of the name and address of a witness to a defendant. Full disclosure of these details could result in intimidation of the witness.

Comment

1425. New section 14A (inserted by clause 414) is primarily a relocation of section 344C of the Crimes Act 1961. It outlines the extent to which information can be required to be supplied to a defendant about an identification witness, and so fits within the framework of the Criminal Disclosure Act 2008. Section 344C
requires that information relating to identification witnesses be given, on request, to defendants, unless an order is made to protect the identity of the witness or any other person. However, the approach adopted in more recent legislation (for example, section 87 of the Evidence Act 2006 and section 16/16A of the Victims’ Rights Act 2002) is that the address of a witness/victim is not to be provided except with the leave of the judge/judicial officer unless it is essential to the charge (eg if a burglary is alleged to have been committed at a particular address).

1426. There is no justification for treating identification witnesses differently pursuant to section 344C as to be relocated into the Criminal Disclosure Act 2008. If it was not changed to align with the other provisions then it is possible that under the current provisions disclosure of an address could be required or obtained under one provision but not another as the tests/approaches for disclosure are different. The amendment to section 17 is also required to align with those amendments.

1427. Advisers do not recommend changes to these clauses. However, advisers note the recommendation to amend the Criminal Disclosure Act 2008 made earlier in the report (refer paragraphs 739 to 745).

Criminal Justice Act 1985

Clause 416 – Criminal Justice Act 1985 repealed

1428. Clause 416 repeals the Criminal Justice Act 1985. After the provisions in that Act relating to the suppression of names and evidence are repealed as a consequence of the reforms in this Bill, only a very small number of provisions would be left in it. Therefore these provisions are also relocated into this Bill (clauses 178 – 182 which outline how remanded children and young persons must be dealt with), and into the Corrections Act 2004.

1429. Any consequential amendments required in light of the repeal of the Criminal Justice Act 1985 are set down in schedules 6 and 7 of the Bill. The amendments in Schedule 6 link to all provisions in the Criminal Justice Act 1985 except sections 138 – 141, which are dealt with in Schedule 7 as these provisions relate to name suppression and may come into force earlier than the rest of the Bill.

Comment

1430. There were no submissions on this clause, and advisers do not recommend any changes be made to it.

Criminal Justice Regulations 1985

Clause 417 – Criminal Justice Regulations 1985 revoked

1431. Clause 417 repeals the Criminal Justice Regulations 1985. There is no need for the regulations to remain. Most have already been repealed. Any consequential amendments required as a result of the repeal of the regulations are set down in Schedule 6, Part 4 (amendments to regulations).

Comment

1432. There were no submissions on this clause and advisers do not recommend any substantive changes be made to it.
**Amendments to District Courts Act 1947**

**Clauses 418 – 420 (appointments and protections)**


1434. Clause 419 inserts new section 5B into that Act. This section replaces section 28B of the District Courts Act 1947 and confers power on the Governor-General to appoint Judges to conduct jury trials.

1435. Clause 420 inserts new sections 11CA to 11CE. These sections relate to the protection of Community Magistrates in respect of the exercise of their judicial functions. They replace sections 193 to 197 of the Summary Proceedings Act 1957, which conferred immunity on Community Magistrates and Justices of the Peace. (Equivalent sections that protect Justices of the Peace are being inserted into the Justices of the Peace Act 1957.)

**Comment**

1436. There were no submissions on this clause except the drafting matter addressed in Appendix 2.

**Amendments to Evidence Act 2006**

**Clauses 421 – 423 (inference of guilt and identification evidence)**

1437. Clauses 421 to 423 amend the Evidence Act 2006.

1438. Clause 422 amends section 32. The effect of the amendment is to repeal the requirement that no person may invite a fact-finder in a criminal proceeding to infer guilt from a failure by a defendant to disclose a defence before the trial.

1439. Clause 423 inserts a new section 46A regarding the caution required with regards to identification evidence. Section 46A is substantially similar to section 67A of the Summary Proceedings Act 1957. It is considered more appropriate to provide for this matter in the Evidence Act 2006.

**Submissions**

1440. Consistent with its opposition to the Bill’s requirement on the defence to identify the issues in dispute, the New Zealand Bar Association (39b) opposes clause 422 and the amendments to section 32.

**Comment**

1441. Advisers do not recommend any change to clause 422. Section 32 is in direct conflict with the provisions in the Bill that enable a fact-finder to draw an adverse inference from a defendant’s failure to adequately identify the issues in dispute before the trial. Its amendment is a necessary consequence of the inclusion of those provisions.

**Amendments to Juries Act 1981**

**Clauses 424 – 427 (number of jurors)**

1442. Clauses 424 to 427 amend the Juries Act 1981 to provide that a trial may continue when jury numbers fall to 10, subject to judges’ existing powers to dismiss the whole jury if there is a good reason.
Submissions

1443. Four submitters oppose these clauses. The Coalition of Community Law Centres (22) considers that trials should only be allowed to proceed with 10 members if all parties consent and the court considers that it is in the interests of justice (not just for reasons of efficiency).

1444. Anne Stevens (17) notes that the Bill will allow a majority verdict of 9 (where jury numbers have fallen to 10), and questions whether it is safe to allow someone to be found guilty based on 9 jurors. She suggests that it would be better to start with 13 or 14 jurors for trials, for example, lasting a week or longer. Edward Millar and Kris Gledhill, University of Auckland (53) are similarly concerned at the further extension of majority verdicts so soon after the first change. They consider that, as a consequence, the value of the burden of proof is reduced, and the views of a minority can be ignored because a majority verdict will suffice.

1445. Robert Terry (45) refers to the 1688 Bill of Rights Act [UK] and the NZBORA and appears to be stating that the NZBORA should not be amended just because a Queen’s Counsel challenged a lawful conviction of a 10 person jury.

Comment

1446. Currently, when two jurors are dismissed from a jury, “exceptional circumstances” must exist for the case to continue. The Supreme Court has said this creates a high threshold. As a result, in circumstances where jury numbers fall to 10, trials usually need to be abandoned and a retrial called, which is both costly and stressful for all parties.

1447. Advisers have been unable to identify any evidence to indicate that a jury of 10 is not large enough to be representative and to provide robust decision making; or that larger juries are an effective solution to the problems associated with juror attrition. Rather, the evidence suggests that jury numbers need to fall to 6 or 8 before they appear to deliver less accurate and less predictable verdicts. Further, in jurisdictions similar to New Zealand, judges are given wider latitude to proceed with trials when jury numbers are reduced – all the Australian states and Canada allow trials to continue with 10 jurors, and England permits trials to continue with 9 jurors.

1448. Nevertheless to mitigate the risk of jury numbers falling, the practice of using ‘alternate’ jurors (that is, jurors in addition to the standard 12) is allowed in some Australian states, the United States Federal system and some US states. Two main models for providing alternate jurors are available:

1448.1. standby jurors (that is, potential jurors who are selected at the start of a trial but remain outside the jury unless jury numbers fall); and

1448.2. additional jurors (that is, larger juries from which ‘extra’ jurors are removed if more than 12 remain when final deliberations are due).

1449. While the advantage of using alternate jurors is that it reduces the risk of jury numbers falling below 12, there are also some significant disadvantages associated with them. These relate to:

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66 Section 22A(2)(b) of the Juries Act 1981.
1449.1. jury selection;
1449.2. cost and administration; and
1449.3. problems associated with deliberation.

1450. Using alternate jurors requires additional jury selection processes, increases the administrative burden on the courts, and adds to costs for courts (and those additional people who would be required to serve as jurors). These burdens and costs would differ depending on the particular model of alternate jurors adopted, but advisers expect that they would mostly be associated with implementation (changing IT and other systems); ongoing operational costs are likely to be relatively small.

1451. The more significant problems are associated with deliberation. For example, objections that might be raised regarding the role of ‘extra’ jurors influencing decisions they may ultimately not be responsible for, or (alternately) not being able to participate in deliberations until late in a trial; incentives for ‘extra’ jurors not to pay attention (on the assumption they may not be needed); and difficulties associated with supporting jurors who might be released prior to the final deliberation, including stopping them from commenting.

1452. These problems could be addressed by simply retaining a larger jury. However, larger juries also have problems associated with them, including greater problems of communication, coordination, conflict, motivation, and lower levels of participation.

1453. Given that advisers have been unable to identify significant problems associated with smaller juries, these options have been rejected.68

1454. The existing ability to allow majority verdicts where all but one juror are agreed, was introduced when the Criminal Procedure Bill was enacted by Parliament in 2008.69 The policy objectives for making this change included to:

1454.1. help address the problem of rogue jurors, who refuse to participate in deliberations and produce a hung jury for reasons outside the merits of the case;

1454.2. prevent a single juror from being pressured by the other 11 to return a verdict against his or her conscience; and

1454.3. make jury tampering by bribery or intimidation more difficult for organised criminals to achieve.

1455. These policy objectives are just as relevant to 10 member juries as to larger juries in the circumstances prescribed for accepting majority verdicts.

