21 December 2009

Criminal Procedure (Simplification) Project: Questions and Answers

1. What is the Criminal Procedure Simplification project?

The Criminal Procedure (Simplification) Project was established in October 2007 to review and reform New Zealand's criminal procedure. It integrates a range of initiatives within key justice sector agencies to improve timeliness and efficiency in criminal court cases.

The project is a joint effort by the Ministry of Justice and the Law Commission.

The project's steering group includes representatives from the Law Commission, the Ministry of Justice (Operations and Policy), the New Zealand Police, the Crown Law Office and the Parliamentary Counsel Office.

The changes will be supported by a new Criminal Procedure Bill that will repeal the Summary Proceedings Act 1957 and consolidate other provisions relating to criminal procedure.

2. What is the objective of the project?

The key objective of the project is to improve court services for victims, witnesses, the community and defendants by:

- Reducing unnecessary court delay through legislative and operational change.
- Creating a more accessible and simplified criminal procedure.
- Ensuring that trials are efficient, focused, and confined to the issues in dispute.

3. Why is the project being undertaken?

The project is being undertaken to address a number of long-standing inefficiencies and issues with pre-trial criminal procedure, including:

- Repeated adjournments of cases.
- Unnecessary court appearances to deal with matters that should have been addressed by prosecution and defence out of court.
- Late guilty pleas that result in inefficient use of court and judge time.
- Trials that fail to proceed on their scheduled date.
- Inadequate incentives and sanctions to ensure that prosecution and defence progress the case as they should.

- Long delays before the final disposal of cases.
- A trial system in which relatively minor cases may be tried by jury.
- Trials that are unduly long and hear significant volumes of undisputed evidence.
- Barriers to the use of modern technologies and an excessively paper-based process.
- An excessively complex and outdated legislative framework.

These problems not only create inefficiency but frequently cause inconvenience and fail to deliver justice to victims, witnesses, defendants and the community.

4. The scale of the problem

Unnecessary court hearings

The Ministry of Justice estimates that:

- 10% of summary court appearances after the administration stage may be unnecessary.
- 15-20% of pre-committal court appearances may be unnecessary.
- 10% of post-committal court appearances may be unnecessary.

This translates into approximately 14,900 unnecessary court appearances per year, which results in costs to victims, witnesses, defendants, Police, Corrections and the Courts.

Delays

- The median time to dispose of a District Court jury trial is one year from first appearance until final disposal. This is an increase of about five-and-a-half weeks in the past five years.
- The median time to dispose of a High Court jury trial is 16-and-a-half months from first appearance (in the District Court) to final disposal. This is an increase of approximately five-and-a-half months in the past five years.
- The median time to dispose of a summary defended hearing is 157 days from first appearance until final disposal, down from 176 days in 2004. This small decrease comes from administrative efforts to improve court efficiency. However, this is still an undesirable length of time and further reductions will require more fundamental changes.
- In some cases, delays have contributed to a loss of the ability to prosecute. In the 2007/08 year, 19 cases were stayed under section 25(b) of the New Zealand Bill of Rights Act 1990 which sets out the right to be tried without undue delay. This compares to seven cases in 2004/05.

- Delays in proceedings have further implications for time spent on remand (average 58 days at December 2008 compared to 30 days in December 1998), which in turn has had an impact on demand for prison beds for remandees awaiting trial (1,771 December 2008 compared to 534 in December 1998).

Cost of jury trials

The average cost to Courts of processing a jury trial case from start to finish in the District Court is about $20,000.[1]

The average cost to Courts of processing a summary defended case from start to finish in the District Court is about $2,000.[2]

While some of this difference in cost can be attributed to the greater seriousness and complexity of the typical case that proceeds to a jury trial, the jury trial process is nevertheless substantially more expensive in itself. More time and cost is involved in the process leading up to the trial, and the involvement of jurors increases the cost and the length of the trial.

5. How will these problems be addressed?

Officials are working towards the fundamental reform of criminal processes to ensure that:

- Where an offender intends to plead guilty, the plea is entered as soon as practicable.
- Hearings are held only when a judicial decision or other judicial intervention is required.
- Better information is exchanged between parties with out-of-court discussions becoming the standard (and expected) way for progressing a case.
- Incentives and sanctions are in place to promote compliance with procedures by all parties, including both defence and prosecution counsel.
- Unnecessary adjournments and the number of cases that fall over close to trial are minimised.
- All pre-trial matters are adequately dealt with before trial.
- There is proper focus on the issues in dispute at trial.
- Jury trials are reserved for only the most serious cases.
- Modern technologies are appropriately utilised.

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

6. How will the Project deliver these reforms?

The project will implement fundamental operational changes within the courts (including improved case management processes) supported by a new Criminal Procedure Bill that will repeal the Summary Proceedings Act 1957 and consolidate other provisions relating to criminal procedure.

In addition, the project has already developed a Bill (the Courts (Remote Participation) Bill) that will enable the use of Audio and Audio-Visual links in a wider range of circumstances than are available now.

7. What are the major components of the proposed reforms currently being considered under the project?

Reforms currently being considered under the project include:

- The introduction of case management processes to require parties to discuss the case in an attempt to resolve it, and to provide specified information to the court so that unnecessary court appearances can be avoided and trial time can be shortened **(appendix 1)**
- Removing the prosecution's ability to choose a jury trial for something that could go to summary trial, and potentially raising the jury trial threshold from more than three months to more than three years (or more) **(appendix 2)**
- Changing the way offences are categorised for the purpose of determining by whom, and in which court, a case will be heard, and rationalising appeal pathways **(appendix 3)**
- Formalising the process for defendants to obtain an indication from the judge of the likely sentence if the defendant were to plead guilty **(appendix 4)**
- A requirement on the defence to identify issues in dispute to enable the court to focus on those issues at trial **(appendix 5)**
- The introduction of ways to promote compliance of all parties with processes (options include: enabling adverse inferences to be drawn from a defendant's failure to identify the issues in dispute; taking into account compliance/non-compliance by the prosecution or defence in sentencing; reforming the provision of legal aid; and improving processes for monitoring and enforcing professional standards) **(appendix 6)**
- Introducing clearer rules for proceeding in the absence of the defendant **(appendix 7)**
- Drafting the legislation to enable electronic management of information, including electronic filing of documents, by courts **(appendix 8)**.
- Legislation to enable the different participants in criminal proceedings to appear by audio-visual link **(appendix 9)**
- Changing the decision process to determine whether jury trials are held in the High Court or the District Court (the middle band process).

