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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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*Report 66*

# Criminal Prosecution

*October 2000*  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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16 October 2000

Dear Minister

I am pleased to submit to you Report 66 of the Law Commission, *Criminal Prosecution*, which is part of the continuing reference to the Commission to review the law, structure and practices governing procedure in criminal cases.

We have concluded that the current criminal justice system is, by and large, effective and respectful of human rights. Radical change is not required but existing structures can be modified in many respects to make the system fairer as well as more efficient.

A broad analysis of the issues relating to Māori was beyond the scope of this paper. It is nevertheless clear that many Māori consider that the existing system is monocultural and even hostile to them. Further work is required in this area.

Yours sincerely

*The Hon Justice Baragwanath*  
President

*The Hon Phil Goff*  
Minister of Justice  
Parliament Buildings  
Wellington

*The Hon Margaret Wilson*  
Associate Minister of Justice  
Parliament Buildings  
Wellington



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# Preface

IN AUGUST 1989 THE LAW COMMISSION was asked by the Minister of Justice to devise a system of criminal procedure for New Zealand that would:

- ensure the law conforms to New Zealand's obligations under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi;
- ensure the fair trial of accused persons;
- protect the rights and freedoms of all persons suspected or accused of offences; and
- provide efficient and effective procedures for the prosecution of offences and the hearing of criminal cases.

With these purposes in mind the Law Commission was asked to examine the law, structures and practices governing procedure in criminal cases from the time an offence is suspected to have been committed until an offender is convicted.

This report is the tenth in a series of Law Commission publications on aspects of criminal procedure. Previous papers published by the Commission are:

- *Criminal Procedure: Part One: Disclosure and Committal* NZLC R14 (1990)
- *The Prosecution of Offences* NZLC PP12 (1990)
- *Criminal Evidence: Police Questioning* NZLC PP21 (1992)
- *Police Questioning* NZLC R31 (1994)
- *The Privilege Against Self-Incrimination* NZLC PP25 (1996)
- *Criminal Prosecution* NZLC PP28 (1997)
- *Juries in Criminal Trials: Part One* NZLC PP32 (1998)
- *Juries in Criminal Trials: Part Two* NZLC PP37 (1999)
- *Costs in Criminal Cases* NZLC R60 (2000)

After the release of its discussion paper, *Criminal Prosecution* NZLC PP28 (1997) ('the Discussion Paper') the Commission undertook

consultations with interested parties. Written submissions were received from 38 parties, including judges, lawyers, academics, community organisations and interest groups.<sup>1</sup> We are very grateful for the helpful comments on our proposals. However, we emphasise that the views expressed and the recommendations made in this report, except where expressly acknowledged in the text, are those of the Law Commission and not necessarily of the people who helped us. This report has been prepared under the guidance of Mr Tim Brewer, the Commissioner responsible for the criminal procedure reference, but many others have been involved. The discussion paper that preceded this report was prepared by Mr Les Atkins QC, now Judge Atkins, when he was a Commissioner. The Commission also acknowledges the very great assistance of Mr Jim Cameron, a former Commissioner, and its researchers – in particular Ms Louise Symons.

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<sup>1</sup> A list of submitters is set out in appendix B.

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# 1

## The prosecution system – its objectives and the scope of this report

### ASSESSMENT OF THE PROSECUTIONS SYSTEM IN TERMS OF ITS OBJECTIVES

1 THE OBJECTIVES of the prosecution system (as identified in *Criminal Prosecution NZLC PP28 (1997)* ‘the Discussion Paper’ are:

- to subject offenders to the processes of the law;
- to ensure that law and practice conform to the principles of te ao Māori (the Māori dimension) and the Treaty of Waitangi;
- to ensure that the human rights and dignity of persons suspected or accused of offences are respected and that they are not placed in jeopardy without sufficient cause;
- to ensure that the interests of victims are secured;
- to limit the use of formal prosecutions to cases where that is the only appropriate method of dealing with a person who has broken the law;
- to ensure that prosecution decisions are made in a fair, consistent and transparent manner and that those who make the decisions are accountable;
- to ensure the prosecution system is economic and efficient; and
- to reflect the aspirations of New Zealanders.

Many of these objectives compete with one another. For instance, the right of an accused person to a free and public hearing may conflict with the privacy interests of a victim of a sexual crime. In such cases, a principled balancing exercise is called for. In some situations one objective may predominate.

2 After assessing the current system against these objectives we concluded that, by and large, the system is effective and respects human rights. It also processes large volumes of cases effectively, reasonably quickly and results in the successful prosecution of large

numbers of offenders.<sup>2</sup> However, existing strengths in the system are more a consequence of luck than design. Our prosecution system remains today essentially the English system of the mid-nineteenth century, modified by piecemeal change. The system does not fully meet many of its objectives and is less efficient than it might be. In particular, we have observed that:

- some cases go further through the legal process than they need to; some cases unnecessarily go to trial, some are unnecessarily prosecuted, while others are less well prepared than they might be;
- until a recent change of policy, on which the police are to be congratulated, the fusing of investigation, arrest, and prosecution functions in the police could give the impression of unfairness;
- the relative indifference of the system towards victims heightens perceptions of unfairness;
- a high degree of decentralisation has resulted in inconsistency in prosecution decisions; and
- lines of accountability are uncertain and mechanisms for oversight and control inadequate.

3 This report contains the Commission's reform proposals to address these problems. Given that the prosecution system is not fundamentally flawed or in need of radical reform, we have concluded that the most effective solution is to modify existing structures to maximise efficiencies. However, it is not enough to deal with these faults bit by bit. The prosecution system needs to be considered as a whole and reformed according to coherent principles. At stake is the rule of law. Any reform must promote adequate minimum standards of common decency and fair play; and maintain the principles of democracy, freedom and equality.<sup>3</sup>

4 As a consequence of the deficiencies identified, and the values that must be protected, a number of key themes have been developed in this report. Guiding these reform proposals are the following conclusions:

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<sup>2</sup> In 1989 and 1990, 70 per cent of all prosecutions resulted in conviction. This proportion has gradually decreased, reaching 63 per cent in 1998. The decrease is probably due to the increased use of police diversion: *Spier Conviction and Sentencing of Offenders in New Zealand: 1989 to 1998* (Ministry of Justice, Wellington, 1999) 6.

<sup>3</sup> See generally Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Limited, Sydney, 1993) chapter 7; Finnis (ed) *Natural Law (Vol II)* (Dartmouth, Aldershot, 1991).

- Investigation and prosecution of offences are fundamentally the responsibility of the State.
- Prosecution should be separated from investigation. Separation of these two key functions ensures that there are checks and balances incorporated into the system to protect the individual. It also promotes impartiality and ultimately respect for the criminal justice system and the rule of law. A separate evaluation of a case by someone who is independent, and seen to be independent, of the investigation process:
  - helps to ensure the prosecution decision is not prompted by bias or prejudice;
  - lessens the chance of corruption or improper motives; and
  - brings greater independent judgment to bear.
- Prosecution decisions must be exercised in a *consistent* way in order to be fair. Where possible, discretions and decisions should be exercised in accordance with publicly available guidelines developed by the Solicitor-General.
- Decision-making processes should be transparent.
- Those who make the decisions should be accountable for them.
- Accountability for and consistency of decisions requires a satisfactory level of *control* over the prosecution system through Crown Solicitors, the Crown Law Office and ultimately by the Solicitor-General.
- Clear lines and forms of administrative accountability are a corollary of proper control mechanisms.

## SCOPE OF THIS REPORT

- 5 The purpose of this report is to set out the Law Commission's final conclusions on the legal and administrative structures, procedures and agencies involved in prosecuting criminal offenders. The report begins by considering some of the fundamental issues overarching the entire prosecution system, such as who should have constitutional responsibility for the prosecution system. It then moves on to address the specific machinery, such as a comprehensive disclosure regime, which we have devised in order to promote the key objectives.
- 6 In chapter 2 we examine the reform models available for the criminal prosecution system. We assess the alternatives and confirm the key finding of the views expressed in the Discussion Paper that the most effective means of remedying deficiencies in the prosecution system is to build upon existing strengths, rather than

to adopt an alternative model such as privatisation or a Crown prosecution service.

- 7 In chapter 3 we consider overarching issues relating to control and accountability. We set out proposals for improving control over the system, by promoting accountability for prosecution decisions, and increasing powers of oversight. We examine some fundamental constitutional issues, such as the nature of prosecutor autonomy and the need for freedom from political influence. In that regard, the position of the Attorney-General is paradoxical and requires special consideration; he or she is the individual ultimately responsible for the prosecution system and has a duty to discharge the office impartially. However, as a matter of convention, the Attorney-General is also a member of Cabinet and the political arm of the executive. Principled grounds for the exercise of the Attorney General's powers are identified and considered, as is the appropriate role of Ministers in charge of prosecuting agencies such as departments of state.
- 8 In chapters 4 (Prosecutors' Powers), 5 (Prosecution Decisions and the Discretion to Prosecute), 6 (Court Review and Supervision of the Discretion to Prosecute), 7 (Preliminary Hearings), 8 (Criminal Disclosure), and 9 (Charge Negotiation), we set out specific reforms designed to promote the identified objectives of the prosecution system. In particular we examine:
- the discretion to prosecute, and how it should be exercised;
  - court control and review of prosecution decisions through section 347 of the Crimes Act 1961. We also consider the position in relation to Crown appeals and recommend that an appeal right on specified grounds should be introduced;
  - the role of Crown Solicitors as independent prosecutors and how it can be enhanced. We also review the new police prosecution service, and look again at governmental prosecuting agencies;
  - charge negotiation. We recommend that the existing practice of charge negotiation should be promoted but strengthened and regulated through publicly available guidelines. We also review status hearings as a forum for charge negotiation and recommend legislative intervention;
  - preliminary hearings and how they can be streamlined to promote the efficient use of court and police resources; and
  - a comprehensive criminal disclosure regime that is an essential corollary of our proposed reforms to preliminary hearings.



## MATTERS OUTSIDE THIS REPORT

- 9 There are important elements of the prosecution system that do not fall within the scope of this report (either because review is not warranted or, if it is, because those elements will form an entire project). In particular, we do not at this stage make concluded reform proposals upon:

### *Alternatives to prosecution*

Alternatives to formal court processing and sanction are an important feature of our existing system. Whilst we outlined in the Discussion Paper some of the important alternatives (such as diversion schemes and family group conferences), and considered restorative justice, a detailed reform appraisal is beyond the scope of this work.

### *Victims in the prosecution system*

One objective of the prosecution system should be to ensure that victims' interests are secured. However, victims' interests have not historically been to the fore. The State has traditionally assumed the responsibility for investigating and prosecuting all reported crime on behalf of society generally. The role of victims is limited to that of a witness and the victims are to a large extent marginalised by the process. The Discussion Paper therefore proposed that the position of victims in the prosecution system should be strengthened by reviewing and amending the Victims of Offences Act 1987 and amending the Solicitor-General's Prosecution Guidelines to ensure that both oblige prosecutors to consult with victims and to provide them with information about the progress of the prosecution. The Commission considered that all prosecuting agencies should take account of victims' interests. In our subsequent paper *Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*,<sup>4</sup> we recommended opportunities be given for Māori groups, organisations and providers to share and participate in the formulation and delivery of services for Māori and, in particular, services for victims.

The Discussion Paper also asked a more fundamental question: should victims' interests be given greater weight by creating rights

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<sup>4</sup> New Zealand Law Commission *Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*, NZLC R53 (Wellington, 1999) [*Justice: The Experiences of Māori Women*].

and methods of enforcement? We also asked whether the Ministry of Justice should co-ordinate policy-making for victims, and whether the Victims of Offences Act 1987 should be reviewed, and, if so, what should be taken into account in such a review. Six months after the Discussion Paper was published, Cabinet approved terms of reference for a review of support services for victims of crime and directed the Ministry of Justice to lead a working group. That working group has undertaken a substantial review of the area, leading to a number of proposed changes. In the 2000 Budget, Support for Victims was included as a specific output class (Vote: Justice) for the first time, and allocated \$1.785 million. The Victims' Rights Bill 1999 is currently before the House, but its final form is still under consideration. We expect that, amongst other things, it will ensure that victims' rights are made properly enforceable, place specific obligations upon designated government agencies to ensure that victims' rights are fulfilled, and improve procedures relating to victim impact statements.

Given the substantial progress that has been made in relation to victims since our Discussion Paper was published, and the ongoing work by the Ministry of Justice in this area, we do not intend to address the matter further in this report.

### *Te ao Māori*

The Commission considers te ao Māori (the Māori dimension) and the Treaty of Waitangi in relation to all its work, and has a number of projects that address important issues for Māori within the broader justice area.

In the Discussion Paper we set out the results of some preliminary enquiries that included sponsoring a one-day hui for a number of Māori working with Māori in the criminal justice system. As we reported in the Discussion Paper, there was a consensus that many Māori believe the criminal justice system as a whole is defective in that it does not adequately take account of Māori values nor meet Māori needs. The hui participants were people of experience, with practical knowledge of the impact on Māori of the criminal law and the criminal justice system. The 17 matters of concern that they identified (in the context of oral discussion) have been repeated and confirmed by subsequent work that the Commission has undertaken. For example, in *Justice: The Experiences of Māori Women*,<sup>5</sup> which discusses issues that contribute to the perception

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<sup>5</sup> *Justice: The Experiences of Māori Women*, above n 4, chapter 3.

by Māori women that they are treated as if they are of little value by the justice system – including the criminal justice system – and are thus unable to participate in it. Those perceptions are equally applicable in relation to Māori men and women involved in the criminal prosecution system. It was confirmed to the Law Commission again and again that many Māori feel that the processes of the system are often unfair and that the system is particularly hostile to them because it is monocultural. Monocultural attitudes are perceived to result in a systemic bias and unfairness that denies justice to Māori. This perception of unfairness highlights the need for transparency and accountability by all those exercising discretionary powers within the prosecution system, and highlights the need to ensure that transparency and accountability are consistent themes of this report.

It was the intention of the Commission to follow up these themes in a project tentatively entitled *Alternatives to Prosecution*. The work we performed in that project again highlighted the alienation from the criminal justice system seen by many Māori and which has led Māori to call for expanded diversion schemes, development of restorative justice projects and protocols or memoranda of understanding between police and iwi groups. It also made clear that there is a real need for practical, grassroots approaches such as those suggested, which not only address offending but also empower communities and encourage family and community participation.

The Law Commission, however, will not now continue with the *Alternatives to Prosecution* project. This is because we learned from the Ministry of Justice's briefing paper to the incoming government that the Ministry has a similar project that is considerably more advanced than our own:

The Ministry is undertaking a Māori Perspectives on Justice project to identify Māori values, cultural beliefs, practices, and principles related to justice. The study will provide an overview of Māori perspectives of tika or rightness rather than prescribe how the criminal justice system of New Zealand might work. The study will provide a better insight into the Māori dimension in regard to justice matters, enhancing the Ministry's capability to find solutions for social issues that continue to plague the lives of a significant proportion of Māori. The first draft is almost completed.<sup>6</sup>

Accordingly, the Commission will do what it can to assist the Ministry of Justice in preparing and implementing its report.

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<sup>6</sup> Ministry of Justice 1999 *Ministry of Justice Post Election Briefing for Incoming Ministers*, appendix 2.

Perhaps because the Discussion Paper made it clear that the Commission's investigation of the criminal prosecution process would not extend to a comprehensive review of the criminal justice system as it pertains to Māori, we did not receive a great deal of comment on these proposals. The proposals are, perhaps, modest but worthwhile nonetheless. The Commission recommends that:

- Police prosecutors should be trained in tikanga Māori, with a view to improved understanding of and sensitivity to Māori cultural values.
- The recruitment of more Māori police and police prosecutors should be encouraged.
- The appointment of Māori within the Crown prosecution system should be encouraged.
- All Crown Solicitors should receive training in tikanga Māori, with a view to improved understanding of and sensitivity to Māori cultural values.
- Court staff and lawyers should emulate the initiatives of judges to improve their understanding of and sensitivity to Māori cultural values. Training should be ongoing.
- Judges, counsel and court officials should be able to pronounce Māori words and names properly.
- The involvement of more Māori personnel in court processes as judges, Justices of the Peace, lawyers and court staff should be encouraged.

Generally, those who responded to the Discussion Paper did not favour delaying the changes proposed pending a wider review, except a lawyer and police officer, who (in a joint submission) thought the necessary training and understanding could not be achieved quickly, would be insufficient, and had an attendant risk of tokenism. They suggest utilising existing Māori 'experts' throughout the country as funded Māori advisers in a role similar to friends at court.

The police also thought that the proposals were inadequate. They saw the proposals as history attempting to repeat itself by "adding more Māori people to a mono-culturally driven system [which] does nothing to change the outcome for Māori".

The New Zealand Law Society supported the proposals but considered them insufficient to address significant structural and operational concerns; they believe wider review and change is necessary. The Ministry of Justice made no comment pending the outcome of its project on responses to offending by Māori.

Having considered the submissions, the Commission still considers the proposals outlined in the discussion paper useful, although modest, and reaffirms them. The Commission sees no reason why such practical recommendations should not be instigated at once. The Commission also considers that its recommendations in the report that require fairness, transparency and accountability of all those exercising powers within the prosecution system will contribute to fairer processes for both Māori and non-Māori.

There was little comment on whether there should be a full review of the criminal justice system with a view to meeting Māori concerns and, if so, what body is best placed to undertake such an examination. Much the fullest comment came from the New Zealand Law Society Criminal Law Committee which recommended a Royal Commission to review the whole criminal justice system, including consideration of a separate justice system for Māori. The Youth Law Project also favoured a full review (but had no opinion on what body might do it).

### *Minor offences and infringement notices*

The Discussion Paper asked whether minor offence and infringement notice procedures should be used more widely, thereby limiting formal trials to cases that warrant a hearing. Of those submissions that addressed this issue, all supported the suggestion, some enthusiastically. None were opposed. The Commission has recently sought a reference to consider the consolidation, rationalisation and simplification of the criminal procedure statutes. The new project would include a close examination of these issues.

## THE ASSUMPTIONS OF THIS REPORT

- 10 For the purposes of the Discussion Paper, and in this report, the Commission made the following assumptions:
- the existing division of offences into summary and indictable offences would continue – at least in the short term. In our discussion paper *Juries in Criminal Trials: Part One*<sup>7</sup> it was suggested that the division of summary and indictable offences is no longer meaningful to determine the court and mode of trial suitable for an offence. Accordingly, that paper suggested

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<sup>7</sup> New Zealand Law Commission *Juries in Criminal Trials: Part One*: NZLC PP32 (Wellington, 1998) para 150.

that the summary/indictable distinction be abolished. This would be addressed in the proposed project on consolidation, rationalisation and simplification of the criminal procedure statutes. Whilst we assume for the purposes of this report that the division will continue, we reiterate the need for legislative attention in order to bring coherence to this area of criminal procedure;

- the adversarial nature of prosecution in New Zealand should not be changed; and
  - the discretion to prosecute should be retained. We consider this issue in chapter 5.
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## 2

# The structure of the prosecution system in New Zealand

### WHAT ARE THE OPTIONS FOR REFORM?

- 11 **T**HE DISCUSSION PAPER outlined three options for reform of the structure of the prosecution system:
- privatising prosecution services;
  - establishing an independent Crown prosecution service; and
  - building on and adapting the present structure.
- 12 The Commission said that the best reform option was to build upon existing strengths of the present structure. After considering the submissions, the Commission has not changed its view.

