Streamlining New Zealand's Criminal Justice System

By Justice Susan Glazebrook[1]

It is a great honour and of course pleasure to have been asked to take part in such an important conference on reforming the criminal justice system of Hong Kong. The conference programme is indeed ambitious but it is one that highlights the need to reassess criminal procedures constantly to ensure the system is the best it can be. I am very grateful to be able to present at a conference that will canvas such a broad range of topics and I am sure there will be much that I can take back for consideration in the New Zealand context.

I was (unwisely) given an open brief on what to cover. As a result, what follows is a rather idiosyncratic tour of some recent developments in New Zealand's criminal justice system. I have just retired as chairperson of our Institute of Judicial Studies (IJS) and so I start with the topic of judicial education. I then move onto a discussion of a number of reforms of the criminal justice system in New Zealand over recent years, arranged roughly in chronological order from the beginning of the engagement with the criminal justice system, through pre-trial measures, the trial process, sentencing and finally appeals.

Judicial Education

The IJS is the New Zealand body charged with providing judicial education to all levels of the judiciary in New Zealand. Its governing Board comprises a majority of judges (with representatives from all jurisdictions), together with representatives from the legal profession, academia, the Ministry of Justice and the general public. Courses run by the IJS include programmes in a core curriculum, designed to cover all areas of judges' work. These courses are open to all judges in all jurisdictions. The Institute also offers specialist courses for particular jurisdictions and orientation programmes for new judges.

A number of courses run by the Institute are of relevance to criminal law, including courses on evidence and procedure and a jury trials orientation course. The two courses I want to examine in a bit more detail in this paper focus on jury directions and on assessing witnesses.

Jury Directions Course

Judges in New Zealand have for some time been concerned to ensure that directions given to juries are understandable.[2] This concern was magnified after research conducted by

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1 Judge of the Supreme Court of New Zealand. Paper prepared for the *Criminal Law Conference 2012: Reforming the Criminal Justice System of Hong Kong,* Hong Kong 17 November 2012. I acknowledge the invaluable assistance of my clerk, Claire Brighton, in preparing this paper. The oral address given will cover only some of the issues covered in this written paper.

2 In New Zealand, juries consist of 12 jurors, who are drawn by ballot from a jury list which contains a random selection of the names of people who are registered on the electoral roll in the area. Currently, defendants charged with offences punishable by a maximum sentence of imprisonment of three months or more have a right to elect trial by jury: Summary Proceedings Act 1957, s 66(1); New Zealand Bill of

the New Zealand Law Commission.[3] While the majority of jurors who participated in the research were positive about the directions given, the Commission identified five areas of criticism: that the judge's directions were too technical or detailed; that the delivery of the directions was "boring" causing jurors to lose concentration; that more direction was needed on the decision-making process; and that jurors would have been assisted by a written copy of the judge's directions. The Commission concluded that, to the extent that there were criticisms, they generally arose either from the limitations of the individual juror or from the fact that the instructions were delivered in oral form without written or visual aids. [4]

The concern about juror understanding has led to a move away from standard directions. Judges now put much more emphasis on tailoring the directions to the particular case and the issues involved in that particular case. Judges are encouraged to give written material to the jury, including question trails referring to the evidence.[5] Judges are also encouraged to discuss with counsel what is truly in issue and direct the jury only on those matters.

The ideal summing up is now considered to be the one suggested by Professor Edward Griew on the law and Lord Devlin on the facts. Professor Griew said that it should be the function of the judge to protect the jury from the law rather than to direct them on it. The Judge should simply identify for the jury the facts which, if found by them, will render the defendant guilty of the offence charged, taking account of any available defence(s). [6] In summing up on the facts, Lord Devlin said that judges should remind the jury of the evidence, marshal the facts and provide the jury with the agenda for their discussions. This process should lead to the identification of one or more broad questions which the jury have to decide. [7]

The IJS offers a two-day course on directing juries, based on the above principles. The programme consists of a mixture of lectures, discussion, workshops, individual tutorials and redrafting exercises. The objective of the course is to assist judges in structuring and delivering jury directions in a way that is understandable.

During the first part of the course, the participants are provided with a mock case, including an outline of evidence from Crown and defence witnesses. The participants are then required to draft a fact-based question trail which specifically addresses the facts and issues of the case. They discuss these draft question trails in small groups. Question trails, as used in New Zealand, relate to the facts of the case, avoid legal concepts (if at all possible), use simple words and are arranged logically. The law is largely embedded in these factual questions.

During the second part of the course, the participants draft jury directions based on the

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Rights Act 1990, s 24(e). However, as discussed below, s 50 of the recently enacted Criminal Procedure Act 2011 raises the threshold at which a jury trial can be elected to two years' imprisonment.

3 See research published by the New Zealand Law Commission summarised in *Juries in Criminal Trials Part Two: A Summary of the Research Findings* (NZLC PP37(2), 1999). For a discussion of that research and research conducted in other jurisdictions see William Young "Summing up the Juries in Criminal Cases – What Jury Research says about Current Rules and Practice" [2003] Crim LR 665.

4 At 51–52.

5 It is common practice now for juries to be given a transcript of the evidence to assist them in their deliberations.

6 Edward Griew "Summing up the law" [1989] Crim LR 768 at 799, quoted in Young, above n 3, at 686.

7 Patrick Devlin *Trial by Jury* (Stevens and Sons Ltd, London, 1966) at 115–116.

question trail they have prepared. Participants are encouraged to use plain language in those directions, which are then discussed and evaluated within small groups. In the final segment of the course, the participants are asked to draft appropriate general directions as to the onus and standard of proof and on relevant rules of evidence and to identify where in the summing up such directions best fit.

Participants are encouraged to insert evidential directions as qualifications to the evidence to which they relate at the point such evidence is being discussed. The participants are reminded that the goal is to ensure that directions (including general directions) are applicable to, and reflect the facts of, the particular case.

This is probably a good place to mention a research project being undertaken to compare standard directions given to juries in Victoria, Australia, with the question trial approach in New Zealand. The idea behind the research is to evaluate juror understanding of directions and to assess how juries apply legal instructions. New Zealand judges await the results of this research with interest (and hope it does show that our new question trail approach enhances juror understanding). [8]

Assessing Witnesses Course

Research has shown that even professional investigators, lawyers and judges detect lies at little more than chance. It has also highlighted issues with the reliability of memory and with eye witness testimony. All involved in the criminal justice arena are well aware of instances where witness error or deception has resulted in the legal process going awry, even leading to wrongful convictions. The IJS therefore considered it important to develop a course to assist judges with the task of assessing the credibility and reliability of witnesses.[9]

The course itself is highly interactive. In the opening exercise, the course participants view a video clip of an armed bank robbery. The robber comes into the bank with a shotgun, puts a bag on the counter and demands money. During the course of the robbery, the gun goes off and a teller is shot. [10]

After the video is played, the participants are split into groups. One of the members of each group is interviewed about the incident by an experienced police interviewer, using the cognitive interviewing techniques that the New Zealand police currently use. The new style of police interview begins with open questions designed to elicit a description of the incident. Only when that has been done does the interviewer move on to more explicit questions that have been carefully worded to avoid being leading or suggestive. [11]

The issue that struck the participating judges most was the incomplete memory they had of the robbery, despite having watched the video clip with the expectation that they would be

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8 The Supreme Court of Victoria has in fact recently released recommendations for simplifying jury directions. See Supreme Court of Victoria *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Victoria, August 2012) www.supremecourt.vic.govt.au.

9 The New Zealand Institute was aided greatly in putting this course together by material provided by the Canadian National Judicial Institute from the courses it runs that touch on assessing evidence.

10 The video was prepared by the New Zealand police. It is used by them for training their officers in cognitive interviewing techniques.

11 For an article setting out the theory and practice of cognitive interviewing see Ronald Fisher "Interviewing Cooperative Witnesses" (2010) 15 Leg. Crim. Psychol. 25.

asked questions about it. The differences in the members of each group's recollection of crucial details were also noted. The real benefit of this exercise is to allow judges to experience for themselves the fallibility of observation and memory. They are therefore more open to the material presented in the following sessions.

Immediately after the observation exercise, participants are provided with an interactive introduction to memory and memory research presented by a research psychologist.[12] The presentation covers the three stages of memory (acquiring, storing and retrieving) and the circular and iterative nature of the second and third stages. The general difficulties with eye witness observation at the acquisition stage are discussed, as well as the distortions that can occur in the second and third stages (including by the use of leading questions).[13] There is also a discussion on the creation of false memories, finishing with general recommendations on best practice for how evidence should be collected to maximise retrieval and to minimise false memories.

In brief, it is clear that memories diminish and are more susceptible to distortion with time. Witnesses tend to remember central details better than the peripheral details. Further, while some people may have better memories than others, memory strength is directly related to how much attention people pay to an event and what they expect to occur.[14] Evidence collection mechanisms should take account of these factors. The overall message is that as much care should be taken to avoid contamination of eye witness evidence during the process of retrieval as is taken with physical evidence.

The course then moves onto an aspect of eye witness evidence that is of particular concern: eye witness identification evidence. This part of the course begins with a demonstration of a line-up procedure. Participants view a short video of an incident and then are asked pick out the offender from a photo montage line-up.[15] Participants invariably pick different photographs. It turns out, however, that the culprit is not in the montage and so those who have picked out a culprit from the line up have definitely identified an innocent man.[16]

This exercise allows judges to experience first-hand the real problems with identification evidence and particularly that by strangers after a "fleeting glance". Inaccurate identification evidence has been responsible for a number of major miscarriages of justice. Approximately three-quarters of the convictions that have been exonerated by DNA evidence in the United States were based on faulty eye-witness testimony.[17]

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12 For a fuller discussion of memory issues see Matthew Gerrie, Maryanne Garry and Elizabeth Loftus "False Memories" in N Brewer and K Williams (eds) *Psychology and Law: An Empirical Perspective* (Guilford, New York, 2005) at 222–253. See also British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Revised April 2010).

13 The concept of leading questions is more subtle than might be thought. For example, estimates of speed have been found to be higher in witnesses asked how fast the cars were going when they "smashed" into each other than in witnesses who are asked how fast the cars were going when they "hit" each other. See Gerrie, Garry and Loftus, ibid, at 223–224.

14 See Gerrie, Garry and Loftus, ibid, at 226–227.

15 There were eight photographs in the line-up for participants to choose from.

16 Or at least one innocent of that particular crime.

17 See Ian Fraser and others "The Police Line-up and Its Impact on the Justice System" [2009] 54 Crim L Q 332 and Margery Koosed "Reforming Eyewitness Identification law and Practices to Protect the Innocent" (2009) 24 Creighton L Rev 595 at 597.