Additional issues being considered include:

- Options for allowing greater flexibility to continue a trial when jurors have to be excused during the course of a trial.
- Whether, and how, a representative charge that covers more than one incident or a continuing course of conduct should be provided for.
- Whether private prosecutions present problems and, if so, how these problems might be addressed.
- Provision to enable the Solicitor-General to refer questions of law arising from criminal proceedings to the Court of Appeal and, if necessary, on to the Supreme Court.

8. What are the expected benefits?

The proposed changes are expected to result in less delay, fewer adjournments, shorter trials, a more satisfactory process for victims and witnesses, and increased efficiencies within the system.

This will have benefits for:

- Victims, who have the right to justice without delay.
- Defendants, who have both the right to a fair trial and also to know the outcome of the case against them in a timely manner.
- Witnesses, who have to attend court to give evidence.
- Taxpayers, who largely bear the cost of the system.
- Counsel, who will have reduced waiting times, experience more efficient scheduling of court dates and who will be able to provide a better service to their clients.
- Government justice sector agencies who will experience greater efficiencies in prisoner transport, security and court attendance costs.

For example:

(1) Early defence identification of issues in dispute will reduce preparation and trial times:

- A survey amongst Crown Prosecutors of 287 case files indicates that out of a total 1337 trial days in the High Court and District Court, an estimated 85 trial days were saved through the voluntary defence identification of issues in dispute and the admission of facts. An estimated 54 days of prosecution preparation were also saved. It was estimated that an additional 108 trial days and 48 prosecution preparation days could have been saved if the issues were identified in all cases.

(2) It is estimated that removing the prosecution's choice of form of trial and changing the jury trial threshold to over three years may result in about 1,100 fewer cases being committed for a jury trial – of which an estimated 300 would have actually proceeded to a jury trial.

9. What consultation has been undertaken?

The project requires and depends on the input, co-operation and support of the Judiciary and a range of other stakeholders to ensure its success. The Steering Group regularly updates the Judiciary, and consults on the Project's progress with justice sector agencies, the New Zealand Law Society, the Auckland District Law Society, and other representative bodies.

Bill Plan and Commentary

A Bill Plan and commentary was released for consultation on 21 December 2009. The Bill Plan sets out the proposals to reform criminal procedure in legislative form. It will provide the foundation of the proposed new Criminal Procedure Bill.

Together with the accompanying commentary, the Bill Plan has been prepared to help stakeholders:

- Consider the range of proposals to improve criminal procedure as an integrated package.
- Make an assessment of whether they think that the draft provisions are workable and give proper effect to the proposed policies.

The drafting approach in the Bill Plan aims generally to simplify and modernise language. Where possible, generic terms have been used to describe both summary (termed 'lower-level' in the Bill Plan) and indictable (termed 'upper-level' in the Bill Plan) processes. For example, the term 'prosecutor' is used for both 'informant' and 'prosecutor'; and the term 'defendant' is used to for both 'defendant' and 'accused'. In addition, some new terms have been introduced. For example, to facilitate electronic management of information, the term 'charge' has been used to replace the concepts of an 'information' and an 'indictment'.

The Bill Plan omits many sections currently contained in criminal procedure legislation, particularly those provisions where no substantive change is proposed. This is because the aim of the Bill Plan is only to consult on key reforms. The final Bill for introduction will include all necessary sections, (whether substantially reformed or not) and will be drafted in a modern and simplified style.

Previous Consultation

Consultation papers have previously been released to stakeholders on:

- Audio-Visual Links
- Jury numbers
- Representative Charges
- Suppression of names and evidence (as a Law Commission report)
- Sentencing jurisdiction and appeals
- Sentence indications
- Defence identification of issues

- Incentives and sanctions (general)
- Proceeding in the absence of defendant
- Options for avoiding re-trials following the discharge of jurors after trial commencement
- Criminal procedure case progression model
- Attorney-General's reference for New Zealand
- Categories of offence and the middle-band.

With the cooperation of Police and other court participants, new case management processes have been tested in the summary jurisdiction at the Tauranga and Manukau District Courts. An evaluation of these tests has also been made available to stakeholders.

Further consultation

Additional consultation papers on specific topics will be released, as required, during the first few months of 2010.

10. What is the anticipated timeframe?

It is expected that a new Criminal Procedure Bill will be introduced during 2010, and enacted before the end of 2011.

Appendix 1 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

CASE PROGRESSION AND CASE MANAGEMENT PROPOSALS

Proposals currently under consideration

The Bill Plan reflects proposals to reform the way in which cases progress through the courts by introducing clearer procedures and requirements on the various participants whose contributions are vital to ensuring the effective and efficient progress of a criminal case through the courts.

The purpose is to generally ensure that:

- Where an offender intends to plead guilty, that plea is entered as soon as practicable.
- There are no unnecessary adjournments.
- There are only court hearings when a judicial decision or intervention is required.
- Out-of-court discussions are the standard (and expected) way for making progress on a case.
- The number of cases that fall over at or close to trial are minimised.
- When cases reach trial, all pre-trial matters have been adequately dealt with.
- When cases reach trial, there is a proper focus on the issues in dispute.