1456. Advisers do not recommend any substantive changes to these clauses.

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68 Refer also to the discussion paper: Options for avoiding retrials following the discharge of jurors after trial commencement at www.justice.govt.nz/policy/justice-system-improvements/criminal-procedure-simplification-project-1.
69 The Criminal Procedure Bill was split prior to enactment. The relevant provision, section 29C of the Juries Act 1981, was consequently added by the Juries Amendment Act 2008.
Amendment to Justices of the Peace Act 1957

1457. Clause 428 inserts new sections 4A to 4F into the Justices of the Peace Act 1957. These sections relate to the protection of Justices of the Peace in respect of the exercise of their judicial functions. They replace sections 193 to 197 of the Summary Proceedings Act 1957, which conferred immunity on both Community Magistrates and Justices of the Peace. (Equivalent sections that protect Community Magistrates are being inserted into the District Courts Act 1947.)

1458. There were no submissions on this clause except the drafting matter addressed in Appendix 2.

Amendment to New Zealand Bill of Rights Act 1990

Clause 429 – Rights of persons charged

1459. Clause 429 amends section 24(e) of the NZBORA raise the threshold for a jury trial from offences for which the penalty is includes imprisonment for more than three months to more than three years.

1460. Submissions and comment on this clause are contained in the discussion of raising the jury threshold (paragraphs 54 to 85).

Amendments to Sentencing Act 2002

Clause 431 – Aggravating and mitigating factors

1462. Clause 431 amends section 9, which sets out aggravating and mitigating factors on sentencing, to include factors related to procedural compliance or non-compliance.

Comment

1463. Submissions and comment on the substance of this clause are contained in the discussion of incentives and sanctions (paragraphs 240 to 261).

Clause 432 – new section 81B inserted

1464. Clause 432 inserts a new section 81B, which provides for a District Court to transfer an offender to the High Court for sentencing if a sentence of life imprisonment may be appropriate. This new section is consistent with the Bill’s changes to District Court sentencing, including the remaining overriding restrictions on the sentencing jurisdiction of a District Court in clause 120(2) of the Bill.

Comment

1465. There were no submissions and no substantive changes are recommended to this clause.

Clause 433 – new section 143A inserted

1466. Clause 433 inserts a new section 143A. This relocates into the Sentencing Act 2002 current section 340(7) of the Crimes Act 1961 (which concerns sentencing following a finding of guilt or a verdict of guilty on more than 1 charge).
Comment
1467. There were no submissions and no substantive changes are recommended to this clause.

Amendments to Summary Proceedings Act 1957
1468. Clauses 434 to 437 amend the Summary Proceedings Act 1957.

Clause 435 – Withdrawal of warrant and clause 436 – Expiry of section 435
1469. Clause 435, which may come into force before the main parts of the Bill (refer clause 2(1)(i)), clarifies the powers of Registrars to withdraw warrants of arrest where a defendant or witness reports to court on an unscheduled date. These amendments are temporary and expire on the commencement date of the full Act as clause 436 provides for the expiry of clause 435 when clause 437 comes into force. When that happens, the equivalent power of Registrars will be in the Bill itself (see clause 168).

Comment
1470. No submissions were received on this clause. However, the purpose of the amendment is to clarify the grounds on which Registrars can withdraw warrants – meaning that such withdrawals need not be put before a judge. If not applied retrospectively, for some time after commencement it will be necessary for the courts to maintain two processes for withdrawing arrest warrants and to actively consider each time what procedure to follow, depending on the timing of the issue of the warrant to be withdrawn. This is inefficient and raises the risks of errors being made.

1471. Advisers recommend a further provision, making it clear that clause 435 applies whether the warrant to which the withdrawal relates was issued before or after clause 435 comes into force. This will have no effect on the criminal procedure rights of the defendant.

Recommendation 97
Advisers recommend that the Bill be amended to make it clear that clause 435 (withdrawal of warrant) applies whether the warrant to which the withdrawal relates was issued before or after clause 435 comes into force.

Clause 437 – Second stage of amendments to Summary Proceedings Act 1957
1472. This clause concerns a second stage of amendments to the Summary Proceedings Act 1957. Subclauses (1) and (3) rename the Act as the Enforcement of Infringement Offences and Fines Act 1957. Subclause (2) provides for the extensive amendments set out in Schedule 5.

Comment
1473. No submissions were received on this clause. However, advisers note that if the search and tracking device provisions in the Summary Proceedings Act 1957 (sections 198 – 200P) are not repealed by the Search and Surveillance Bill prior to enactment of this Bill, then it will not be appropriate to change the title to that Act to the Enforcement of Infringement Offences and Fines Act 1957 which is the new title used throughout the Bill to reflect the more limited content following
implementation of the Bill. However, it would not adequately cover the contents of the Act if the search and tracking device provisions remain in it.

Recommendation 98
Advisers recommend that clause 437 (second stage of amendments to Summary Proceedings Act 1957) be amended by omitting the repeal of the title of the Summary Proceedings Act.

Amendments to Victims’ Rights Act 2002

Clauses 438 – 441 (victim impact statements)
1474. Clauses 438 to 441 amend the Victims’ Rights Act 2002 to provide for the possibility of victim impact statements being used by the court when sentence indications are being considered.

1475. No submissions were received that were directly relevant to this clause; more general submissions in relation to victims are discussed in Section VI Issues not Addressed by the Bill.

Comment
1476. No changes are recommended, apart from a new transitional provision to allow a victim impact statement, which was prepared before the sentence indications provisions and related provisions for use of victim impact statements commenced, to be submitted for the purpose of a sentence indication after the provisions come into force. This is addressed in the discussion of retrospective application of sentence indications and related provisions under Part 8, Subpart 4 Transitional Provisions.

Amendments to other enactments

Clause 442 – Amendments to other enactments
1477. Clause 442 provides for:

1477.1. the amendments to the Children, Young Persons, and their Families Act 1989 set out in Schedule 3;

1477.2. the amendments to the Criminal Procedure (Mentally Impaired Persons) Act 2003 set out in Schedule 4;

1477.3. the amendments to other enactments set out in Schedule 6.

Comment
1478. There were no submissions on this clause, and advisers do not recommend any substantive changes be made to it though a number of amendments are proposed to be Schedules themselves.

Clause 443 – Consequential amendments relating to public access and restriction on reporting provisions
1479. Clause 443 provides for consequential amendments relating to public access and restrictions on reporting provisions as set down in Schedule 7. Provision is made
in clause 2(1) for these amendments (along with subpart 3 of Part 5) to come into force before the main parts of the Bill.

Comment

1480. There were no submissions on this clause, and advisers do not recommend any substantive changes be made to it though a number of amendments are proposed to Schedule 7 itself.
Schedule 1

[Clause 6]

1481. Schedule 1 lists offences that must always be tried in the High Court.

1482. Part 1 lists specified offences against the Crimes Act 1961 (eg, murder).

1483. Part 2 lists specified offences against other enactments, such as acts of torture under the Crimes of Torture Act 1989 and engaging in a terrorist act under the Terrorism Suppression Act 2002.

Comment

1484. While there were submissions on the categorisation of offences in general (refer paragraphs 281 to 292) and on the regulation-making power associated with category 4 offences (refer paragraphs 1396 to 1401), there were no specific submissions on category 4 and this schedule.

1485. No changes are recommended to this schedule.

Schedule 2 – Amendments to the Bail Act (clause 407)

[Clause 407]

1486. Schedule 2 makes the second stage of consequential amendments to the Bail Act 2000, which are to come into force at the same time as the main parts of the Bill.

1487. These amendments include changes required as a consequence of the procedural and terminology changes made by the Bill.

Comment

1488. There were no submissions on this Schedule. However, advisers propose two substantive sets of amendments.

Alignment of information provided to a defendant served summons and released on Police bail

1489. As a matter of policy, the information that is provided to a defendant who is served with a summons and a defendant who is released on police bail should be the same. The information to be included on the summons is contained in clause 27(2) of the Bill, which is likely to be supplemented by rules. The information included on a bail bond is provided in section 22(1) of the Bail Act 2000. The main difference between the two provisions is that there is no requirement to specify the particulars of the charge on a bail bond. This information is currently provided as a matter of practice. It seems appropriate for this information to be a statutory requirement, given that the information is critical to a defendant’s ability to plead.

1490. In addition, there is no ability to supplement the information that must be provided on a bail bond with information specified in rules. If the information to be provided in a summons is supplemented by rules, the same information should also be included in a bail bond.

1491. An amendment is proposed to section 22 of the Bail Act 2000 to align the information to be provided to a defendant on a bail bond with that required on a summons.
Dealing with defendant pending retrial or resentencing

1492. The Bill contains several mechanisms by which a trial court (on application) or an appeal court (on appeal) may order a retrial of a person’s case or a rehearing as to sentence.

1493. There are some gaps and uncertainties in relation to the scope and application of certain Bail Act provisions pending and following an appeal. For instance:

- in Schedule 2, new section 52(3) deals with bail pending an appeal on a question of law. However, it only applies to appeals to the Court of Appeal and Supreme Court;
- also in Schedule 2, new section 53 provides that where sentence is postponed by the trial court on a question of law appeal, the court may order that the convicted person be detained in prison or bailed in the meantime. This clause only applies to the High Court.

1494. It is recommended that the Bill be amended to ensure that appeal and trial courts are provided with the necessary powers to grant bail to a defendant pending and following an appeal.

**Recommendation 99**

Advisers recommend that:

- schedule 2 be amended to include an amendment to section 22 of the Bail Act to align the information to be provided to a defendant on a bail bond with that required on a summons;
- the Bill be amended to ensure that appeal and trial courts are provided with the necessary powers to grant bail to a defendant pending and following an appeal.