The unreliability of identification evidence is caused partly because of the inherent unreliability of perception and memory and partly because of distortions caused during the collection of such evidence. Much has been done in recent years to try to minimise the latter. In the course, the following recommendations are discussed,[18] which are aimed at diminishing[19] (but not eliminating) inaccurate identifications:

(a) Line-ups[20] should contain only one suspect.

(b) Foils should capture the key features of the witness' description and be plausible matches for, but not too similar in appearance to, the suspect.

(c) Double-blind line-up administration should be preferred. This is where the administrator of the line-up does not know who the suspect is.

(d) Witnesses who have previously seen a suspect's face in a mugshot search or show-up should not subsequently view a line-up for that suspect.

(e) Unbiased instructions that provide clear warnings regarding possible culprit absence should be given.

(f) Immediately after the identification decision, a (independent) record of the witness' exact identification response, the confidence in that decision, the witness' decision latency,[21] and other perceptions that witnesses had of the encoding and identification experiences should be made. Research has shown that confidence in the identification, provided it is measured immediately, provides some measure of the accuracy of the identification.[22]

(g) Giving disconfirming feedback to witnesses following an initial identification decision should be avoided if there is a chance that the witness may subsequently be asked to view another line-up. Confirming feedback should also be avoided.

(h) Courtroom expressions of identification confidence and other witness perceptions of encoding and the line-up should be discounted.

The provisions in the New Zealand Evidence Act 2006[23] take into account some but not all of the above recommendations: for example the Evidence Act requires similarity to

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18 Neil Brewer and Matthew Palmer "Eyewitness Identification Tests" (2010) 15 Legal and Criminological Psychology 77 at 90. British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Revised April 2010) at 33.

19 Even with properly constituted identification line-ups there is an approximate error rate of 10_15 per cent. See British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory*, above n 18, at 33.

20 There are no clear research findings that favour one medium (eg live or video line-ups) over another (eg photo montages). The experts are also still divided on the issue of whether there should be simultaneous or sequential line-ups. British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory*, above n 18, at 33.

21 Time taken to make the identification.

22 Courtroom confidence is not, however, an accurate measure of reliability.

23 Section 45.

the suspect, rather than the witness' description and there is no requirement for double blind administration.[24]

The issue of jury directions on identification evidence is also discussed during the course. Juries have difficulty assessing the reliability of such evidence and have a tendency to put inordinate weight on it. More importantly, the factors they use to assess reliability, such as witness confidence, memory for peripheral details and consistency of description, are not necessarily indicative of the reliability of the evidence.[25]

In New Zealand s 126 of the Evidence Act 2006 provides for judicial warnings about identification evidence. No prescriptive formula is required for warnings under s 126 but there is prescriptive content:

(a) trial judges must warn the jury that a mistaken identification can result in a serious miscarriage of justice, as opposed to simply warning them of the special need for caution;[26]

(b) the reference to avoiding a risk of a miscarriage has to be identified separately from the risk of identification evidence being objectively unreliable;[27]

(c) the reference to avoiding the risk of a miscarriage of justice should make it clear that that risk has been identified on the basis of actual cases in the past, and is not something that is purely theoretical.[28]

The New Zealand Court of Appeal held in *R v Turaki* that s 126 warnings must be tailored to the circumstances of the case, which could go beyond what is prescribed in the Act.[29] The Court noted that, in particular, judges should consider whether any of the additional warnings suggested by the Law Commission[30] are appropriate in the specific circumstances, including the ways in which events surrounding the witness' observation of the defendant and any factors particular to the individual witness may have influenced the quality of the identification evidence (eg, poor eyesight or hearing, or bias). The Court also considered that incorporating aspects of the warning suggested in the United Kingdom case *Turnbull*[31] could be useful.

The course then moves onto the subject of witness credibility assessments. This part

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24 Evidence Act 2006, s 45(3)(b).

25 As noted by the New Zealand Law Commission in *Evidence: Reform of the Law* (NZLC R55 – Vol 1, 1999) at [199] ["Reform of the Law"].

26 *Hohepa*, ibid at [26]; *R v Davis* [2008] NZCA 424 at [9]; *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733 at [38].

27 *R v Uasi*, ibid, at [38].

28 *R v Uasi*, ibid. I think this is very important. A theoretical direction risks being merely puzzling. Any decision on any factual issue a jury makes could, if wrong, lead to a miscarriage of justice.

29 *R v Turaki* [2009] NZCA 310 at [90]. Research has established that detailed warnings are generally more effective at countering the unreliability of identification evidence, although traditional safeguards such as cross-examination of eyewitnesses have only a limited ability to help a jury discriminate between accurate and inaccurate eyewitness identifications. See Martire and Kemp "The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony" (2009) 33 Law Hum Behav 225.

30 Law Commission *Evidence Code and Commentary* (NZLC, R 55-Vol 2, 1999) at [C398].

31 *R v Turnbull* [1977] 1 QB 224, at 228.

of the course is given by Professor Aldert Vrij[32] by video conference link from the United Kingdom. Professor Vrij deals with what signs are not indicative of deceit and what signs may in some circumstances provide some indication of lying. His presentation stresses that there is no evidence that liars look away, fidget, speak with a high pitched voice[33] or that they are likely to be more nervous than truth tellers. The content of the evidence is, however, more diagnostic than is behaviour. Liars tend to be less detailed, providing less temporal and spatial information and fewer sensory details. Professor Vrij also outlines methods for credibility assessment, such as increasing cognitive load,[34] a creative use of evidence[35] and playing the devil's advocate. There are likely, however, to be limited opportunities to employ these techniques in the courtroom.[36]

After this session, there is small group discussion on the issue of credibility. In the course of those discussions, participants noted that there is less opportunity for judges to intervene in questioning where there is a trial before a jury. It was seen as important therefore that counsel were made aware of credibility research. As to jury instructions, it was considered that, at the least, all judges should stop instructing juries to rely on their view of a witness' demeanour.[37] Participants were divided on whether judges should go further and were also divided on whether juries should be exposed to expert evidence on issues of reliability and credibility.[38]

The objectives for the course on assessing witnesses are modest. With regard to credibility assessments, the goal is to assist judges to avoid the error of over-emphasizing demeanour and to learn better ways to think through and state credibility findings. With regard to reliability assessments, the goal is to raise awareness of the issues and to suggest strategies to avoid undue reliance on fallible human memory.

It is recognised that no assessment of credibility and reliability can ever guarantee the "right" answer in terms of "the truth", given the limits of human memory and ability to detect deception. However, our overall goal with the course has been to assist judges in making credibility and reliability assessments as robust as possible, within those limits.

The task of reviewing evidence and assessing witnesses is central to the judicial role. Thus, any assistance that can be given to judges (and juries) in performing this task has to be welcomed. However, the dilemma remains that it is impossible to know if, as a result of the programme, judges' credibility and reliability findings in court have become more accurate. This stems from two main factors: the difficulty in ascertaining with certainty the "ground truth" (that is, whether a given witness in court was actually lying or mistaken); and confidentiality and privacy issues. It must be the case, however, that better informed judges, who are aware of the risks and pitfalls in assessing witnesses' evidence, will be more

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32 See Aldert Vrij *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd ed, John Wiley and Sons Ltd, England, 2008).

33 At least not so as to be detectable in ordinary circumstances.

34 For example, by asking the person to repeat the story background.

35 For example, delaying confronting the suspect with evidence until after the suspect has been invited to give his or her version of events. This may, however, conflict with rights of suspects to disclosure of evidence.

36 The course also has a section on suspect interviewing, including techniques to avoid false confessions.

37 It has been some years since that instruction has been removed from the Criminal Bench Book but some judges still direct on this.

38 There is also a session in the course dealing with this issue. The research in this area is not clear on what benefits expert witnesses on witness credibility (or indeed judges' instructions on the subject) provide.

effective judges.

Search & Surveillance Act

The Search and Surveillance Act 2012 was the result of a long process of research and consultation beginning with a report by the Law Commission in 2007. Following the 2011 Supreme Court case of *Hamed,* in which the Court held that the police did not have statutory power to issue warrants for covert video surveillance, the Government announced its decision to legislate. The Video Camera Surveillance (Temporary Measures) Act 2011 was passed under urgency in October 2011 to "provide a temporary period to enable Parliament to move with all deliberate speed to pass the Search and Surveillance Bill".[39]

The Search and Surveillance Act itself came into force in April 2012. The Act empowered the police to issue warrants for a wider range of surveillance methods, including video surveillance, covert interception of private communications, and the use of tracking devices. The parties empowered to issue warrants for the various forms of surveillance depend on the level of intrusion involved, with judges holding the exclusive power to issue warrants for the use of surveillance devices.[40]

Concern has been raised over a number of aspects of the regime. These include the adequacy of the Act's device reporting requirements, whether the threshold for issuing certain warrants is appropriate, whether the Act provides adequate protection for citizens' privacy, and the decision not to include the use of surveillance devices by the public within the scope of the regime.[41] The Act is designed to strike a balance between law enforcement needs and human rights.[42] Whether this balance is adequately reached is likely to be a question of perspective.

Suspect and Witness Interviewing

The New Zealand police are engaging in an ongoing review of suspect interviewing practices. The new suspect interviewing techniques are similar to the cognitive interviewing techniques for witnesses discussed above, but modified to accommodate protections for suspects and also to take into account the fact that suspects may not be co-operative.[43]

Before commencing an interview, the police are obliged to caution the suspect: that they have the right to refrain from making any statement and to remain silent;[44] that they have

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39 Video Camera Surveillance (Temporary Measures) Bill 2011, s 3. The Bill was heavily criticised during the Select Committee stage. For more information see Samuel Beswick and William Fotherby "Surveiling the Stopgap" [2011] NZLJ 404, at 405.

40 Search and Surveillance Act 2012, s 53.

41 See Samuel Beswick "For Our (Government's) Eyes Only" [2012] NZLJ 213.

42 Ibid, s 5.

43 The following articles provide some background: Dave Walsh and Ray Bell "What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills against Interviewing Outcomes" (2010) 15 Leg. Crim. Psychol 305 and Julianne Read and others "Investigative Interviewing of Suspected Sex Offenders: A Review of What Constitutes Best Practice" (2009) 11 Int. J. Police Sci. Manag. 442.