Why?

- Delays are often due to unnecessary adjournments during the court process. An estimated:
  - 10% of adjournments in the summary process are avoidable
  - 15-20% of pre-committal adjournments are avoidable
  - 10% of post-committal adjournments are avoidable.

  This amounts to about 14,900 unnecessary events per year in the criminal court system.

- There is little to encourage parties to make progress on their cases out of court, and they are often not well prepared for court appearances (as evidenced by counsel and clients who can often be seen dealing with cases in the foyers of most District Courts on court sitting days).

How?

Summary cases

It is proposed that there is:

- Routine early Police disclosure to the defence
- No more than two appearances in the administrative stage (the point between the laying of a charge and the entry of a plea)
- Active case management by the parties including completion of a case management memorandum
- A status hearing (or 'case review event') only if there is an issue requiring judicial intervention.

Processes for cases proceeding to jury trial (indictable cases)

The Criminal Procedure (Simplification) Project is intending to build on the experiences gained from tests in the summary jurisdiction and has developed similar proposals to improve case management for cases proceeding to jury trial.

For offences where the defendant can choose whether or not to be tried by a jury ('electable offences'), it is proposed that:

- The parties are required to participate in active case management and complete a case management memorandum.
- The defendant must decide whether he or she wishes to be tried by a jury after case management discussions between the parties are completed. Restrictions will also be placed on the defendant's ability to change that decision later on in the process.
- The formal stage in the process where the defendant is committed for trial is abolished, although the requirement for the prosecution to file written statements and the defence's ability to obtain an oral evidence order will remain.
- Oral submissions in applications for oral evidence orders are dealt with at callover, with oral evidence heard as part of other pre-trial hearings where appropriate.
- Pre-trial hearings and callovers are only held when there is an issue requiring judicial intervention.
- For offences that must be heard by a jury, it is also proposed that the defendant is given an opportunity to plead to the offence at an early stage.
- As with electable offences, formal committal is abolished; parties must participate in active case management; callovers are only held when judicial intervention is required; and changes are made to how oral evidence applications and orders are dealt with.

Appendix 1 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

Benefits of the proposal

Summary cases

The proposals for summary cases are based on a process that was tested in two District Courts (Manukau and Tauranga) for 6 months from July 2008 to January 2009. The full benefits of the process could not be tested because of difficulties surrounding court scheduling practice and the absence of mechanisms to enforce compliance with the process. However, an evaluation of the process showed that the changes led to a reduction in delay, fewer court appearances, pleas being entered earlier, and an earlier resolution of charges.

Processes for cases proceeding to jury trial (indictable cases)

The proposed reforms for indictable (upper-level) cases aim to put in place a simpler and streamlined process that will make better use of court and judicial time and cause less disruption for victims and witnesses. As with the reforms to the summary jurisdiction, the proposed reforms are likely to lead to a reduction in delay, fewer court appearances, pleas being entered earlier, and an earlier resolution of charges.

International Comparisons

The review of criminal court processes and the development of case management memoranda is a trend taking place in jurisdictions similar to New Zealand. A compulsory case management memorandum system has been established in the United Kingdom, and a similar process for encouraging pre-court discussions between the prosecution and defence was created in Victoria in 1999. The United Kingdom has also abolished committal for indictable offences. Canada is currently undertaking a review of its criminal processes to reduce unnecessary delays in their system.

Appendix 2 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

RESTRICTING AVAILABILITY OF JURY TRIALS

Proposal currently under consideration:

The Bill Plan restricts the availability of jury trials by:

- Removing the prosecution's ability to choose a jury trial over a summary trial in respect of approximately 700 offences (Schedule 1 of the Summary Proceedings Act 1957).
- Restricting the defence's ability to elect trial by jury by increasing the jury trial threshold.

Why?

The process to take a case to jury trial is longer than that involved in trying a case summarily. At present, the average jury trial process takes more than 12 months to complete. By contrast, the average summary trial process before a judge alone takes six months to complete.

Jury trials therefore need to be restricted to cases that are sufficiently serious to warrant the cost and time that they incur.

Prosecution choice of form of trial

There is a category of offences (in Schedule 1 of the Summary Proceedings Act 1957) that the prosecution can choose to proceed in the jury trial process or the summary trial process. In 2007, about 52,000 cases fell within this category and the prosecution chose to lay the charges indictably rather than summarily for about 3,600 of them (or 7% of the time). Of these 3,600 cases, about 1,000 then went on to be committed for trial and around a third of these to a jury trial itself.

There is no reason in principle why the prosecution should be able to choose the form of trial. The decision is made by individual police officers and may be made in an *ad hoc* or inconsistent manner. Jury trials are sometimes chosen for quite minor offences.

Jury trial threshold

Under section 24(3) of the New Zealand Bill of Rights Act 1990, a defendant charged with an offence that has a maximum penalty of over three months imprisonment has a right to elect trial by jury. This right is also reflected in section 66 of the Summary Proceedings Act 1957. There are exceptions to this right. In particular, the right to trial by jury has been removed in respect of the offences of common assault and assault against a police officer under the Summary Offences Act 1981.

The range of offences which entitle the defendant to elect jury trial is therefore very broad and includes a range of minor offences, such as a theft of property

valued between $500 and $1,000, that do not warrant the time and resource that is required for a jury trial.

How?

Prosecution choice of form of trial

The Bill Plan does not carry over the prosecutor's ability to choose the form of trial. Affected offences are instead 'electable' (ie, the defence decides whether there is a jury trial or a summary trial) or 'summary', depending on the jury threshold (discussed below).

Jury trial threshold

The threshold for election of jury trial by the defence has been increased so that jury trial is only available for offences with a maximum penalty of more than three years imprisonment. Consideration may also be given to five or seven year thresholds.