### **Privatisation of prosecution services**

- 13 The Commission does not favour further privatisation of the prosecution system.
- 14 The State has the right to create and define criminal offences.<sup>8</sup> No behaviour is criminal until Parliament, on behalf of the public, deems that behaviour harmful and passes legislation to make it an offence. The Solicitor-General's Prosecution Guidelines (referred

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<sup>8</sup> Section 9 of the Crimes Act 1961 provides:

No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom:

Provided that—

- (a) Nothing in this section shall limit or affect the power or authority of the House of Representatives or of any Court to punish for contempt;
- (b) Nothing in this section shall limit or affect the jurisdiction or powers of any Court Martial, or of any officer in any of the New Zealand forces.

to in this report as ‘the Guidelines’, and reproduced in appendix C) provide:<sup>9</sup>

Behaviour classified as criminal has been deemed so harmful to society generally that the State, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.

- 15 The Commission believes that the preservation of the public peace and the prosecution of offences are essential responsibilities of the State. Under our existing system the Attorney-General has the ultimate constitutional responsibility for the conduct of State (or public) prosecutions, and the power to stay private prosecutions. The Solicitor-General has responsibility for the day-to-day functioning of the criminal prosecution system (see paragraphs 35-37 below). The reality, therefore, is that a crime is treated as belonging first to the State, and only secondly to the victim/complainant, although there is increasing awareness of the need for victims’ interests to be considered. The public utility of criminal law, and the prosecution system generally, weigh heavily in favour of retaining centralised state control. Existing constitutional practice reflects this.
- 16 Privatisation of the *discretion to prosecute* was not favoured in the Discussion Paper, and the Commission’s view remains unchanged. This is not an area where the economic principle of competition should predominate. Public interest factors, including consistency of decision-making, are paramount, rather than cost. The discretion itself is a part of the fundamental responsibility of the State to carry out prosecutions.
- 17 Whilst contracting out the *conduct of prosecutions* in court is not subject to the same criticisms as privatisation of the discretion to prosecute, the Commission has accepted as a fundamental goal that investigation and prosecution functions should be separated wherever possible (see paragraph 4 above, and Discussion Paper, paragraphs 325–328). There is a danger that investigating agencies that contract out their prosecution function could see themselves as entitled to direct the prosecution decisions in ways contrary to the fundamental goal of separation. Conversely, those who win a contract to prosecute would have an interest in keeping the investigating agency ‘happy’.

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<sup>9</sup> Solicitor-General’s Prosecution Guidelines, para 1.2.



18 A number of submissions pointed out the existing private aspects of the current system such as the remuneration of Crown Solicitors on an hourly rate, and the use of panel prosecutors. Further privatisation was not favoured, although some respondents suggested that a wider use of lawyers other than Crown Solicitors and panel prosecutors might be advantageous. The existence of private organisations undertaking prosecutions was a matter of some comment. This issue is covered in detail in chapter 10.

## **A Crown Prosecution Service for New Zealand?**

19 The Discussion Paper asked whether it was appropriate to establish a stand-alone Crown Prosecution Service in New Zealand, and reached a preliminary view, mainly for practical reasons of efficiency and economy, that it was not the best option. Instead, the Commission proposed a number of improvements to the existing system. However, the Commission did indicate that a factor strongly in favour of a Crown Prosecution Service was the former lack of clear separation between investigation and prosecution functions within the police and prosecuting agencies generally.

20 There was a clear division of views on this issue in the submissions. Those favouring a Crown Prosecution Service included some judges, the New Zealand Law Society (as a preferred option) and an ex-police officer. Desire for a Crown Prosecution Service arose mainly from concern about the conduct of summary prosecutions, and the lack of separation of investigation and prosecution roles in the police. By contrast, the four government departments that responded in writing opposed a Crown Prosecution Service, as did the Crown Law Office and Crown Solicitors. The police were also opposed. The Ministry of Justice expressed no firm preference; its major concern was that such a fundamental change would be more costly than the present system.

21 The police have responded to the concerns about the conduct of summary prosecutions by creating a prosecution service to ensure separation of prosecution and investigation functions. This is outlined in paragraphs 112–118 of this report.

22 There was almost universal acceptance by prosecuting agencies that prosecution functions should be separated from investigative ones. There was also widespread dissatisfaction at the present standard of summary prosecutions.

23 Prosecuting agencies consulted by the Commission indicated a strong willingness to review their current prosecution systems with a view to developing their own prosecution guidelines, using the

Solicitor-General's guidelines as a blue-print. We consider this development critical to prosecuting agencies and their role in the prosecution system. We also recommend in this report that a specialist team within the Crown Law Office be established, in part in order to assist prosecuting agencies in developing their own guidelines (see paragraphs 67–69).

- 24 Since publishing the Discussion Paper, the Commission has been encouraged in its view by the recent restructuring of the English Crown Prosecution Service which brings the English model closer to the existing New Zealand system of Crown Solicitors. In his report Sir Iain Glidewell considered that national centralisation of the service in 13 geographical areas was not working and recommended, amongst other changes, a reorganisation into 42 areas (corresponding with police force areas) and the appointment of a Chief Crown Prosecutor to run each area. The 42 Chief Crown Prosecutors were appointed in late 1999, and the Service is now operating under Sir Iain's new structures.<sup>10</sup>
- 25 In view of the progress the police have made to implement changes in their prosecution structure and the willingness of prosecuting agencies to do the same, the Commission remains of the view that it is unnecessary to introduce a Crown Prosecution Service for New Zealand. However, we reiterate the importance of the principle of separation of prosecution and investigation functions for all prosecuting agencies.

### **Improving the present structure**

- 26 In our view the preferable model for reform is to build upon the considerable strengths of the current prosecution system in order to overcome its identified limitations. We consider that change to the existing system and structures should be made only when it is demonstrably necessary. Nothing in our review of the prosecution system indicated such radical flaws that would warrant an entirely new model for prosecution services.
- 27 We believe the recommendations in this report will ensure separation of investigation and prosecution functions, and increase accountability, transparency, and public control over prosecution decisions. An improvement in the standard of prosecutions, without significantly greater use of resources, is also likely.

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<sup>10</sup> *The Review of the Crown Prosecution Service: A Report* (Chairman: Rt Hon Sire Iain Glidewell, The Stationery Office, London, 1998).

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## 3

# Control and accountability

28 **I**N THIS CHAPTER we make proposals to improve control and accountability in the criminal prosecution system. In the Discussion Paper we noted the present informality of the existing system, which is characterised by discretions at all stages of the investigation and prosecution process. The impact these decisions can have on an individual's liberty and well-being reinforces the importance of control and review of these powers. In assessing reform options there are a number of competing aims that must be appropriately balanced, including:

- the need for independence in decision-making. Too much control can undermine independence and result in the appearance of political influence or even bias;
- the need for uniformity and consistency of prosecution decisions; and
- the need for transparency in the decision-making process. This in turn requires a mechanism to ensure access to information for those involved in the prosecution system.

Our preliminary view was that the legal and administrative mechanisms for controlling and reviewing prosecution decisions were often weak or unclear or were not consistently applied.

29 We now set out our concluded views and our recommendations to improve control and accountability. The reform matters considered are:

- Clarifying and formalising the roles of the Attorney-General, Solicitor-General, and Ministers in charge of prosecuting agencies.
- Development of a Crown prosecution monitoring unit within the Crown Law Office.
- The jurisdiction of the Police Complaints Authority.
- The extent of judicial review of prosecution decisions.
- Review of the investigation and prosecution functions of the Serious Fraud Office (SFO).
- The introduction of a comprehensive criminal disclosure regime. This reform is closely related to our proposed reforms of the

preliminary hearing regime. Accordingly, preliminary hearings are discussed in chapter 7 and criminal disclosure in chapter 8.

## THE ROLE OF THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL – CONSTITUTIONAL REFORMS

- 30 The Attorney-General and the Solicitor-General are referred to collectively as the Law Officers of the Crown. In this section we discuss the constitutional roles of the Law Officers as overseers of the prosecution system. We consider whether the existing constitutional conventions concerning the Attorney-General are consistent with independence and accountability. We also consider whether formal powers of supervision should be delegated to the Solicitor-General from the Attorney-General. Finally, we query whether summary prosecutions should all be brought in the name of the Crown.

### **Who should have ultimate responsibility for prosecution policies and decisions?**

It is the Attorney-General's duty to ensure that the criminal law is enforced in a just and proper manner. [The Attorney-General] is responsible for the ultimate control of all criminal prosecutions undertaken by the Crown.<sup>11</sup>

- 31 The Discussion Paper<sup>12</sup> asked whether it was ever appropriate for the government or the Attorney-General to influence prosecution policies and asked who should have ultimate responsibility for prosecution policies and decisions.

### *The constitutional position of the Attorney-General and Solicitor-General*

- 32 The position of Attorney-General, like that of the Solicitor-General, is a prerogative appointment.

It is an established constitutional practice in New Zealand that the office of Solicitor-General is non-political . . . The Attorney-General in New Zealand is a Member of Parliament and a Minister who, almost

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<sup>11</sup> Crown Law Office, *Crown Law Practice in New Zealand* (Government Printer, Wellington, 1961), 15.

<sup>12</sup> At paras 247–248 and 418–429.

invariably, is a member of Cabinet holding other policy portfolios in addition to Law Officer responsibilities.<sup>13</sup>

33 The Attorney-General has four primary areas of responsibility, as the:

- principal legal advisor to the Crown;
- named plaintiff or defendant representing the Crown in all proceedings brought by or against the government;
- principal law officer; and
- link between the executive government and the judiciary.

The Attorney-General's overriding responsibility in exercising all four functions is to act in the public interest. Acting in the public interest clearly means acting free of political influence.

34 The English Court of Appeal in *Attorney-General v Blake and Anor* outlined the role of the Attorney-General as the guardian of the public interest:

In connection with the criminal law, the Attorney-General historically has had, and still has, both statutory and inherent powers of great importance involving the enforcement of the criminal law, which involve him having to make decisions of a highly sensitive nature. He has the overall responsibility for the enforcement of the criminal law.<sup>14</sup>

Although in England the Attorney-General is not a member of Cabinet, Lord Woolf's comments are equally applicable to the role of the New Zealand Attorney-General in relation to the criminal law.

35 It is the role of the Attorney-General (with the Solicitor-General) to supervise all criminal prosecutions, both public and private. Because of the importance of impartiality generally in the criminal law, and the profound effect prosecution decisions may have on individuals, it is essential that the Attorney-General supervises prosecutions free of political influence.

The strongest of the relevant conventions concerns the Attorney-General's role in prosecuting criminal offences, and prohibits the Attorney-General from acting on cabinet instructions. Prosecution decisions must be made by the Attorney-General in the public interest – without regard to the interests of the government. Thus, the prosecution of the criminal law is not discussed at cabinet, although the Attorney-General may consult with cabinet colleagues or other

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<sup>13</sup> J McGrath QC "Principles for Sharing Law Officer Power – the Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197, 198.

<sup>14</sup> [1998] Ch 439, 460. The case went on appeal to the House of Lords: *Attorney-General (respondent) v Blake (appellant) and Anor* [2000] 1 WLR 625.

members of the government in determining the public interest. Unlike other ministerial decisions, the Attorney-General's prosecution decisions are not subject to the doctrine of collective responsibility.<sup>15</sup>

- 36 Section 9A of the Constitution Act 1986 provides that the Solicitor-General may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General. It is an established constitutional convention that the Solicitor-General is a non-political appointment, because independence from government is essential to the proper exercise of the Solicitor-General's duties.
- 37 By long-standing convention successive Attorneys-General have generally not personally undertaken prosecution decisions or Law Officer decisions in relation to criminal proceedings, but have left them to the Solicitor-General. The reason for the convention is to prevent the administration of the criminal law becoming a matter of political decision-making.<sup>16</sup> So the Solicitor-General, as head of the Crown Law Office, is responsible for supervision of criminal prosecutions. This includes granting consent to the commencement of certain types of prosecution, entering stays of proceedings, granting immunities from prosecution (including in relation to extradition and criminal mutual assistance), and granting leave to prosecute under various statutes. It also includes oversight of the work of Crown Solicitors.
- 38 Instances where the Attorney-General, rather than the Solicitor-General, becomes directly involved in decisions in individual cases are few, but do sometimes occur. These are usually cases in which the public interest factors are complex and unclear, for instance, where important international consequences might follow. In such cases, political considerations are almost unavoidable. For example, in 1991 a person wanted in connection with the bombing of the *Rainbow Warrior* was arrested in Switzerland. The Minister of Justice decided not to seek extradition. The Attorney-General then had to decide whether or not outstanding charges in relation to the bombing against other French nationals should be stayed. Because of the national-interest considerations involved and the international flavour of the issues, the then Attorney-General, the

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<sup>15</sup> Huscroft "The Attorney-General, the Bill of Rights, and the Public Interest" in Huscroft and Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 135.

<sup>16</sup> Letter from the Solicitor-General to the Attorney-General, 16 December 1996, 4. But see McGrath QC, above n 13, 207 for three examples of Attorneys-General making decisions themselves.

Honourable Paul East, decided to make the decision personally in these terms:

The decision to stay the charges was one which, once taken, the Attorney-General could reasonably be expected to justify in Parliament. The decision to intervene in the *Rainbow Warrior* case was one which had to be exercised personally and independently. I did not consult Cabinet in making the decision, but rather considered the merits of the case without political pressure. I did not regard pressing ahead with the prosecution as being in New Zealand's national interest . . . I therefore signed stays of proceedings in respect of the information laid against the other defendants.<sup>17</sup>

39 In our view, it is entirely proper for the Attorney-General to direct prosecution policies, so long as that is done in the public interest and free from improper political influence.<sup>18</sup> The Attorney-General has the constitutional responsibility of supervising the criminal prosecution system, and is ultimately responsible to Parliament for the functioning of the prosecution system. We see no need to replace or alter the current system which has been proven in its performance. Constitutional convention dictates that generally the Attorney-General will not personally exercise decisions related to the prosecution of individual cases. However, we also see that in certain cases it is important that decisions are taken personally by the principal Law Officer, not by the Solicitor-General. The present system ensures flexibility but does not encourage use of the power by the Attorney-General for political purposes.

40 Where the Attorney-General issues prosecution policy guidelines, or makes a decision in an individual case (for example, a stay of proceedings or immunity from prosecution) the policy guidelines or decision in an individual case should be publicly disclosed. Disclosure will ensure that the policies and decisions made by the Attorney-General are amenable to public scrutiny and, ultimately, to public accountability in Parliament. Where it is necessary in the interests of justice, the Attorney-General should be permitted to postpone making a decision in an individual case until the case has been disposed of.<sup>19</sup>

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<sup>17</sup> The Hon Paul East "The Role of the Attorney-General" P Joseph (ed) in *Essays on the Constitution* (Brooker's, Wellington, 1995) 207.

<sup>18</sup> For a dissenting view, see Hon LJ King AC, QC "The Attorney-General, Politics and the Judiciary" (2000) 74 ALJ 444.

<sup>19</sup> We note that the Canadian Law Reform Commission made the same recommendation in 1990. We agree entirely and are grateful for that agency's thorough consideration of the issue: Law Reform Commission of Canada *Controlling Criminal Prosecutions: The Attorney-General and the Crown Prosecutor: Working Paper 62* (Ottawa, 1990) 53.

## *Ministers of the Crown and prosecution policies*

- 41 Having recognised that the Attorney-General is responsible for the supervision of the prosecution process the question now arises: what is the proper role for Ministers, other than the Attorney-General, who are in charge of departments or agencies that undertake prosecutions?
- 42 The system of parliamentary government requires that Ministers are responsible for controlling their departments and associated agencies, and are responsible to Parliament for the performance of the same departments and agencies.
- 43 There are, however, important exceptions in the cases of the SFO and police, who enjoy a large degree of independence from both their responsible Minister and the Attorney-General.<sup>20</sup> Our comments do not affect those bodies. Other government prosecuting agencies do not have the statutory autonomy the SFO clearly has, or that the police appear to have. The practice for other prosecuting agencies is that the relevant Minister will be required to answer questions in Parliament relating to the law enforcement decisions of the agency. However, the agencies are free from direct executive interference by their Minister in individual cases.

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<sup>20</sup> Unlike most legislation that constitutes government departments, the Police Act 1958 contains no provision making the Commissioner of Police subject to control or direction by the Minister of Police in relation to prosecution policies or prosecution of individual cases or any other decision. The Commissioner of Police, and every police constable, is independent of the executive. No Minister can instruct him to do, or not do, any thing. In particular, no Minister can direct that a prosecution must or must not take place: *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, 135–136. The Minister of Police does not accept responsibility in Parliament for prosecution decisions of the police. On occasions where parliamentary questions have been asked about individual prosecution decisions the Minister has stated that such decisions are made by the police independently of the government (see *Criminal Prosecutions NZLC PP28*, para 241 and footnote 162). The Attorney-General has the ultimate responsibility for the Crown's prosecution processes, including those of the police. However, by convention and in practice, the Attorney-General takes an approach similar to that of the Minister of Police. Like the police, the SFO is not subject to any political control. Under the Serious Fraud Office Act 1990 (ss 29 and 30) the Director exercises power independently of the Attorney-General.



- 44 Importantly, a Minister can impose administrative and resource requirements upon a prosecuting state agency, which will have flow-on effects in relation to prosecution policies.<sup>21</sup>
- 45 We emphasise the importance of the prosecution system being, both in appearance and reality, free from political influence. It is therefore inappropriate for a Minister, or the government as a whole, to dictate prosecution policy. But some operational or administrative directives from a Minister are appropriate, notwithstanding they may have an impact on prosecution activities. Prosecuting agencies remain clearly responsible to the relevant Minister for the overall performance of their functions in terms of budgets and purchase agreements. But all prosecuting agencies are ultimately responsible *for their prosecution functions* to the Attorney-General, rather than their Minister.<sup>22</sup> Ministers should never have any direct influence on prosecution policies; but indirect influence by means of budget agreements and purchasing arrangements is unavoidable and must be accepted.
- 46 It is never proper for a Minister to try to influence the exercise of the prosecution discretion in an individual case.<sup>23</sup> Decisions about whether or not to prosecute in individual cases must rest with the prosecuting agencies, who are ultimately responsible to the Attorney-General. This is vital to ensure the independence of the prosecution process from the political process.

### **Should oversight of the prosecution function be formally delegated by the Attorney-General?**

- 47 We have concluded that prosecution is a state function that requires clear lines of control and accountability.<sup>24</sup> Given that the Attorney-General has ultimate responsibility for the Crown's prosecution

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<sup>21</sup> For instance, *the Review of Police Administration and Management Structures: Report of Independent Reviewer* (unpublished, Wellington, August 1998, para 91) stated:

It is clear that the Minister cannot direct the Commissioner [of Police] in criminal law enforcement, either in particular cases, or in classes of cases. The Minister can, however, impose binding requirements in respect of administration and resources.

<sup>22</sup> See paras 103–108 that outline the importance of the Attorney-General's oversight of the criminal prosecution system.

<sup>23</sup> Submission of Grant Huscroft, Senior Lecturer, Auckland University Faculty of Law has been of great assistance with these issues.