44 There is some uncertainty over whether evidence obtained from a suspect who is advised not to give an interview but who then later waives their right to silence will be admissible. See *Lisiate v R* [2011] NZCA 170; *R v Harder* (2004) 21 CRNZ 25; *R v Kau* CA 179-02 Aug 22, 2002 cf *R v Hughes* [2007] NZCA 38, [2007] NZFLR 719.

the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions, and that such right may be exercised without charge under the police Detention Legal Assistance Scheme; and finally, that anything that they say will be recorded and may be given in evidence.[45] If the police are found to have acted improperly in obtaining evidence from a suspect, that evidence may be excluded under s 30 of the Evidence Act 2006.[46]

Suspect interviews are almost always video-recorded to protect both the suspect and the police against false accusations of improper practice.[47] The police are now also embarking on a process of video-recording interviews with witnesses of major crimes and are promoting the possibility of having such interviews admissible in court on the basis that this would be the account given when memories are fresh and not contaminated or diminished through the passage of time.

New police initiatives

The criminal process in its broadest sense starts with the police investigation and the decision whether or not to charge a suspect. This section of the paper discusses two recent initiatives adopted by the New Zealand police that are part of a programme called "Policing Excellence".[48] The first relates to a new warning system. The second initiative is a community justice panel.

Under the new warning policy, police officers dealing with eligible offenders after arrest will, before a decision to prosecute is made, consider whether to release the offender after giving him or her a formal pre-charge warning. If the offender is released with a warning, there will be no involvement of the court or a judge at all. This has been instigated by operational decisions within the police and is characterised as a new and more active approach to the utilisation of the prosecutorial discretion.[49]

A pre-charge warning can be issued only by a Sergeant or above. The offence must carry a maximum penalty of six months imprisonment or less and the offender must admit guilt.[50] Victim considerations must be taken into account, but the issuing of a pre-charge warning is not contingent on the victim's consent. A record that a pre-charge warning has been given may be presented to a court during any future court proceedings.[51]

In his recent address to the International Criminal Congress, Justice Mark O'Regan, President of the New Zealand Court of Appeal, said that the use of pre-charge warnings on a large scale is potentially a significant change to New Zealand's criminal justice system.[52]

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45 Practice Note — Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297.

46 Discussed in more detail in the Evidence Act section of this paper.

47 In the section of the paper on the assessing witnesses course.

48 For a fuller discussion see Justice Mark O'Regan "Criminal Justice Institutions in Times of Change" **(**paper presented to the 13th International Criminal Congress, Queenstown, September 2012) www.courtsofnz.govt.nz**.**

49 There is also a police diversion scheme of longer standing (similarly without legislative imprint), but its use is diminishing.

50 Excluding possession of methamphetamine or any offences arising from a family violence related incident.

51 See Law and Order Committee "Vote Police: 2011/12 Police Response to Additional Supplementary Estimates Questionnaire, Questions 145-181", www.parliament.nz.

52 O'Regan, above n 50.

Any change that affects the way 12 per cent of alleged offences are dealt with is significant, particularly where the change arose from policy development in the police with no more formal law making process. Even though the offences may be minor, the difference between a pre-charge warning and prosecution is significant for the individual involved. Justice O'Regan questioned whether it is appropriate to have one system of summary justice that ends with a conviction for the guilty and another that does not. [53]

Justice O'Regan also posed some open-textured questions that should be addressed in any debate on the new system. These included what legal framework a pre-charge warning scheme should be implemented under; whether it is appropriate to have a target level for pre-charge warnings; what range of offences should be eligible for pre-charge warnings; what process should be followed by the decision maker; what reporting should occur; and whether there should be a monitoring or review system.

The second police initiative is associated with the development of a community justice panel in Christchurch. This is a pilot scheme which has been set up by the police, staffed by volunteers. Offenders, who are prepared to admit guilt and co-operate, go before the panel. The panel determines what the sanction should be, but does so in an environment that allows much more interaction with the offender than occurs in the court where summary offences are dealt with. Offenders who do not co-operate are returned to the court system.

Lord Judge[54] has expressed a concern with regard to similar neighbourhood justice panels in England and Wales. His concern was that they could become bodies with a quasi-judicial function sitting somewhere between the executive and the judiciary, but not subject to the normal accountability requirements that apply to the exercise of judicial power. These concerns deserve to be debated.

Like Justice O'Regan, I make no comment on what the outcome of any debate on the new initiatives should be but endorse his calls for a debate to take place.

Pre-trial procedures

Prior to 2008, before a case was committed for trial, witnesses were required to give oral or written depositions at a committal hearing. Following this the judge (or Justice of the Peace) would determine if there was a sufficient case to go to trial. In 2008, legislation was passed which effectively made the filing of witness evidence in written form the default procedure. [55] An oral evidence hearing (committal hearing) would only be called if it was requested by the prosecution or defence and that request was granted by the judge. This made committal or depositions hearings largely redundant.

The Criminal Procedure Act 2011 has entirely removed the committal hearing stage,

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53 He also referred to concerns about similar systems in the United Kingdom, for example Lord Justice Leveson "Criminal Justice in the 21st Century" (The Roscoe Lecture, Liverpool, 29 November 2010), www.judiciary.gov.uk.

54 Lord Judge "Summary Justice In and Out of Court" (John Harris memorial Lecture, Drapers Hall, London, 7 July 2011). Available at www.judiciary.gov.uk.

55 The changes are set out in the Summary Proceedings Amendment Act 2008 (No 2), part 5. This came into force in June 2009.

while retaining the ability to request oral evidence orders.[56] While there has been criticism of the 2008 changes,[57] the Government maintains that they have almost halved the average time taken for committal to trial and reduced pressure and stress on victims.[58]

One of the measures taken to mitigate against adverse effects from the changes to depositions was a comprehensive statutory disclosure regime.[59] The Criminal Disclosures Act 2008 came into force in 2009.[60] Disclosure under the Act occurs in a number of stages. Initial disclosure by the prosecution must be made within 21 days of commencement of the proceedings. This includes a summary of the facts of the alleged offence, the penalties applying to the offence and a summary of the defendant's previous convictions.[61] Following this, the defendant can request further disclosure, including the names of witnesses to be called, a list of exhibits, copies of all interviews and notes on evidence.[62] Full disclosure occurs after the defendant has pleaded in a summary proceeding, elected trial by jury, or made an appearance in court. The prosecution must disclose all relevant information,[63] together with a list of any information that the prosecution is refusing to disclose.[64] The defendant can, once again, request that the prosecution make additional disclosure.[65] Under the Act, the prosecutions obligation to disclose is ongoing.[66]

Disclosure by the defendant is limited to disclosure of an alibi, if one will be argued, and disclosure of any expert witnesses that will be called.[67] Finally, the Act introduces a new form of disclosure enabling the defendant to apply for disclosure of information held by third parties. If requested, a hearing will be called to determine whether a defendant's request

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56 Criminal Procedure Act 2011, ss 54–59 (pre-trial case management system), and ss 90–100 (oral evidence order process). These changes are expected to come into force in mid-2013. For more information on the rationale behind the changes see New Zealand Ministry of Justice *Discussion Document: Criminal Procedure Case Progression Model* (June 2009).

57 John Rowan QC "Doing Away with Depositions" [2011] NZLJ 397.

58 Simon Power (then Minister of Justice) "Removal of depositions speeding up court process") press release, 11 April 2010).

59 Prior to the Act the law on disclosures was a mix of common law and piecemeal statutory provisions. See *R v Taylor* CA 130-02, Dec 17, 2003, at [21]–[26].

60 The Act is in the form of a code, thus removing the applicability of the Privacy Act 1993 and the Official Information Act 1982 to disclosures in criminal trials.

61 Criminal Disclosures Act, s 12(1).

62 Ibid, s 12(2).

63 This includes: statements by prosecution witnesses; briefs of evidence; contact details of persons interviewed but who will not be called as witnesses; the written account of the interview/any statement; known convictions of prosecution witnesses; exhibit list; relevant exhibits that will not be introduced as evidence; information about expert witnesses proposed to be called; information about expert witnesses not proposed to be called.

64 Criminal Disclosures Act, s 13. Information may be withheld if it is not relevant (s 13(2)), or refused under s 15, 16, 17, or 18. The grounds for refusal include where disclosure: would endanger a witness or any person; includes trade secrets; would prejudice the proceedings; would constitute contempt of court; or is privileged.

65 Ibid, s 14.

66 Ibid s 13(5) and (6). This was reinforced by the 2010 report of the Independent Police Conduct Authority of New Zealand relating to how police had handled disclosure of evidence in the prosecution of Chris Kahui for murder: Independent Police Conduct Authority "Christopher Kahui Trial**"** (press release, 30 April 2010).

67 Ibid, ss 22–23. Prior to the commencement of the Act, defendants were required to disclose the particulars of an alibi under s 367A of the Crimes Act but no further disclosure was required. *R v Livingston* [2001] 1 NZLR 167; (2000) 18 CRNZ 162 (CA) at [26] confirmed that, apart from disclosure of an alibi, there is no obligation for an accused person to disclose particulars of the defence and there is no power on the part of a trial court to order disclosure.

should be granted. The Court can order disclosure, or conditional disclosure, if satisfied that the information is relevant and disclosure is necessary in the public interest.[68]

Evidence admissibility hearings are often held prior to trials to determine what evidence will be admitted. Parties wishing to appeal can apply for leave to do so.[69] Delays and disruption in the timing of trials can occur if parties appeal evidence decisions at the last minute. However, the ability to address evidence arguments prior to trial ensures that, once commenced, trials run more smoothly. Clarifying what evidence will be admissible at trial can also assist defendants in deciding how to plead.

Another change to the pre-trial process in New Zealand is the requirement, introduced by the Criminal Procedure Act 2011, that the defence discuss and identify the issues in dispute in a particular case prior-to trial. This change is expected to come into force in mid-2013. There is currently no such requirement. This means that, unless the defence voluntarily identifies issues, cases progress on the basis that everything is disputed. As a result, prosecutors can undertake unnecessary preparation, trials may be unnecessarily complex and some trials progress further than they should.[70]

Under the Criminal Procedure Act, the defence and prosecution will be required to discuss both what issues and facts they agree on and what issues are in dispute. The outcome of these discussions must be included in a memorandum filed by the defence prior to trial.[71] Lawyers, however, will have to take care in these pre-trial meetings. Like statements made during plea bargaining, it may be that concessions or comments made during disputed issues discussions will not be covered by privilege and may later be adduced as evidence at trial.[72]

The Criminal Procedure Act has also introduced a statutory basis for the giving of sentencing indications.[73] A sentencing indication is a statement given by the court indicating the likely sentence that would be given if the defendant pleads guilty, including the type, range or quantum of the particular sentence or sentences.[74] An indication ensures that a defendant is in an informed position to decide how he or she will plead. This is significant considering the impact that an early guilty plea can have at sentencing.[75] Prior to the Act, sentencing indications were routinely given in the District Court but were rarely given in the High Court.