Under section 24(e) of the New Zealand Bill of Rights Act 1990 (NZBORA), a defendant charged with an offence that has a maximum penalty of over three months imprisonment has the right to elect a jury trial. This right is also currently reflected in section 66 of the Summary Proceedings Act 1957. Accordingly, increasing the current jury trial threshold will require an amendment to the NZBORA.

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals.

Removing prosecution's choice of form of trial

Based on 2007 figures, it is estimated that removing the prosecution's choice of form of trial (without changing the jury threshold) would result in 966 fewer cases being committed for trial.

Increasing the jury trial threshold

Based on 2007 figures, if the election threshold was set at more than three years, an estimated 184 fewer cases would have been committed for trial.

Based on 2007 figures, if the election threshold was set at more than five years, an estimated 271 fewer cases would have been committed for trial.

Appendix 2 **21 December 2009**

DRAFT GOVERNMENT POLICY –

This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

Removing prosecution's choice of form of trial and raising the threshold

The biggest savings from changing the election threshold occur if that change is combined with the removal of the prosecution choice of forum:

- Based on 2007 figures, removing the prosecution choice of forum and changing the election threshold to over three years would have led to an estimated 1,100 fewer cases being committed for trial.
- Based on 2007 figures, removing the prosecution choice of forum and changing the election threshold to over five years would have led to an estimated 1,250 fewer cases being committed for trial.

Together it is estimated that, from these 1,100 fewer cases being committed for trial, 300 jury trials could be saved. The resources saved by avoiding these jury trials would be able to be utilised to manage approximately 2,300 defended judge alone (summary) trials (including the summary trials of those 300 cases that would previously have had a jury trial). This is more than the number of summary defended hearings disposed of in the Manukau District Court, New Zealand's second busiest court, and nearly the same number of summary defended hearings disposed of at Auckland District Court, New Zealand's busiest court in the 2008 year.

International comparisons

The general right to a jury trial has significant historic and common law origins, and is recognised in clause 39 of the Magna Carta. Hence, the right is present in many former British colonies and some civil law jurisdictions (including Austria, Belgium, Switzerland, Russia and Japan).

However, none of the existing international conventions setting out agreed fundamental human rights contain a specific right to a jury trial. The current protection afforded by section 24(e) NZBORA goes beyond what is required of New Zealand under its international human rights obligations and is more generous to offenders than most equivalent provisions overseas.

The European Convention on Human Rights and the International Covenant of Civil and Political Rights both enshrine a right to a "fair and public hearing", but do not specify that this requires a trial by jury. The recently enacted Victorian Charter of Human Rights and Responsibilities, and the United Kingdom's Human Rights Act 1998 likewise guarantee a right to a "fair and public hearing", without providing for a right to a jury trial.

In Australia, section 80 of the Australian Constitution provides that indictable offences are eligible for jury trial. However, the Australian High Court has held that Parliament can limit this right by reference to the maximum penalty available for the offence, as in New Zealand. Although there are variations from state to state, the threshold is typically more than one year's imprisonment.

Appendix 2 **21 December 2009**

DRAFT GOVERNMENT POLICY –

This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

In Canada, the Canadian Charter guarantees the right to trial by jury if the maximum penalty with which an offender is charged is five years imprisonment or more.

Appendix 3 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

RE-CATEGORISING OFFENCES, AND RATIONALISING APPEAL PATHWAYS

Proposal

The Bill Plan simplifies the categories of offences for the purpose of determining whether a jury or a judge alone should decide the case and what court should hear the case.

Proposals to rationalise and simplify appeal paths are also being considered.

Why?

All offences are organised into categories. The category that an offence falls into determines how and where it is dealt with by the courts. For example, an offence might be tried by a judge alone or by a jury, and it might be heard in a District Court or in the High Court.

The current system for categorising offences has evolved over many years and is consequently now overly complex, sometimes arbitrary, and inefficient. Likewise, current appeal pathways have led to the development of some inefficiencies and are, in some instances, also somewhat anomalous.

In any case, the categories of offence and appeal pathways will need adjustment given other reforms proposed by the project, particularly those outlined in appendices 1 and 2. These reforms include, for example, the abolition of the concept of a case being 'committed' for trial, as well as changes to the types of cases that will be dealt with in the lower level (summary) and higher-level (indictable) jurisdictions.

How?

Categories of offence

The proposed categories of offence in the Bill Plan are as follows:

Category 1	Offences that are not punishable by a term of imprisonment ("non-imprisonable offences")
Category 2	Offences that are punishable by a term of imprisonment not exceeding 3 years ("summary offences")
Category 3	Offences punishable by a term of imprisonment of more than 3 years that do not fall into categories 4 or 5 ("electable offences")

Category 4	Offences punishable by a term of imprisonment of more than 3 years that may be tried in either the District Court or the High Court ("middle band offences")
Category 5	Offences punishable by a term of imprisonment of more than 3 years that must be tried in the High Court ("High Court only offences")

However, the project team considers that even this categorisation (while simpler than the current system) may be overly complicated and still a bit arbitrary. This is because it continues to link the decision about how a case is heard with where it is heard. For example, under the above categorisation, if a defendant charged with an electable offence like a serious fraud offence wishes to be tried by a judge in the High Court, he or she must first elect to be tried by a jury, then apply to have the case heard in the High Court, and then apply to have the case heard by a judge alone.

The project team is therefore also consulting on a second proposal that separates the decision about whether a case is heard by a judge or a jury from the decision about whether a case is heard in the District Court or the High Court. This proposal would allow more flexibility for judge-alone trials in the High Court.

Appeal pathways

The project team has also proposed different options for future appeal pathways. There are two broad alternatives:

- Retain the current pathways as far as they can be in light of the other changes proposed to criminal procedure, so that appeals from District Court jury trials would continue to go to the Court of Appeal.
- Take a more hierarchical approach so that appeals from the District Court would generally go to the High Court, even in jury trial cases.