<sup>24</sup> *Criminal Prosecution NZLC PP28* (Wellington, 1997), paras 423–429 [the Discussion Paper].

processes, should the responsibility for overseeing the prosecution function be formally delegated to the Solicitor-General, and then down to the Commissioner of Police and the chief executive officers of government prosecuting agencies? In our Discussion Paper we considered this to be appropriate in order to promote control and accountability. We also noted difficulties that might be caused by formal delegation.<sup>25</sup>

- 48 Most submissions indicated a pragmatic view; there was not a problem which made formal delegation necessary.<sup>26</sup>
- 49 Currently, day-to-day decisions concerning the prosecution system are made by the Solicitor-General. This is as much the result of practicality as it is the need for the appearance of independent and politically neutral administration of the justice system. However, ultimate constitutional responsibility for the prosecution system remains clearly with the Attorney-General. Indeed, most of the powers of the Solicitor-General are co-extensive with the Attorney-General's, as a result formerly of section 4 of the Acts Interpretation Act 1924 (Repealed) and now of section 9A of the Constitution Act 1986.<sup>27</sup>
- 50 Given that the Law Officers have overarching authority over the prosecution system, it is appropriate for them to issue prosecution guidelines. It may be appropriate for the Guidelines to reiterate

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<sup>25</sup> See Discussion Paper above n 24, paras 428–429. We identified potential problems with identifying agencies connected with the Crown which should have powers delegated to them. Another potential difficulty noted was that Crown solicitors do not appear to come within the sub-delegation framework envisaged by the State Sector Act 1988.

<sup>26</sup> For example, the Ministry of Justice submission commented:  
... it appears that holders of the office of Attorney-General have generally exercised the powers, to the extent that they have done so, in accordance with constitutional conventions. There has been little controversy surrounding the role of the office. There was criticism of two interventions by the Attorney-General in prosecutions in the late 1970s (the staying of proceedings in relation to alleged breaches of the New Zealand Superannuation Act 1974 and the staying of prosecution of 170 Bastion point protesters). The Crown Law Office consequently published guidelines on prosecution to give guidance to the Attorney-General on the exercise of these powers.

<sup>27</sup> Although, note, that there are also a number of statutory and prerogative powers that can be exercised by the Attorney-General alone. Others with responsibility for prosecutions, such as the Commissioner of Police and chief executive officers of prosecuting agencies, are already responsible either by statute or by convention to the Attorney-General for the exercise of prosecution functions within their mandates. The Director of the SFO, however, is an important exception (see the discussion in para 43).

the fact that all prosecutors bound by the Guidelines are ultimately responsible for the exercise of their prosecution function to the Attorney-General. Also, to the extent that it comes to the attention of the Law Officers that there are difficulties in the operation of the prosecution system, such as unevenness in prosecution patterns throughout the country, or systemic failure to comply with disclosure obligations, it is their right and responsibility to intervene to correct such problems.

- 51 It is significant that the already large number of prosecuting agencies is increasing, because of further fragmentation of Crown functions, resulting in the creation of increasing numbers of quasi-Crown entities with responsibilities to prosecute. This increase makes it even more important that the agency with power or responsibility to prosecute under a statute is aware that ultimately it is responsible to the Attorney-General for the exercise of its prosecution function, and not to the responsible Minister.
- 52 We conclude that there is no need for formal delegation of the power to oversee the prosecution system. The convention that ensures the Attorney-General exercises prosecution powers independently and free from political influence is a strong one, and works well in practice. We see no compelling reason to dilute the responsibility and authority of the Attorney-General by formal delegation. Indeed, it is important for the Attorney-General to retain the ultimate authority over the prosecution system. Parliamentary accountability is only meaningful so long as the Attorney-General retains real authority over the prosecution process.<sup>28</sup>

### **Should all prosecutions be in the name of the Crown?**

- 53 The Discussion Paper suggested (paragraphs 430 and 431) that the current practice of commencing all prosecutions with an information in the name of the individual informant, such as a police officer, was not satisfactory. In order to reflect truly the public nature of prosecution the Commission asked whether all prosecutions should be conducted in the name of the Crown.
- 54 The Summary Proceedings Act 1957 sets out the form in which informations must be sworn.<sup>29</sup> Commonly, one police officer is given

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<sup>28</sup> Thanks to Grant Huscroft, Senior Lecturer, Auckland University Faculty of Law.

<sup>29</sup> Summary Proceedings Act 1957, forms 1 and 2 of the Second Schedule.

the task each day of swearing all informations going to a particular court that day, whether he or she has real knowledge of the offence and offender or not. This is inconsistent with the information itself, which requires the officer to swear on oath that he or she has “just cause to suspect and do suspect” a named person of committing a particular offence.

55 In *New Zealand Police Court Based Resolution Project: Process Design*<sup>30</sup> the police suggest dispensing with the necessity of requiring a constable to swear a summary information before a judicial officer. The report also proposes a system of electronically generated summary informations. We agree with this proposal provided that the document initiating the prosecution sets out clearly the name of the person who laid the charge. An amendment to section 15 of the Summary Proceedings Act 1957, that requires informations to be filed in the prescribed form and upon oath, would be required to implement this proposal.<sup>31</sup>

56 The Commission recommends:

- that summary proceedings should be brought in the name of the prosecuting agency (eg, *Inland Revenue Department v X*, or *Police v X*) rather than the name of the individual swearing an information, provided that the information contains the name of the person who made the decision to prosecute; and
- that indictable proceedings should continue to be prosecuted in the name of the Crown (*R v X*).

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<sup>30</sup> Unpublished paper, New Zealand Police, 1998, 28.

<sup>31</sup> The sheer volume of prosecutions instituted by the police indicates the practical advantages of electronically generated informations that are not sworn in front of a judicial officer. The Commission encourages the police to continue their research and development of this proposal, which could be introduced once separation of the prosecution and investigation functions is complete. However, we stress again that each document instituting a prosecution should set out clearly the name of the person who made the decision to prosecute. This would facilitate accountability even if the document is unsworn. While the Commission can see the advantages for other prosecuting agencies of a similar procedure, we do not presently recommend that these changes extend beyond the police. However, a process allowing other agencies to be exempted from s 15 of the Summary Proceedings Act 1957, could be developed. In practice, this might mean that if the prosecuting agency meets specified criteria, including an acceptable separation of investigation and prosecution functions within the agency and the naming of the person responsible for the decision to prosecute, it is added to a list of bodies with this power by Order in Council.

## JURISDICTION OF THE POLICE COMPLAINTS AUTHORITY AND REVIEW OF PROSECUTION DECISIONS

- 57 One way of ensuring control and accountability in the prosecution system is to provide adequate means for review of prosecution decisions. The Police Complaints Authority is a specialist body that already performs the important task of holding the police accountable for their actions and decisions. However, the jurisdiction of the Authority to accept complaints is not limitless, and for good reason. We have considered the ability of the Authority to act as an independent check upon police action by examining its jurisdiction to investigate complaints. No good reason has been suggested to us to expand the present jurisdiction of the Authority, or how it determines whether or not a complaint is justifiable. Sufficient avenues for review and independent scrutiny exist both through the Authority, and by virtue of the High Court's power of judicial review. Our present observations are to be considered in the light of the current review of the Police Complaints Authority being performed by the Hon Sir Rodney Gallen QC.
- 58 Section 12(1)(a) of the Police Complaints Authority Act 1988 empowers the Authority to receive complaints –
- (i) Alleging any misconduct or neglect of duty by any member of the police; or
  - (ii) Concerning any practice, policy, or procedure of the police affecting the person or body of persons making the complaint in a personal capacity . . .

In the course of taking action in respect of any complaint, the Authority may investigate any apparent misconduct or neglect of duty by a member of the police, or any police practice, policy, or procedure, that appears to the Authority to relate to the complaint, notwithstanding that the complaint itself does not refer to that misconduct, neglect, practice, policy or procedure.

- 59 The Authority believes that the discretion to prosecute is an operational decision of the police. As a consequence, it will not generally review prosecution decisions:
- unless there is evidence of material bias, bad faith, failure to carry out an adequate investigation which might have affected the exercise of the discretion, or some other convincing reason giving rise to possible misconduct or neglect of duty.<sup>32</sup>

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<sup>32</sup> Police Complaints Authority Annual Report [1997], AJHR G. 51, 30.

The Authority is also firmly of the view that it should not have a general power to review prosecution decisions of the police.<sup>33</sup> However, some cases investigated by the Authority suggest that the Authority sees itself as having some discretion to review cases falling outside its stipulated criteria, where it considers the need arises. This is illustrated by the example given in the Authority's 1997 Annual Report:<sup>34</sup>

... cases involving death in motor accidents are often the genesis of bitter criticism of Police either for prosecuting or not prosecuting. ... One such case which was particularly distressing and demanded the most compassionate and sensitive approach was this. A 13-year old girl was killed while cycling to school. This was the tragic result of being involved in a collision with a motor vehicle. Police made a decision not to prosecute the driver of the vehicle. The decision was made some four months after the event. It was made by a senior officer after a legal opinion was obtained.

The decision not to prosecute was not accepted by the parents of the young victim. The result was a private prosecution alleging the driver was guilty of careless driving causing death. After a two-day hearing the charge was dismissed ...

Some seven months after the hearing a complaint was made to the Authority by Solicitors acting for the parents ... The primary complaint to the Authority was the failure of Police to prosecute. Linked to this was the claim that the Police investigation into the death was not made out professionally or competently. The complaint ... also raised the concern that five days after the tragedy a local radio station announced that there would be no prosecution arising from the accident ... Naturally [the parents] took the view that there could not have been an adequate investigation in a such a short time on which to base this decision not to prosecute ... because of the distress this family was obviously continuing to suffer the complaint was accepted for investigation ... The Authority concluded that in fact there had been a full and professional investigation and the decision not to prosecute was reached only after a most careful consideration.

60 After considering submissions, the Commission recommends no change to the Police Complaints Authority Act 1998. The Police Complaints Authority should not be empowered to make recommendations on pending prosecutions to the Commissioner of Police. However, neither should the Authority be precluded from investigating complaints of the kind outlined above, which it currently, and justifiably, considers within its ambit. No legislative clarification is needed to enable it to deal with such complaints.

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<sup>33</sup> Police Complaints Authority Annual Report [1997], above n 32, 30.

<sup>34</sup> Police Complaints Authority Annual Report [1997], above n 32, 14–16.

## JUDICIAL REVIEW OF PROSECUTION DECISIONS

- 61 The Discussion Paper (paragraphs 219 to 232) suggested that judicial review of decisions to prosecute, or more particularly decisions *not* to prosecute, was arguably already available for proceedings in a District Court in the light of *C v Wellington District Court*<sup>35</sup> and *R v Bedwellty Justices, ex parte Williams*.<sup>36</sup> However, it is very rare that the High Court will use its civil jurisdiction to intervene in the exercise of the court's criminal jurisdiction by way of judicial review under the Judicature Amendment Act 1972 and the High Court Rules. The Discussion Paper suggested that such judicial review would be exceptional and at most available only if no reasonable agency could have made such a prosecution decision.<sup>37</sup>
- 62 The Discussion Paper envisaged that judicial review would be a principal form of accountability, and that the majority of requests for judicial review would be of decisions *not* to prosecute, rather than of decisions to prosecute. The Commission proposed no general legislative intervention to encourage judicial review of prosecution decisions and suggested that it might best be left for the courts to develop.
- 63 The Discussion Paper also asked (paragraph 435) whether, in principle, all prosecution decisions *should* be judicially reviewable. If so, it proposed that all prosecuting agencies should be amenable to judicial review on the same footing. In particular, it proposed (at paragraph 220) that section 20 of the Serious Fraud Office Act 1990, which exempts the prosecution decisions of the SFO from judicial review, be reviewed in light of the *C v Wellington District Court* and *Bedwellty* cases.
- 64 The issue of judicial review of prosecution decisions perhaps attracted more adverse comment than any other proposal in the Discussion Paper. There were fears expressed that it would become a routine tactic in criminal cases, placing another obstacle in the path of prosecutions. Several respondents implied that judicial review was not now available. Either way, it is certainly not used now as a routine tactic. The Department of Labour believed that

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<sup>35</sup> *C v Wellington District Court* [1996] 2 NZLR 395.

<sup>36</sup> *R v Bedwellty Justices, ex parte Williams* [1997] AC 225, [1996] 3 All ER 737 (HL).

<sup>37</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

any move to open up legal avenues for external review should be resisted. The police were of a similar view.

- 65 After careful consideration the Commission considers that the state of the law of judicial review as it relates to prosecution decisions needs no amendment. The Commission is mindful of the necessity to ensure that the use of judicial review as a delaying tactic does not become routine as it might if judicial review of decisions to prosecute became commonplace. The Commission considers that the criminal courts already have the capacity to control proceedings before them, as by the court's inherent power to prevent abuse of its process.
- 66 The Commission recommends no change to the law relating to judicial review of prosecution decisions. Further, section 20 of the Serious Fraud Office Act 1990 does not need to be repealed; it is noted that the section already seems to allow for decisions of the Director *not* to prosecute to be reviewed.

## MONITORING ROLE OF THE CROWN LAW OFFICE – INCREASED OVERSIGHT OF THE PROSECUTION SYSTEM BY THE SOLICITOR-GENERAL

- 67 In the Discussion Paper (paragraphs 362 and 363) we proposed increased oversight of the prosecution system by the Solicitor-General. However, the ability of the Solicitor-General (and alternatively or ultimately, the Attorney-General) to oversee the prosecution system effectively is dependent to a large extent upon the mechanisms in place for supervision and control of the system. With that in mind, the Discussion Paper suggested that a small unit within the Crown Law Office should be established, under the control of a Deputy Solicitor-General. Its role would be to monitor the operation of the prosecution system, and in particular to ensure national standards of transparency and consistency in prosecution decision-making.
- 68 Having revisited the issue, we again stress the importance of this reform proposal. It is significant that the already large number of prosecuting agencies is increasing, because of further fragmentation of Crown functions, resulting in the creation of increasing numbers of quasi-Crown entities (such as the Accident Compensation Corporation, and Health Benefits Limited). This increase makes it more difficult for the Solicitor-General (on behalf of the Attorney-General) to oversee the entire prosecution system and ensure quality and consistency of prosecutions. Therefore, it is more



important that a unit within the Crown Law Office be responsible for assisting the Solicitor-General in this role. There was support for this idea both in submissions and in meetings held with prosecuting agencies.<sup>38</sup>

- 69 The Commission therefore recommends that the Crown Law Office, through whatever means the Solicitor-General thinks appropriate, should develop mechanisms that allow it to:
- assist all prosecuting agencies with the development of compliance and prosecuting guidelines and ensure that their practices are consistent with the Guidelines; and
  - review the Guidelines to ensure their relevance to summary prosecutions.

## THE SERIOUS FRAUD OFFICE: SEPARATION OF INVESTIGATION AND PROSECUTION FUNCTIONS

- 70 The SFO occupies a unique place in New Zealand's criminal prosecution system. It is a government-funded entity established by the Serious Fraud Office Act 1990, solely for the purpose of combating serious or complex fraud. The Director of the SFO has wide powers to investigate such fraud and to take criminal proceedings against those suspected of committing it. The Attorney-General is responsible for the SFO in terms of the State Sector Act 1988, but the Director is specifically exempted from responsibility to the Attorney-General for decisions to investigate or prosecute.<sup>39</sup> The Commission has examined the role and structure of the SFO to see whether this independent creature of statute is properly accountable for its prosecution decisions and processes.
- 71 SFO investigators and forensic accountants undertake investigations where serious fraud is suspected. An in-house prosecutor is assigned to an investigation, but his or her role is to give advice on any legal issues arising in the course of the investigation and to provide a report to the Director on the legal aspects of the case, the strength of the evidence, and what charges, if any, in their opinion could or should be brought in the particular

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<sup>38</sup> The Crown Law Office pointed out that to an extent it already carries out this function in relation to Crown solicitors through the office of Deputy Solicitor-General.

<sup>39</sup> Section 30, Serious Fraud Office Act 1990.

matter. Separate reports are supplied to the Director by the investigators and the forensic accountants.

- 72 The Director, assisted by the head of the Investigations branch and the head of the Prosecutions branch, reviews the reports and determines whether or not a prosecution will be taken, and if so the charges to be laid. A case may be reviewed several times until the Director is satisfied that there is sufficient information to determine whether or not to proceed with a prosecution. In particularly complex cases a panel prosecutor may be involved in advising on the case. The Guidelines are used by the Director in arriving at decisions on whether or not to prosecute, and are also used by the panel prosecutors.
- 73 The Director of the SFO does not have the power to file an indictment. Any indictment to further a SFO prosecution must be filed either on behalf, and in the name, of the Solicitor-General or by a Crown Solicitor. Further, no one other than a member of the Serious Fraud Prosecutors' Panel may act for the SFO in any SFO prosecution.<sup>40</sup> Appointment to this panel is by the Solicitor-General after consultation with the Director of the SFO. Panel members operate under a set of instructions prepared by the Solicitor-General and their fees for conducting trials are approved and paid by the Crown Law Office. The SFO's own lawyers act on some interlocutory matters such as name suppression and bail applications and may also act as junior counsel to a panel prosecutor if appropriate.
- 74 It is evident from this that the SFO cannot act as a law unto itself. Any prosecution brought by it will be subject to the oversight of the Solicitor-General once the defendant has been committed for trial. In the Commission's view this accords with the constitutional role of the Solicitor-General and is particularly necessary given the SFO's statutory independence from the Attorney-General.
- 75 The Commission does have a concern relating to the limited degree of control a Solicitor-General can exercise over the Serious Fraud Prosecutions Panel. It seems clear that section 48 of the Serious Fraud Office Act 1990 was intended to ensure that the SFO has independent senior counsel experienced in fraud cases and that its cases are handled objectively. However, it is the Director of the SFO who decides which panel prosecutor should handle each case and this gives rise to the possibility of patronage. It is stressed that the Commission's concern is with the system itself, and the use

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<sup>40</sup> Section 48, Serious Fraud Office Act 1990.

that might be made of it at some future time if a difference were to arise between a Director of the SFO and a Solicitor-General as to proper prosecution practice. The danger is that a lawyer/client relationship could develop between the Director and panel prosecutors resulting in a loss of objectivity and a distancing of the SFO from the practices approved by the Solicitor-General. We note that the Solicitor-General has the power to remove a case from the authority of a Crown Solicitor.<sup>41</sup> In practice this means a high degree of oversight, and where necessary would enable the Solicitor-General to direct a particular trial to another Crown Solicitor or to a member of the Crown Solicitor's prosecution panel. No such ability to direct or control exists in relation to the SFO.

76 The Commission recommends that section 48(3) of the Serious Fraud Office Act 1990 be amended to read:

- (3) No proceedings relating to serious or complex fraud shall be conducted on behalf of the Director except by a member of that panel *selected by the Solicitor-General after consultation with the Director.*

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<sup>41</sup> This power exists both as a matter of convention, and under reg 9 of the Crown Solicitors Regulations 1994, which empowers the Solicitor-General to take any matter or business out of the hands of any Crown solicitor.

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## 4 Prosecutors' powers

77 THE PROSECUTION SYSTEM is largely successful in meeting its objectives. Nonetheless, the fragmentation of state functions and the devolution of the power to prosecute emphasise the need for guidance and control over the system. In order for state prosecutors to act as independent reviewers of investigating agencies, clarification of their powers and role is required. As outlined in this chapter, expansion of the role of prosecutors is essential to implement other improvements to the prosecution system as recommended in this report.

78 In this chapter we set out the Commission's specific recommendations for reform of the powers and respective roles of:

- Crown Solicitors;
- police prosecutors;
- prosecutors in public agencies.