It is generally acknowledged that a willingness to give sentencing indications when requested has led to an increase in guilty pleas and thus a reduction in defended matters. [76]

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68 Ibid ss 24–29. Third-party pre-trial disclosure was not possible prior to the Criminal Disclosures Act: *A-G v Otahuhu District Court* [2001] 3 NZLR 740 (CA). The defence could, however, call third parties as witnesses and to produce documents in the course of their evidence.

69 This process is governed by s 344A of the Crimes Act 1961. This provision will be repealed and replaced by s 79 (for judge alone trials) and s 101(for jury trials) of the Criminal Procedure Act 2011.

70 For more information see New Zealand Ministry of Justice *Discussion Document: identification of Issues in Dispute* (May 2009).

71 Criminal Procedure Act 2011, s 56 (judge alone trial); s 88 (jury trial).

72 Brendan Horsley "Plea Discussions and Statements of Disputed Issues" [2012] NZLJ 269.

73 Criminal Procedure Act 2011, subpart 4. This change came into force during the first stage of the Act's commencement in March 2012.

74 Criminal Procedure Act 2011, s 60.

75 *Hessell v R*, above n 193.

76 New Zealand Ministry of Justice *Discussion Document: Development of a formalised sentence indication scheme* (May 2009) at 2.

However, there has been some concern over risks associated in attempting to determine sentences at such an early stage.[77]

Under the Act, an indication will only be given if the defendant requests it prior to trial.[78] However, even when requested, the giving of an indication remains discretionary.[79] If a defendant pleads guilty in reliance on a sentencing indication and the sentence given surpasses the indication, the defendant has a right to change their plea and have their case remitted back to sentencing court.[80]

Jury Trial availability

At present, a defendant has a right to elect a jury trial where the maximum sentence is 3 months imprisonment or more.[81] There is, however, a judicial discretion to override a defendant's election and order that the trial be heard before a judge alone where the trial is likely to be long and complex.[82] Under the Criminal Procedure Act 2011, the threshold at which a jury trial can be elected by a defendant will be raised to two or more years' imprisonment.[83] This change does not alter the residual discretion and is expected to come into force probably around mid-2013.

The Act also sets out four new categories of offences based on penalty.[84] The default in all categories except for category 4 charges, which relate to the most serious of offences, will be trial by judge alone.[85] The changes were aimed at reducing both the number of jury trials and the costs associated with them. Under the previous system, relatively minor

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77 For more information see New Zealand Ministry of Justice ibid; and New Zealand Law Commission *Pre-Trial Processes: Justice Through Efficiency* (NZLC RP89) at 91–99.

78 Criminal Procedure Act 2011, s 61.

79 Ibid.

80 *Sipa v R* [2006] NZSC 52; (2006) 22 CRNZ 978. Concern has been raised over the pressure that such incentives place on defendants to plead guilty: see A. Ashworth and M. Redmayne, *The Criminal Process*, (4th ed, Oxford University Press, Oxford, 2010) at 310–20; and P Darbyshire, "The Mischief of Plea Bargaining and Sentencing Rewards," [2000] Crim. L. Rev. 895.

81 Summary Proceedings Act 1957, s 66. The Summary Offences Act 1981 contains some exceptions to the right to elect trial by jury. In addition, under s 361D of the Crimes Act the judge has a discretion to order trial by judge alone where the cases in likely to be long and complex or where there is a risk of jury intimidation.

82 Crimes Act 1961, s 361D. This will not apply, however, where the defendant is charged with an offence that is punishable with 14 or more years imprisonment, or is charged with being a party to such an offence. In *Porter v R* [2009] NZSC 107 the Supreme Court stated that, where the question of whether the s 361D criteria are met is "finely balanced", the court should decline to exercise the discretion in recognition of the right to trial by jury under the Bill of Rights. At [9].

83 Criminal Procedure Act 2011, s 50–53, read with s 6. This requires an amendment to s 24(3) of the New Zealand Bill of Rights, which currently includes the right to elect a jury trial for any charge with a maximum sentence of over 3 months imprisonment.

84 Criminal Procedure Act 2011, s 6: category 1 includes offences not punishable by imprisonment; category 2 includes offences that are punishable by less than 2 years' imprisonment; category 3 includes offences that are punishable by 2 or more years' imprisonment and do not fall into category 4; and category 4 offences include only the most serious offences and can only be heard in the High Court. The category 4 offences are listed in schedule 1 and include murder, treason, sabotage, piracy, manslaughter, and infanticide. This replaces the previous category system under which there were six levels of offence. See New Zealand Ministry of Justice *Discussion Document: Categories of Offences and the Middle Band* (October 2009) at [2].

85 Criminal Procedure Act 2011, s 4.

offences still gave rise to the right to elect a trial by jury. [86]

Removal of the partial defence of provocation

Until 2009, defendants found guilty in homicide proceedings could have their conviction for murder reduced to manslaughter by way of the partial defence of provocation. Section 169 of the Crimes Act 1961 permitted the defence if it could be shown that the defendant was provoked in a manner that was "sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control".

The availability of the provocation defence was put onto Parliament's agenda following the highly publicised murder trial of Clayton Weatherston, who was charged with mutilating and stabling his former girlfriend more than 200 times. The perceived cruelty of the defence's attempt to invoke the defence of provocation led to heated debate and calls for its abolition. Within four months of Mr Weatherston's conviction, Parliament passed the Crimes (Provocation Repeal) Amendment Act 2009, removing the availability of the defence under both the Crimes Act and common law. It is understood that Parliament's intention was for the elements of provocation to be considered at the sentencing stage as a mitigating factor.[87] However, no legislation has been enacted to give effect to this intention.

Under s 102 of the Sentencing Act 2002, an offender who is convicted of murder must be sentenced to life imprisonment, unless, given the circumstances, that sentence could be manifestly unjust. In a 2007 report on the future of provocation the Law Commission suggested that, were Parliament to remove the defence of provocation, s 102 should be amended to ensure that it could accommodate provocation as a mitigating factor.[88] It has also been suggested that a simpler solution would be for provocation to be taken into account under s 9 of the Sentencing Act, which deals with aggravating and mitigating factors. As provocation could be either a mitigating or aggravating factor, s 9 would need to be amended to include a presumption that provocation will be addressed as a mitigating factor, unless the circumstances show otherwise.[89]

It is yet to be seen how the courts will address provocation in light of Parliament's failure to provide legislative direction. It is possible that it could be taken into account in either the interpretation of "manifestly unjust" or under s 9(4)(a), which allows the court to consider any other mitigating or aggravating factor that it thinks fit. However, as the Law Commission noted in its report, this could lead to inconsistency and overly harsh sentences for defendants who would otherwise have succeeded under provocation.[90]

Evidence Act 2006

The enactment of the Evidence Act 2006 was one of the most pivotal legislative

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86 For more information see: New Zealand Ministry of Justice *Criminal Procedure (Simplification) Project: Proposals relating to restricting the availability of jury trials* (June 2009).

87 Gloria Kim "Repeal of provocation: Further Reform" [2012] NZLJ 227, at 227.

88 New Zealand Law Commission *The Partial Defence of Provocation* (NZLC RP98), at [200]–[209].

89 Kim, above n 87, at 227.

90 New Zealand Law Commission *The Partial Defence of Provocation*, above n 88, at [192]–[199].

developments in the last 10 years. The Act codified[91] and clarified the common law rules relating to evidence. The fundamental principles are set out in ss 7 and 8. In order to be admissible, evidence must be relevant and will only be admitted if its probative value outweighs any unfairly prejudicial effect that it may have on the proceeding.[92] In addition to these two principles, the Act sets out specific rules dealing with certain types of evidence. These relate to hearsay,[93] opinion evidence,[94] defendants' statements,[95] improperly obtained evidence,[96] previous consistent statements,[97] identification evidence,[98] and privilege and confidentiality.[99]

One of the significant developments in the Act is the definition of hearsay evidence as being limited to evidence of statements made by persons who are not witnesses. This has all but done away with the stringent common law exclusion.[100] Evidence that remains defined as hearsay evidence under the Act will be only be admitted where the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and either the maker of the statement is unavailable as a witness, or the judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.[101]

The Evidence Act sets out specific rules for propensity[102] and veracity evidence.[103] Propensity evidence is defined as evidence that "tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved" but it does not include evidence of an act or omission that is an element of the offence or the cause of action in the proceeding in question.[104] Propensity evidence will be admissible only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.[105]

In assessing the probative value of the evidence, the judge must take into account: the nature of the issues in dispute[106] and may take into account; the frequency with which the conduct that constitutes the propensity evidence has occurred; the connection in time between the conduct that constitutes the propensity evidence and the alleged offending; the similarity between the conduct that constitutes the propensity evidence and the alleged offending; the

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91 The Act is not a complete code. Many of the common law rules of evidence are still available following the Act. See Evidence Act s 10.

92 Or needless prolonging of the proceeding. Section 8.

93 Evidence Act 2006, ss 17 and 18.

94 Ibid ss 23-26.

95 Ibid, ss 27-29.

96 Ibid, s 30.

97 Ibid, s 35.

98 Ibid, ss 49.

99 Ibid ss 51–70.

100 Ibid, s 4.

101 Ibid, ss 17 and 18.

102 Called similar fact evidence under the common law.

103 Called character evidence under the common law.

104 Evidence Act, s 40. The Supreme Court has held that acquittals may be propensity evidence. See *Fenemor v R* [2011] NZSC 127; [2012] 1 NZLR 298 (SC). However, recent Court of Appeal authority has demonstrated that it may be difficult to meet the statutory test in such cases. Ssee Court of Appeal cases of *Blackburn v R* [2011] NZCA 365 and *Thomas v R* [2011] NZCA 443.