Benefits of proposals

These proposals should be viewed alongside the proposals in appendices 1 and 5.

Some adjustment to offence categories and appeal paths will be required in light of other proposals. However, depending on the options chosen, there will also be a number of efficiency gains for the courts arising from less complex procedures and removal of some cases from higher courts to courts that are lower in the hierarchy.

International comparisons

Other jurisdictions take a variety of approaches to offence categorisation. A hierarchical approach is the predominant approach taken to appeal pathways.

Appendix 4 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

SENTENCE INDICATION SCHEME

Proposal currently under consideration:

The Bill Plan provides a formalised process for defendants to obtain an indication from the judge of the likely sentence if the defendant pleads guilty.

Why?

In a large numbers of cases the defendant enters a not guilty plea, which they later change to guilty at a late stage in the process (including the day of the trial itself):

- In 42% (1000) of indictable cases, defendants waited until after being committed for jury trial to change their plea to guilty[3].
- In 28% of defended cases in the summary jurisdiction (10,500 cases), defendants change their initial 'not guilty' plea to 'guilty' before their trial (defended hearing).[4]

The District Court's experience is that sentence indications allow defendants to make informed choices about the options available to them at an early stage in the process and therefore reduce the number of late guilty pleas and trials. It is desirable that indications are given in a consistent manner across the country and are available in both the High Court and the District Court.

How?

The key features of the proposed scheme included in the Bill Plan are:

- A sentence indication may be given for all categories of offence at the request of the defendant.
- A sentence indication may only be requested before the commencement of either a lower-level (summary) or upper-level (indictable) trial.
- A sentence indication can only be given by a judicial officer with jurisdiction to sentence the defendant requesting the indication.
- Before a Court provides a sentence indication as to type and quantum it must have certain minimum information.[5]
- Sentence indications cease to have any effect after 5 working days or a date specified by the Court.

---

[3] Including those that plead guilty to some charges, with others withdrawn.
[4] 2007/08 year.
[5] An agreed summary of facts, information as to previous convictions of the defendant, and a copy of any victim impact statement prepared.

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

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

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals (set out in Appendix 1). Formalisation of the sentence indication scheme will:

- Ensure that defendants are able to make decisions as to plea on an informed basis in all types of cases.
- Give assurance to judges that they are operating appropriately within the law.

Formalisation of the scheme, including the specification of the types of indications available and the information required to make them, will also ensure that the interests of victims and the public are properly safeguarded.

Conservative estimates would be that the benefits of providing a legislative framework for sentencing indications in the District Court would be:

- *Summary cases*

The Ministry of Justice estimates (based on information from the summary jurisdiction tests) that a guilty plea might be entered sooner in up to 30% (approximately 3,500 cases) of the defended cases that currently enter a change of plea from 'not guilty' to guilty'.

- *Jury trial cases*

Currently a defendant is not required to enter a plea until they are committed. As the charges are more serious, disclosure of evidence can be ongoing. If parties are provided with the opportunity and enough evidence to see the case before them, a sentencing indication can round out the information a defendant has, and enable them to make an informed decision about their plea. We estimate this will result in defendants in about 130 cases changing their plea earlier in the process.

International comparisons

The Victorian Government has just legislated to permit formal sentence indications in both the summary (section 50A Magistrates' Court Act 1989) and indictable jurisdictions (sections 60-61 Criminal Procedure Act 2009). The United

Kingdom Courts have also recognised sentence indications and provided detailed guidance as to their use.

Appendix 5 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

IDENTIFICATION OF THE ISSUES IN DISPUTE

Proposal currently under consideration:

The Bill Plan includes provisions that require the defence to identify the issues that are in dispute before trial at a specified and early stage in the process.

Why?

- Currently, the defence is not required to tell the prosecution, judge or jury the aspects of the prosecution case that the defendant does not seek to challenge. This means that cases must progress as if everything is disputed unless the defence voluntarily identifies issues that are agreed or disputed.

As a consequence:

- The prosecution must undertake preparation that is ultimately not required.
- Witnesses are called unnecessarily.
- Trials are unnecessarily complex and the judge's or jury's job is made more difficult.
- Some trials progress further than they should.

How?

- A new process is proposed in the Bill Plan under which:
  (a) The defence is required to identify, before a trial, the issues that are in dispute (ie, the particular elements of the charge that are denied, and/or the defences that it intends to run).
  (b) In a jury trial, the defence is required to provide an opening statement at the commencement of the trial that identifies the issues in dispute.
- If the defence fails to identify the issues in dispute, the fact-finder (whether judge or jury) may draw an adverse inference about the defendant's guilt from that non-compliance, when appropriate.

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals set out in Appendix 1.

The proposal would have widespread benefits for:

- Prosecution and defence resources, by ensuring they are not misdirected to irrelevant matters. Preliminary data from a survey amongst Crown Prosecutors of 287 cases that went to jury trial indicates that prosecutors saved a total of 54 days in preparation time from the voluntary defence identification of issues in dispute and an additional 48 days could have been saved if the issues were identified in all other cases.
- The length and complexity of hearings. Preliminary data from the Crown Prosecutor file survey indicates that of a total 1,337 trial days, 85 days were saved by the voluntary defence identification of issues in dispute and an additional 108 days could have been saved if the issues were identified in all other cases.
- The number of hearings. If the issues in dispute are identified at an early stage, defence counsel may determine that the case has little prospect of success and advise their client to plead guilty earlier than they otherwise would. The prosecution may also consider amending or withdrawing charges.
- Convenience to witnesses, by ensuring that those who appear really need to appear.
- The fact-finder (either judge or jury), because they would know what the case is about before the trial or hearing begins, and would be in a better position to assess the significance of the evidence being presented.