### CROWN SOLICITORS

79 Crown Solicitors are lawyers (generally in private practice) who have the responsibility for conducting indictable criminal trials. There is a Crown Solicitor for each High Court centre and one in Tauranga. They are responsible for both firmly and fairly presenting all relevant evidence to the jury. It is not their role to strive to get a conviction. They require key qualities of independence and objectivity.

80 We have already concluded that the role of Crown Solicitors as independent prosecutors should be developed (see paragraphs 25 and 26) in preference to adopting a different model for reform of the prosecution system.

81 We now consider a number of matters relating to the independence of Crown Solicitors as prosecutors, and their role within the prosecution system. In particular we consider:

- The method of appointment and nature of their tenure.

- Whether Crown Solicitors should be responsible for *all* indictable prosecutions, including those undertaken by prosecuting agencies but not including those undertaken by private prosecutors and the SFO.
- Whether there should be a power to discontinue prosecutions.
- Whether there should be a power to divert offenders.
- Whether there should be a power to direct or veto prosecutions.

82 We also make one of the key recommendations of this report; that Crown Solicitors should have oversight and effective control over indictable prosecutions *before* the preliminary hearing. In practice, this would mean Crown Solicitor involvement once a plea is entered or the defendant has elected trial by jury.

### **Mode of appointment and tenure of Crown Solicitors**

83 In order to be effective as independent prosecutors, Crown Solicitors must be free from political influence. Two matters that impact upon independence from such influence are:

- the mode of appointment of Crown Solicitors; and
- the tenure of their office.

If the mode of appointment of Crown Solicitors is subject to political influence, the appearance of independence is undermined. If tenure is too uncertain, the position of the Crown Solicitor as an independent prosecutor may also be undermined by the apparent threat of removal. Equally, if security of tenure is absolute, there will be little incentive or mechanism for improvement of prosecutions by Crown Solicitors.

84 In the Discussion Paper we asked whether the current method of appointment and nature of tenure should change. Our view was that this was unnecessary. After considering the submissions, we have confirmed that view.

#### *Appointment of Crown Solicitors*

85 Crown Solicitors are appointed by the Governor-General on the advice of the Attorney-General. Appointments are made under prerogative and are held 'at pleasure'. Crown Solicitors are officers of the Crown responsible to the Attorney-General, through the Solicitor-General, for the proper exercise of prosecution functions.

Successive Attorneys-General have looked to the Solicitor-General for advice on appointments.

- 86 An appointment as Crown Solicitor is a personal one. However, a member of the same firm has usually succeeded a retiring Crown Solicitor because the firm has become the local repository of skill and experience in the prosecution area. To spread that experience and provide a wider pool of potential Crown Solicitors the Solicitor-General has appointed panels of prosecutors in each district to whom the Crown Solicitor must brief a proportion of prosecution work. The Commission supports this initiative.
- 87 There was agreement from those who made submissions on the issue that no change was necessary to appointment procedures. The Commission concurs. We consider the constitutional convention for appointments, involving as it does both the Law Officers and the Governor-General, in itself provides a strong degree of oversight and self-regulation of the method of appointment, and ensures proper scrutiny of those individuals prior to appointment. The present system also incorporates sufficient devolution of decision-making powers to the Solicitor-General to ensure appointments are not influenced by political considerations.

### *Tenure of office for Crown Solicitors*

- 88 Crown Solicitors hold their office at pleasure, and can be removed by the Governor-General acting, by convention, on the Attorney-General's advice. In practice the Attorney-General would consult the Solicitor-General, as the person responsible for the practical oversight of the prosecution system.
- 89 One submission suggested that appointing Crown Solicitors for a fixed renewable term would be desirable, with regular reviews considering competency, efficiency and accountability. The Crown Law Office submission noted that the Solicitor-General has put into effect periodic performance reviews as envisaged by Laurenson and Taylor's 1992 report *Review of the Crown Solicitor's Structure for the Solicitor-General*.<sup>42</sup>
- 90 The Commission recommends that the existing system of tenure for Crown Solicitors remain. The 'at pleasure' nature of tenure by convention provides a high degree of security for Crown Solicitors. We have been unable to find any record of a Crown Solicitor being removed from office in New Zealand legal history. Equally, the

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<sup>42</sup> Laurenson and Taylor *Review of the Crown Solicitor's Structure for the Solicitor-General* (Ernst and Young, Wellington, 1992).

prerogative nature of the appointment assures that, if necessary, a Crown Solicitor could be removed for serious misconduct or incompetence. The devolution of the power of decision from the Governor-General through the Attorney-General to the Solicitor-General creates a strong series of checks and balances removing the risk of political interference in the tenure of Crown Solicitors.

## **Crown Solicitors and indictable proceedings**

### *Crown Solicitors to oversee prosecutions before the preliminary hearing*

- 91 Crown Solicitors have a discretion regarding two vital aspects of a prosecution:
- whether a prosecution should be brought by indictment; and, if so,
  - what charges should be proffered against an accused.
- 92 However, Crown Solicitors do not become involved in an indictable prosecution until long after it has commenced, and therefore exercise their discretionary powers late in the process. Depositions files, or records of the evidence given at a preliminary hearing, are forwarded to Crown Solicitors by the Registrar of the District Court some time *after* the preliminary hearing has been conducted. It is only at this stage that a Crown Solicitor can determine whether a prosecution by way of indictment should be pursued and, if so, what charges should be brought. By now, considerable human and financial resources have already been committed to the prosecution: the initial decisions to charge and the nature of the charges have been made, an indictable information has been laid in the court, witnesses have been briefed, given evidence, and been cross-examined at the preliminary hearing.
- 93 Late involvement by Crown Solicitors limits the effectiveness of their role as independent public prosecutors by restricting the scope of their powers of oversight and discretion to charge. The existing system is inefficient because the individual with the ultimate power to decide whether a prosecution is to proceed and what form it should take cannot make those decisions until very late in the process. It is also clearly desirable that the independent review of the investigation charging decision should be carried out as early as possible.
- 94 In their submission, the police were opposed to the earlier mandatory involvement of Crown Solicitors in indictable cases. They submitted that changes to the police prosecution structure

and decision-making processes removed the need for earlier involvement (see paragraphs 112–118 for an outline of the proposed changes to the police prosecution structure). The police also pointed out that they often do consult Crown Solicitors in indictable cases. Other prosecuting agencies also did not favour the earlier involvement of Crown Solicitors. By contrast, Crown Solicitors were in favour of such a change. The Ministry of Justice was concerned that earlier involvement would have significant cost implications.

95 Having considered the submissions, we recommend that Crown Solicitors review all prosecution files once a plea is entered or an election for jury trial made,<sup>43</sup> to confirm that the original charges are appropriate, and to give guidance to police on evidential issues. Responsibility for conducting the preliminary hearing itself would remain with the police,<sup>44</sup> except in cases where police elect to instruct the Crown Solicitor (as is the present practice in relation to particularly serious or complex cases).

96 The Commission considers that earlier involvement of Crown Solicitors in indictable cases is likely to result in a number of significant improvements to the prosecution system:

- Earlier control will improve the quality of prosecution cases at an earlier stage. If necessary, different charges can be laid, additional evidence can be sought, experts engaged and pleas negotiated, all before significant resources are committed to the preliminary hearing. Stronger cases at the preliminary hearing stage will promote a greater number of early guilty pleas.
- Earlier involvement should not mean significantly greater cost. Police will continue to be responsible for the conduct of preliminary hearings. Indeed, we expect a possible overall cost saving as police resources are efficiently used, and less court time wasted on cases or charges that are not eventually pursued.
- Crown Solicitors will be able to exercise earlier their important constitutional function of independent review of prosecution decisions and thereby reduce unnecessary distress and expense for accused persons who are not ultimately prosecuted.

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<sup>43</sup> Section 66(1) of the Summary Proceedings Act 1957 provides that when charged with an offence punishable by more than three months imprisonment, a defendant may elect trial by jury. This right is also enshrined in s 24(e) of the New Zealand Bill of Rights Act 1990.

<sup>44</sup> Note our proposals for streamlining preliminary hearings in chapter 7 should result in considerable cost savings for the police.



- 97 The Commission recommends that the Solicitor-General ensure that Crown Solicitors review and oversee the prosecution of all indictable offences, except those dealt with by the SFO,<sup>45</sup> once a plea is entered or election for jury trial made. No legislative change is required to implement this alteration in the role of Crown Solicitors. However, the Cabinet Directions for the Conduct of Crown Legal Business 1993<sup>46</sup> require amendment to reflect the increased role of Crown Solicitors.

*Should Crown Solicitors be responsible for all prosecutions by indictment?*

- 98 Some public agencies (including some government departments) wish to conduct their own indictable prosecutions and not use Crown Solicitors. For example, Health Benefits Limited is a company formed to deal with health benefit fraud, in particular by the medical profession. The company investigates fraud, and decides whether to prosecute. It also wishes to conduct any resulting trials on indictment. To date this has not been approved by the Solicitor-General (see also chapter 10, Private Prosecutions). In the Solicitor-General's view public criminal investigation agencies should not conduct their own indictable trials. We agree. To do so would effectively telescope the roles of counsel and client, and the key elements of independence and objectivity in public prosecution of serious crime, which Crown Solicitors possess, would be eroded.<sup>47</sup> There is a risk that the prosecutor will not put the case:

... both fairly and firmly presenting all relevant evidence to the jury but not ... striving to get a conviction, especially where the evidence arguably does not warrant it.<sup>48</sup>

- 99 In the Commission's view, to preserve the independence of prosecutors it is essential that Crown Solicitors (or panel members instructed by the Crown Solicitor) remain responsible for all indictable prosecutions brought by public prosecuting agencies.<sup>49</sup>

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<sup>45</sup> Because no proceedings relating to serious or complex fraud can be conducted on behalf of the SFO except by a member of the Serious Fraud Prosecutors Panel: s 48(3), Serious Fraud Office Act 1990.

<sup>46</sup> Cabinet Directions for the Conduct of Crown Legal Business 1993, appendix to the *Cabinet Office Manual* (1996).

<sup>47</sup> Letter of Solicitor-General to Attorney-General, 17 December 1997.

<sup>48</sup> Cabinet Directions for the Conduct of Crown Legal Business 1993, above n 46, 2.

<sup>49</sup> Except the Serious Fraud Office; see chapter 3 of this report.

*Should Crown Solicitors make initial charging decisions?*

100 We remain of the view that as a general rule Crown Solicitors should not make the initial decision about what charges should be laid.<sup>50</sup> That is because:

- Efficiency and practicality weigh in favour of the investigating police continuing to exercise the initial charging discretion. It will often be impossible for the police to refer a matter to a Crown Solicitor for charging. Many crimes are committed and detected in circumstances that require an immediate arrest and charge, for instance, a police officer attending a domestic violence incident, or a detective at the scene discovering a homicide suspect with a smoking gun.
- We agree with the submission of the Crown Law Office and the police that Crown Solicitors should be distanced from initial decisions, in order to maintain their necessary independence. The initial charging decision should continue to be regarded as part of the investigative process, rather than a prosecutorial function.
- In practice, Crown Solicitors do occasionally suggest appropriate charges when their advice is requested by the police. This will often arise in complex cases calling for expert legal knowledge.
- Development of charging standards for police and prosecuting agencies will assist in obtaining quality and consistency in the original investigative decision to charge.<sup>51</sup>

101 The Commission recommends that, for these reasons, initial charging decisions should continue to be made by the police in accordance with the Guidelines, and by prosecuting agencies in accordance with guidelines to be developed with the assistance of the Crown Law Office.<sup>52</sup> Crown Solicitors should not make initial charging decisions, although they are free to continue to give advice to the police or prosecuting agencies on the appropriateness of charges when requested to do so.

*Should Crown Solicitors have a power to divert offenders?*

102 We have considered whether Crown Solicitors should be empowered to divert offenders. In the Commission's view, it is

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<sup>50</sup> See para 349 of the Discussion Paper, above n 24.

<sup>51</sup> Discussion Paper, above n 24, para 372.

<sup>52</sup> Discussion Paper, above n 24, 67–70.

unnecessary to introduce such powers. Although it was our preliminary view that a power to divert might complement the earlier involvement and increased oversight of Crown Solicitors in indictable trials,<sup>53</sup> in practice we think that the power would be seldom, if at all, used. We agree with the submissions that cases that are referred to Crown Solicitors are generally too serious for diversion to be considered.

*Should Crown Solicitors, police and other prosecutors have the power to discontinue prosecutions? Should Crown Solicitors be able to direct or veto the initial charging decision?*

- 103 Initially, the Commission proposed that all prosecutors should have the express power to discontinue a prosecution.<sup>54</sup> We suggested this reform would reflect the existing informal process of discontinuing proceedings by not presenting evidence, or seeking leave of the Court to withdraw informations. Formal guidelines for exercise of the power were proposed to ensure certainty, transparency and consistency.
- 104 However, we have concluded that a power to discontinue is not warranted. The existing practice requires a charge to be withdrawn (or no evidence tendered) in open court. This ensures judicial supervision of the process, and exposes the decision to the public for comment. We believe the combined effect of judicial and public scrutiny to be sufficient incentive to ensure a principled decision-making process by prosecutors. In contrast, a power to discontinue would not be publicly exercised. A document would merely be filed or a brief appearance in court made. Even if guidelines existed to direct exercise of the power the added control of public and judicial scrutiny would not be available.
- 105 We also believe it desirable to maintain the current restriction on the power to grant a stay of prosecution. At present, only the Solicitor-General or Attorney-General may exercise this power. This ensures a high level of supervision of the system by the Law Officers who are ultimately responsible for all prosecution decisions.

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<sup>53</sup> Discussion Paper, above n 24, para 370.

<sup>54</sup> Discussion Paper, above n 24, paras 371–373.

Several submissions favoured retention of the current position and discouraged introduction of a power to discontinue.<sup>55</sup> Those who favoured a power to discontinue suggested a very limited scope.

- 106 In the Discussion Paper we also asked<sup>56</sup> whether in cases of unusual sensitivity or difficulty, especially where public interest factors are of great importance, Crown Solicitors should be able to direct a prosecution or veto the initial charging decision made by the investigator. Examples might include where a suspected offender holds an important or sensitive office in or connected with the enforcement agency, or where there are significant international aspects to the prosecution. That question by implication asks the question already answered; should the power to veto or stay proceedings continue to be reserved exclusively to the Attorney-General and Solicitor-General?
- 107 A power to direct a prosecution or veto initial charging decisions can be seen as one aspect of a power to discontinue a prosecution. For the same reasons outlined already we have concluded that the Attorney-General and Solicitor-General alone should retain the power to stay proceedings. Cases so sensitive as to warrant veto of a decision to charge are unlikely to be appropriately dealt with by

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<sup>55</sup> A variety of views emerged from the submissions. Crown solicitors thought that a power of discontinuance should be available to all prosecutors (including police and departmental prosecutors), subject to the Guidelines, and always formally exercised (ie, notified to the Solicitor-General). However, they thought there should be a number of serious offences (such as murder and Class A drug dealing) for which the power was limited to the Solicitor-General. Crown solicitors thought that in summary cases prosecutors should be able to exercise the power of discontinuance otherwise than by seeking leave to withdraw the information or simply offering no evidence, and that a formal discontinuance should be a bar to further prosecution on the same incident. It would thus be equivalent to a stay. The New Zealand Customs Service favoured a power of discontinuance. The police pointed out that they already have some authority to seek an amendment to a summary charge (s 43 Summary Proceedings Act 1957), to seek the leave of the court to withdraw a charge (s 36), or to offer no evidence. The police suggest the authority could be more clearly spelled out and standard guidelines developed. Currently, the possibility of a s 347 Crimes Act 1961 discharge may be raised by a prosecutor, and accepted by a judge. The Crown Law Office was opposed to prosecutors having a formal power to discontinue prosecutions because it thought the court should continue to deal with such matters in an open and public way. The Ministry of Fisheries was also opposed – on the ground that no problem had emerged to make it necessary. The Police Association suggested caution in any widening of powers, which it saw as complicating the prosecution process. The National Collective of Rape Crisis thought that any discontinuance should always be in consultation with the victim, and must occur before the preliminary hearing.

<sup>56</sup> Discussion Paper, above n 24, paras 371–373.

a Crown Solicitor. These cases can be adequately dealt with under the existing power of the Law Officers to issue a stay.

- 108 In our view the Law Officers should continue to have the power *to direct that a prosecution take place*, in exceptional circumstances.<sup>57</sup> The power is recognised by section 345 of the Crimes Act 1961, which permits the Attorney-General, or any person authorised by the Attorney-General, to file an indictment without the need for a preliminary hearing. However, so far as the Attorney-General is concerned, the strong convention against personal intervention in particular cases makes this a residual power only and it is difficult to see how in modern times it could be properly exercised.

### **The role of the police in the prosecution system**

*Should the police retain the prosecution of summary offences?*

- 109 An important question that we have revisited is whether the police should continue to prosecute summary offences. In our Discussion Paper we considered that they should, and we remain of that view.
- 110 Given the considerable steps taken by police to establish an independent police prosecution service, and the substantial costs in transferring responsibility for these prosecutions to another body, the Commission confirms its previous view. The police should retain the prosecution of summary offences, subject to appropriate guidelines and mechanisms of accountability being put into place, as recommended in this report.
- 111 A related issue that we have considered is the position of prosecuting agencies. In consultation meetings, prosecuting agencies generally indicated that they wished to continue to prosecute summary offences. We agree, but again stress that appropriate guidelines and mechanisms of accountability are required (see paragraphs 121–126 below).

*An autonomous, national, police prosecution service*

- 112 The key themes of this report are the need for greater transparency, public control and accountability in the prosecution system. Towards those ends the Commission considers it vital to make

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<sup>57</sup> For example, where the prosecution concerns a person in high public office, or where there are international ramifications. See also paras 35–40 above, in relation to the parallel power of the Law Officers to grant a stay.

investigative and prosecution decisions distinct and independent. A central platform of our Discussion Paper<sup>58</sup> was the establishment of an autonomous, national, career-oriented prosecution service within the police to replace the current police prosecution service. We indicated that the new service should be administratively distinct from the criminal investigation and uniform branches of the police. This proposal was seen as so important that if it was not implemented the Commission signalled it would favourably reconsider the idea of a Crown Prosecution Service.

113 As a result of the proposals in the Discussion Paper a separate prosecution service has been developed by the police. The Police National Prosecution Service was formally established on 1 July 1999. The Commission welcomes the police initiatives in this area, and has been consulted as the new structure has developed.

114 The key features of the new Police National Prosecution Service are:<sup>59</sup>

- provision of advocacy services in criminal and traffic summary prosecutions, Coroner's inquest hearings, defended Youth Court proceedings and licensing hearings (for example under the Sale of Liquor Act 1989, or the Secondhand Dealers Act 1963);
- the decision to charge and the selection of charges remain part of the investigation process and therefore remain a decision for the investigator. The investigator also controls the post-charge investigation;
- all prosecutors are responsible directly to the head of the Police National Prosecution Service, to whom the Commissioner of Police has delegated operational control. Effectively the head of the Police National Prosecution Service exercises control of the prosecution process as an agent of the Commissioner of Police prosecuting on behalf of the Attorney-General and Solicitor-General;
- prosecutors assess whether the charges are appropriate and whether there is sufficient evidence to prosecute (in terms of the Guidelines); identify shortcomings in the investigation and evidence presented, and direct the investigator to remedy the shortcomings; may withdraw or modify charges; receive and modify briefs of evidence, interview and brief witnesses, develop

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<sup>58</sup> Discussion Paper, above n 24, paras 353 to 357.