Schedule 3 – Amendments to the Children, Young Persons, and Their Families Act 1989

[Clause 442(1)]


1496. Under the Children, Young Persons, and Their Families Act 1989, the Youth Court is established for dealing with:

- 1496.1. young people (14 – 16 years’ old) who offend; and
- 1496.2. from 1 October 2010, some children (12 and 13 years’ old) who commit serious offences.

1497. Some parts of Youth Court procedure are linked to criminal procedure for adults. This Schedule makes changes to align Youth Court procedure with the Bill’s changes to criminal procedure and terminology in the adult jurisdiction.

**Submissions**

1498. The Criminal Bar Association (23) supports some aspects of the amendments as they relate to young people and opposed others. It erroneously believes that children and young people will be able to elect trial by jury for a larger number of
offences than currently and gives this as a reason for supporting the Bill. On the other hand, it opposes several aspects of the amendments. It points out that more hearings will take place in the Youth Court for “serious” charges and considers that this will have the undesirable effect that Youth Court judges will hear serious cases which were previously heard in the District Court by a judge with a jury warrant. It observes that the Bill repeals section 7 of the Summary Proceedings Act 1957, which imposes a sentencing limit of five years’ imprisonment when the District Court sentences young people transferred from the Youth Court. It opposes that repeal for young people.

1499. The Children’s Commissioner’s (20) response to the Bill is also mixed. Matters of concern for the Commissioner include that 17 year olds will continue to be treated as adult defendants under the Bill. He notes that the Bill does not provide defendants aged under 18 with legal advice or support in contrast with a child or young person aged under 17 years who is automatically appointed a lawyer by the Youth Court. The Commissioner is positive in relation to other aspects of the Bill. He lauds the Bill’s objectives of reducing delay and avoiding unnecessary stress to victims and witnesses on the basis that that may well have a positive impact on the experiences of child victims and witnesses. The Commissioner is also complimentary of clause 208 of the Bill which provides privacy protections to children through automatic name suppression for any victim of crime or witness aged under 18 years.

1500. The Youth Court Judges (66) comment that the reorganisation of offence categories will greatly simplify the existing procedure by eliminating ‘purely indictable’ offences. Further, the judges do not oppose amendments to pre-trial obligations or joint charging proposed in the Bill, but point out the anomaly of excluding non-imprisonable traffic offences and the enforcement of infringement notices in respect of children and young people from the jurisdiction of the Youth Court.

1501. The NZLS (40) details several concerns with the Bill in respect of young people and children. NZLS submits that there is particular concern in relation to the effect of defence indication of issues in dispute for young people.

1502. Youth Law (67) submit that measures that improve the court experience for child complainants and witnesses should be explored and adopted urgently. Youth Law also has concerns about the age of criminal responsibility.

**Comment**

1503. Children and young people will not be able to elect trial by jury for a larger number of offences for two reasons. First, there is effectively a presumption under the amended section 273 that the Youth Court will hear charges against a young person. This “presumption” applies to all offence categories (except for murder/manslaughter.) Secondly, the Bill’s increase to the jury trial threshold will apply to children and young people as well as adults.

1504. There are no reservations about Youth Court judges presiding over “serious” cases in the Youth Court. Youth Court judges currently have jurisdiction to deal with purely indictable offences other than murder or manslaughter in the Youth Court under section 275 of the Children, Young Persons, and Their Families Act 1989. Jurisdiction under this section is not limited to jury warranted Youth Court judges.

70 Submission p. 22.
1505. Opposition to the removal of the five year sentencing “cap” is misconceived. There is no absolute five year limit on sentencing. If a court is of the view that five years’ imprisonment is inadequate in any given case, it may commit a young person to the High Court for sentence where the offence’s maximum penalty will be available to the sentencing judge. The sentencing that then takes place will have to take age into account as a mitigating factor. Sometimes it will be a decisive consideration.

1506. It would be inappropriate to consequentially amend the CYPF Act via this Bill to implement any fundamental policy change on the upper age of New Zealand's youth justice system. Such change must be made by way of primary amendment to CYPF Act.

1507. The limits on the provision of legal assistance to young defendants are again consistent with the jurisdiction of the adult courts. The Youth Court jurisdiction has been set at under 17 years and therefore the provision of automatically appointed counsel is pegged to the same age. As the Children’s Commissioner notes, legal aid is still available for qualifying young people. Even in a minor case where aid is not normally available, the age of a young person might be seen as a factor indicating the grant of aid under the general interests of justice test.

1508. Inclusion of non-imprisonable traffic offences and the enforcement of infringement notices is under consideration but the necessary policy work will not be completed in time for inclusion in the Bill. The Cabinet paper on Alcohol Law Reform proposed that the jurisdiction for alcohol infringement notices given to young people be reviewed by the Ministry of Social Development, in consultation with the Ministry of Justice and Police. On 7th September 2010 Cabinet noted that further work is being done on whether non-imprisonable traffic offences should be brought within the Youth Court jurisdiction. The Ministry of Social Development and the Police have confirmed with the Ministry of Justice that the work is progressing separately and on a slower timeframe than that for the Bill.

1509. Notification of issues in dispute is not required in cases tried in the Youth Court. The relevant provisions will apply only to a child or young person who must be tried by a jury (ie for murder/manslaughter under new section 275), who has elected to be tried by a jury (for category 3 and 4 offending aside from murder/manslaughter under new section 274), or who is to be tried jointly with an adult in a court other than the Youth Court (new section 277(2A)).

1510. Advisers recommend the following amendments, to clarify which provisions in the Bill apply to proceedings in the Youth Court:

- Trial in the absence of the defendant

1511. One of the principles of the CYPF Act is participation by children and young people in proceedings involving them. However, the Bill codifies and modifies...
the common law power to proceed in the absence of a defendant in certain circumstances. Given that the power to proceed in absence directly cuts across the participation principles of the CYPF Act, these sections of the Bill should not apply to Youth Court proceedings.

**Recommendation 100**

Advisers recommend that clauses 126 and 128-132 should not apply to Youth Court proceedings.

**Applicable pre-trial processes**

1512. The proposed new section 275 of the CYPF Act requires that “applicable” pre-trial processes take place in the Youth Court. Which pre-trial processes are applicable should be made clearer. This can be achieved by referring to subparts 1-4 of Part 3 the Bill, subject to any identified modifications. The approach should include cases where a young person is jointly charged with an adult and has to be tried in the District Court or High Court (unless the Youth Court orders otherwise).

**Recommendation 101**

Advisers recommend that schedule 3 be amended to include an amendment to section 275 of the Children, Young Persons, and Their Families Act 1989 to:

- make it clear that the applicable pre-trial processes (modified as necessary) are those set down in subparts 1-4 of Part 3 of the Bill, but subject to the modifications that will be set down in further provisions;
- apply this approach to cases where a young person is to be tried jointly with an adult in a court other than the Youth Court.

**Notification of issues in dispute**

1513. A further provision should be inserted into the Children, Young Persons, and Their Families Act 1989 referring to notification of issues in dispute. This should specify that the issues in dispute provisions only apply to (i) a child or young person who must be tried by a jury (ie for murder/manslaughter under new section 275), who has elected to be tried by a jury (for category 3 and 4 offending aside from murder/manslaughter under new section 274), or where a young person is to be tried jointly with another person in a court other than the Youth Court (new section 277(2A)); and (ii) an adult who is jointly charged with a child or young person and who is to be tried in the Youth Court with that child or young person (new section 277(2B)(b)).

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79 clauses 126 and 128 – 132.
**Recommendation 102**

Advisers recommend that schedule 3 be amended to include a further provision to be inserted into the Children, Young Persons, and Their Families Act 1989 specifying that the issues in dispute provisions only apply to:

- a child or young person who must be tried by a jury or is to be tried by a jury; and
- an adult who is jointly charged with a child or young person and who is to be tried in the Youth Court with that child or young person.

**Sentence indications/case management**

1514. Neither sentence indications nor case management sit comfortably with the Youth Court jurisdiction. Youth Court dispositions (sentences) are informed by the outcomes of Family Group Conferences, and it is difficult to see how a judge could agree to give an indication before such a Conference had been held. It is conceivable, though, that there is a residual need for indications in some situations and there needs to be some flexibility for a judge to agree to a request for one.

1515. Likewise, case management seems unnecessary in a jurisdiction which has overriding statutory imperatives to dispose of proceedings in a timely fashion. However, it might be useful on a case by case basis and would be required where trial by jury had been elected or where there had to be a jury trial because there was a charge of murder/manslaughter or the election of trial by a jointly charged defendant.

**Recommendation 103**

Advisers recommend that schedule 3 be amended to include amendments to the Children, Young Persons, and Their Families Act 1989 enabling the Bill’s case management and sentence indication provisions to:

- always apply for category 3 and 4 when a young person was to be tried by a jury; and
- apply at the discretion of the Youth Court judge in other cases.

**Section 277**

1516. There is currently no mechanism in section 277 (where young people are jointly charged with adults and there is to be a jury trial) for transfer to the trial court. Accordingly, new section 275 should be amended to extend its applicability to young people (and not children) who are to have a jury trial because they are jointly charged with an adult who has elected such a trial. This is consistent with the policy in relation to young people who are destined for a jury trial (either because of an election or because there is a murder/manslaughter charge) to maintain proceedings in the Youth Court for as long as possible.
Schedule 4 – Amendments to Criminal Procedure (Mentally Impaired Persons) Act 2003

[Clause 442(2)]

1517. Schedule 4 makes amendments to the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act). These amendments are required as a consequence of the procedural and terminology changes made by the Bill.