International comparisons

Similar regimes are in place in the United Kingdom,[6] Victoria,[7] New South Wales,[8] Western Australia,[9] and South Australia.[10] Of the Australian states, Victoria's regime is the most comprehensive.

[6] Criminal Procedure and Investigation Act 1996
[7] Crimes (Criminal Trials) Act 1999
[8] Criminal Procedure Act 1986
[9] Criminal Procedure Act 2004
[10] Criminal Law Consolidation Act 1935

Appendix 6 **21 December 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

MECHANISMS TO PROMOTE COMPLIANCE WITH PROCEDURAL OBLIGATIONS

Proposal currently under consideration:

The Bill Plan includes mechanisms to enforce compliance by legal practitioners and defendants with procedural obligations (eg, the requirement to identify the issues in dispute or to file a case management meorandum).

Why?

- The current system has few consequences for either the prosecution or defence if they fail to do what is required of them or otherwise needlessly prolong proceedings.
- Incentives and sanctions are required to:
  - effect a change in culture to ensure that the behaviour of prosecutors and defence counsel does not unnecessarily contribute to court delays;
  - support other reforms to the process which will involve changes to long-established and entrenched practices.

How?

Specific mechanisms in the Bill Plan

Specific mechanisms included in the Bill Plan to enforce compliance with particular obligations are:

- *Adverse inferences*
  - The judge or jury will be able to draw an adverse inference about a defendant's guilt from his or her failure to identify the issues in dispute before the trial.
- *Mitigating and Aggravating factors in sentencing*:
  - An amendment to section 9(1) of the Sentencing Act 2002 to make the fact that the offender has not complied with procedural requirements an aggravating factor;
  - Amendments to section 9(2) of the Sentencing Act 2002 to include as mitigating factors:
    - any steps that the offender has taken before or during the trial to reduce the cost or expense of proceedings or to shorten the time to disposition
    - Any delay in resolving proceedings arising from the prosecution's non-compliance with procedural requirements.

- *Costs orders*:
  - The ability to impose a costs order on parties (including directly against both prosecution and defence counsel) when they fail to comply with specific statutory requirements (such as failing to file a case management memorandum).

General mechanisms regulating counsel

In addition, we could make better use of existing processes and systems that are already in place to regulate the legal profession, in particular:

- *Legal aid* – improvements to legal aid services that will arise from the recent review chaired by Dame Margaret Bazley are expected to impact on the timeliness and efficiency of criminal case more generally. In particular improvements are expected as a result of providing proper incentives in fees structures for progressing legal aid cases efficiently.

- *Professional standards and discipline* – options include:
  - Reinforcing and clarifying the ethical obligations of counsel practising in the criminal jurisdiction, including their obligation to comply with court orders and directions;
  - Making greater use of current processes that monitor and enforce the professional standards of counsel (ie, processes under the Lawyers and Conveyancers Act 2006 and processes administered by the Legal Services Agency in relation to legal aid providers).

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals set out in Appendix 1.

The provision of effective incentives and sanctions for parties and counsel to comply with their obligations is essential to the other reforms proposed in the Criminal Procedure (Simplification) Project. They are therefore a core component in realising the collective benefits of the proposed new process.

International comparisons

The United Kingdom and the Australian states make varying use of the specific mechanisms identified above.[11] Some of the mechanisms of this type have the potential to directly impact on the defendant and how his or her case may be run.

[11] See, for example, the Criminal Procedure and Investigation Act 1996 and the Prosecution of Offences Act 1985 (United Kingdom); the Criminal Procedure Act 1986 and the Crimes (Sentencing Procedure) Act 1999 (New South Wales); the Crimes (Criminal Trials) Act 1999

Concern over the defendant's right to a fair trial has led most jurisdictions to focus on the potential of the legal aid and disciplinary frameworks. In England and Wales, reform of the legal aid system (including changes to the structure of legal aid payments, the delivery of legal aid services, and measures to ensure the quality of legal aid providers) is proceeding in tandem with reforms to the criminal process.

---

and the Sentencing Act 1991 (Victoria);and the Criminal Law Consolidation Act 1935 (South Australia).

Appendix 7 **6 July 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

PROCEEDING IN THE ABSENCE OF THE DEFENDANT

Proposal currently under consideration

Provisions in the Bill Plan enable (and sometimes require) courts to proceed in the defendant's absence more frequently than currently occurs.

Why?

A defendant who fails to appear at a pre-trial or defended hearing without a valid reason for non-appearance (eg, illness or transport problems) causes:

- Delay as cases take longer than necessary to resolve.
- Considerable disruption to the court system.
- Additional stress and trauma to victims.
- Inconvenience to witnesses and jurors.

If a defendant does not appear for their hearing the court may issue a warrant for their arrest. In 2008, the Courts issued warrants to arrest in:

- 18% of summary (judge alone) cases
- 16% of all jury trial cases, prior to committal
- 19% of District Court jury trial cases, after committal
- 10% of High Court jury trial cases, after committal.

This also has implications for the wider Justice sector, including

- Police needing to spend time locating defendants.
- Additional bail applications for defendants who have been remanded in custody for failing to attend.
- Additional remand time in a Corrections facility for defendants who are not given bail after failing to attend.

There are some examples of New Zealand courts commencing or continuing a trial in the defendant's absence. The courts in these cases have found no reason in principle why proceedings should not be able to proceed in these circumstances.

How?

The Bill Plan includes a statutory presumption that the court will commence or continue the proceedings in the defendant's absence if satisfied that the defendant does not have a reasonable excuse for his or her absence and that continuing without the defendant would not be manifestly unjust. Statutory factors that are provided to assist the court to consider whether continuing would be manifestly unjust relate to:

- The issues identified by the defence pre-trial as being in dispute.
- The likely length of an adjournment, and the particular interests of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates and the effect of delay on the memories of witnesses.
- The extent to which an absent defendant's counsel has received instructions and is generally able to run the defence.
- The interests of any co-defendants.