105 Ibid, s 43(1).

106 Ibid, s 43(2)

number of persons making allegations against the defendant that are the same or similar to the subject of the offence charged; whether these allegations are reliable; and the extent to which the conduct that constitutes the propensity evidence or constitutes the alleged offending is unusual. In assessing the prejudicial effect of admitting the evidence, the judge must consider: whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.[107]

Until recently, New Zealand courts had demonstrated a tendency to classify some propensity evidence as mere evidence of "background" or "part of the narrative" evidence.[108] In the Supreme Court case of *Mahomed*, however, the Court made it clear that the statutory test for the admissibility of propensity evidence should not be circumvented in this manner.[109]

If propensity evidence is held to be admissible, the judge will usually be required to give a specific direction to the jury on the use to which such evidence may be put [110] In *Mahomed*, the minority said that directions given in the past have been overly complex and confusing. It was suggested that, where required, a direction should: identify the propensity evidence and explain why it has been led and the legitimate respects in which it might be taken into account by the jury; explain the parties competing arguments in relation to the evidence, and caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence.[111]

Veracity is defined in the Act as the disposition of a person to refrain from lying, whether generally or in the proceeding.[112] Veracity evidence, which can include character evidence, will not be admissible unless the evidence is substantially helpful in assessing that person's veracity.[113]

The Law Commission is currently reviewing the Evidence Act[114] and has indicated that it may suggest changes to the veracity and propensity rules as they relate to the

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107 Ibid, s 43(4).

108 For example *R v R* [2008] NZCA 342 at [49]–[50]; *R v Gooch* [2009] NZCA 163 at [8]; See Richard Mahoney "Evidence" [2011] NZLR 547 at 547; Elizabeth McDonald '*Mohamed:* Future Applications' [2011] NZLJ 385 at 386.

109 *Mahomed v R* [2011] SC 52; [2011] 3 NZLR 145.

110 In *Mahomed v R*, ibid, the minority stated that a direction would only be needed where the prosecution's reliance on the propensity evidence invokes ideas about coincidence or probability; where the evidence attacks the defendant's character in respects not directly associated with the alleged offending; or where the jury might not realise the relevance of the evidence or there is a specific risk of unfair prejudice. This was not expressly addressed by the majority. At [91]–[93].

111 In *Mahomed v R*, ibid, at [83] the minority questioned the utility of the more complex seven-part direction previously set out in *Stewart (Peter) v R* [2008] NZCA 429, [2010] 1 NZLR 197 and suggested these elements as an alternative, at [95]. The majority did not expressly agree with the minority's suggested alternative direction, and preferred to leave the matter to a later case. However, they did state that they had reservations about the utility and content of the *Stewart* direction. See at [7] ftnt 1.

112 Ibid, s 37(5).

113 Ibid s 37(1).

114 To be released on 28 February 2013. Section 202(2) required the Law Commission to carry out a review of the Act. This is one year from the date on which the review was requested under s 202(2).

disclosure of defendants' previous convictions, similar offending, and bad character.[115]

The Evidence Act also provides for the treatment of evidence that has been improperly obtained. Under the Act, evidence that is found to be improperly obtained will only be admitted if the probative value of the evidence outweighs the impropriety committed. In carrying out this balancing exercise, the court must take proper account of the need for an effective and credible system of justice.[116] Arguments surrounding improperly obtained evidence often arise in cases where breaches of the Bill of Rights have been claimed.[117]

Vulnerable witnesses

Obtaining the most accurate and complete testimony from witnesses in a trial is critical to the administration of justice within the court system. Giving evidence in court is difficult for most witnesses but it can be especially daunting for young witnesses and victims of sensitive offences. A recent study of 71 children involved as complainants in trials highlighted a number of issues.[118] The first is that delays before trial have increased since the 1990's from 255-260 days to an average of 477 days. Such a delay is a long time in the life of the child and one that has obvious effects on memory of events.

A linguistic analysis of questioning in court further showed that children were still being questioned in the courtroom in ways that were forensically unsafe and subjected to tactics in cross-examination that were likely to confuse them. One encouraging sign, however, was that judges did intervene to restrict inappropriate questioning more than they had in the 1990's [119]

This study and others[120] have led to calls for different procedures for sexual cases, particularly those involving children.[121] The possibility of introducing an inquisitorial trial system for sex offences and cases involving children was proposed in New Zealand in 2011 by the then Minister of Justice, Simon Power, as a way of addressing concerns over the

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115 New Zealand Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103). Also see New Zealand Law Commission "Evidence Act Review: Operation of the Veracity and Propensity Provisions" (Report to Simon Power, 1 April 2010).

116 Evidence Act 2006, s 30(2).

117 The seriousness with which the Court will treat a breach of the Bill of Rights was affirmed by the Supreme Court in *Hamed v R* [2011] NZSC 101; [2012] 2 NZLR 305.

118 Kirsten Hanna and others *Child Witnesses in The New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (Institute of Public Policy, 2010), summary of findings at 4–6.

119 Ibid, at 7–9 and 87.

120 Elisabeth McDonald, Yvette Tinsley "And Still We Must Talk About 'Real Rape'" (2009) 29 Pace Law Review 349; and Elisabeth McDonald, Yvette Tinsley *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

121 Similar research and procedural developments have occurred in England. For guidelines and procedures see Working Party for the Family Justice Council *Working Guidelines in Relation to Children Giving Evidence in Family Proceedings* (Family Justice Council, UK, December 2011); Judiciary of England and Whales *Judicial College Bench Checklist: Young Witness Cases*, January 2012, www.judiciary.govt.uk. For research see: Joyce Plotnikoff and Richard Woolfson *Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings* (National Society for the Prevention of Cruelty to Children, July 2009). For relevant UK case law see: *R v B* [2010] EWCA Crim 4 (Crim App), *R v W and M* [2010] EWCA Crim 1926 (Crim App); *R v Wills* [2011] EWCA Crim 1938 (Crim App); *R v E* [2011] EWCA Crim 3028 (Crim App); *Re W* [2010] UKSC 12.

impact of the trial process on vulnerable witnesses.[122] The current Minister of Justice, Judith Collins, however, has made it clear that she does not support the proposed changes. The Minister has questioned whether an inquisitorial system would benefit victims of sexual offending and made it clear that she did not think a mixed adversarial/inquisitorial system was practically feasible.[123]

There are measures that can be and are taken, however, to make giving evidence easier for vulnerable witnesses. The ordinary way of giving evidence is to give it orally in a court room in the presence of the judge, parties and members of the public.[124] The Evidence Act provides discretion to allow alternative means of giving evidence: witnesses may give evidence in the courtroom while being unable to see the defendant or some other specified person (through the use of screens); they may give evidence from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or by a video record made before the hearing of the proceeding.[125] These measures are routinely made available for vulnerable witnesses.[126]

Vulnerable defendants

Court processes can be bewildering and alienating when encountered for the first time even for well educated professionals. The position is even worse for defendants in criminal trials who are vulnerable through mental impairment. In New Zealand the threshold for holding a person fit to stand trial is low. This is because of the fundamental principle that accused persons are entitled to choose their own defences and present them as they choose.[127]

It is nevertheless vital to ensure that vulnerable defendants receive a fair trial. In a recent case, the New Zealand Court of Appeal held a profoundly deaf man to be fit to stand trial but endorsed special measures to be implemented in the trial.[128] The measures set out by the trial Judge included the breaking down of information into small and discrete blocks to enable the defendant to assimilate and to reciprocate and provide instructions and/or responses. The prosecution was also limited to very specific and simple questioning, and was required to take adequate time and care to ensure that the defendant understood the information/evidence presented and so as to be able to respond if and when required.

On appeal, however, the Court of Appeal went further by saying that, if the defendant wished to give evidence, an order could be made allowing it to be given in an alternative manner (for example through pre-recorded evidence). In addition, given that the defendant may have a tendency to agree to things he does not understand, leading questions should be avoided, even in cross-examination.

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122 New Zealand Ministry of Justice, *Government Response to the Report of the Taskforce for Action on Sexual Violence*, September 2010 www.justice.govt.nz at [23].

123 Interview with Judith Collins, Minister of Justice (Rachel Smalley, The Nation, TV3, 23 September 2012) transcript available at www.frontpage.co.nz.

124 Evidence Act 2006, s 83. This is a codification of the common law position.

125 Evidence Act 2006, s 105. For more information see Mahoney, McDonald, Optican, and Tinsley *The Evidence Act 2006: Act and Analysis* (2nd ed, 2010, Brookers Ltd, Wellington)

126 They were also available for such witnesses before the Evidence Act was passed.

127 *R v Power* CA187/96, 22 October 1996 at 7-8; endorsed in *R v Dougherty* [2012] NZCA 405 at [11].

128 *Barton v R* CA823/2011 [2012] NZCA 295 at [19]. The need to consider such measures was endorsed in *R v Dougherty* , ibid, at [58] referencing to *Barton v R* [2012] NZCA 295.

Further, in order to ensure that the defendant understood the questions put to him, the evidence given by other witnesses and any other matters arising during the trial, the defendant's understanding would need to be tested at each point. The only way to do this would be to "ask him to put in his own words everything said in Court". Proper breaks would need to be taken to allow the assimilation of information. Repetition of information previously given would also likely be necessary. The Court also suggested that some specialist communication assistance (apart from an interpreter) may be necessary. The reasons for taking any of these measures would need to be carefully explained to the jury at the outset.[129]

The Court of Appeal concluded by saying that, as matters progressed, it could become clear that the defendant's difficulties were such that the decision as to his fitness to stand trial would need to be reconsidered in light of new developments.[130] The overriding requirement is for the defendant to have a fair trial.[131]

Interpreters

Te Reo Māori[132] and sign language[133] are both official languages of New Zealand. In July 2012 the Chief Judge of the District Court announced an initiative requiring all announcements in the District, Youth and Family Courts to be in both English Māori.

Interpreters are regularly provided for all parties and witnesses in criminal trials who require one. The Supreme Court has confirmed that the right to an interpreter is part of the right to a fair trial under the Bill of Rights. The standard of interpretation required for an accused is the standard that, in the overall context of the trial, is compatible with the defendant's fair trial rights,[134] and consecutive, rather than simultaneous, interpretation is preferable.[135]

New court initiatives

It is recognized in New Zealand that there may need to be modification of traditional court processes for courts to become more effective. In this section of the paper I briefly describe some of the initiatives that have been, and are to be, taken in New Zealand in this regard.