<sup>59</sup> See generally: unpublished paper on National Police Prosecution Service presented to Police Executive Committee meeting on 16 December 1997, by Assistant Commissioner NB Trendle.

strategy and tactics for the court hearing; and prosecute the matter in court;

- the conduct of post-charge investigation is to be controlled by the investigator, subject to directions regarding procedure and evidence by the prosecutor.

115 The Police National Prosecution Service is structured around regional prosecution centres, and where appropriate uses prosecutors on circuit. Each regional Prosecution Service will in time have a briefing centre with specialised staff to manage prosecution files. The briefing centre concept is being piloted in Whangarei. The centre will have responsibility for ensuring criminal disclosure (see chapter 8 for the Commission's recommendations on disclosure). The police intend to accommodate changes to the disclosure process by introducing new technology. They are also developing new national prosecution policies for matters such as diversion, disclosure, prosecution file format and codes of conduct:

to ensure a nationally consistent and uniform approach . . . [and ensure that] fair and consistent prosecution decisions are made while maintaining a transparent and distinct delineation between investigations and prosecutions.<sup>60</sup>

116 The Discussion Paper asked whether all members of the Police National Prosecution Service should be legally qualified. There was agreement in the submissions that this would not be immediately practicable, and some division of opinion over whether it was necessary. The police say that it is likely that the National Prosecution Service will be made up of a mix of qualified lawyers, who may or may not be police officers, and police officers without formal legal qualifications but with some specialised training. Career development will be encouraged – including training before taking up the position, ongoing training opportunities and encouragement for staff to achieve higher levels of academic qualification.<sup>61</sup>

117 In July 1998, the Institute of Professional Legal Studies delivered a pilot advocacy training programme to police prosecutors. The pilot was considered a success and further courses have been held in 1998 and 1999.

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<sup>60</sup> New Zealand Police Court Based Resolution Project: Process Design, above n 30, 3.

<sup>61</sup> See Trendle, above n 59.

118 The Commission is encouraged by the progress the police have made in implementing the proposals it set out in the Discussion Paper towards separating prosecution and investigation functions and welcomes the establishment of the National Prosecution Service. The Commission considers that the development of the National Prosecution Service is likely to achieve the necessary separation of investigation and prosecution functions which should improve the quality of decision-making and increase accountability. A higher standard of summary prosecutions in court is expected because of the greater specialisation and increased training of police prosecutors.

## OTHER PROSECUTING AGENCIES

- 119 There is an increasingly large number of departments and Crown entities, other than the police, undertaking prosecutions in New Zealand. Indeed, with greater fragmentation of the State there has been considerable devolution of the power to prosecute to bodies removed from the direct supervision and control of the Solicitor-General on behalf of the Attorney-General. State prosecuting agencies, to name a few, include the Inland Revenue Department, Department of Labour, Accident Compensation Corporation, Department of Social Welfare and the Ministry of Fisheries.
- 120 The Attorney-General has ultimate constitutional responsibility for criminal prosecutions. The Commission considers that prosecuting crime is fundamentally a state function. It is, therefore, essential to ensure that all prosecuting agencies meet appropriate and publicly available prosecution standards. The obligation for setting and maintaining such standards lies with the Attorney-General and the Solicitor-General.
- 121 The Discussion Paper proposed<sup>62</sup> that the Crown Law Office should establish an administrative unit to oversee the prosecution system, with a number of practical functions, including co-ordinating the Guidelines with the prosecution guidelines of other agencies. This is desirable as it will promote consistency of decision-making.
- 122 Submissions from prosecuting agencies outlined the general view that, while consistency of practice is desirable, the Guidelines are often not relevant to summary cases, and to departmental prosecutions in particular. A number of agencies have developed their own prosecution guidelines as a part of their compliance policy, using the Guidelines as a model.

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<sup>62</sup> Discussion Paper, above n 24, para 363.



- 123 The Commission was also interested in the existing administrative structures within prosecuting agencies that ensure the separation of investigation and prosecution functions. Submissions and meetings made it clear that, within their own structures, prosecuting agencies are aware of the necessity to keep the two roles distinct.
- 124 Nearly all government departments or Crown agencies with responsibility for investigation and prosecution also have other roles (in contrast to the police). For instance, Work and Income New Zealand sees its primary role as delivering benefits to those who are eligible for them. Its role in preventing and prosecuting benefit fraud is a secondary one. Many other prosecuting agencies consider their prosecution policies to be a part of broader objectives. A prosecution policy might only form a part of a compliance programme that emphasises education and prevention rather than deterrence.
- 125 The Commission appreciates the broad range of factors that prosecuting agencies need to consider in relation to their prosecution policies. However, with increasing numbers of prosecuting agencies (in addition to the police) performing the important public function of prosecution we think that it is of great importance that charging standards are created to ensure consistency and quality of prosecutions. Prosecuting agencies should also ensure that their prosecutors are well trained in advocacy and evidence.
- 126 For these reasons the Commission recommends that the Solicitor-General should establish prosecution standards – for which the current Guidelines are a useful blueprint – for all state prosecuting agencies (that is, all agencies that are departments or Crown entities for the purposes of the Public Finance Act 1989, or are responsible either to the Attorney-General or to a Minister of the Crown). The standards should:
- apply to summary, as well as indictable, proceedings;
  - suggest measures for ensuring an appropriate separation of investigation and prosecution functions; and
  - reiterate that departmental prosecutors are responsible to the Attorney-General for prosecution decisions, not the Minister in charge of their department.

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## 5

# Prosecution decisions and the discretion to prosecute

### DISCRETION TO PROSECUTE

127 **T**HE DISCRETION TO PROSECUTE is the means by which a prosecutor can assess and balance competing facets of the public interest. Often there will be aspects of community interest that call for prosecution, such as the need to punish and deter, but also there will be factors that pull in the contrary direction; for example, where a young offender has good chances of rehabilitation if appropriately supported. The Discussion Paper asked whether the discretion to prosecute should be retained, given concerns about consistency and transparency of, and accountability for, prosecution decisions. The unanimous response of submissions was that the discretion must continue. The Commission agrees.

128 The discretion is a fundamental feature of our prosecution system. Mandatory formal prosecution for all reported offences is not in the public interest because:

- Automatic investigation and prosecution would put a much greater strain on the limited resources available for law enforcement. Resources will always be limited and discretions are necessary to enable the resources to be used effectively and efficiently.
- Beyond the issue of resources, there will be situations where there is clear evidence of an offence but it is not in the public interest to prosecute (for instance, where an undercover police officer has technically committed offences as a party during the course of an investigation). In other situations alternatives to prosecution, such as warnings or diversion, may often be more effective methods of promoting the aims of criminal justice. A discretion to prosecute allows those alternatives to be considered.

Of course, the discretion is not and must not be unfettered. It should be exercised by the police, Crown Solicitors and prosecuting

agencies in accordance with publicly available guidelines. This will promote consistency and fairness, and discourage arbitrary prosecutions.

## **What test should be used for decisions to prosecute?**

*A reasonable prospect of conviction?*

- 129 The current test that prosecutors use to decide whether or not to prosecute is contained in the Guidelines.<sup>63</sup> The Guidelines set out a test with two limbs, both of which must be considered when deciding whether or not to prosecute:<sup>64</sup>
- First, the prosecutor must ask whether there is admissible and reliable evidence that an offence has been committed by an identifiable person, and whether that evidence is sufficiently strong to establish a prima facie case; that is, if the evidence is accepted by a properly directed jury it could find guilt proved beyond reasonable doubt (the evidential sufficiency limb).
  - Secondly, if that evidential basis exists, the prosecutor should consider whether the public interest requires a prosecution to proceed (the public interest limb).
- 130 In the Discussion Paper, the Commission observed<sup>65</sup> that the public interest limb of the Guidelines seems to incorporate a more stringent test than the evidential sufficiency limb itself. The discussion in the Guidelines under the public interest limb states:
- ... ordinarily the public interest will not require a prosecution to proceed unless it is *more likely than not* it will result in a conviction [emphasis added].<sup>66</sup>
- 131 The Commission originally proposed<sup>67</sup> that the existing evidential sufficiency limb should be strengthened so that a prosecution should proceed only if there was a reasonable prospect of a reasonable jury convicting. This test would reflect the discussion in the Guidelines in relation to the public interest limb of the discretion.

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<sup>63</sup> The Solicitor-General's Prosecution Guidelines, above n 9, are reproduced in appendix C.

<sup>64</sup> Guidelines, above n 63, 3.

<sup>65</sup> Discussion Paper, above n 24, para 110.

<sup>66</sup> Guidelines, above n 63, 3.3.1.

<sup>67</sup> Discussion Paper, above n 24, paras 378 and 379.

- 132 In contrast, the Crown Law Office and Crown Solicitors submitted that assessment of a reasonable prospect of conviction would require a prosecutor to determine the credibility of the witnesses. In their view prosecutors should not be required to judge the credibility of witnesses because this is properly a function for the tribunal of fact (a point which seems to be implicitly recognised by paragraph 3.3.1 of the Guidelines). Particular concern was expressed in relation to those classes of case, such as historic sexual abuse, where credibility of the complainant was likely to be the ultimate issue presented to the jury. They supported the present *prima facie* test.<sup>68</sup>
- 133 Having considered the submissions, we consider that a change to the existing test is unnecessary. The ‘reasonable prospect of conviction’ test is vague; it would require prosecutors to assess the credibility of a witness, and determine whether the witness would be believed by the tribunal of fact. This would confer an undesirably wide discretion upon the prosecutor. It would also impose a higher onus than that imposed upon the court under section 347 of the Crimes Act 1961 (which is whether a jury properly directed *could* properly convict).<sup>69</sup> The existing test is flexible enough to allow consideration of the prospect of conviction, albeit within the context of the *public interest limb*. The reasonable prospect of conviction will no doubt be a significant consideration in cases where the prosecution evidence has inherent difficulties. However, it would be inappropriate in our view to elevate the prospect of conviction to the fundamental evidential sufficiency test, given the practical problems that are likely to arise from its rigid application.

*Prima facie case alone sufficient to charge despite the prospect of conviction?*

- 134 The Guidelines anticipate that the public interest in some classes of case (for instance, drink driving offences, or corruption of public officials) will warrant prosecution where the first limb of the test – a *prima facie* case – can be satisfied, even if the prosecutor considers conviction is unlikely under the public interest limb. The issue is

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<sup>68</sup> Some departments favoured the ‘reasonable prospect of conviction’ test. The police thought the reasonable prospect of conviction test would be more difficult to apply than the current test(s) and would have no practical advantage.

<sup>69</sup> *Re an application by Fiso & Ors* (1985) 1 CRNZ 689, see also para 151, where we outline our conclusions on the preferred judicial use of s 347 of the Crimes Act 1961.

whether this position is correct; we consider it is. There are types of offences where social considerations such as prevalence and societal harm are such as to justify a policy strongly in favour of prosecution notwithstanding a low prospect of conviction.

- 135 The Commission has considered whether it is desirable to catalogue in the Guidelines those offences where the public interest weighs heavily in favour of prosecution (where a *prima facie* case exists) irrespective of prospects of success. In our view this is undesirable; it is impossible to prescribe in advance the class of relevant offences, because social circumstances are constantly changing, and those offences will change with time as policy and public attitudes change. We also stress that prosecutors should consider actively the public interest in each and every case. There is a danger that a list of offences where a prosecution should almost always follow might encourage prosecutors to abdicate their important responsibility to weigh the public interest.

*A review of public interest factors is warranted*

- 136 As a related issue the Discussion Paper queried the utility of the public interest factors in the Guidelines, and asked whether they should be reviewed.
- 137 Those who commented (including the Crown Law Office) agreed that a review would be useful. The National Collective of Rape Crisis suggested that victims' interests should be given more emphasis and, in particular, pointed out that the present Guidelines explicitly protect the defendant from discrimination *but not the complainant*.<sup>70</sup>
- 138 We recommend the factors should be reviewed with a view to increasing their relevance and utility. The Commission believes that the current public interest factors in the Guidelines are a useful non-exhaustive list that guides prosecutors to the kinds of matters that they should consider in weighing the public interest for or against prosecution. Specific changes to the Guidelines that we are able to recommend now are:

- the grounds of prohibited discrimination in paragraph 3.3.4 of the Guidelines should include the complainant;

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<sup>70</sup> The Guidelines, above n 9, provide (at paragraph 3.3.4) that:

- A decision whether or not to prosecute must clearly not be influenced by:
- (a) the colour, race, ethnic or national origins, sex, marital status, or religious, ethical or political beliefs *of the accused* [emphasis added];
  - (b) the prosecutor's personal views concerning the accused or the victim.

- the prohibited grounds of discrimination (such as sexual orientation) should be the same as those in section 21 of the Human Rights Act 1993.
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## 6

# Court review and supervision of the discretion to prosecute

- 139 **O**NCE A DECISION TO PROSECUTE has been made it is important that the court retains adequate control and supervision over the cases that it is asked to adjudicate. Sometimes, it will be quite proper for the court to dismiss a prosecution as unwarranted, vexatious or oppressive. However, while maintaining a power to supervise and review the cases that it will hear, it is important that the court itself does not undermine the independence of the decision to prosecute by substituting its own decision. Nor should the court make the ultimate decision of guilt or innocence when it is not asked to do so. These competing factors must be balanced.
- 140 The Discussion Paper identified several mechanisms designed to ensure court oversight of prosecutions once they have begun: the New Zealand Bill of Rights Act 1990, the doctrine of abuse of process, control over the trial process itself, costs awards, and through section 347 of the Crimes Act 1961. In relation to section 347, the Discussion Paper noted the differing approaches that could be taken and asked a fundamental question: how should the power to discharge an accused be exercised? In this chapter we consider section 347 of the Crimes Act 1961 and make our recommendations upon the approach the courts should take. We also consider whether, and to what extent, the section 347 discretion should itself be the subject of review through Crown appeal rights and judicial review. Finally, we consider mechanisms for court oversight of summary prosecutions.

### COURT REVIEW OF INDICTABLE MATTERS: SECTION 347 OF THE CRIMES ACT 1961

#### **The preferred approach for exercise of the section 347 discretion: evidential sufficiency**

- 141 The primary purpose of section 347 is to screen out weak and inappropriate cases. Before the trial commences the judge has the power under section 347(1) of the Crimes Act 1961 to direct that

no indictment be filed or that the defendant not be arraigned on the indictment. In either case the judge may discharge the defendant. The judge may also direct the defendant be discharged at any stage of the trial.<sup>71</sup> Any discharge under section 347 is deemed to be an acquittal.<sup>72</sup>

- 142 However, the general language of section 347 has resulted in varying judicial views as to how the discretion should be correctly exercised. In the Discussion Paper we therefore asked whether the power should be exercised similarly to the English appellate procedure under the Criminal Appeal Act 1968 (UK). Section 2(1)(a) of that Act provides that the Court shall allow an appeal against conviction if it thinks that the conviction is unsafe.<sup>73</sup> This is a very flexible test that provides the Court with a wide discretion when considering whether to set aside the conviction. Judges must ask themselves the subjective question, whether they are content to let the matter stand as it is, or whether there is not some lurking doubt in their minds making them wonder whether an injustice has been done. That reaction may not be based strictly on the evidence as such; it can be produced by the general feel of the case as the court experiences it.<sup>74</sup>
- 143 If the English procedure were applied to the section 347 discretion, the test would become whether a reasonable jury, properly directed, would find it unsafe (or unsatisfactory) to convict.
- 144 There is no test expressed in section 347 for the judge to apply when exercising the discretion. A number of tests that focus upon *evidential sufficiency* as the appropriate measure have been developed as a matter of practice by the courts, based upon the English decision in *R v Galbraith*.<sup>75</sup> The test accepted in these cases is whether a properly directed jury *could* properly convict on the prosecution evidence. If not, then the judge should stop the case. It has been generally accepted that this formulation does not require, or indeed entitle, a judge to consider the credibility of witnesses or the reliability of their evidence when applying

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<sup>71</sup> Section 347(3) Crimes Act 1961.

<sup>72</sup> Section 374(4) Crimes Act 1961.

<sup>73</sup> Since publication of the Discussion Paper, above n 24, s 2(1) of the English Act has been amended to delete the word 'unsatisfactory', because there was seen to be no real difference between 'unsafe' and 'unsatisfactory'.

<sup>74</sup> *R v Cooper* [1969] 1 QB 267, 271.

<sup>75</sup> *R v Galbraith* [1981] 2 All ER 1060.



the test. The *Galbraith* test has been expressly adopted in New Zealand.<sup>76</sup>

- 145 However, some High Court judges have not applied the *Galbraith* test. For example, in *R v Myers*,<sup>77</sup> the Court stated the test under section 347 thus:

[I]f after reading the depositions, the Judge is satisfied that it is unlikely that any jury, properly directed, would convict, or, a *fortiori*, that it would be wrong for a jury to convict the accused, it appears that the discretion may be properly exercised.

Clearly, the test of whether a jury would be *unlikely* to convict is a more exacting standard than the *Galbraith* test of whether a jury *could* convict. By considering whether it would be *wrong* for the jury to convict, the test thus framed incorporates a subjective element similar to the English unsafe conviction test; the *Myers* test suggests a judge can and should assess the reliability of evidence when determining whether to grant a discharge.

- 146 In *Long v R*,<sup>78</sup> a medical manslaughter case, Hammond J reviewed several cases in which section 347 was discussed. He preferred a pragmatic test similar to that in *Myers*:

In the end I doubt if any satisfactory intrinsic test(s) can be adopted. A pragmatic approach is the more intellectually honest, and feasible. The first concern must always be evidential . . . Is there evidence on which – if it is given proper directions – a jury could properly convict? . . . The second inquiry is as to the “justice” of the case. Even if there is evidence on which it “could” convict, in all the circumstances pertaining to the case at the time of the application, would it be unjust to have the case proceed to trial?<sup>79</sup>

- 147 In *R v H*,<sup>80</sup> Baragwanath J preferred the *Galbraith* approach when considering a section 347 application. He specifically rejected the *Myers* test because the first limb (it is unlikely that any jury properly directed could convict) entails judicial prediction of what a jury might do, which is no function of the court, and because the second limb (it would be wrong for a jury to convict) is also uncertain in

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<sup>76</sup> See *Re an application by Fiso & Ors*, above n 69, and *R v H* (1996) 13 CRNZ 648.

<sup>77</sup> *R v Myers* [1963] NZLR 321.

<sup>78</sup> *Long v R* [1995] 2 NZLR 691.

<sup>79</sup> *Long v R*, above n 78, at 696. The accused was ultimately discharged on the ground that to proceed with a trial would have been against the public interest and unduly burdensome to the accused, although the judge also found the evidence to be inadequate to support a conviction.

<sup>80</sup> *R v H*, above n 76.

its application. He also observed that the ‘pragmatic’ test in *Long*, if it differs from that in *Myers*, is also too uncertain as a test of whether there is enough evidence for a case to be left to a jury.