The proposal applies to all trials once the defendant has entered a plea (except for, as currently,offences not punishable by imprisonment). There is little to be gained in proceeding in the defendant's absence before this point, because a high percentage of defendants plead guilty when they eventually do appear.

The proposal does not apply to sentencing.

Safeguard

The Bill Plan includes a provision that enables the courts to set aside a conviction when the defendant can establish that he or she has a defence that would have had a reasonable prospect of success if he or she were present at the hearing or trial.

Defence counsel will still be able to run their client's defence and challenge evidence if the trial is continued.

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals.

Proceeding without the defendant rather than adjourning the proceedings in the hope that the defendant will turn up has substantial benefits, as it

- Prevents defendants dictating when the case against them will proceed.

- Reduces stress and trauma to victims, by ensuring that the trial proceeds on the scheduled date and that cases are disposed of in a timely manner
- Reduces inconvenience to victims, witnesses and jurors.
- Reduces the risk of witnesses' memories fading, and thereby reducing the reliability and credibility of the evidence they eventually give (which may be the defendant's objective in absconding).

It also avoids the problems that are particular to multi-defendant trials:

- It is often difficult to separate the charges against the absconding defendant from those against the other defendants, even where the other defendants want the trial to proceed.
- The trials tend to be over a number of weeks, meaning their rescheduling is particularly difficult.

There may be some concern about the impact on the defendant's right to generally be present at proceedings, and his or her right to a fair trial. However:

- The House of Lords has said in this context that someone who chooses not to exercise a right cannot complain about losing benefits that she or he may have expected to enjoy had the right been exercised.
- Courts can (and do) take measures to make the trial as fair as possible (eg, by giving clear instructions to the jury that no adverse inference can be drawn from the defendant's absence).
- Unless the defendant intends to give evidence (which only occurs in a minority of trials), it is debatable what impact the defendant's presence actually has. If the issues in dispute are identified beforehand, defence counsel know the basis on which the case is to be run and will be able to conduct the trial on that basis.

International comparisons

Canada, Australia, and the United Kingdom allow trials to commence or continue in the defendant's absence.

There is statutory backing to do so in Canada[12] and in the Magistrates' Court in the United Kingdom.[13] In Australia[14] and in the Crown Court in the United Kingdom,[15] the practice of proceeding in the defendant's absence has developed through case law.

[12] Criminal Code 1985, s475
[13] Magistrates' Courts Act 1980, s11(1)
[14] See, for example, *R v Jones* [1998] SASC 7021
[15] *R v Jones* [2003] 1 AC 1

Appendix 8 **6 July 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

ELECTRONIC MANAGEMENT OF INFORMATION

Proposal

Court processes should be able to take advantage of developing information technologies.

Why?

One of the impediments to greater use of technology in the courts is the way that the legislation is currently framed. Because alternatives to paper could not have been contemplated when the current legislation was drafted, it was drafted in a way that means that, even where electronic systems are currently in place, duplicate paper systems must also be maintained. This is inefficient, costly and can lead to delay (for example, when paper files are lost).

How?

The Bill Plan has been drafted so that:

- In general, any information technology should be permissible (for example, the legislation may specify that certain information is required but not the medium or manner in which it is to be presented to the court).
- Where it seems necessary to prescribe the form in which information is to be presented (for example to safeguard the rights of a defendant), consideration is given to prescribing the use of technology in secondary legislation (regulations) rather than the primary legislation (the Act).
- The rights of those participating in criminal procedures are safeguarded
- Information technologies may be used to help facilitate any part of criminal procedure.
- Access to and integrity of the information held under an electronic regime is protected.

Benefits

Increasing the use of electronic information in courts is beyond the scope of this project. However, the Ministry of Justice, together with other justice sector agencies, is developing options for increased use of information technologies in the courts. The legislative changes proposed will enable the eventual implementation of an electronic operating model that will enable smarter, faster and more integrated delivery of court services.

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

International comparisons

Similar reforms are currently taking place in Australia, Britain, Canada, the United States and Singapore.

Appendix 9 **6 July 2009**

DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

AUDIO VISUAL LINKS (AVL) IN CRIMINAL AND CIVIL PROCEEDINGS

Proposal:

Legislation has been introduced to enable greater use of Audio Visual Links (AVL) in civil and criminal proceedings, where certain requirements are met to ensure the defendant still receives a fair trial.

Why?

The law currently requires defendants to physically attend court for many minor procedural hearings, including simple adjournments.

Expansion of AVL would result in significant efficiencies in the justice system. It has the potential to reduce costs and delays, improve efficiency, improve safety and security, increase access to justice, and improve the quality of evidence heard by the courts.

How?

Legislation to enable the use of AVL has been introduced. The legislation:

- Sets out criteria for consideration in all decisions on the use of AVL.
- Allows a registrar or judicial officer to require a person to appear by AVL in matters where no evidence is being presented (criminal procedural matters).
- Allows any party to apply to use AVL in matters where evidence is being presented (criminal substantive matters).
- Allows for the use of AVL in civil matters where the parties consent, or for the judicial officer to decide that AVL should be used where there is disagreement between the parties.

AVL facilities could be installed in remand prisons, courtrooms (across jurisdictions) and police stations in the future.

Benefits of the proposal

This proposal should be viewed alongside the broader case management proposals.

Creating efficiencies

Greater use of AVL would benefit all users of the courts, including defendants, counsel, witnesses (particularly overseas witnesses), judges, applicants for

probate and parties in civil disputes. Witnesses and victims often bear the costs of travelling to court and for any costs due to delays in a court's schedule, and AVL has the potential to provide savings to these participants.