Research suggests that a large majority of criminal offending is fuelled by drug and alcohol abuse. In New Zealand, a Youth Drug Court has been operating in Christchurch for some years. The Court's underlying philosophy is that court processes, and in particular the role of the judge, can be used to facilitate treatment. Key features of the Youth Drug Court model are the consistency of seeing the same judge on a regular basis and the use of the judge's authority to recognise progress and to sanction non-compliance. The Court uses an

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129 At [34]–[35].
130 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 7.
131 New Zealand Bill of Rights Act 1990, s 25(a).
132 Māori Language Act 1897, s 3.
133 New Zealand Sign Language Act 2006, s 6.
134 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at [43]. This applies to the whole of the trial, including the counsel addresses, witness evidence and the judge's summing up.
135 Ibid, at [60].

interagency approach with a multidisciplinary team to provide and refer young people to services to address their various needs. The target groups are recidivist youth offenders aged 14-16 who have moderate to severe alcohol and/or drug dependency linked to their offending.[136]

There is to be a five year pilot starting in November this year of two adult Alcohol and Other Drug Treatment Courts in Auckland.[137] These Courts are targeted at individuals whose offending is driven by alcohol or drug dependency and who will likely remain in that cycle until their dependency is addressed. If offenders in that category plead guilty they will be offered a chance to enter the Treatment Courts. Those with current or past offences of serious violence, sexual offending or arson, however, will not be eligible.

Once transferred to the Treatment Courts, the participant will typically be required to undertake treatment and suitable aftercare to achieve abstinence from their alcohol or drug use. A holistic and coordinated approach is taken in the provision of this treatment to accommodate the particular needs of each individual participant. The participant will be closely monitored by the Courts, with the judge as part of a 'team' of professionals. The participant's other core needs, such as health, education, housing and work will also be addressed so that they will have better chance of succeeding in treatment. Cultural considerations are also vitally important and form an important part of both the treatment focus and, wherever appropriate, the other supports offered.

The aim of the programme is for the participants to become contributing members of the community. Once defendants have completed their treatment program, they "graduate" from the Treatment Courts and get the appropriate credit for the disposition of their case.

Another recent innovation is a community outreach project by the District Court at Porirua, Wellington. This was an attempt to replicate the key concepts of the Red Hook Community Justice Centre in New York[138] in an ordinary court setting. The Porirua judges visited over thirty community groups that they considered could help fashion appropriate responses to offending. These groups included: violence intervention services; alcohol and other drug services; youth interventions; a school for solo mothers; and the Housing New Zealand urban renewal programme together with government agencies and local body initiatives. In the course of that process, the judges learned a great deal about the services that were available in the community, those that were missing, and how the Court was seen by the community. Importantly, they sensed enthusiasm for a court that was more connected with its community.

The judges held a community meeting at the Porirua Court in February 2010 with over one hundred representatives of community groups and agencies, local government, police, Corrections and Members of Parliament. This was an independently facilitated forum and workshop which addressed two questions how the Court could be more responsive to the needs of the community, and what the community could do to assist the Court in its work.

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136 See Wendy Searle and Philip Spier "Christchurch Youth Drug Court Pilot: One year follow-up study" (New Zealand Ministry of Justice, Wellington, 2006) www.justice.govt.nz; and Dr Sue Carswell "Process Evaluation of the Christchurch Youth Drug Court Pilot" (New Zealand Ministry of Justice, Wellington, 2004) www.justice.govt.nz.

137 These courts will follow the United States model where such courts have been operating since 1989.

138 See www.courtinnovation.org.

A large number of recommendations were produced. The consensus from the meeting was that there is more the Court could do to made justice more visible and to educate the community about what the court actually does. It was also important to build strong linkages between community agencies, and for family and community groups to have more opportunity to support defendants through the court process and provide the judge with the "complete picture". In order to achieve this, family and community members should be allowed to speak in court and to present information in different ways. In addition to this, the need to look at different cultural models for addressing criminal justice issues, including the use of solution focused models, was stressed.[139]

The meetings described above are seen as only the start of the process of community engagement. This must be ongoing. At the community meeting at the courthouse, a participant said "if you want to go faster go alone, if you want to go further, go together". The judges in Porirua have adopted this as a motto.[140]

Another interesting initiative has been the gradual introduction through the country of the Rangatahi (youth) courts.[141] The Rangatahi courts were established to address the prevalence of Māori, and particularly Māori youth, in crime and prison statistics. The Rangatahi courts are, however, open to offenders aged 14 to 16 from all ethnicities. Youths can decide to have their family group conference[142] held at the District Youth Court or a Rangatahi court, which now operate at various marae[143] around the country.[144] In the Rangatahi courts, the law is applied in the same way as it is in the Youth Court but the process is influenced by Māori protocol. The scheme allows the judge and marae elders to monitor the youths as they complete tasks set in the family group conference.[145]

Finally, I mention an initiative that is under discussion at present as part of the rebuilding of Christchurch after the earthquake. This is for a Justice and Emergency Service Precinct to include the police, courts, Corrections and related emergency services. The idea behind the initiative is for the various agencies to share infrastructure and integrate their

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139 The IJS runs a course on solution focused judging. Rather than seeking to solve participants' problems, a solution-focused approach supports participants' own desire to change and facilitates their involvement with treatment and support agencies as needed. For further information see Michael S King *Should Problem Solving Courts be Solution-Focused Courts?* Monash University Research Paper No 2010/03 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725022

140 See Judge John Walker "The Porirua District Court and the Community – Working Together Mainstreaming the Community Justice model" (Non Adversarial Justice Conference – Melbourne 7 May 2010).

141 The term court is a bit of a misnomer as the Rangatahi courts are for those who have already appeared in the conventional Youth Court and admitted the charges they face. See Matiu Dickson "The Rangatahi Court" [2011] 19 Waikato Law Review 86.

142 Family Group Conferences were introduced in 1989. The aim of the conferences is involve the young offender, the victim and their families in the decision-making process with the objective of reaching a group-consensus on a 'just' outcome. Each conference results in a plan regarding how to address the conduct in question. Almost all of these involve some form of accountability measures, but they can also include counselling and rehabilitation. The lack of statutory prescription for plans allows them to be tailored to the needs of the young person concerned. The Youth Court can accept the plan, but has the residual discretion to impose additional orders if necessary. See Children, Young Persons, and Their Families Act 1989 ss 20–38.

143 A marae is a traditional Māori meeting place.

144 There is also a similar court for Pacific Island youth offenders, the Pasifika Court in Mangere.

145 See "The Rangatahi Courts Newsletter" Issue 1 2012 www.justice.govt.nz; Derek Cheng "Marae Youth Courts Reshape Attitudes, Govt says" *The New Zealand Herald* (online ed, Auckland, March 11 2010).

service delivery.[146]

Open justice

The principle of open justice acknowledges that there is a genuine public interest in knowing the identity of those persons who come before the courts and in knowing how the courts deal with them. At times, however, the courts need to deny or restrict coverage of court proceedings to ensure the proper administration of justice. This includes the granting of name suppression for defendants in criminal trials.

Prior to the Criminal Procedures Act 2012, there was no statutory guidance on the circumstances in which name suppression should be granted. Concerns were raised over the ease with which defendants were succeeding in being granted name suppression.[147] The Act sought to address these concerns by specifically setting out the grounds on which name suppression could be ordered.[148] The Act also permits the granting of interim name suppression where the defendant may have an arguable case but, for example, lacks legal representation.[149]

In accordance with the principle of open justice, New Zealand judges have routinely permitted television coverage of court proceedings since 1999. This recognises the undoubtedly critical role of the media in facilitating public access to court proceedings and making the principle of open justice more of a reality.[150] Television media's access to the courts is set out in specific media guidelines.[151] These guidelines are non-binding and judges retain their full discretion to regulate proceedings as appropriate in the circumstances.

Under the guidelines, if a member of the media[152] wishes to record court proceedings for broadcast on radio or television, or wishes to take still photography, or a sketch of the courtroom[153] they must apply through the registrar of the court.[154] The judge will generally grant the application if all parties have advised their consent or non-opposition, or if the time for notifying any opposition has passed and no party has given notice of any opposition.[155] New Zealand courts very rarely prohibit the media from filming in the courtroom. The main exceptions are proceedings involving young persons,[156] or sexual offences[157] and permission

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146 See www.ccdu.govt.nz.

147 New Zealand Law Commission *Suppressing Names and Evidence* (NZLC RP109, 2009) at 17.

148 Criminal Procedures Act 2011, s 200(2). Those in effect mirror the grounds laid out in caselaw. These changes came into force in March 2012.

149 Ibid, s 200(4) and (3).

150 There has been recent debate over the prevalence of TV cameras in courtrooms. See "Cameras in the Courtroom" feature in [2012] 807 Lawtalk 4–11.

151 The guidelines apply to the District Court (except in summary proceedings), the High Court and the Court of Appeal. The Supreme Court, Environment Court and Waitangi Tribunal have separate guidelines which can be accessed at www.justice.govt.nz. Notably, under the Supreme Court's guidelines, there is a presumption that applications to televise proceedings will be allowed.

152 The guidelines adopt the definition of "media" set out in s 198(2) of the Criminal Procedure Act 2011.

153 New Zealand Ministry of Justice, *Media Guide for Reporting the Courts and Tribunals*, (3rd Edition, Wellington, 2012),[Media Guide] at [4.8].

154 The application form is set out in sch 1 of the New Zealand Ministry of Justice *In-Court Media Coverage Guidelines 2012* www.justice.govt.nz [Guidelines].

155 Guidelines, ibid, guideline 9.2.

156 Media Guide, above n 153, at [5.5]; see the Children, Young Persons, and Their Families Act 1989 s 348(1).

to cover a case may be subject to relevant restrictions imposed by the judge.[158]

If an application is granted, the guidelines set out the standard conditions for recording.[159] These include the requirement that filming in the courtroom must not be broadcast on television until at least ten minutes have elapsed. This is because, a witness at trial can, without notice, start to give evidence that is confidential or that might reflect on the fairness of another trial. The ten minute rule gives the judge time to act to avoid this kind of evidence being broadcast.

The standard conditions for recording further state that, in jury trials, jurors should not be filmed, photographed or otherwise identified, and no broadcast or photograph published may show the jury or any member of it, except when the verdict is given.