- 148 The Commission agrees with the comments of Lord Lane CJ in *Galbraith*,<sup>81</sup> that a judge, in considering whether a conviction will be ‘unsafe’, is likely to consider the weight and reliability of the evidence. Such evaluation is properly the function of the tribunal of fact, and should not be entertained by a court embarking upon a section 347 enquiry. For the same reason, we reject the test in *Myers*. We also consider that the pragmatic test in *Long* is unworkable for reasons of certainty and practicality. In our view, the correct balance is not struck by permitting a court to examine the merits and reliability of the evidence when considering the section 347 discretion. In indictable matters issues of credit are always for the jury, and there is no reason to believe that juries are less well equipped than the judge to make such an assessment.

### **The preferred approach for exercise of the section 347 discretion: abuse of process**

- 149 Other judges have interpreted section 347 in a manner that permits policy considerations to be taken into account. In *R v E T E*<sup>82</sup> Holland J stated that:

... it is not desirable for the Judges to place a fetter on the unfettered discretion vested in the Judges by Parliament.

In that case, the issue was whether it would be appropriate to discharge an accused under section 347 if the accused established that the complainants’ delay in reporting alleged offences to the police constituted an abuse of process. Holland J held:<sup>83</sup>

An applicant under s 347 Crimes Act may be able to establish that there has been an abuse of process of the Court. I see no reason why a Judge should not exercise his discretion under s 347 if such facts are established. If a Judge is satisfied that a delay has been so great, and the prejudice to an accused is of such a nature that it would be quite unfair or unjust for the prosecution to be allowed to continue, then the Court may discharge an accused under the provisions of s 347.

The issue of whether a properly directed jury could or would be likely to convict did not arise.

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<sup>81</sup> *R v Gailbraith*, above n 75, 1061.

<sup>82</sup> *R v E T E* (1990) 6 CRNZ 176, 180.

<sup>83</sup> *R v E T E*, above n 82, 181–182.

150 Section 347 may also be used to grant a discharge on the basis of public interest factors even though the evidential sufficiency test is met. According to *Adams on Criminal Law*,<sup>84</sup> the discretion may also be exercised on the following grounds:

- No useful purpose would be served by the continuation of the proceedings.
- Continuation of the proceedings would be unfair, oppressive or otherwise damaging to the maintenance of public confidence in the administration of justice. This category includes unconscionable conduct during the investigation of an offence, unfair conduct by the prosecution, and unreasonable delay.

In our view, it is important to preserve the alternative use of the discretion.

## Conclusion

151 We consider that section 347 should be and is legitimately used in two ways:

- to filter prosecutions by ensuring there is sufficient evidence to continue with the prosecution. Of the models developed by the courts to assess evidential sufficiency the *Galbraith* test, as applied in *Re Fiso*, of whether there is evidence on which a properly directed jury *could* convict, is to be preferred. This test does not require the judge to assess the reliability or weight that should attach to the evidence; a function in our view reserved exclusively for the jury or tribunal of fact. The test also avoids the difficult task of judicial prediction of what a jury might do;
- to ensure that the continuation of prosecutions conforms with the public interest. The Commission considers it appropriate that the section 347 discretion be exercised in cases where there are such factors as unfair or unconscionable conduct by the police or prosecution, undue delay, or proceedings that create a risk of unfairness, even though an evidential sufficiency test has been met. New Zealand case law reveals that the discretion has been used in this way for some time, and we approve this practice. In such cases, section 347 is merely one mechanism that the court can utilise to dispose of inappropriate prosecutions. The discretion conveniently reflects and confirms other common law powers of the court, such as the power to grant a stay for abuse of process.

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<sup>84</sup> Robertson (ed) *Adams on Criminal Law* (Brooker's, Wellington, 1992) para CA347.04.

## Should the Crown have a right of appeal from section 347 decisions based on a question of law?

- 152 Section 380 of the Crimes Act 1961 provides that at any time either during or after a trial, whether the result of the trial is conviction or acquittal, the judge may reserve for the opinion of the Court of Appeal any question of law related to the case. If the result of the trial is acquittal the accused shall be discharged, subject to being arrested again if the Court of Appeal orders a new trial.<sup>85</sup>
- 153 However, there is no similar power in relation to discharges under section 347. A section 347 discharge is deemed to be an acquittal<sup>86</sup> and the Crown has (outside of section 380) no right to contest an acquittal. A section 347 discharge can occur either before or after the commencement of the trial. But even if it occurs after the commencement of the trial it is not subject to the section 380 procedure. The Court of Appeal has held<sup>87</sup> that a discharge under section 347 is not reviewable under section 380 because it cuts the trial short; so it cannot be said that the result of *the trial* is acquittal for the purposes of section 380.
- 154 In our Discussion Paper we asked (paragraph 176) whether there should be a right (which clearly would be exercised by the Crown) to appeal a section 347 discharge. We concluded there should be if a discharge is based upon a question of law rather than fact. However, it would be undesirable to have a general right of appeal, because an accused person should either be acquitted finally and conclusively or know that he or she has a conditional discharge because of a point of law. Thus a section 380 procedure would be more appropriate for contesting a section 347 discharge than a general appeal.
- 155 It has been suggested that, despite an accused being discharged under section 347, it may still be possible to use section 380:
- ... the appropriate course is for the Crown to urge that the Judge direct the jury to return a verdict of “Not Guilty” in respect of which the case stated procedure of s 380 would then apply.<sup>88</sup>
- 156 The Commission considers the practice of a directed verdict to be an unnecessary complication. The Crown should have recourse to

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<sup>85</sup> Section 380(4), Crimes Act 1961.

<sup>86</sup> Section 347(4), Crimes Act 1961.

<sup>87</sup> *R v Grime* [1985] 2 NZLR 265.

<sup>88</sup> *R v Grime*, above n 87, 269, per Richardson J.

a section 380 procedure where there has been a section 347 discharge on a point of law only. The current practice of directed verdicts could then be abandoned. We note that the Ministry of Justice is investigating whether the Crown should have a limited right of appeal, on a point of law, against a section 347 discharge – in contrast to the position in *R v Grime*. The police and the National Collective of Rape Crisis both agree that the prosecution should have the right of appeal against a discharge under section 347.

- 157 We also make the point that, although the section 380 procedure is not available in cases of section 347 discharge, judicial review of the decision is available, *but only if* the decision is made by a District Court judge.<sup>89</sup> Judicial review is not available for a section 347 discharge by a High Court judge. Other than jurisdictional differences between the District Court in contrast to the High Court, there is no reason in principle to support this difference. The Commission considers this is another anomaly that points to the need for statutory reform.
- 158 We therefore recommend that section 347 of the Crimes Act 1961 be amended to provide the Crown with the right to reserve a point of law so that the discharge is conditional upon the ultimate determination of that reservation.<sup>90</sup>
- 159 We have also considered whether the accused should have a right of appeal against a refusal to grant a section 347 discharge. This is only an issue pre-trial, because if it is alleged that a mistake of law was made during the trial the accused has a general right of appeal following conviction. It is strongly arguable that whether a citizen should stand trial at all is a fundamental matter of justice, and if that principle is to be recognised by allowing the Crown to appeal on a reserved point of law following a pre-trial section 347 discharge, then the accused should have the same facility.

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<sup>89</sup> In *Auckland District Court v Attorney-General* [1993] 2 NZLR 129, 133–136 the Court of Appeal concluded that because, in the exercise of its criminal jurisdiction, the District Court is a court of limited jurisdiction, it is in the public interest that it be subject to judicial review. Therefore, the decision of a District Court judge under s 347 is amenable to judicial review by the High Court. The Court of Appeal stressed that the power to review the decision of a District Court judge under s 347 must be sparingly exercised, and only when, because of the nature of the error of jurisdictional law in the District Court, the intervention of the High Court is imperative.

<sup>90</sup> We note that the Law Commission for England and Wales has recently published a consultation paper *Prosecution Appeals Against Judges' Rulings* (Consultation Paper 158, June 2000).

160 The argument against a defence right of appeal to a pre-trial refusal to grant a section 347 discharge is the practical one of delay. It would also require the Court of Appeal to review an entire case in the same way that the court of committal and the court of indictable jurisdiction had already done. Given that an accused has a right of general appeal following a conviction, and given that the right of the State to put a person on trial will have been considered at both the preliminary hearing and trial stage, the Commission is of the opinion that it is unnecessary to have a third pre-trial opportunity to review a case. The Crown is in a different position because it has no right of general appeal at the end of a trial and currently has no redress when a High Court judge orders a section 347 discharge pre-trial.

### **Should a power equivalent to section 347 be available to a judge sitting in the summary jurisdiction?**

161 The reason the section 347 procedure is available in the indictable jurisdiction is that the indictable procedure requires the Crown to first prove that it has a prima facie case at a preliminary hearing before a jury can be troubled by it. Therefore, a written record of the Crown's case is available to a court of higher jurisdiction to consider if the defence wishes to, in effect, appeal the committal decision. We have recommended (see paragraph 188 below) the abolition of routine preliminary hearings so that the committal decision will be largely administrative and made on the basis of disclosure pursuant to a statutory regime.

162 In the past, the summary jurisdiction could not have had an equivalent of the section 347 procedure. The jurisdiction was truly 'summary', in that procedures were swift and simple; the information was laid, a plea was taken, a date was set for hearing and the trial proceeded. At the end of the prosecution case the defence could submit that there was no case to answer, and if that submission was upheld the trial ended at that point. If not, the defence would have the option of calling evidence. However, the 'summary' procedure is no longer truly summary. The prosecution (by judicial practice) is required to make disclosure of material in its hands relevant to the case, to prepare full written briefs for the prosecution witnesses and to file and serve those in advance of trial.<sup>91</sup> This procedure is now well-established and accepted. It

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<sup>91</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385

would be expedient, therefore, to give District Court judges the power to consider a ‘no case to answer’ submission once the prosecution has filed its briefs of evidence.

- 163 The test to be applied by a judge in the summary jurisdiction in considering a submission, that there is no case to answer, is the same as that applied by a judge sitting with a jury:<sup>92</sup>

At the conclusion of the prosecution’s case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding [no case to answer].

This test reflects our preferred enquiry under section 347 for evidential sufficiency (see paragraph 151 above).

- 164 One objection that may be raised to the extension of the section 347 procedure to the summary jurisdiction is that it will be used routinely by defence counsel for the purposes of delaying trial. However, in practice it seems to us unlikely that the procedure will be used often. The papers will usually show that there is a case to answer; usually it is only under the challenge of cross-examination that the evidence will be shown to be lacking.

- 165 One advantage of introducing this procedure in the summary jurisdiction is that it would act as a control on private prosecutions. In the Discussion Paper, we discussed the need for reform to preserve the right of citizens to prosecute privately, while ensuring adequate safeguards against vexatious and oppressive conduct by private prosecutors. If the Summary Proceedings Act 1957 were amended to provide that any informant must provide the accused, before a hearing date is set, with copies of all witness briefs and the accused is permitted to make a ‘no case to answer’ submission prior to trial, then this would protect the citizen from the vexatious or commercially predatory private prosecutor while not inconveniencing the police, who already make this disclosure.

- 166 Accordingly we recommend that the Summary Proceedings Act 1957 be amended to provide that:

- (a) a District Court judge may require an informant to provide the accused, before a hearing date is set, with disclosure of all

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<sup>92</sup> Per Lord Diplock in *Haw Tua Tau v Public Prosecutor and other appeals* [1982] AC 136, 151 (PC).

material in its possession relevant to the case and copies of briefs of evidence of all witnesses whom it proposes to call; and

- (b) once that information has been provided, a procedure equivalent to section 347 shall be available to the accused.

## Quashing the indictment under section 345

167 Section 345 of the Crimes Act 1961 provides:

- (5) Except where an indictment is [filed] under subsection (3) of this section, the accused may, at any time before he is given in charge to the jury, apply to the Court to quash any count in the indictment, on the ground that it is not founded on the evidence disclosed in the depositions; and the Court shall quash that count if satisfied that it is not so founded.
- (6) If at any time during the trial it appears to the Court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of that count remaining in the indictment, the Court may quash that count and discharge the jury from finding any verdict on it; but the Court shall not do so unless it is satisfied that justice requires it.

168 Subsections (5) and (6) of section 345 were not discussed in our Discussion Paper, but have been raised by the peer reviewers of this report. Upon further consideration, we have concluded that they serve no practical function that cannot be achieved by the broader section 347 provision, and are seldom used in practice. Therefore they should be revoked.

169 There are a number of significant differences between these subsections and section 347,<sup>93</sup> in particular:

- (a) A section 345(5) application can only be made after the presentment of the indictment and before the accused is given in charge. A section 347 application can be made at any time after committal, even after verdict.
- (b) Section 345(5) is mandatory, section 347 is discretionary.
- (c) Under sections 345(5) and (6), the court is limited to the evidence disclosed in the depositions. Section 347 has no such limitation.

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<sup>93</sup> For a detailed discussion see Garrow and Turkington *Criminal Law* (Butterworths, Wellington [looseleaf]) pages 601/2–603.



(d) Quashing charges under section 345(5) (and presumably also under section 345(6)) does not amount to an acquittal.<sup>94</sup> The Crown is free to lay fresh charges. No doubt this is why the sections are seldom used, and an application under section 347, which does result in an acquittal, is preferred.

170 Accordingly, the Commission recommends that sections 345(5) and (6) of the Crimes Act 1961 be revoked.

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<sup>94</sup> *R v Grime*, above n 87, 267.

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## 7

# Preliminary hearings

## THE FUNCTION OF PRELIMINARY HEARINGS

171 **I**N INDICTABLE CASES (cases where an information is laid indictably or where a defendant elects trial by jury) a preliminary hearing is conducted under the Summary Proceedings Act 1957. This hearing is a means of establishing whether a prima facie case exists, that is, whether the evidence is sufficient to put the defendant on trial.<sup>95</sup> If there is a prima facie case the defendant is committed for trial; if not, the defendant is discharged. Thus the primary justification for preliminary hearings is to act as a filter protecting defendants from unwarranted prosecutions, and preventing the expense of unwarranted trials.

## PRELIMINARY HEARINGS IN PRACTICE

172 Today, parties can agree that some or all evidence at the preliminary hearing may be given in writing without the need to call witnesses.<sup>96</sup> If all the evidence consists of written statements, a defendant who is represented may agree to waive the hearing and accept committal for trial.<sup>97</sup>

173 The prosecution is not obliged to accept committal on the papers and may prefer to call its witnesses. In *Phillips v Drain*,<sup>98</sup> the Court of Appeal acknowledged that there can be legitimate tactical advantages for the prosecution (such as testing whether the witnesses 'come up to brief') in hearing witnesses give evidence, and be cross-examined, at a preliminary hearing. If the prosecution can establish its case without calling all available witnesses it may do so. However, in *R v Haig*,<sup>99</sup> the Court stated that the prosecution

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<sup>95</sup> *W v Attorney-General* [1993] 1 NZLR 1, 6 (CA).

<sup>96</sup> Section 173A, Summary Proceedings Act 1957.

<sup>97</sup> Section 160A, Summary Proceedings Act 1957.

<sup>98</sup> *Phillips v Drain* [1995] 1 NZLR 513.

<sup>99</sup> *R v Haig* [1996] 1 NZLR 184, 190.

should, wherever possible, call all the witnesses at depositions it intends to call at trial. That is because, in practice, preliminary hearings have important consequential effects, principally that of informing the defence of the strength of the prosecution case. When a witness gives oral evidence and is cross-examined, both prosecution and defence are able to assess the witness's credibility. Some defence counsel assert that hearing witnesses give oral evidence can help convince the defence of the strength of the prosecution case, facilitating early guilty pleas. Conversely, some defence counsel consider that police briefs of evidence are not infrequently overwritten, and consequently prosecution witnesses do not come up to brief. Defence counsel believe that it is essential to their clients to have this information at a pre-trial stage. The ability to hear and to cross-examine witnesses at preliminary hearings may also provide the basis for a later section 347 Crimes Act 1961 application,<sup>100</sup> which unlike discharge at a preliminary hearing acts as a complete acquittal.

- 174 Preliminary hearings may be conducted by Justices of the Peace or Community Magistrates,<sup>101</sup> except in the case of sexual offences where Part VA of the Summary Proceedings Act 1957 requires a District Court judge to preside. There is a rebuttable presumption in serious sexual cases that a complainant will give a written statement only and not be examined or cross-examined on it.<sup>102</sup> Over half of all preliminary hearings proceed on the papers without any oral evidence.<sup>103</sup>
- 175 The Discussion Paper considered the topic of preliminary hearings and concluded that these hearings continue to perform a number of useful functions and should be retained for the present.<sup>104</sup> But this does not mean that there is no need for reform in this area.

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<sup>100</sup> The hearing of which is conducted on the papers without oral evidence. However, applications are often only made after hearing oral evidence at the preliminary hearing.

<sup>101</sup> Section 145(2), Summary Proceedings Act 1957.

<sup>102</sup> Section 185C, Summary Proceedings Act 1957.

<sup>103</sup> Garry and Sutton *Preliminary Hearings: Processes, Outcomes and Discharges* (unpublished paper prepared for Department for Courts, Wellington, 1997) 7.

<sup>104</sup> Discussion Paper, above n 24, chapter 21.

## REFORM OF PRELIMINARY HEARINGS: PROPOSALS

### *Law Commission's 1990 report and proposals for change*

- 176 In our 1990 Report, *Criminal Procedure: Part One: Disclosure and Committal* (the '1990 Report'),<sup>105</sup> we concluded that the preliminary hearing was not achieving its central purpose of acting as an effective filter. We identified two reasons. First, most hearings are before lay Justices of the Peace (and, now, Community Magistrates) who may feel unqualified to put an end to the prosecution even though they will be aware that a second and similar charge could then be proffered. Secondly, to a large extent the discharge at the preliminary hearing stage has been made redundant by the ability to have a final discharge under section 347 of the Crimes Act 1961. The 1990 Report recommended that prosecution evidence should be presented in the form of a written statement except with the leave of a District Court, on application by either party or of its own motion.<sup>106</sup> Cross-examination would be allowed only by leave, and for limited practical reasons. The grounds for authorising personal attendance of a witness would be that the witness:
- is to give evidence concerning identification of the defendant;
  - is to give evidence of an alleged confession of the defendant;
  - is alleged to have been an accomplice of the defendant; or
  - has made an apparently inconsistent statement.
- 177 Of the 11 written submissions to the Commission that commented on preliminary hearings, none favoured outright abolition. Indeed some, notably the New Zealand Law Society, were opposed to any modification of the present system.

### *The 1997 Disclosure Consultation Paper*

- 178 In 1996 the Department for Courts circulated a draft paper that contained options for either abolishing or restricting preliminary hearings. The Commission responded to that paper. We favoured restricting preliminary hearings in the way outlined in the 1990 Report, rather than abolishing them. We were also concerned that the Department for Courts had not considered criminal disclosure in tandem with preliminary hearings. In November 1997 the

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<sup>105</sup> New Zealand Law Commission *Criminal Procedure: Part One: Disclosure and Committal*: NZLC R14 (Wellington, 1990) [1990 Report].

<sup>106</sup> 1990 Report, above n 105, para 161.