Costs avoided

Costs are avoided through use of AVL as a result of reducing the need for expensive prisoner transportation, reducing travel costs for civil participants, and allowing more efficient use of court resources in both civil and criminal jurisdictions.

For example – Prisoner Transports

In 2008, Corrections and Police carried out between 100,000 and 150,000 prisoner transports (between police cells or prison and courts).

Prisoner transport is one of the most visible areas in which delays and costs would be reduced. The process of preparing and transporting a prisoner can typically consume a whole day and a large amount of resource, court space and security (see flowchart, below). If AVL is installed in police stations, corrections facilities and courts, avoided costs in the area of prisoner transports alone arise in the first ten years post implementation through reductions in:

- the number of prisoners transported to court
- the number of steps required to prepare a prisoner for court
- the number of prisoner escorts required
- renovation/extensions required to court holding cells
- maintenance to holding cells from vandalism
- Legal Aid costs.

International comparisons

AVL in court proceedings is commonplace in many overseas jurisdictions:

- Australian states are internationally recognised for the effective use of videoconferencing in legal processes, and have been proactive in developing legislative criteria to complement the use of AVL in proceedings in the criminal context.[16]
- United Kingdom: The UK has recently established a "virtual courts" pilot, which allows defendants to be linked to the Magistrates Court from around 15 Police stations across London.

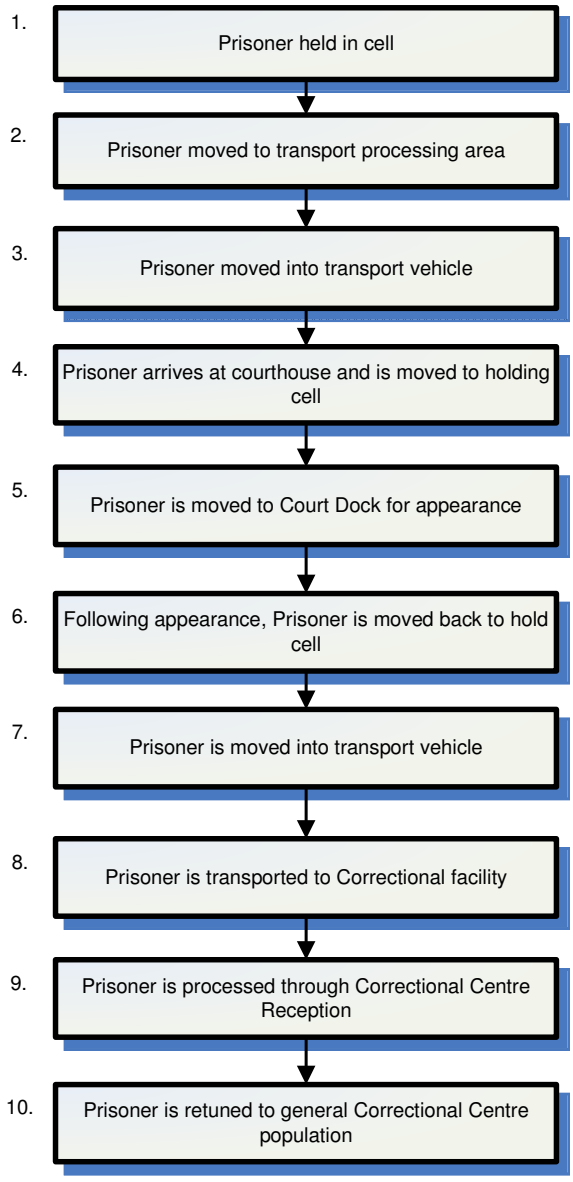
[16] Parliament of Victoria Law Reform Committee, Technology and the Law, Report 52, Melbourne: Government Printer, May 1999, p 181 (available at www.parliament.vic.gov.au/LAWREFORM/inquiries/Technology%20and%20the%20Law/final%)

Appendix 9 **6 July 2009**

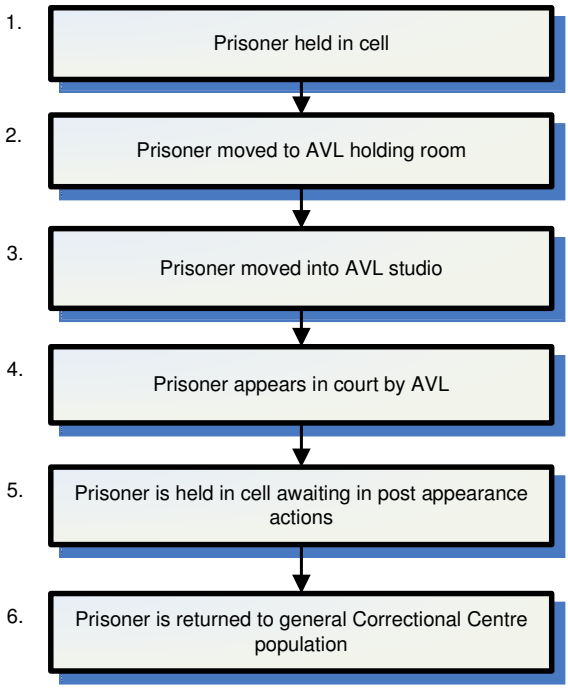
DRAFT GOVERNMENT POLICY –
This policy option is currently being considered by officials under the Criminal Procedure (Simplification) Project

- Canada: a person may appear by AVL for any part of the trial other than a part in which the evidence of a witness is taken.[17]
- United States: AVL for remote first appearances and arraignment has become commonplace throughout the state courts, with over 29 states using or authorising videoconferencing for various proceedings.[18]

Basic Steps for a Prisoner to Appear in Person



Basic Steps for a Prisoner to Appear By AVL



[17] Criminal Code 1985, ss650, 9, 61, 77, 60 and 12
[18] Lederer, Federic I., "The Road to the Virtual Courtroom?", p.14