In criminal trials, witness protection from visual identification is generally available for any witness who requests it (other than the accused and certain official witnesses).[160] All witnesses in criminal trials, however, can apply for additional discretionary witness protection. If granted, a judge can make a number of orders ranging from prohibiting the filming or recording of the witness to ordering that any film or record of the witness must be modified to hide the identity of the witness.[161]

Finally, at any time during the proceedings, the judge may revoke the media applicant's permission to film, record or take still photography if: the media applicant breaches the guidelines; the judge believes the rights of a participant in the trial could be prejudiced by continued coverage; the judge believes the accused's right to a fair trial could be prejudiced by continued coverage; or if coverage of the trial is disrupting the proceedings.[162]

Following a recent highly publicised murder trial in New Zealand, questions were raised over the media's sensationalism of court proceedings. The Minister of Justice acknowledged the need for justice to be seen to be done, but expressed concern over the potentially skewed way in which the media reported the trial and the focus that was placed on family members of the accused and deceased. While a review has not been ordered, the Minister did not rule out the possibility of reform.[163]

Another issue that has been exercising the minds of judges everywhere is the challenge of new social media and increasing technological advances. New forms of instantaneous electronic communication provide the media, participants in court proceedings and members of the public with new methods of communicating information from the courtroom to the outside world. The right to a fair trial is increasingly compromised by the ability of jurors to access potentially prejudicial information through the ever-growing

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157 See ibid [4.8], and Guidelines, above n 154, guideline 8; Under s 203 of the Criminal Procedure Act 2011 complainant's in sexual cases have automatic identity suppression.

158 Guidelines, above n 154, guideline 12.7.

159 Guidelines, above n 154, sch 4 at [5].

160 Guidelines, above n 154, guideline 10.

161 Guidelines, ibid, guideline 10.8.

162 Guidelines, ibid, guideline 13.

163 Interview with Judith Collins, above n 123.

platform of the internet.[164]

In the past, trial publicity took place in traditional print, radio and television media, and thus the potential impact of that publicity on jurors was considerably lessened by the passage of time, and by practical and partial obscurity. However, technological developments over the last decade have meant that such publicity remains as fresh and available the day before a trial starts as it was a year earlier.

The rise of social media has also led to concern over its ability to impact upon the right to a fair trial. Cyber bullying, "trolling" and comments on social media sites have the potential to influence juries, while jury members' participation in social media during the trial process can prejudice the proceedings and affect how the trial is perceived. This has caused a push for further research, model guidelines and warnings, model jury directions and procedures and protocols for the removal of prejudicial material.[165]

Concern has also been expressed regarding the difficulties of maintaining identity suppression in the age of social media.[166] In a recent NZ prosecution, for example, an online blogger was ordered to pay approximately $8000 in fines and costs for illegally identifying several high profile New Zealanders protected by name suppression orders.[167]

The 2012 Media Guidelines deal with some of the issues posed by new and more instantaneous forms of electronic communication which have become available over the last decade. The 2012 Media Guide states that "electronic communication devices"[168] must, as a general rule, be turned off before entering a courtroom. They must not be used for voice calls but may be used for silent electronic communication, subject to the restrictions in the guidelines.[169]

A new provision in the 2012 Guidelines states that only members of a "recognised

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164 In the words of the Lord Chief Justice of England and Wales "Laptops which until relatively recently were large and cumbersome are now less obtrusive. Internet access which previously was only available at a dedicated wireless access point or back in the office is now available not only to the new generation of notebooks and laptops, but also to smart phones and tablet devices, all from within the confines of the courtroom": *A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting* (Judicial Office for England and Wales, 2011) at [2.2] ["Consultation Paper"].

165 The Australian Attorney General has just recently established a social media working group to report on the impact of social media and its potential to compromise jury trials. Greg Smith "Attorneys General To Examine Impact of Social Media on Trials" (press release, 5 October 2012). The International Bar Association has also recently conducted research into the impact of social media. A vast majority of those members of the IBA who participated supported the provision of guidelines for the use of social media within trial proceedings. International Bar Association "The Impact of Online Social Networking on the Legal Profession and Practice" (London, 2012). A summary of the findings can be found at 12.

166 Tom Griffith, Katie Kossian, Tania Kowalczuk "Twitter, Suppression and The Courts" (2012) 15 Internet Law Bulletin 42; David Barnfield "Effectiveness of Suppression Orders in the face of social media (2011) 33 Bulletin 16.

167 *Slater v R* [2011] NZCA 568; approving the decision of the Judge in *Police v Slater* DC Auckland CRN 004028329 – 9833 14 September 2010. See also *Siemer v Solicitor-General* [2010] NZCA 549 (name suppression order breached by publication on an online blog).

168 This includes cell phones, pagers, personal digital assistants and computers with electronic communication capabilities.

169 Media Guide, above n 153, at [4.5] except where the hearing is an appeal, on the taking of a jury's verdict, on a sentencing, during the judge's summing up, or at other times during a trial if the trial judge grants leave.

media organisation" may electronically communicate information from inside the courtroom to the outside world.[170] The electronic communication must take place as unobtrusively as possible and in such a manner as not to interfere in any way with the running of the trial. [171] Like the guidelines relating to recordings, information communicated electronically must not be published or be the subject of any publication until at least ten minutes have elapsed.[172]

Victims' Rights Act 2002

The Victims' Rights Act 2002 was enacted to give victims of crime statutory recognition in the criminal justice system for the first time. This replaced and expanded on a number of principles that had been set out in the Victims of Offences Act 1987.[173] The 1987 principles were strongly criticised both in a report of the Victims Task Force's report, *Towards Equality and Criminal Justice,* [174] and a citizen-initiated referendum in 1999.[175] It was not considered sufficient that victims could only participate in the criminal justice process at the discretion of the Judge.

The Victims' Rights Act 2002 incorporated the principles set out in the earlier Act and transformed them into legally enforceable rights. It established a regime for the treatment of victims and how information should be given to them. The Act mandated that:

(a) Victims should be treated with courtesy, compassion, and respect for their personal dignity and privacy and have access to welfare, health, counselling, medical, and legal assistance responsive to their needs.[176]

(b) Victims should be informed at the earliest practical opportunity of the services, remedies, and programmes available to them from particular agencies.[177]

(c) Victims should be informed about the progress of the criminal proceedings as well as the charges laid, the victim's role as a prosecution witness, the date and place of certain events surrounding hearings, and every final disposition of proceedings.[178]

(d) Statements about the impact of the offending on the victim should be

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170 Guidelines, above n 154, guideline 5.2. Before court begins, the media must provide suitable identification to the Registrar of the court, which shows they are a member of a recognised media organisation: Media Guide, above n 153, at [4.6]. This requirement is designed to ensure that only members of recognised media organisations can benefit from the use of the press bench. It should be noted that the 2012 guidelines have adopted the definition of "media" in s 198(2) of the Criminal Procedure Act 2011. See guideline 3.

171 Guidelines, above n 154, guideline 5.3.

172 Guidelines, above n 154, guideline 5.5.

173 This Act gave effect to New Zealand's commitment to the United Nations Declaration on the Rights of Victims of 1985.

174 Established under the Victims of Offences Act 1987 and under s 13(h) was able to make recommendations to the Minister of Justice on matters relating to victims.

175 Held on 27 Nov 1999 with an 84.5% turnout. Of those who participated 81.5% voted "yes", while only 18.5% voted no. See www.elections.org.nz.

176 Sections 7 and s 8. These are the only two principles in the Act that do not confer enforceable legal rights.

177 s 11.

178 s 12.

conveyed to the court.[179]

(e) Victims of certain specified offences[180] should have their views regarding both the defendant being released on bail[181] and the defendant being granted name suppression[182] conveyed to the court. They should also be able to participate in the process of making decisions about the offender's release from prison or release to or from home detention.[183]

(f) Victims should be told of their opportunity to request notification of an offender's impending release or escape from penal custody or compulsory detention where they committed specified offences[184], and should on request be promptly supplied with this information.[185]

The Act strengthened the position of victims. However, the use of the word "should" in relation to a number of the rights was criticised in Parliament as it was considered to downplay the enforceability of the rights included in the Act.[186]

The Act is currently in the process of being amended. In 2012 the Victims' Rights Amendment Act 2011 inserted s 21A into the principal Act. Section 21A specifies that victim impact statements may be used for purpose of giving a sentence indication under section 61 of the Criminal Procedure Act 2011. More importantly, however, are the amendments proposed in the Victims of Crime Reform Bill 2011.

The Victims of Crime Reform Bill 2011 is an omnibus bill, which proposes to amend the Victims' Rights Act 2002; the Children, Young Persons, and Their Families Act 1989; the Parole Act 2002; and the Sentencing Act 2002, to:[187]

(a) strengthen existing legislation to provide better for victims of crime;

(b) broaden the rights of victims of serious offences;

(c) provide more opportunities for victims to be involved in criminal justice processes;

(d) ensure victims are better informed of their rights;

(e) increase responsible government agencies' accountability and responsiveness to victims; and

(f) apply consistent victim rights in adult and youth criminal jurisdictions.

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179 ss 17–27.
180 s 29.
181 s 30.
182 s 28.
183 s 47.
184 s 29.
185 ss 35–39.
186 (5 Oct 1999) Second Reading, Hon. Phil Goff.
187 Victims of Crime Reform Bill 2011, commentary contained in Bill.

The proposed amendments aim to give victims a greater voice in criminal proceedings as well as enhancing appreciation of victims' views about offending. Opinion is divided on the extent to which victims should be encouraged to "take control" of criminal proceedings. It has been suggested that too much involvement of victims could create a fundamental shift in the balance of criminal justice and could merely fuel a desire for retribution. [188] There has also been concern expressed that the involvement of victims to such an extent in the criminal justice process may not aid their recovery.[189]

In a submission to the Select Committee on the Bill, the Chief Judges of the High Court and District Court expressed concern over the enlargement of the purposes of victim impact statements. Under the current s 17AB of the Bill, victim impact statements are to assist the court in understanding the victims' views about the offending and inform offender about the impact of the offending. The concern of the Chief Judges was that these purposes will create unrealisable expectations for the victim which risks further trauma and upset and undermining confidence in the judiciary. Moreover, victims could misconstrue these provisions as an entitlement to express a view on an appropriate sentence. But there is no provision in the Sentencing Act 2002 to take into account victims' views on the sentence to be imposed and this would, in any event, conflict with a fundamental principle of sentencing that like offenders should be treated alike. [190]

The Select Committee's report was presented in June 2012.[191] The Bill is yet to have its second reading.

Sentencing Act 2002

The Sentencing Act 2002 codified the common law rules and provided for a principled approach to sentencing with aim of ensuring consistency of sentencing. The Act attempts to address and balance the interests of offenders, the public and victims. The purposes for which a court can sentence an individual therefore include: to provide for the interests of the victim; to provide reparation for harm done by the offending; to denounce the conduct in which the offender was involved; to deter others from offending; to protect the community from the offender; and to assist in the offender's rehabilitation,[192]

In determining a sentence, the court must take into account a number of factors, including: the gravity of the offending and the culpability of the offender; the seriousness of the offending in the specific case in light of the maximum sentence; the need for consistency; the impact on the victim; the particular circumstances of the offender and their family and community background, and the outcome of any restorative justice programs that have occurred.