Comment

1518. No submissions were made on schedule 4. The changes made in schedule 4 include provisions dealing with how a court should inquire into a defendant’s involvement in an offence when determining whether a defendant is unfit to stand trial. The current provisions in the CPMIP Act link to the committal processes provided in the Summary Proceedings Act 1957. A new approach is therefore required.

1519. New section 10 (inquiry before trial into defendants involvement in the offence) and section 11 (inquiry during Judge-alone trial into defendant’s involvement) enable the court to determine the defendant’s involvement in an offence on the basis of admitted facts. However, this is problematic because a defendant who is unfit to stand trial may not be in a position to properly instruct counsel to admit facts. A better approach is to provide a broad basis on which a court may consider the defendant’s involvement in the offence, including any formal statements or oral evidence, and any other evidence that is provided by the parties.

Recommendation 105

Advisers recommend that the references to admissions of fact in new sections 10 (inquiry before trial into defendants involvement in the offence) and section 11 (inquiry during Judge-alone trial into defendant’s involvement) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 be replaced with provisions that enable the court to consider the defendant’s involvement in the offence on a broad basis, including with reference to any formal statements or oral evidence, and any other evidence that is provided by the parties.

Schedule 5 – Amendments to Summary Proceedings Act 1957

[Clause 437(2)]

1520. Schedule 5 makes the second stage of consequential amendments to the Summary Proceedings Act 1957, which are to come into force at the same time as the main parts of the Bill.
1521. The Bill repeals parts of the Summary Proceedings Act 1957 in their entirety while individual sections in other parts are also repealed. Part 3 of the Act is the only part that is not affected by repeal as it focuses solely on the enforcement of fines and infringements. The amendments in this Schedule are primarily related to these remaining provisions of the Summary Proceedings Act 1957.

Comment

1522. No submissions were received on schedule 5. However, some recommended adjustments to schedule 5 are outlined below.

1523. The final wording of various amendments is at this stage dependent on whether the Courts and Criminal Matters Bill and the Search and Surveillance Bill are enacted before this Bill. Advisers note, therefore, that the final wording of adjustments outlined in relation to schedule 5, may be affected by this.

New section 106G – Application of Criminal Procedure (Reform and Modernisation) Act 2010

1524. This provision is inserted into Part 3 of the Summary Proceedings Act to allow the new regime to apply to any hearing or attendance required in relation to enforcement of a fine, or a challenge relating to an infringement offence made under section 78B. Hearings allowed pursuant to section 21(8) will have their own direct link to the Bill by virtue of an amendment to that provision. These are the particular situations where a court may be involved in the enforcement of a fine.

Comment

1525. Advisers propose some adjustments to this new section to make it clear that:

1525.1. where there are specified requirements in Part 3 of the Summary Proceedings Act 1957 that may overlap with more general requirements in the Bill, then the requirements in the Summary Proceedings Act 1957 will apply, though the Bill’s provisions may still apply on a modified basis.80

1525.2. The Bill only applies where the hearing requires the personal attendance of the defendant – that is, not when the hearing is to be on the papers, which is the basis for applications under section 78B. (Clause 126 may otherwise limit when proceedings can be heard in the absence of the defendant.)

1525.3. The hearing or attendance may be before a Registrar rather than the Court, which is often what happens under Part 3. Doing so ensures that Registrars can exercise relevant powers under the Bill, such as the power to withdraw a warrant to arrest, given that section 23 of the Summary Proceedings Act 1957 is to be repealed, with reliance instead on the substituting provisions in the Bill.

80 For example, as new section 100F(2) of the Summary Proceedings Act requires a summons to be issued in a form approved under new section 209A (ie, a summons relating to a third party claim of ownership) it will be used regardless of anything that might be stated in the Bill though the intention is that the hearing resulting from the summons will be dealt with under the Bill, by virtue of this provision.
Recommendation 106
Advisers recommend that: schedule 5 be amended to include a new section 106G of the Summary Proceedings Act 1957 to:
• insert words along the lines of “unless otherwise stated in section 78B or Part 3” be inserted;
• provide for modifications as applicable;
• insert “oral” before “hearing”;
• insert a reference to registrars.

Section 124 - Provisions as to issue of warrant pending appeal
1526. Section 124 is repealed by the Bill, as drafted. This is because it is included in Part 4 of the Summary Proceedings Act 1957, which is to be repealed in its entirety. Part 4 deals solely with appeals which are covered in the Bill.

Comment
1527. Subsection 124(5) needs to be retained to align with the approach to be adopted in respect to sections 78B and 106F, which are contained in Part 3 of the Summary Proceedings Act 1957. These sections require the retention of seized property when particular actions have occurred, including in this instance filing a notice of appeal relating to a warrant to seize property. Such a warrant is one of the enforcement options set down in Part 3 of the Summary Proceedings Act.

Recommendation 107
Advisers recommend that schedule 5 be amended to include a stand-alone provision incorporating the content of section 124 (5) of the Summary Proceedings Act 1957 to be inserted into Part 3 of that Act.

New section 203AA – Criminal records
1528. Clause 189 of the Bill sets down requirements relating to the permanent court record in respect of criminal proceedings. The purpose of new section 203AA is to make it clear that the requirements in that clause extend to any proceedings under the Summary Proceedings Act 1957.

Comment
1529. New section 106G of the Summary Proceedings Act 1957 refers to matters under the Summary Proceedings Act rather than to proceedings under the Act as the proceedings will be under the Bill’s provisions.

1530. Advisers consider that in order to link more clearly to section 21(8) and to new section 106G, new section 203AA should be adjusted by substituting the latter portion of this provision along the lines of “... applies in respect of any matter to which section 21(8) or 106G applies”.

260
Recommendation 108

Advisers recommend that schedule 5 be amended to include an amendment to new section 203AA of the Summary Proceedings Act 1957 to more clearly link it to section 21(8) and section 106G of that Act.

Section 203(2) – Acts not generally to be done on Sundays

1531. Section 203 provides that only the actions specified in subsection (2) can be carried out on Sundays.

Comment

1532. Only subsection (2) is identified for repeal in Schedule 5. However, this has the inadvertent effect that nothing could be done on Sundays as there would no longer be a subsection (2) to identify allowed acts, (though subsection (3) would continue to exist meaning that any such acts would not be invalidated purely because done on a Sunday).

1533. Advisers recommend the whole of section 203 be repealed, not just subsection (2), to align with the approach adopted in the Bill.

Recommendation 109

Advisers recommend that the whole of section 203 of the Summary Proceedings Act be repealed.

Schedule 6 – Amendments to other enactments

[Clause 442(3)]

General comments


Nature of amendments set down in Schedule 6

1535. The amendments set down in Schedule 6 are largely required to enable existing terminology to be updated, to substitute cross references to existing legislation with references to the Bill, and to reflect the interrelationship between default limitation periods and stand alone limitation periods in particular Acts.

Terminology changes

1536. One of the aims of the new legislative regime is to use generic terms to apply equally to both lower level and upper level processes where appropriate. This has meant that where two terms essentially refer to the same thing, for example “informant” and “prosecutor”, the approach has been to select the term most widely recognised, in this instance the “prosecutor”. Therefore any other enactment that refers to an informant in the context of prosecuting an offence (other than infringement offences) is amended in Schedule 6 to refer to a
prosecutor rather than an informant. Similarly “lay an information” becomes “file a charging document”.

1537. Additionally terms such as “indictable offence”, “summary offence”, “conviction on indictment” and “summary conviction” are no longer appropriate as the new legislative regime is not based on these distinctions. Where these terms are used in other enactments they are omitted in Schedule 6, and where necessary substituting terminology is set down. “Conviction on indictment” and “summary conviction” usually simply reduce to “conviction”. Where a reference to an indictable offence is used to denote more serious offences, such as in section 61 of the Arms Act 1983 that allows property to be searched on suspicion of an indictable offence against an Act other than the Arms Act, then advisers have endeavoured to substitute such references with an equivalent threshold, in this instance category 3 or 4 offences.

Cross references

1538. Cross references to existing legislation – in particular to procedural provisions in the Summary Proceedings Act 1957 and the Crimes Act 1961 – are also substituted in Schedule 6 to refer instead to the relevant provisions of the Bill. These may need to be adjusted to take account of any substantive changes to the Bill provisions, for example if any provisions are repealed or amended to the extent that further substitutions are required.

1539. Some references to provisions in the Bail Act 2000 may need to be relocated into Schedule 2 if they link to amendments to the Bail Act that could come into force before the rest of the Bill (see clauses 402, 403 and 405 which can commence early pursuant to clause 2(1)(f)).

Limitation periods

1540. While the majority of the amendments set down in Schedule 6 comprise changes to terminology or to update cross references, the schedule contains a number of amendments to Acts that contain their own statutory limitation period (the time within which proceedings must be commenced, usually running from when the offence was alleged to be committed) rather than relying on the default limitation periods which will in the future be determined by clause 22 of the Bill.