Ministry for Justice and the Department for Courts distributed a consultation paper on proposed changes to preliminary hearings and criminal disclosure (the 'Disclosure Consultation Paper').<sup>107</sup> The Commission made a detailed submission on the proposals based on its recommendations in the 1990 Report and on its further thinking.<sup>108</sup> The Ministry of Justice will report to the Minister with final reform proposals during 2000.<sup>109</sup>

- 179 The Disclosure Consultation Paper's preferred reform option reflected that in the Commission's 1990 Report,<sup>110</sup> but with two important additions. First, it recommended that in addition to one of the four grounds being made out, the witness's evidence must be *required* in the circumstances. This is to ensure that the purpose of establishing a prima facie case remains the central focus of the preliminary hearing, and the Commission agrees that this should be the predominant factor. Secondly, the Disclosure Consultation Paper recommended a further *exceptional circumstances* category where oral evidence could be heard at the preliminary hearing. This category is intended to cover quite exceptional cases where oral evidence is needed because an issue of the credibility of the evidence of a witness is raised, or where a reluctant witness has refused to provide a signed written statement.

### 'Exceptional circumstances' or 'interests of justice'?

- 180 The Commission agrees that it is important to be able to call witnesses in the four situations recommended in the Disclosure Consultation Paper. It also acknowledges that, while it is important for the court to retain flexibility in deciding which witnesses should be required to give oral evidence, it is also important that legislation gives the court some guidance. Therefore, the Commission proposes a different formulation of a fifth category. Rather than *exceptional*

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<sup>107</sup> Ministry of Justice and Department for Courts *Consultation Paper Regarding Preliminary Hearings and Criminal Disclosure* (unpublished, Wellington, 27 October 1997) [Disclosure Consultation Paper].

<sup>108</sup> In 1998, the Ministry of Justice and the Department for Courts made a joint bid for legislative time to reform preliminary hearings and criminal disclosure, but were not successful for that parliamentary year. They were also unable to secure parliamentary time in 1999.

<sup>109</sup> The Ministry of Justice is taking responsibility for changes to criminal disclosure while the Department for Courts is dealing with changes to preliminary hearings.

<sup>110</sup> See para 176 above.

*circumstances*, it should be if it is in the *interests of justice* for the witness to give oral evidence.

- 181 Judges are very familiar with enquiries turning upon the interests of justice. This flexible test focuses upon the *basic goals* of criminal justice and is considered daily in many contexts within the criminal jurisdiction of the courts. The same cannot be said for an exceptional circumstances test that sets a rigid and high threshold. An interests of justice category is wide enough to cover the two situations of concern to the Ministry of Justice and the Department for Courts. It also meets the Commission's concern to allow cross-examination of specific witnesses where the witness might be an important source of information for the defence or prosecution beyond a mere brief of evidence.<sup>111</sup>

### **Who should be able to require a witness to present oral evidence?**

- 182 The Disclosure Consultation Paper suggested that only the defence should be able to apply to have a witness present oral evidence. The Commission stands by its 1990 Report view, and believes that either party should be able to apply to have a witness give oral evidence, or that the court may require it on its own motion.
- 183 The Commission believes it is important for the prosecution as well as the defence to be able to call a witness to give oral evidence at a preliminary hearing for two reasons. First, the prosecution will at times have reluctant, but potentially crucial, witnesses from whom they have not been able to get a statement. Secondly, the prosecution may be better able to assess whether the proper charge has been laid. For example, in one case known to the Commission the prosecution at the preliminary hearing, of its own motion, called a large number of witnesses to a pub brawl in which there were a number of stabbings and one death, because until these witnesses had been questioned it was unclear whether the accused should stand trial for murder, or manslaughter.
- 184 The Commission believes that if an application is opposed by the other party, the decision whether a witness should be required to give oral evidence should be made by a District Court judge. However, if both parties consent to the witness being called,

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<sup>111</sup> In particular, the interests of justice category will ensure that, where there is a demonstrable need, both prosecution and defence have all relevant information to assist in considering a guilty plea, a s 347 Crimes Act 1961 application, or whether to proffer different charges.

a Registrar of the Court should have the power to grant the necessary order.

185 The Disclosure Consultation Paper suggested that in cases where a District Court judge has granted leave for a witness to give oral evidence and be cross-examined generally the evidence should be heard before Justices of the Peace. (Since the Disclosure Consultation Paper was written, Community Magistrates have been created and also given jurisdiction to conduct preliminary hearings.) The Commission agrees that such evidence should normally be heard before Justices or a Community Magistrate. In cases involving particular difficulty, either party can apply to have the preliminary hearing conducted before a District Court judge.

186 The Commission believes that there is no compelling reason why a District Court judge who has heard oral evidence at the preliminary hearing should not preside over the subsequent trial, although section 28C of the District Courts Act 1947 currently precludes this. The current restriction on judges presiding over both the preliminary hearing and subsequent trial stems from the concern to ensure the appearance of fairness to the accused. However, we consider there are strong countervailing reasons that negate this concern:

- the judge does not determine the facts, or the guilt or innocence of the accused;
- at present the trial judge is permitted to hear and decide pre-trial applications, during which the judge may make an adverse credibility finding of the accused. If this practice is acceptable, there is even less objection to a judge presiding over both the preliminary hearing, and the trial;
- administrative difficulties arise in smaller centres that have only one District Court judge with a warrant to conduct jury trials.

Accordingly, the Commission recommends that section 28C of the District Courts Act 1947 be repealed.

187 It is the Commission's view that the provisions of Part VA of the Summary Proceedings Act 1957 (relating to the evidence of complainants in cases of serious sexual offending) should not be affected by its recommendations on preliminary hearings. The Disclosure Consultation Paper on the other hand noted<sup>112</sup> "that victims of alleged sexual offending have significant special protection", but made no mention of those special protections when outlining the preferred option. The Commission believes that the

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<sup>112</sup> Disclosure Consultation Paper, above n 107, para 29.

special protection currently afforded to complainants in cases of serious sexual offending must continue, despite the recommendations outlined here.

188 The Commission recommends that the government introduce a preliminary hearings bill that:

- takes account of the Commission's 1990 draft legislation amending the Summary Proceedings Act 1957;
- requires that in committal proceedings prosecution evidence should be presented in written form; and that an application to hear the oral evidence of a witness, and to cross-examine, may be granted to either party only if:
  - (a) the witness is to give evidence concerning identification of the defendant; or
  - (b) the witness is to give evidence of an alleged confession of the defendant; or
  - (c) the witness is alleged to have been an accomplice of the defendant; or
  - (d) the witness has made an apparently inconsistent statement; or
  - (e) it is in the interests of justice for the witness to be required to give oral evidence.

AND in each of (a)–(e) the evidence of the witness is required to establish a *prima facie* case.

The Commission believes these provisions recognise legitimate ancillary and historic uses of preliminary hearings.

189 The Commission recommends that defended applications to give oral evidence in preliminary hearings should be heard by a District Court judge, but that oral evidence should continue to be heard by Justices of the Peace or Community Magistrates, except where the complexity of the case requires a District Court judge. The same District Court judge should be permitted to hear both the application to have oral evidence presented, and the preliminary hearing itself.

190 The Commission recommends that any amendments to the conduct of preliminary hearings should not affect the provisions of Part VA of the Summary Proceedings Act 1957, which gives explicit special protection to complainants of serious sexual offending.

191 The Commission draws attention to another recommendation in this report that will affect the conduct of preliminary hearings. The Commission recommends that Crown Solicitors should have *oversight* of all indictable proceedings *once a plea is entered*, or the



defendant has elected trial by jury. Crown Solicitors, or counsel appointed by them, would conduct the preliminary hearing at the election of the police, where the nature of the case makes that level of representation desirable. Efficiencies gained from the proposed changes restricting preliminary hearings will be further enhanced by earlier Crown Solicitor oversight of prosecution cases (see paragraphs 91–97).

- 192 The Commission reiterates that preliminary hearings should not be amended in isolation from the introduction of a criminal disclosure statutory regime (see chapter 8). This is because of the important role that the preliminary hearing plays in uncovering the prosecution’s case. Any loss of such an advantage by the restriction in the availability of oral evidence and opportunities to cross-examine prosecution witnesses at preliminary hearings, as a matter of right, should be offset by an effective criminal disclosure regime.
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## Criminal disclosure

### INTRODUCTION

193 **A** PERSON ACCUSED OF A CRIME must be made aware of the nature and extent of the allegation; without adequate disclosure, a defendant will be unable to prepare their defence properly. The extent to which defendants should be entitled to disclosure of information from the prosecution depends upon a fair balance between the general public interest and important personal rights of individual citizens. Defendants should not be handicapped by a lack of relevant information and by an imbalance of resources available to them in preparing a case compared with those resources at the disposal of the State. In the 1990 Report, the Commission concluded that all relevant information in the hands of the prosecution should be made available to the defence subject only to exceptions needed to avoid prejudice to the wider public interest.<sup>113</sup> The real question is *how* do we achieve adequate disclosure?

194 The 1990 Report recommended the introduction of a comprehensive criminal code to regulate disclosure in criminal cases.<sup>114</sup> A comprehensive code was considered necessary because such rights as presently exist are strewn through a number of enactments that have differing policies informing them, such as the Official Information Act 1982, and the Privacy Act 1996. The Commission also agrees with the Disclosure Consultation Paper that a clear and enforceable regime for disclosure is particularly important when access to a preliminary hearing is restricted.<sup>115</sup> That is because of the reduced effectiveness of the streamlined preliminary hearing as a mechanism for pre-trial disclosure, and the diminished importance of preliminary hearings generally as a filter for unwarranted prosecutions.

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<sup>113</sup> 1990 Report, above n 105, paras 65–66.

<sup>114</sup> 1990 Report, above n 105, para 64.

<sup>115</sup> Disclosure Consultation Paper, above n 107, 26.

- 195 We now reiterate our recommendations, made 10 years ago, that a comprehensive disclosure code be introduced. The draft bill contained within the 1990 Report remains a workable starting point for the proposed legislation. In this chapter we examine some of the key features that a new disclosure code should have, and evaluate some of the proposals advanced by other law reform bodies.
- 196 The *New Zealand Police Court Based Resolution Project: Process Design*<sup>116</sup> envisages that the new police prosecution service briefing centres will have the responsibility for disclosure (see paragraph 115 above). The police consider that disclosure could perhaps be more satisfactorily dealt with by the formulation of guidelines rather than legislation.
- 197 The Commission agrees with the suggestions in the Disclosure Consultation Paper, that the outstanding problems in relation to criminal disclosure, which a disclosure statute could solve, are:
- consistency of practice across the country;
  - lack of clarity/certainty of rights – especially for unrepresented defendants;
  - obtaining timely disclosure;
  - court enforcement of rights; and
  - comprehensive coverage of both public and private prosecutions (the Official Information Act 1982/Privacy Act 1993 and common law regime may not be adequate to cover private prosecutions).
- 198 Some of the existing problems with criminal disclosure are illustrated in *Allen v Police*.<sup>117</sup> The appellant had been apprehended after crashing a car he was driving. His defence counsel made a written request for disclosure of certification, maintenance and calibration records of all breath testing devices used in this case. This request was not complied with by the police. The defence had intended to challenge the accuracy of the device at trial – a legitimate and recognised defence. Defence counsel alleged at trial that there had been an unjustified refusal or failure on the part of the police to provide the requested information. Nonetheless, the appellant was convicted. He challenged the conviction on the basis that the refusal of the police to provide the requested information

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<sup>116</sup> New Zealand Police, above n 30, 12.

<sup>117</sup> *Allen v Police* [1999] 1 NZLR 356. We also note the recent text by Janet November *Disclosure In Criminal Cases* (Butterworths, Wellington, 1999), which sets out the current law in this area.

was an abuse of process for which the sanction should have been dismissal of the information.

- 199 Justice Giles decided that the prosecutor had, without acceptable explanation, failed to comply with a legitimate defence request for pre-trial discovery. This refusal had infringed the defendant's rights under section 24(d) of the New Zealand Bill of Rights Act 1990, which provides that a person charged with an offence has the right to adequate time and facilities to prepare a defence. The defence was entitled to be provided with the records, or be given access to them, in advance of the trial, so as to form a view as to whether an issue of reliability of the device arose. Justice Giles held that the appropriate sanction was dismissal of the information. He made the decision on the grounds of abuse of process and denial of a right to a fair trial.

If, upon a timely request the prosecution elects not to respond, then, in my view, there are fatal consequences for the prosecutor since, in most cases, a ground for dismissal for abuse of process or prejudice to the process of a fair trial will have been per se established. The abuse lies in deliberate failure/refusal to supply; the prejudice lies in denial of the ability to assess the history and reliability of the device in order to determine whether there is a defence point open to be taken.<sup>118</sup>

- 200 Justice Giles also considered the legal position in situations ranging from a deliberate failure to make legitimate disclosure, to an accidental default accompanied by an explanation. Regrettably, this kind of complexity is caused by the lack of a coherent regime controlling criminal disclosure. A complete legislative code would provide guidance to prosecutors about their obligations to make discovery. This in turn should result in fewer cases before the court turning upon purely procedural objections. Overall efficiency of the criminal justice system will be improved by freeing up more judicial time for consideration of cases on the merits, rather than discovery and procedure.

## A STATUTORY REGIME FOR DISCLOSURE

- 201 Because of problems with the existing regime (illustrated by *Allen v Police*), the 1990 Report recommended a tailor-made statutory criminal disclosure scheme enshrined in legislation, applying to both summary and indictable cases. Draft legislation was included in the 1990 Report but has not been enacted.<sup>119</sup>

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<sup>118</sup> *Allen v Police*, above n 117, 364.

<sup>119</sup> See paras 176–179 above.

- 202 The Commission also recommended that notice should be given of an intention to call an expert witness, and that defence disclosure of alibi evidence should occur in summary, as well as indictable, cases. The requirement to give notice of intention to call an expert witness is contained in section 225 of the Commission’s draft Evidence Code.<sup>120</sup> We endorse the recommendation that defence disclosure of alibi evidence should occur in summary cases, and expect that this will be contained in the final reform proposals on disclosure now being prepared by the Ministry of Justice (see paragraph 178 above).
- 203 The Disclosure Consultation Paper proposal was along similar lines, although it raised particular issues of timing and scope of disclosure, which we now consider.

### **Initial disclosure**

- 204 The Commission believes, as outlined in its 1990 Report, that there should be two types of disclosure – initial and full. The 1990 Report referred to initial disclosure as “discovery at the time of charge”, and suggested that before defendants are required to plead or elect jury trial in summary cases, and at, or near, the first appearance in indictable cases, there should be automatic disclosure of the charge, its statutory authority, the maximum (and any minimum) penalties upon conviction, and a summary of facts. We note that police summaries of fact invariably include this information, but we believe that it should be a standardised requirement prescribed by legislation. In addition, initial disclosure should include the original complaint, whether police (such as a constable’s notebook entry, or traffic offence check list) or civilian (such as a written statement obtained from a complainant). Information that may be relevant to sentence, such as a list of the defendant’s previous convictions, should be made available at this time. Legislation should be enacted to place a positive obligation to disclose these items. However, such legislation would constitute the minimum disclosure required and the accused would still be entitled to request any further material relevant in his or her case. The same obligation and standardised summary should be used by all prosecuting agencies.
- 205 The defendant should also be given written notice that in the event of a plea of not guilty he or she has a statutory entitlement to full *and ongoing* disclosure.

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<sup>120</sup> New Zealand Law Commission *Evidence Code and Commentary: NZLC R55, Vol 2* (Wellington, 1999) [*Evidence Code and Commentary*].

## *No further disclosure at the initial stage*

- 206 Unlike the Disclosure Consultation Paper, the Commission remains of the view (expressed by implication in its 1990 Report) that, apart from the items listed in paragraph 204 above, further initial disclosure, such as the names of prosecution witnesses and an index of exhibits is unnecessary and, in most cases, impracticable at an initial stage. For example, a full list of exhibits might not be available until after forensic testing is completed, which may take several weeks. Initial disclosure of the listed items before pleading, followed by full and ongoing disclosure, is a more practical solution that will adequately meet a defendant's need for information.

## *Timing of initial disclosure*

- 207 Initial disclosure should be made as soon as possible before a defendant is asked to enter a plea; or as soon as practicable and in no cases beyond 14 days after service of a summons.<sup>121</sup> The Commission does not see the need for any flexibility in timing of initial disclosure, but does see a need for flexibility in ongoing disclosure.

## **Full disclosure**

### *Scope of full disclosure*

- 208 The 1990 Report recommended that the scope of full disclosure should be governed by a general relevance test, relevant information being that which tends to support or rebut or has a bearing on the prosecution case. The Disclosure Consultation Paper adopted that recommendation but also suggested including a non-exhaustive list of types of information that will always be relevant. The Commission initially believed that such a list would be useful. However, it is now concerned that a list, although expressed to be non-exhaustive, might encourage narrow construction by prosecutors and may be counter-productive.
- 209 The 1990 Report listed the categories of information that the prosecutor may withhold, in the public interest, if disclosure would create a real and substantial risk of:
- prejudice to methods of investigating and detecting offences;
  - prejudice to the investigation and detection of another alleged offence;

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<sup>121</sup> 1990 Report, above n 105, para 90.

- facilitating the commission of an offence;
- causing any person to be intimidated or physically endangered;
- prejudice to national security; or
- a breach of an evidentiary privilege.<sup>122</sup>

210 In addition, the Commission considers that the existence of such information, a description of its nature, and the grounds on which it is claimed to be properly withheld must be disclosed to the defendant. Moreover, as recommended in the Commission's 1990 Report,<sup>123</sup> if it is possible to make partial disclosure of information while protecting exempted, sensitive material then clearly it should be done. There must also be an obligation on the prosecution to disclose the existence of relevant information known to exist even if it is not in its possession, and therefore not in its power to disclose.<sup>124</sup> This obligation would be of particular importance in private prosecutions.<sup>125</sup>

### *Obligation to make full disclosure*

- 211 The Crown's obligation to make full disclosure must be ongoing, from the time of initial disclosure until the trial is over, and should be an automatic obligation on the person in charge of prosecuting a case at any given time.
- 212 The Disclosure Consultation Paper noted that, as indictable cases progress, the conduct of the prosecution passes from the police to the Crown Solicitor, and asked whether the Crown Solicitor is then the appropriate person from whom to seek disclosure. The Commission believes that the police officer in charge of the case remains the appropriate person from whom to seek disclosure at all stages of the trial. The police carry out any ongoing investigation and have physical custody of the evidence, the Crown Solicitor does not. However, to the extent that the Crown Solicitor holds relevant information that is not held by the police and not legally privileged, the disclosure regime must be sufficiently robust to ensure that such information is disclosed. The structure of the new Police National Prosecution Service (see paragraph 115 above) will incorporate briefing centres that will have responsibility for ensuring disclosure is made.

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<sup>122</sup> 1990 Report, above n 105, para 81.

<sup>123</sup> 1990 Report, above n 105, para 82.

<sup>124</sup> See further, paras 219–220 below.

<sup>125</sup> See further, chapter 10 below.

### *Timing of full disclosure*

213 The Commission considers that full and ongoing disclosure should be automatically triggered for summary offences by entry of a not guilty plea or election of trial by jury, and for indictable offences by the first appearance. All relevant information should be disclosed as soon as reasonably practicable after entitlement arises. However, the court should retain an express power to set timetabling orders where necessary in order to facilitate disclosure and to monitor progress. Legislation establishing the disclosure regime should confer a specific power upon the District Court to make time-tabling orders.