The principles set out in the Act have been supplemented by guideline judgments

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188 See Rethinking Crime and Punishment *Submission to the Electoral Select Committee on the Victims of Crime Reform Bill* (20 October 2011).

189 For further discussion of the controversy, see Warren Brookbanks "Victims and the Criminal Justice System: When is Enough, Enough? (paper presented to the 13th Criminal Law Congress, Queenstown, 15 September 2012) www.crimlaw2012.com; see also Ian Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 Br J Criminal 967.

190 Chief Judges of the High and District Courts *Re Victims of Crime Reform Bill* (12 March 2012).

191 Justice and Electoral Committee *Victims of Crime Reform Bill* (27 June 2012).

192 Sentencing Act 2002, s 7.

produced by the higher courts.[193] Guideline judgments offer authoritative guidance that is not fact-specific, and are therefore capable of general application. While there is no statutory basis for the giving of guideline judgments, they are accepted as authoritative.[194] They are aimed at advancing consistency in sentencing while still maintaining the discretion of sentencing judges and leaving room for individual justice.[195] Sentencing guidelines specify sentence starting points for certain offences, and categories of offences, and set out how mitigating and aggravating features of the offending should be addressed. [196] Mitigating and aggravating factors relating to the particular offender (including discounts for guilty pleas[197]) are considered separately. Parties currently provide full submissions on sentencing and it is common practice for the prosecution to include suggested sentencing levels based on caselaw.

There have been recent cases in the New Zealand Court of Appeal considering the sentencing of mentally ill and youth offenders. In *Churchward v R, t*he Court of Appeal noted age-related neurological differences between young people and adults, the negative impact that imprisonment could have on young persons and their capacity for rehabilitation. The Court considered that the age of a defendant could be a mitigating factor for a minimum non-parole period in a murder case.[198] In *R v Goodlet* the Court of Appeal affirmed the relevance of mental illness to sentencing and stated that mental illness could either mitigate a sentence if it suggested reduced culpability, or increase it if the illness suggested a increased risk of repetition of offending.[199]

Appeals

Broadly, appeals from sentence and conviction in jury trials are made to the Court of Appeal (where they are heard by panels of three judges).[200] This applies whether the jury trial occurred in the District Court or the High Court. For other offences, there is an automatic right to appeal to the High Court, where the appeal is heard usually by a single judge only.[201] A defendant can have a second appeal to the Court of Appeal either with the leave of the High Court or, if this is refused, with the special leave of the Court of Appeal.[202] In either

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193 In 2007 the Government enacted the Sentencing Council Act, which was to establish an independent body tasked with issuing guidelines on sentencing and parole. This was aimed at promoting consistency in sentencing and parole decisions and providing a vehicle for informing both government and the public on sentencing practice and reform. Following a change of government in 2008, however, the Council was never established. See *Hessell v R* [2010] NZSC 135; [2011] 1 NZLR 607 (SC) at [13].

194 See *Practice Note – Sentencing 2003* [2003] 2 NZLR 575; *Hessell v R*, ibid, at [13].

195 *R v Taueki* [2005] 3 NZLR 372 (CA), at [10].

196 See for example *Taueki* ibid, and *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750. Court of Appeal guideline judgments are only given for serious offences.

197 The Supreme Court in *Hessell v R* [2010] NZSC 135; [2011] 1 NZLR 607 (SC) held that reductions for guilty pleas could be no more than 25% reduction. Concern has been raised over the pressure that such incentives place on defendants to plead guilty: see A. Ashworth and M. Redmayne, *The Criminal Process*, (4th ed, Oxford University Press, Oxford, 2010) at 310–20; and P Darbyshire, "The Mischief of Plea Bargaining and Sentencing Rewards," [2000] Crim. L. Rev. 895.

198 *Churchward v R* [2011] NZCA 531; (2011) 25 CRNZ 446 at [78]–[79].

199 *R v Goodlet* [2011] NZCA 357, [2011] 3 NZLR 783 at [5], [21], [35], [36]; *E v R* [2011] NZCA 13, (2011) 25 CRNZ 411.

200 This also applies to sentence appeals for serious offences. Crimes Act 1961, s 383. This is in accordance with s 25(h) of the New Zealand Bill of Rights

201 Summary Proceedings Act 1957, s 115.

202 Ibid, s 144.

case, a further appeal to the Supreme Court can only be made with the Court's leave, and only on a matter of law. Leave will only be granted if the Supreme 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; or the appeal involves a matter of general commercial significance.[203]

Under s 385(1) of the Crimes Act, the Court of Appeal and Supreme Court must allow any appeal where it can be shown that: the jury's verdict is unreasonable or cannot be supported having regard to the evidence; the judgment of the lower court was wrong on a question of law; or there was a miscarriage of justice; or the trial was a nullity.[204]

The Supreme Court has held that the phrase "unsupported by the evidence" in s 385(1) is of no practical significance. A verdict that was "unsupported" by the evidence was necessarily an unreasonable verdict. A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty. [205] The Court also endorsed an earlier Court of Appeal case[206] in which it was noted that a court hearing an appeal should always to keep in mind that its role was to perform a review function and not to substitute its own view of the evidence. The body charged with finding the facts is the jury and the weight to be given to individual pieces of evidence is essentially a jury function. Reasonable minds may disagree on matters of fact. An appellate court should also give appropriate weight to such advantages as the jury may have had over the appellate court.[207] However, an appellant appealing a decision on the basis of an unreasonable verdict must articulate their case clearly and precisely.[208]

If a defendant alleges incompetence on the part of his or her trial counsel he or she must demonstrate that a miscarriage of justice has occurred.[209] This can occur in two general ways.[210] The first is when something has gone wrong with the trial, and has led to a real risk of an unsafe verdict.[211] The second is where the trial counsel's conduct can be shown to have amounted to a denial of the defendant's right to a fair trial contained in s 25(a) of the Bill of Rights, in which case there is no need to also demonstrate that the verdict was unsafe.[212]

Section 385(1) includes the proviso that "the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred". The Supreme Court has stated that the proviso should not be applied unless the court is satisfied that the verdicts were inevitable in the sense of being the only reasonably possible verdicts on all the admissible evidence. Importantly, the court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict; the court must itself feel sure of the guilt of the accused. Before

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203 Supreme Court Act 2003, ss 12 and 13.
204 Crimes Act 1961, s 385(1).
205 *R v Owen* [2007] NZSC 102; [2008] 2 NZLR 37 at [12].
206 *R v Munro* [2008] 2 NZLR 87 (CA).
207 The Court of Appeal in *R v Munro* did, however, acknowledge that there were issues in assessing the credibility of witnesses, but considered that an appellate court may not be in any better position, ibid, at [81]–[83].
208 *R v Owen*, above n 205, at [13]–[14]. Citing *R v Munro* ibid.
209 Section 385(1)(c) of the Crimes Act 1961.
210 *R v Sungsuwan* [2006] 1 NZLR 730; [2006] 1 NZLR 730 at [6].
211 Ibid, at [69]–[70] and [110],
212 Ibid, at [111]–[112].

applying the proviso, the court must also be satisfied that the trial was fair and thus that there was no breach of the right guaranteed to the accused by s 25(a) of the Bill of Rights.[213]

The final avenue for those who may have suffered a miscarriage of justice is the Royal Prerogative of Mercy in accordance with which the Governor-General may '[g]rant, to any person concerned in the commission of any offence for which he may be tried in any court in New Zealand ... or to any person convicted of any offence in any such court, a pardon, either free or subject to lawful conditions'.[214] This is supplemented by s 406 of the Crimes Act, under which the Governor General may refer the matter back to the relevant appeal court for reconsideration or seek the Court of Appeal's opinion on matters raised by the case.[215]

The Criminal Procedures Act 2011 has also streamlined and clarified the appeal process.[216] First, the Act sets out the grounds on which all appeals must be allowed. These largely reflect the grounds set out in s 385(1) of the Crimes Act.[217] In addition to this, however, the Act defines "miscarriage of justice" as any error, irregularity, or occurrence in or in relation to or affecting the trial 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.[218] The purpose of setting out the grounds for allowing appeals was to integrate the proviso in s 385 into the specified grounds.[219]

Secondly, the Act categorises appeals as first appeal, second appeal and further appeal. The court of first appeal will depend on what court the defendant was initially convicted in, and therefore the nature of the offence.[220] However, first instance appeals arising from jury trials will continue to be heard in the Court of Appeal.[221]

Conclusion

The recent reforms reflect a balance between the promotion of efficiency within the criminal justice system and the promotion of the interests of those involved in the proceedings, including both the defendants' right to a fair trial and concern for the interests of

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213 *R v Matenga* [2009] 3 NZLR 145 (SC) at [30] referring to the High Court of Australia case *Weiss v R* (2005) 224 CLR 300; (2005) 223 ALR 662 (HCA).

214 Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225), cl XI(a).

215 For more information see Malcolm Birdling "Correction of Miscarriages of Justice in New Zealand and England" (DPIL Thesis, University of Oxford, 2012) ora.ox.ac.uk.

216 These changes are expected to come into force in mid-2013.

217 Criminal Procedures Act 2011, s 232(2). The grounds are: that the jury's verdict was unreasonable; that Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or that a miscarriage of justice has occurred for any reason

218 Ibid, s 232(4). For a discussion of on miscarriages of justice in the New Zealand context, see Sir Thomas Thorp, *Miscarriages of Justice* (2005); *Miscarriages of Justice*, Legal Research Foundation Seminar, New Zealand (24 February 2006).

219 See Criminal Procedure (Reform and Simplification) Bill 2010, explanatory note, at 12. It can be assumed that this intention continue in the enacted provisions as they were not substantively altered prior to enactment. As the Act did not amend s 385 of the Crimes Act, it is yet to be seen whether the new provision renders the proviso redundant. It also remains to be seen whether the slight changes in wording will affect how appeals are decided.

220 Criminal Procedure Act 2011, s 229-243 (appeals from conviction). The right to a third appeal is only with the leave of the Supreme Court and must be on a matter of law: s 243.

221 Ibid, s 230(c). Except for appeals from sentence alone that were heard in the District Court, the appellant pleaded guilty and the sentence appealed is not for more than 5 years imprisonment. See s 247(c).

witnesses and victims. For many of these developments, time is yet to tell whether this balance has been achieved.