1541. The limitation periods set down in clause 22 are greater than the current default periods in relation to many offences, as section 14 of the Summary Proceedings Act 1957 currently provides that an information must be laid within 6 months. However, in some cases the time limit will reduce as the existing time for commencing proceedings indictably is either unlimited, or 10 years (if section 10B of the Crimes Act applies). Subclause (5) makes it clear that the default limitation periods in this clause can be overridden by other enactments that specify a different limitation period for commencing proceedings. Where an offence is committed prior to commencement of the new regime then the current limitation period will apply rather than the new period (whether in the Bill or in the separate enactment) (clause 394).

1542. The amendments to Schedule 6 reflect that in some cases existing specific limitation provisions in other enactments are being retained (but updated to reflect the new terminology used in this Bill), and in other cases, existing specific limitation provisions are being repealed in favour of the new default limitation periods specified in clause 22.
Comment

1543. No submissions were received on Schedule 6, except in relation to some specific provisions relating to the burden of proof and discussed below under that heading (paragraph 1549).

1544. However, advisers note that a number of changes will be required to Schedule 6 as a consequence of changes proposed to substantive provisions of the Bill, and the retention of the title to the Summary Proceedings Act.

1545. If Part 9 is restructured to become a series of stand-alone amendment Acts linking to the relevant schedules then amendments to Acts that are included in Part 9 (because they reflect more substantive policy changes) will need to be separated from Schedule 6 and relocated in stand-alone schedules that will be linked to the relevant amendment Act.

1546. Advisers note that Schedule 6 contains a number of amendments to the Criminal Disclosure Act 2008 to align with the new legislative regime. If it is agreed that various references to “days” in the Bill should be changed to “working days”, advisers recommend changing the references to “days” to “working days” in the Criminal Disclosure Act. In most instances the substitution would be the equivalent number of working days (eg 21 days would equate to 15 working days) but in the case of appeals the number of days allowed would become the number of working days allowed.

1547. In some instances legislation requires that action be taken “in a summary way” or “summary manner”. Where the action is to enforce a fine, advisers recommend that such provisions be amended to refer more explicitly to Part 3 of the Summary Proceedings Act 1957 (which enables enforcement of fines). In other instances the appropriate substitution is to the Bill as the reference is to the process for dealing with the matter. All references to summary way/manner have been reviewed and appropriate amendments identified for Parliamentary Counsel’s consideration.

1548. Finally amendments are required to amend Acts that had their 3rd reading on or after 24 August 2010 and SR regulations made on or after 24 August 2010, which was the last date for updating the Bill prior to introduction. Where enactments are passed after the Bill has had its own 3rd reading or where an enactment may have been overlooked, these can be amended on a limited basis using clause 400 which allows regulations to be made but only to change terminology.
**Recommendation 110**

Advisers recommend that Schedule 6 be amended:

- to reflect amendments agreed to substantive provisions in the Bill where necessary, including the restructuring of Part 9 of the Bill, and retention of the title to the Summary Proceedings Act 1957;
- to amend the Criminal Disclosure Act to substitute references to “days” with references to an equivalent number of “working days”, or in the case of appeals the same number of “working days”;
- to amend enactments that use the phrase “in a summary way” or “in a summary manner” to link either to Part 3 of the Summary Proceedings Act 1957 where the intent is to enable payment of money to be enforced; or to link to the Bill where the intent is to outline the process to be applied.
- to amend Acts that had their 3rd reading on or after 24 August 2010, and regulations made on or after 24 August 2010.

**Reverse onus provisions**

1549. The Bill repeals section 67(8) of the Summary Proceedings Act 1957, which places on the defendant the persuasive burden of proving to the fact-finder the applicability of any exception, exemption, proviso, excuse or qualification in relation to an offence. However, it creates exceptions to retain a reverse onus for some specific offences in the Securities Act 1993, Animal Welfare Act 1999, Fisheries Act 1996 and transport legislation. These exceptions are proposed in Schedule 6.

**Submissions**

1550. The table below summarises the number of submissions on the reverse onus provisions created in the Bill.

1551. All the submitters commenting on these provisions (22, 28, 40, 70) support the repeal of section 67(8). However, they all oppose the specific exceptions created in respect of two offences for which a reverse onus is specifically created. These are the offences under:

1551.1. Fisheries Act 1996, section 113A; and

1551.2. Civil Aviation Act 1990, section 53A(4A).

1552. They submit that the limitation of the right to be presumed innocent until proven guilty in relation to these offences is not justified, and refer to the assessment made by the A-G who also came to this conclusion in his section 7 Report.

1553. In addition, the NZLS (40) recommends that the Select Committee seek advice on the remaining offences for which exceptions are created.

**Comment**

1554. The A-G, in his section 7 Report, noted that any offence provision that shifts the onus of proof on to the defendant limits the right, under section 25(c) of the NZBORA, to be presumed innocent until proven guilty.81 The A-G therefore

81 Paragraph 58.
assessed the reverse onus provisions proposed in the Bill to determine whether they could be considered a justifiable limitation in each case.

1555. The A-G concluded that a reverse onus was demonstrably justified in all cases, except two:

1555.1. Fisheries Act 1996, section 113A; and

1556. Advisers agree that these proposals could be removed from the Bill to ensure consistency with NZBORA.

1557. The A-G provides a comprehensive discussion of whether or not the remaining offences for which a reverse onus is proposed are justifiable limitations on the right under section 25(c) NZBORA in his Section 7 Report. Essentially he notes that the offences concerned:

1557.1. involve voluntary activities; and/or
1557.2. would be much easier for the defendant to prove than the prosecution to negate; and/or
1557.3. are significant from the point of view of public confidence in our legal system.

1558. Advisers agree with the A-G’s assessment, and do not consider that further comment is necessary.

Recommendation 111

Advisers recommend that schedule 6 be amended to remove the following reverse onus provisions from the Bill:

- Fisheries Act 1996, section 113A; and
- Civil Aviation Act 1990, section 53A(4A).

Consequential amendments required as a result of dismissal policy in clause 147

1559. Clause 147 of the Bill provides for the circumstances in which a court may dismiss a charge. A small number of consequential amendments are required in other Acts to give full effect to the policy that a dismissal shall be deemed to be an acquittal and the change in terminology to a dismissal of a charge.

Comment

Armed Forces Discipline Act 1971

1560. Section 188(5) of this Act needs to be repealed, consistent with the repeal of section 13(3) the Criminal Procedure (Mentally Impaired Persons) Act 2003. The effect of that change is that a dismissal under that section shall be treated as an acquittal. Section 188(4) should also be consequentially amended. The New Zealand Defence Force has been consulted and agrees with these changes.

Costs in Criminal Cases Act 1967

1561. Several additional minor changes are required to this Act. Firstly, the word “information” in section 5(2) (e) and (f) and 5(4) must be changed to “charge” to
reflect the new terminology in the Bill. Further, the reference to discharged can be omitted from section 5(4) as this relates to a discharge under section 184F of the Summary Proceedings Act and the relevant reference is being omitted from section 5(1) of the Costs in Criminal Cases Act 1967.

Trade in Endangered Species Act 1989

1562. The words “discharged or” should be omitted from section 39C(2). This amendment has been discussed with the Department of Conservation which agrees with this change.

Recommendation 112
Advisers recommend that schedule 6 be amended to include the necessary consequential amendments to the Costs in Criminal Cases Act 1967, the Trade in Endangered Species Act 1989, and the Armed Forces Discipline Act 1971 to reflect the new dismissal policy and the terminology used in the Bill.

Schedule 7 – Consequential amendments relating to public access and restrictions on reporting provisions

[Clause 443]

1563. Schedule 7 makes amendments to legislation, which are required as a consequence of subpart 3 of Part 5 of the Bill (public access and restrictions on reporting). Subpart 3 of Part 5 replaces section 375A of the Crimes Act 1961, sections 138 – 141 of the Criminal Justice Act 1985, and section 46A of the Summary Proceedings Act 1957. Subpart 3 of Part 5 of the Bill may come into force before the rest of the Act by virtue of clause 2(1)(c) of the Bill.

1564. This means that those replaced sections need to be repealed, and that any enactment that contains a cross reference to any of those sections needs to be amended to cross reference to the substituting provision or provisions in the Bill. This needs to occur at the same time that subpart 3 of Part 5 comes into force. Therefore the consequential amendments linking to subpart 3 of Part 5 are set down in a separate schedule (Schedule 7), which may also come into force early pursuant to clause 2(1)(c) of the Bill, by virtue of clause 443.

1565. While some provisions containing cross references to those sections are themselves to be repealed, this will not occur until the Bill comes fully into force. Therefore they need to be amended on a temporary basis to cover proceedings that commence after subpart 3 of Part 5 comes into force and before the Bill comes fully into force.

Comment

1566. No submissions were received on Schedule 7. A number of technical changes are required to ensure that there is a complete set of consequential amendments in Schedule 7. However, no substantive changes are recommended.
Section VI: ISSUES NOT ADDRESSED BY THE BILL

1567. Some submitters raised issues that are not directly addressed by the Bill. These include the following:

Suppression register

1568. David Farrar (25), InternetNZ (30), the Media Freedom Committee (37), Trade Me (55), New Zealand Legal Information Institute (72) and Television New Zealand (52) support the creation of a suppression register.

1569. They suggest that this needs to be accessible remotely, so that those who have access can ascertain what is suppressed, and verify if published material is suppressed so it can be removed from an internet site.

1570. Television New Zealand (52), New Zealand Legal Information Institute (72) and the Media Freedom Committee (37) see this as particularly important if there is to be an increase in penalties.

1571. The Ministry of Justice is currently looking at options around creating a suppression register. It has developed two options for a suppression orders register. One option is a register, open to all, identifying the cases in which one or more suppression orders have been imposed and are active, but containing no details of the suppressed information. The second is a restricted access register which would contain suppressed names and such other information as has been recorded in case management systems. At the direction of the Minister of Justice, consultation with the judiciary, Law Commission and media on the two options has begun. A report on the results of the consultation process will be prepared for the Minister of Justice in due course.

Defendants with intellectual impairments

1572. Tony Ellis (54) is concerned with the criminal justice system’s treatment of defendants with intellectual impairments.

1573. The Ministry of Justice, in collaboration with the Ministry of Health, is currently reviewing the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act) and its interface with associated legislation, in particular, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The concerns raised by Tony Ellis will be considered as part of this review.

1574. The Ministries are due to report back to Cabinet on the outcome of the review in mid 2012.

Independent prosecution service

1575. Tania Smith (9) and the Human Rights Foundation (29) believe there is a need for an independent prosecution service in New Zealand.

1576. The Government has recently announced a review of New Zealand’s public prosecution service. This review will examine the public prosecution system with the aims of ensuring that services are cost effective but also foster high standards in prosecutions. A report will be provided to the A-G by 30 September 2011.

Bail

1577. Thirteen submitters (Michael Jacobs (15), Chris Burke (21), Graeme Moyle (27), Judy Ashton (34), Ken Evans (35), Leigh Woodman (36), Rebecca and Andrew
Templeman (44), Sensible Sentencing Trust (46), Sensible Sentencing Trust (Napier) (47), Sharlene and Malcolm Barnett (48), Valerie Burr (56), David White (61) and Rita Croskery (65) raised concerns regarding the provision of bail to serious offenders, with many submitting that those charged with a category 3 or category 4 offence should never be eligible for bail.

1578. Issues relating to bail will be considered by the current review of New Zealand’s bail system. The public consultation document Bail in New Zealand: *Reviewing aspects of the bail system* was released on 15 March 2011.

1579. The document seeks the public’s views on a series of preliminary Government proposals relating to specific aspects of the bail system. The Ministry of Justice will use the information gained during the consultation process to prepare final policy proposals regarding the bail system, and will report back to the Minister with recommendations by September 2011.

**Other Miscellaneous Suppression Issues**

1580. Adam Edwards (16) submits on two matters not included in the Bill:

1580.1. Lack of recognition of the significance of the stage of proceedings at which an application for name suppression is made.

1580.2. Lack of a specific provision prohibiting publication of identifying particulars of individuals who have been arrested, but have not yet appeared in court.

1581. The Criminal Bar Association (23) submits that name suppression should be automatic on completion of diversion.

1582. Tech Liberty (50) submits that suppression should be on specific grounds specified in legislation, and no discretionary grounds should exist in that respect.

1583. The New Zealand Legal Information Institute (72) submits that there should be a wholesale review of statutory suppression orders. Inconsistencies between various approaches need to be looked at to ensure a fair approach. For example there are different suppression regimes for the Social Security Appeal Authority, the Teachers Council and the Accident Compensation Appeals District Court Registry.

1584. The New Zealand Legal Information Institute also submits that there should be standardised suppression orders.

1585. Express recognition exists of the significance of the stage of the proceeding in respect of interim orders (clause 204(4)) – these are most likely to be sought quickly at the beginning of the proceedings, and accordingly reflect that it may take time to gather together all the evidence needed to meet the threshold required.

1586. Aside from this, the stage of proceedings is relevant, but this can be taken into account by the courts without needing to be set out in the legislation. For example, what amounts to extreme hardship to the defendant justifying name suppression before the trial may not be considered to be extreme hardship after conviction.

1587. The Law Commission has considered whether there should be automatic suppression on arrest, concluding that it is currently not necessary. For example,
the Press Council noted that it had never received any complaints about publication in these circumstances.

1588. Name suppression should not be automatic on completion of diversion. Whether name suppression is appropriate should be considered on a case by case basis. The Law Commission report noted that there was little support for automatic suppression when this was raised in its issues paper.

1589. The existing law provides a wide discretion for granting suppression orders. The Bill changes this by setting out specified grounds on which a suppression order can be granted.

1590. The amendments proposed in this Bill relate to criminal proceedings, and the much wider wholesale review of statutory suppression orders suggested is not a matter that can appropriately be dealt with in the Bill.

1591. While advisers agree that, as far as practicable, suppression orders should be made in a standardised or consistent manner, this is a matter of practice and is not appropriate for legislation.

Victims’ Rights Act 2002

1592. Candor Trust (11) supports the use of victim impact statements to assist the judicial officer in giving a sentence indication. However, most of the comments in this submission on this part of the Bill relate to the Victims’ Rights Act 2002 and the process around the preparation and use of victim impact statements. Those issues will be considered in the context of the Enhancing Victims’ Rights Review that is being undertaken by the Ministry of Justice.

Reduction in sentence for guilty plea

1593. Judy Ashton (34) says no discount should be given for an early guilty plea.

1594. The Sentencing Act 2002 provides in section 9(2)(b) that the court must take into account as a mitigating factor, to the extent applicable, whether and when the offender pleaded guilty.

1595. Section 9(2)(b) of the Sentencing Act gives statutory effect to long standing judicial acknowledgement that some appropriate reduction should be made to a sentence to recognise an offender’s guilty plea. That principle has been expressly recognised in numerous cases in the New Zealand Court of Appeal dating back to the 1960’s.

1596. In Hessell v R [2010] NZSC 135 at [45], the Supreme Court acknowledged that it is appropriate for the courts to give credit for a guilty plea primarily to facilitate the effective operation of the criminal justice system. Such a plea avoids the costs associated with a trial and may reduce the backlog of trials. There are also benefits for witnesses, particularly victims, who will not be required to give evidence and may receive some comfort from the offender’s acknowledgment of responsibility for the offending. The benefits of a guilty plea to the criminal justice system, and those involved in it, therefore justify recognition of a guilty plea in the sentence imposed.

Additional issues

1597. Fifteen submitters (Michael Charles Jacobs (15), Chris Burke (21), Graeme Moyle (27), Judy Ashton (34), Ken Evans (35), Leigh Woodman (36), Rebecca and Andrew Templeman (44), Sensible Sentencing Trust (46), Sensible Sentencing Trust (Napier) (47), Jardine Jamieson (62), Rita Croskery (65),
Sharlene and Malcolm Barnett (48), Simon Cowan (49), Valerie Anne Burr (56), and Margaret Jamieson (63) raised one or more of the following additional issues:

1597.1. amending the Bill of Rights to recognise the rights of victims;
1597.2. harsher sentences for serious violent crimes and the introduction of the ability to extend sentences where offenders reach the end of the sentence but still pose a threat to society;
1597.3. the abolition of parole for all defendants convicted of a category 3 or 4 offence;
1597.4. greater accountability for the Parole Board;
1597.5. the abolition of the right to silence;
1597.6. changing the verdict of ‘not guilty by reason of insanity’ to ‘guilty but insane’ to ensure a conviction is entered against the offender;
1597.7. greater judicial accountability;
1597.8. victim impact statements should not be edited or censored in any way;
1597.9. full disclosure of a defendant’s criminal history at trial;
1597.10. the establishment of a publicly available offender database;
1597.11. the provision of greater information to victims;
1597.12. the introduction of three degrees of murder to ensure first degree murderers are given a life sentence without parole; and
1597.13. the establishment of night courts to hear category 1 offences to enable courts to hear more serious offences during the day.

1598. As these issues all fall outside the scope of the Bill they have not been considered in this Report.

Access to the court documents

1599. The Committee has asked for clarification as to how court documents are accessed and how this links with the proposed suppression register. Advisers outline a response to this question below.

Indictable cases

1600. In indictable cases access to documents on the Court file is governed by the Criminal Proceedings (Access to Court Documents) Rules 2009. “Criminal Proceedings” are defined in rule 3 as only indictable cases, or where jury trial is elected (and therefore includes committal proceedings under Part 5 or 5A of the Summary Proceedings Act 1957).

1601. The parties to proceedings have a general right to access the court file, subject to the courts supervision (rule 7). No formal application is required.
Anyone has the ability to access the “formal court record” (rule 6), which is defined to include all judgments, orders, minutes, and sentencing decisions, unless a Judge has directed that the particular document not be accessed without express permission. Otherwise there is no basis to refuse access, and no “application” is required.

There are other rules about access during committal or trial stage to documents falling outside the formal court record (rules 8 and 9). Requests for access to such documents are to be made informally by letter to a Registrar (rules 8(4), 9(4)). Requests relating to access to such documents outside these times must be made by informally by letter to a Registrar (rule 13). The application is heard and determined by a judge or, if a judge directs the Registrar to do so, by the Registrar (rule 13(3)). A judge has the power to direct that the matter be put into a formal interlocutory application, and to require service of the application (rule 13(4)-(6)). The application can be dealt with on the papers or at an oral hearing (rule 13(7)), and decisions are treated as being made pursuant to a court’s civil rather than criminal jurisdiction (rule 5). Any decision made by a Registrar is subject to a right of review before a Judge (rule 15), and any further appeals are governed by civil appeal process (rule 5).

Fees are prescribed for access under the Rules by the Criminal Proceedings (Search Fees) Regulations 2009. Any right of access is subject to the payment of the prescribed fee (r 12(1)(b)), although parties to proceedings only have to pay a fee for copying not searching (r 7(1)(a) and (b)). For example, search of the formal court record has a $25 fee, the fee for a copy of any judgement or order ranges from $15 to $50 depending on the number of pages (see Schedule 1 of the Regulations).

The legal position in respect of access to summary court records falling outside section 71 of the Summary Proceedings Act 1957 is not clear, but it has been suggested that the rules applying to indictable cases should be applied by analogy. This has been the approach taken by court staff, and consequently applications for access to summary court records are dealt with in accordance with the process above (with all necessary modifications).

With the enactment of the Bill, the 2009 Rules will need to be revised extensively. The new Rules will be able to cover access to files relating to all categories of cases. The power to amend the rules resides with the rules committee. Without any decisions regarding the form and content of a suppression register, it is unclear what links will need to be made with the rules that cover access.

Section 71 of the Summary Proceedings Act 1957 allows access for anyone with a “genuine and proper interest” to entries in the “criminal record”. Entries in the “Criminal Record” per s 71(4) are limited to “a minute or memorandum of all proceedings in the Court under its criminal jurisdiction” (s 71(1)) and “A statement of the way in which the requirements of section 30 of the Sentencing Act 2002 have been satisfied” (s 71(1A)).

In L v Police [2000] 2 NZLR 298 Williams J suggested the Criminal Proceedings (Search of Court Records) Rules 1974 (predecessor to the 2009 Rules above) should be applied by analogy.
Appendix 1: Technical and drafting amendments with application across the Bill as a whole

1. **APPROACH TO ELECTRONIC MANAGEMENT OF DOCUMENTS**

1. One of the purposes of the Bill, noted in the General Policy Statement, is to “simplify criminal procedure and provide an enduring legislative framework that...enables the courts to adopt new (and current) information technologies...”. This purpose finds specific expression in clause 23 which allows the electronic filing of charging documents.

2. However, as the Bill is drafted, it might be argued that Parliament did not intend that new technologies be used in any circumstances other than the ones expressly provided for. This is because, in addition to clause 23, there is only one another specific reference to electronic technology – clause 177. The current drafting of clause 3(b) may also reinforce this argument.

3. To address the risk that electronic technology may be prohibited, advisers recommend that clause 23 is deleted, the rule making power in clause 382 amended to allow the use of electronic technology, and amendments made to clause 3(b) to clarify the intention of the Bill to enable the use of electronic technology.

4. Clause 23(1) and (2) are redundant because of the general approach on rules (see commentary on clause 382) and because clauses 23(3) and (4) are covered by clauses 12, 13, and 14.

5. Further, any rules that might be made about electronic filing should be able to differentiate between courts, prosecutors and defendants, who conceivably have access to different systems.

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**Recommendation 113**

Advisers recommend that

- clause 23 (manner of authentication and filing charging document) be deleted following recommended changes to facilitate electronic management of documents;
- clause 382 (rules) be amended to insert a general reference to rules allowing for the use of electronic technology. These rules should allow for differentiation between courts, prosecutors and defendants.

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2. **ADJOURNMENTS AND BAIL POWERS**

6. One of the key powers that any judicial officer or Registrar must be able to exercise is a power to adjourn proceedings as, in most cases, proceedings cannot progress without adjournment. Powers in relation to adjournments and bail are set out at clauses 172 to 176 in the Bill and in Schedule 2 in relation to the Bail Act 2000. As now, the general policy intent is that:

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6.1. the court, Justices of the Peace, Community Magistrates and Registrars must have the power to adjourn proceedings;
6.2. the Registrar’s power may be limited;
6.3. the defendant must be able to be dealt with on any adjournment;
6.4. the court, judicial officers or Registrar must be enabled to issue warrants to arrest, remand the defendant in custody, at large, or on bail, as appropriate.

7. Advisers have identified a number of gaps in procedure or practice in the existing Summary Proceedings Act 1957 provisions that have been perpetuated in the provisions that have been carried into the Bill and inconsistencies between the relevant provisions of the Bill and the Bail Act 2000. To rectify these deficiencies, make explicit Registrars’ powers to adjourn, issue warrants to arrest and grant bail, and to clarify requirements, a number of amendments to the Bill are proposed to:
7.1. reduce the duplication of clauses dealing with essentially the same matter;
7.2. ensure that all such powers are clearly stated in accordance in existing law or practice;
7.3. ensure that the Bail Act adjournment powers and those in the Bill are complimentary and form a coherent package of reforms.

**Recommendation 114**

Advisers recommend that the Committee agree to advisers discussing with Parliamentary Counsel the most appropriate way to ensure that powers of judicial officers and Registrars to adjourn, issue warrants to arrest and grant bail are clearly and appropriately stated in the Bill and that they form a coherent package of reforms with the relevant Bail Act powers.

4. USE OF ‘COURT’, ETC.

8. The terms “court”, “judicial officer” and “judge” are used throughout the Bill but are, at times, used inconsistently.
9. A major source of inconsistency is that these terms are used in a broad way in relation to various powers under the Bill, when in fact the intention is that only a particularly constituted court, specific judicial officer, or judge of a particular “court” is meant to be able to exercise that power.

**Submission**

10. The District Court Judges (26) consider that the Bill’s use of “court” and “judicial officer” is confused, and that as a consequence there is confusion about the degree to which lower level judicial officers may carry out certain functions.

**Comment**

11. It is recommended that “court” be defined to mean “a court presided over by a judicial officer with authority to exercise the court’s jurisdiction in relation to the matter”. This will allow the relevant clauses to operate in an unambiguous way in conjunction with specific clauses granting jurisdiction to judicial officers. These specific clauses will require technical amendments to the use of “judicial officer” or “judge” on a case by case basis restricting or broadening judicial power as appropriate.
5. **USE OF VICTIM VS COMPLAINANT**

12. The Bill takes an inconsistent approach to its use of the terms “victim” and “complainant”. It is recommended that a definition of “victim” be included in clause 5 of the Bill, which will cross-reference to the broad definition of “victim” in section 4 of the Victims’ Rights Act 2002. The term “complainant” should be used when the intention is to refer to the direct victim of the offence — that is, the person upon or with whom an offence has been, or is alleged to have been, committed. The terms “victim” and “complainant” should then be used as appropriate.

### Recommendation 116
Advisers recommend that:

- a definition of “victim” be included in clause 5 of the Bill (which will cross-reference to the definition of “victim” in the Victims’ Rights Act 2002); and
- amendments are made to the Bill to ensure a consistent use of the terms “victim” and “complainant”.

6. **USE OF DAYS VS WORKING DAYS**

13. The Bill defines “working day” to mean:

13.1. A day that is not Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Queen’s birthday or Waitangi Day. A working day is also not a day in the period commencing on 25 December and ending on the following 15 January.

13.2. If a time period is expressed in terms of “working days”, the period will not include holidays, weekends, and the Christmas break. For example, if a Judge gives a sentence indication during the week before Christmas, the sentence indication will expire in January (clause 62) unless a date is specified. That means that the actual length of the period varies, depending on when it occurs.

13.3. If a time period is expressed in terms of “days” (‘calendar days’), the period will include holidays etc. For example, a charging document must be filed not less than 7 days before the date on which the defendant is required to appear. If the defendant is required to appear on 20 January, the 7-day period will include days during the Christmas break (clause 28). The period will only ever be 7 days, irrespective of when it occurs.

14. Advisers recommend the Bill be amended to adopt the following consistent and principled approach to use of the expression “days” versus “working days”:

14.1. Maximum periods of imprisonment/custody – “days” (because there needs to be certainty about the duration);
14.2. Duration of orders – “days” (because there needs to be certainty about the duration of a court order, irrespective of when an order is made);
14.3. Sentence indications – “working days” (because defendants require access to, and consultation with, counsel during office hours);
14.4. Deadlines for filing documents/making applications/serving notices – “working days” (because parties will need access to their lawyers, and they will only be able reasonably to have that on working days); and
14.5. Deadlines by which hearings must take place – “working days” (to be consistent with filing).

15. Advisers also recommend that the Criminal Disclosure Act 2008, which currently refers to “days” also be amended to reflect the above approach. Given the relationship between the two statutes, it is desirable that their approach to this issue aligns.

Recommendation 117

Advisers recommend that the Bill be amended to adopt the following consistent and principled approach to use of the expression “days” versus “working days” in the Bill:

- maximum periods of imprisonment/custody – “days” (because there needs to be certainty about the duration);
- duration of orders – “days” (because there needs to be certainty about the duration of a court order, irrespective of when an order is made);
- sentence indications – “working days” (because defendants require access to, and consultation with, counsel during office hours);
- deadlines for filing documents/making applications/serving notices – “working days” (because parties will need access to their lawyers, and they will only be able reasonably to have that on working days); and
- deadlines by which hearings must take place – “working days” (to be consistent with filing).

7. USE OF DEFENDANT VS LAWYER

16. The Bill mostly uses the term “defendant” generically to refer to things the defendant or, if the defendant is represented, his or her lawyer can do – see, for example, clauses 78 and 101 dealing with evidence admissibility applications. If the defendant is represented, these things will almost always be done by the defendant’s lawyer rather than by the defendant personally. However, some provisions specifically refer to the “defendant” or the “defendant’s lawyer” – see, for example, clause 33(2) dealing with the entry of a plea. A clearer and more consistent approach to this issue is desirable.

17. It is recommended that the Bill be amended to include a provision to the effect that, unless the context requires otherwise, references to the procedural steps a “defendant” may or should take are to be read as including a reference to a lawyer representing the defendant. Some changes to specific provisions in the Bill will also be required, in light of this approach. In particular, clauses 33(2), 36(2) and 48(2) can be deleted. Amendments are also likely to be required to clauses 52(3), 77(1) and 188(1).
8. TIMING

18. The Bill prescribes overall timeframes for doing some things. However, it also envisages that more precise times for doing things will be prescribed in rules.

Comment

19. No submissions were received on this aspect of the Bill. However, advisers have noted that a vires issue could arise if rules are made imposing earlier deadlines than required in the Bill. For example, the Bill may require something to happen “before the trial”, while it is envisaged that rules would impose an earlier deadline such as “5 working days before the trial”. Advisers therefore recommend that drafting changes are made to make it clear that the timing of certain steps be prescribed in rules. This can generally be achieved by removing general references to timing in the Bill.

Recommendation 118

Advisers recommend that the Bill be amended to make it clear on the face of the Bill the policy intention that rules prescribe certain timeframes.
**Appendix 2: Submissions on technical and drafting amendments relating to specific clauses**

<table>
<thead>
<tr>
<th>Clause</th>
<th>Submission</th>
<th>Submitter</th>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2(3)</td>
<td>Subclause (3), which currently reads “receives the Royal assent” should read “receives Royal Assent”.</td>
<td>James Richardson (39a)</td>
<td>No change. The wording in the Bill reflects the drafting approach adopted in New Zealand enactments.</td>
</tr>
<tr>
<td>4</td>
<td>This explanatory clause is unnecessary, as subclause 4(2) declares it has no substantive effect and the explanatory note should be sufficient. It is also grammatically incorrect.</td>
<td>James Richardson (39a)</td>
<td>No change. This clause reflects the drafting approach adopted in New Zealand.</td>
</tr>
<tr>
<td>4</td>
<td>Clause 4(r) should make it clear that, for youth offenders charged with category 4 offences (other than murder or manslaughter), the trial may be held in the Youth Court before a Judge alone.</td>
<td>Youth Court Judges (66)</td>
<td>No change. The amendment would clarify the Bill but it might misleadingly imply that that is the only difference between the Youth Court and the adult jurisdiction.</td>
</tr>
<tr>
<td>9(1)</td>
<td>Should read “subject to subsections (2) and (3)” not “subject to subsection (2) and (3)”</td>
<td>James Richardson (39a)</td>
<td>Amend as suggested.</td>
</tr>
<tr>
<td>12(2)</td>
<td>Clause 12(2) allows parties to a proceeding to agree to the filing of a charging document in a different District Court. However, prior to commencement of proceedings there is no ‘proceeding’, and there are no ‘parties’.</td>
<td>NZLS (40)</td>
<td>Re-draft clause 12(2) to ensure that the terms used are accurate.</td>
</tr>
<tr>
<td>33(6)</td>
<td>The reference to “amending” a plea should be a reference to “changing” a plea.</td>
<td>New Zealand Bar Association (39b)</td>
<td>Amend accordingly.</td>
</tr>
<tr>
<td>38</td>
<td>The word “amend” in the heading to clause 38 should be “change”.</td>
<td>New Zealand Bar Association (39b)</td>
<td>Amend accordingly.</td>
</tr>
<tr>
<td>Clause</td>
<td>Suggestion</td>
<td>Reason</td>
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<tr>
<td>44</td>
<td>Clause 44 should be subject to sections 151 and 154.</td>
<td>NZLS (40) No change. The plea of previous acquittal generally in relation to the tainted acquittal etc provisions is dealt with by clause 156(2). Providing an additional cross-reference in clause 44 would be inconsistent with the approach to drafting in the rest of the Bill, which is to state each thing once only wherever possible and locate the relevant statement in the best place.</td>
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<tr>
<td>69(4)</td>
<td>The reference to subsection (2) should be to subsection (3).</td>
<td>James Richardson (39a) Amend accordingly.</td>
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<td>111</td>
<td>The language used in sub-clause 111(2), which concerns procedure if a charge alleges a previous conviction (in particular the words “given on the part of the defendant”) are criticised as “archaic” and “vague”.</td>
<td>NZLS (40) In sub-clause 111(2), replace “given on the part of the defendant” with something like “by or on behalf of the defendant” (as in clause 110(3)(c)).</td>
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<tr>
<td>116(b)</td>
<td>Sub-clause 116(b) should refer to section 178(2) of the Crimes Act 1961, as opposed to section 178 as a whole, like the current section 339(2) of the Crimes Act 1961.</td>
<td>New Zealand Bar Association (39b) Amend clause 116(b) by replacing “178” with “178(2)”.</td>
<td></td>
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<tr>
<td>118</td>
<td>The heading to this clause is inaccurate as it says the court “may” dismiss charge, when the clause expressly provides that the court “must” dismiss the charge.</td>
<td>New Zealand Bar Association (39b) Amend the heading to clause 108 to something like Court must dismiss charge in certain cases” or “Dismissal of charge in certain cases”.</td>
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<tr>
<td>122(2)(b)</td>
<td>The word “it” in clause 122(2)(b), which concerns sentence indications, could be read as referring back to the information available to the court rather than the sentence indication.</td>
<td>NZLS (40) In sub-clause 122(2)(b) replace “it” with “the sentence indication”.</td>
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<tr>
<td>Page</td>
<td>Issue</td>
<td>Recommendation</td>
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<tr>
<td>130</td>
<td>A defendant is not summoned to attend a trial, so clause 130 could never apply.</td>
<td>Coalition of Community Law Centres (23)</td>
<td>Amend so that clause 130 applies if the defendant has not received notice of the hearing.</td>
</tr>
<tr>
<td>135 – 138</td>
<td>Part 5 may be read more easily if it was more closely aligned with the ordering of events at trial.</td>
<td>James Richardson (39a)</td>
<td>Consider placement of these and other charge provisions in Part 5.</td>
</tr>
<tr>
<td>142</td>
<td>Clause 142 should reflect section 16(4) of the Summary Proceedings Act, which is limited to defended hearings (the equivalent of Judge-alone trials under the Bill).</td>
<td>NZLS (40)</td>
<td>Amend clause 142 so that it only applies to Judge-alone trials.</td>
</tr>
<tr>
<td>147(1)</td>
<td>The discretion to discharge under clause 147(1) should not focus on whether or not there is admissible evidence under clause 85.</td>
<td>Crown Solicitors’ Network</td>
<td>Amend clause 147 to include an equivalent provision to Crimes Act 1961 section 347(1)(c) to allow the judicial officer to consider formal statements, other evidence and such other matters in making a dismissal determination under this clause.</td>
</tr>
<tr>
<td>151</td>
<td>It is not clear in subclause (2) that the acquitted person has been convicted of an administration of justice offence connected with the proceedings that led to acquittal.</td>
<td>James Richardson (39a)</td>
<td>No change. Subclause (2) needs to be read with subclause (1). The drafting approach in the Bill reflects the current approach to this provision, which is carried over from section 378A of the Crimes Act 1961.</td>
</tr>
<tr>
<td>170</td>
<td>The wording of sub-clause 170(1), “any person”, could be interpreted to mean that the defendant may be required to give evidence (as could counsel or potentially the judge).</td>
<td>NZLS (40)</td>
<td>Amend sub-clause 170(1) to the effect that any person present at court who could have been compelled to give evidence for the party seeking to call the person as a witness may be required to give evidence whether or not not previously summoned.</td>
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<tr>
<td>Clause</td>
<td>Recommendation</td>
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<td>173</td>
<td>Clause 173 sets out what happens to the defendant when a proceeding is adjourned. This includes the option of remanding in custody. It is desirable to make it clear that it is inappropriate to issue a warrant for a defendant’s detention in prison where the defendant is a young person. Amend clause 173 to make it expressly “subject to clauses 178 and 179” (which set out special provisions applying to defendants under the age of 20). NZLS (40)</td>
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<td>174(2)</td>
<td>The reference to section 173(2) in sub-clause 174(1) should be a reference to section 173(1) Amend clause 174(1) to make the correct cross-reference. NZLS (40)</td>
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<td>180(2)</td>
<td>The definite article is missing from the second line (“the chief executive”). Amend subclause 180(2) by inserting “the” before “chief executive”. James Richardson (39a)</td>
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<tr>
<td>188(3) &amp; (4)</td>
<td>“The Register” in each subclause should be “the Registrar”. Amend subclauses 183(3) and (4) by replacing the word “Register” with “Registrar”. James Richardson (39a)</td>
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<tr>
<td>190, 192, 194</td>
<td>Clauses 190, 192, and 194 should be merged. No change. These clauses deal with different issues and it is clearer for them to be separate. NZLS (40)</td>
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<tr>
<td>420</td>
<td>The word “judgment” in new section 11CA of the District Courts Act should be “amount paid or agreed to be paid”. Amend accordingly. New Zealand Bar Association (39b)</td>
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<tr>
<td>428</td>
<td>The word “judgment” should be changed to “amount paid or agreed to be paid”. Amend accordingly. NZ Bar Association (39b)</td>
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</table>