### *Enforcement of full disclosure*

214 There need to be sanctions to ensure compliance with disclosure requirements and timetable orders. There are currently remedies available to punish non-compliance, because the High Court has both inherent power to deal with non-disclosure,<sup>126</sup> and the function of giving effect to the rights of the accused under section 24 of the Official Information Act 1982 to have access to personal information and the District Courts have implied powers in respect of each. One of the advantages of a statutory regime would be to clarify the exact requirements and bring the remedies for non-compliance into sharp focus. We recommend that any disclosure regime provide for disclosure to be enforced by way of timetabling orders (from which there should be no appeal), and if those orders are not complied with, the following sanctions to be available:

- further timetabling orders;
- orders for the prosecuting agency to contribute to the costs incurred by the defendant;
- as a last resort, dismissal of the case.

215 In relation to an order for costs, we note that the Costs in Criminal Cases Act 1967 does not provide for costs orders at an interlocutory stage, and therefore separate provision would be required in a disclosure statute. In our recent review of the Costs in Criminal Cases Act,<sup>127</sup> we recommended that costs under that Act should be recoverable by the Legal Services Board as this encourages high

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<sup>126</sup> *Allen v Police*, see paras 198–200 above; see also *Commissioner of Police v Ombudsman* [1998] 1 NZLR 385.

<sup>127</sup> New Zealand Law Commission, *Costs in Criminal Cases: R60* (Wellington, 2000) [*Costs in Criminal Cases*].



prosecution standards.<sup>128</sup> For the same reason, we would recommend that a provision for costs in a disclosure statute should also be exercisable by the Legal Services Board. There should also be a provision analogous to section 7 of the Costs in Criminal Cases Act 1967, so that where a prosecution is conducted by or on behalf of the Crown, the costs shall be paid out of money appropriated by Parliament for that purpose or, if the court is of the opinion that the failure to disclose arises from negligence or bad faith, by the prosecuting agency itself.

- 216 Where the failure to disclose is discovered after a case has been concluded, effective remedies already exist: the court may quash the conviction and order a rehearing, the police and the Crown Law Office have internal procedures to investigate and discipline, and in appropriate cases a criminal charge of conspiring to defeat the course of justice may be laid.<sup>129</sup> No further remedies are required.
- 217 In relation to the scope of disclosure before trial, if full disclosure is not made, upon application the court could order disclosure of particular items of evidence. In relation to indictable offences, the Commission agrees with the Disclosure Consultation Paper's suggestion that section 379A Crimes Act 1961 would be the appropriate provision for appeals against such an order in indictable cases. An analogous procedure should be available in summary cases.
- 218 The Commission agrees with the suggestion of the Disclosure Consultation Paper that, when the prosecution seeks to adduce undisclosed evidence at trial, the court should have the power to exclude or accept it, to adjourn and/or order costs.
- 219 The Commission believes that it is not necessary that the disclosure regime deal specifically with issues raised by the existence of material held by third parties. At present the prosecution is under a duty to disclose to the defendant the existence of all relevant information in the hands of third parties. Once a defendant has been apprised of the identity of the holder of the information, the defendant is able to compel the evidence through the normal means of witness summonses and subpoena duces tecum. It would be impossible to regulate third party disclosure coherently given the limitless number of circumstances where it might arise. It is better left to the general law to determine the extent to which a defendant can compel relevant evidence from a third party, counter-balanced by the third parties' rights to privacy.

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<sup>128</sup> *Costs in Criminal Cases*, above n 127, paras 69–75.

<sup>129</sup> Section 116 Crimes Act 1961.

220 An example of the complexity of third party disclosure is evidence of a sensitive nature. Such a claim must remain to be decided by the courts, balancing the competing interests. Section 67 of the Commission's draft Evidence Code would create a discretion to prohibit the disclosure of confidential information in a proceeding.<sup>130</sup> In our view, section 67 provides the flexibility necessary to ensure that the interests of justice are served.

### **Relationship of proposed disclosure code to Official Information Act 1982 and Privacy Act 1993**

221 The Commission recommends that the disclosure regime should operate alongside the Official Information and Privacy Acts before and during trial. Any conflict between those Acts and the disclosure statute would be resolved under section 52 of the Official Information Act 1982 and section 7 of the Privacy Act 1993, both of which provide that neither Act derogates from other provisions that require or authorise the disclosure of information.

222 The Commission considers that if the post-trial use of the Official Information and Privacy Acts reveals relevant evidence that was not disclosed pre-trial, the defendant must retain his or her current right to apply for a rehearing. In addition, there needs to be some sanction against the prosecuting authority if evidence is uncovered post-trial that should have been disclosed pre-trial, for example, the failure to disclose evidence that tended to rebut the prosecution case.

223 The Commission considers that post-trial disclosure performs an important role in the review of cases and therefore recommends that section 31 of the Privacy Act 1993 (although yet to come into effect), which denies inmates access to personal information related to their conviction, should be repealed.

### **Recommendations**

224 The Commission recommends that, in tandem with the legislation amending preliminary hearings, the Government introduce a disclosure bill that:

- takes account of the Commission's 1990 draft disclosure bill amending the Summary Proceedings Act 1957;

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<sup>130</sup> *Evidence Code and Commentary*, above n 120.

- applies equally to summary and indictable offences and to prosecutions by the State and by private prosecutors;<sup>131</sup>
  - requires defence disclosure of alibi evidence in summary as well as indictable cases;
  - ensures that the disclosure regime operates alongside the Official Information Act 1982 and the Privacy Act 1993; and
  - repeals section 31 of the Privacy Act 1993.
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<sup>131</sup> We have suggested that the division of offences into summary and indictable is no longer meaningful to determine the court and mode of trial for an offence and should be abolished (see para 10 of this report, first bullet point) but we have assumed that the distinction will continue, at least in the short term.

## Charge negotiation

225 **C**HARGE NEGOTIATION is the informal process whereby the prosecution and the defence reach an agreement on charges to which the defendant will plead guilty. In practice, this occurs once a decision has been made to bring charges, or after charges have been laid, but before trial. In return for a plea of guilty, the prosecutor may be willing to reduce the number of charges faced by the defendant, charge him or her with a less serious offence, or amend the summary of facts on which the charge is based. If the facts of the case permit selection from a wide range of charges, there may be room for negotiation of the charge or charges. In some jurisdictions *sentence* negotiation occurs; the prosecutor and defence counsel agree on the appropriate sentence in return for a guilty plea, although the judge retains a discretion to reject the agreement. In New Zealand sentence negotiation is expressly prohibited.<sup>132</sup>

226 The Discussion Paper noted that formal charge negotiation is not encouraged in New Zealand, but acknowledged that it does occur. We also accepted that charge negotiation can be an effective mechanism to further the prosecution system's objectives when conducted under strict conditions. The Discussion Paper posed the question of whether the practice of charge negotiation should continue and assessed its utility in relation to the objectives of the prosecution system.<sup>133</sup> There are dangers with any system of charge negotiation which we identified thus:

- The denial of defendants' rights of access to the judicial process. Charge negotiation if conducted improperly might create pressures on defendants to plead guilty in the hope that their sentence will be reduced. Innocent defendants might plead guilty to a lesser charge rather than run the risk of conviction at trial.
- The defendant may not know all the facts when pleading guilty in return for some (apparent) concession by the prosecution. A

<sup>132</sup> Solicitor General's Prosecution Guidelines, above n 63, 7.5(c).

<sup>133</sup> Discussion Paper, above n 24, chapter 17.

lack of information might result in guilty pleas that are not supported by the evidence available to the prosecution.

- Victims are not consulted during charge negotiation and may feel betrayed, even if objectively the prosecutor has achieved all that could have been achieved by a trial.
- An informal and unregulated system of charge negotiation may undermine consistency, transparency and accountability. Too much unguided discretion creates the opportunity for abuse by prosecutors. Because charge negotiation is generally not at present a public or open practice, there is little opportunity for independent review and comment upon such discretion.

Despite the potential drawbacks of charge negotiation, we concluded that if regulated properly charge negotiation can achieve significant advantages:

- Costs will be reduced by avoiding unnecessary trials.
- The chances of securing the conviction and punishment of the offender without the uncertainty of a trial will be increased.
- Victims will be spared the stress of testifying.
- Greater avenues for restorative justice and rehabilitation of offenders may be created.

227 To implement appropriate regulation the Discussion Paper proposed that:

- the Guidelines regulating charge negotiation should be expanded to cover adequately issues of fairness, consistency, transparency and accountability; and
- the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors should be amended to cover charge negotiation.

There are two ways in which charge negotiation is likely to occur in practice:

- informally and privately between prosecutor and counsel; or
- in the case of summary matters, in the course of, or as part of, the preparation for District Court status hearings.

We now set out our final recommendations, dealing with each in turn.

## CHARGE NEGOTIATION BETWEEN PROSECUTOR AND DEFENDANT – NO REGULATION OF CHARGE NEGOTIATION BY LEGISLATION

- 228 The Commission's preliminary view did not favour charge negotiation being regulated by legislation for two principal reasons:<sup>134</sup>
- significant abuse of charge negotiation has not come to light in New Zealand; and
  - status hearings had recently introduced sentence indication as a standard part of judicial practice in the District Court. It is desirable to monitor development of this practice with a view to determining whether comprehensive regulation of charge negotiation might be necessary in the future and, if so, in what form.
- 229 The general view expressed in submissions to the Commission was that charge negotiation did not need to be regulated by legislation, but that the Guidelines should be reviewed. The Crown Law Office was almost alone in suggesting that legislation was desirable to encourage openness and consistency of approach. In contrast, the New Zealand Law Society Criminal Law Committee considered that charge negotiation should neither be formalised nor codified. The Criminal Bar Association and the police favoured expanding the Guidelines to achieve a recognised and transparent form of charge negotiation, compared with the rather informal ad hoc current process. However, the police submission suggested that regulation may be more appropriately achieved with a judicial practice direction rather than through the Guidelines.
- 230 The Commission does not recommend the use of legislation to regulate charge negotiation as there is no demonstrable need for it. However, that is not to say that clear principles should not be articulated. In our view, an examination of the Guidelines in order to articulate the relevant principles is an effective method of addressing our concerns with the present, informal, system of negotiation.

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<sup>134</sup> Discussion Paper, above n 24, para 401.

## EXAMINATION OF PROSECUTION GUIDELINES ON CHARGE NEGOTIATION

- 231 The Discussion Paper suggested that in some respects the Guidelines do not regulate charge negotiation in sufficient depth.<sup>135</sup> In particular, the Commission suggested that two aspects of the Guidelines may be unduly restrictive and hamper the attainment of early guilty pleas in appropriate cases:
- the present restriction on a prosecutor supporting any particular sentencing option<sup>136</sup> might unnecessarily inhibit the willingness of defendants to plead guilty and could also prevent the views of victims being taken into account;
  - the restriction on laying a lesser charge than the evidence supports<sup>137</sup> may at times contradict the ability not to charge at all if the public interest so demands.<sup>138</sup>

### **No sentence negotiation – sentence support instead**

- 232 We consider that there may be room in the Guidelines as presently worded to enable a prosecutor to make a range of responses to sentencing representations made on behalf of the defendant. However, we also consider that charge negotiations should not include express agreement as to a particular sentence. This reflects existing practice. The prosecutor cannot presently guarantee that the sentence agreed upon would be that ultimately imposed by the sentencing judge. Nor should it be so. Judicial oversight and responsibility for the ultimate sentence should not be diminished. The objection is to agreement as to the particular sentence. Prosecutors have an obligation to tell the court what they consider to be the appropriate sentencing range. That is quite proper. Commissioners have experienced police prosecutors supporting a particular sentence from time to time. It is the Commission's view that, other than in the most general terms, this should not happen.
- 233 On balance, the Commission prefers the status quo for two reasons. The first is that there is no evidence that the existing system is creating difficulties. Indeed, by not opposing a sentencing option,

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<sup>135</sup> Discussion Paper, above n 24, para 406.

<sup>136</sup> Solicitor General's Prosecution Guidelines, above n 63, para 8.3.

<sup>137</sup> Solicitor General's Prosecution Guidelines, above n 63, para 7.5(b)(i).

<sup>138</sup> Solicitor General's Prosecution Guidelines, above n 63, para 3.3.

a prosecutor can already effectively signal a position. The second is that obvious problems would be created if pleas of guilty were entered partly in reliance on a prosecutor's undertaking to support a sentencing option that was not subsequently adopted by the court.

### **No prosecution discretion to lay lesser charges than the evidence supports**

- 234 In the Discussion Paper we noted that the prohibition in the Guidelines on laying lesser charges than the evidence supports<sup>139</sup> contradicts the power not to charge at all if the public interest so demands: if the public interest sometimes requires no prosecution at all<sup>140</sup> then it may also justify a lesser charge than the overall evidence supports. Cases may occur when this course of action is reasonable.
- 235 However, the Commission considers prosecutors should not have the power to lay lesser charges than the evidence supports because:
- no matter how guidelines might seek to regulate such a discretion there is a potential for inconsistency, bias and prejudice;
  - administrative expediency could reduce the levels of charging;
  - it is the role of the court, rather than the prosecution, to decide whether proven facts warrant a particular sanction. It is not for the prosecution to attempt to limit the ability of the court to respond to the facts of a case.

### **Prosecutors should not initiate charge negotiation**

- 236 The Guidelines currently prohibit prosecutors initiating charge negotiations in indictable matters.<sup>141</sup> This is to avoid the suggestion that Crown Solicitors overcharge to encourage negotiation. We support the prohibition.
- 237 With regard to summary cases, we understand that the police do initiate charge negotiations. It might be argued that it is acceptable for police to do this because:
- summary charges are less serious than indictable charges;

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<sup>139</sup> Solicitor General's Prosecution Guidelines, above n 63, para 7.5(b)(i).

<sup>140</sup> Solicitor General's Prosecution Guidelines, above n 63, para 3.3.

<sup>141</sup> Solicitor General's Prosecution Guidelines, above n 63, para 7.5a.



- in the summary jurisdiction many more defendants are unrepresented, so there is no defence counsel to initiate charge negotiation;
- the sheer bulk of cases going through the summary jurisdiction makes it expedient for the police to try to get through them.

238 These reasons are, however, simply matters of expediency. The difference between summary and indictable offences is simply one of degree; defendants must be entitled to the same basic protections in summary matters as in indictable matters. If the police were permitted to initiate charge negotiations the possibility for abuse, or at least the appearance of abuse, and particularly the possibility of overcharging to facilitate charge negotiation, is obvious. It is recognised that at status hearings police prosecutors must, as a regrettable necessity, hold discussions with unrepresented defendants. An element of charge negotiation is therefore an inevitable possibility and might have to be raised by the prosecutor so that the unrepresented defendant understands his or her options. The Commission recognises that this will happen but reiterates the danger inherent in police-initiated charge negotiations. Apart from this exception, if there is a practice of police initiating charge negotiations, it should be stopped.

239 Currently, the duty Solicitor scheme does not extend to status hearings, so that many defendants do not have legal representation at this stage. We recommend that either duty Solicitors should be routinely allowed to attend status hearings, or else the Registrar of the Court should be empowered to make a limited grant of legal aid for status hearings.

### **Conclusion: the need for a principled practice of charge negotiation**

240 Overall, the Commission sees real value in a principled practice of charge negotiation. We agree with a 1995 Australian Institute of Judicial Administration recommendation that:

The essential criterion in any plea agreement must be proof of the accused's criminal conduct. Prosecutors must be prepared to identify weak cases early and reduce charges or withdraw prosecution entirely. At the same time, prosecutors must be prepared to try cases where there is a reasonable prospect of conviction, rather than to accept a plea to an inappropriately reduced charge.<sup>142</sup>

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<sup>142</sup> Mack and Anleu *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration Inc, Carlton South, 1995) 176.

241 However, it remains the Commission's view that the Guidelines do not regulate charge negotiation in sufficient depth. We repeat the recommendation made in the Discussion Paper<sup>143</sup> that the following features need to be addressed by the Solicitor-General, in consultation with the New Zealand Law Society, the criminal bar, the police, and other prosecuting agencies:

- All public prosecution agencies should be bound by charge negotiation guidelines. The Guidelines should be the benchmark for all prosecution conduct.
- Prosecutors should endeavour to ensure, in the course of negotiations, that defendants in similar circumstances receive equal treatment.
- Charge negotiations are not relevant to the sentencing judge's duty and details should not be mentioned in open court, unless raised by the defence.
- To ensure transparency and accountability in the exercise of charge negotiation discretions, prosecutors should be required to record the outcome of charge negotiations on the file.
- To ensure that the human rights and the dignity of defendants are respected, there should be:
  - an express prohibition on prosecutors initially laying more charges or more serious charges than the circumstances warrant so as to obtain leverage in charge negotiations;
  - an express prohibition on prosecutors making any offer, threat or promise, the fulfilment of which is not a function of his or her office;
  - an express prohibition on misrepresentation;
  - a requirement that prosecutors offer defendants entering charge negotiations a reasonable opportunity to seek legal advice and to have their counsel present;
  - guidance should be given to prosecutors regarding their obligations when entering charge negotiations with an unrepresented defendant. When defendants are represented, prosecutors should not enter charge negotiations except when counsel is present or a written waiver of counsel is given;
  - where reasonably practicable, an entitlement for defendants to be present at charge negotiations concerning them, should they so wish (based on an informed decision on advice from counsel); and

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<sup>143</sup> Discussion Paper, above n 24, para 406.

- To ensure that the interests of victims are appropriately considered in the process, prosecutors should be required:
  - to take into account the victim’s views and interests (as far as they are appropriate) in considering whether and on what terms charge negotiations should be conducted;<sup>144</sup> and
  - without compromising the confidentiality obligation to a defendant or the safety of any person, to inform the victim of the outcome of any charge negotiations made and the justification for those negotiations.

## DEFENCE GUIDELINES ON CHARGE NEGOTIATION

- 242 The Discussion Paper asked whether the New Zealand Law Society Rules of Professional Conduct should be expanded to provide defence counsel with guidance on their responsibilities when entering charge negotiations on behalf of a client. Presently there are no defence guidelines on the conduct of charge negotiations. The submissions contained some support for this, especially if our proposals on prosecution guidelines and duties are implemented.
- 243 We think there should be guidance for defence counsel undertaking sentence negotiation. In practice, such guidance should be developed by the New Zealand Law Society and the criminal bar. This could either be in the Rules of Professional Conduct or in a litigation good practice manual. For example, the rules could indicate that discussions regarding the possibility of resolving criminal charges are proper, in some circumstances, and should always be considered. In some circumstances such discussions may be a positive duty for defence counsel.<sup>145</sup>

## STATUS HEARINGS

- 244 The second way in which charge negotiation is likely to arise in summary prosecutions is during the process of preparing for, or during, a status hearing.
- 245 A pilot ‘status hearings’ scheme for defended summary prosecutions operated in the Auckland District Court in 1995 and 1996. The scheme now operates in district courts throughout the country. Defendants who plead not guilty are referred to a status hearing and then proceed to a defended hearing. Status hearings aim to

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<sup>144</sup> In closely balanced situations where a decision either way is appropriate.

<sup>145</sup> Mack and Anleu, above n 142, 177.

assist in efficient disposition of cases and to promote the entry of proper pleas at the first opportunity. An evaluation was done of the first 12 months of operation of the scheme at the Auckland District Court. The evaluation showed that sentence indications were given in less than a quarter of cases, and in most of these cases the defendant pleaded guilty.<sup>146</sup>

- 246 The conduct of status hearings varies from district to district, probably because there are no national guidelines. For example, in Hamilton domestic violence matters do not go to status hearings but directly to a defended hearing. In other areas domestic violence matters do go to status hearings. The Status Hearings Report, Auckland District, and Porirua District Court Status Hearings Practice Note (which also applies to Wellington) contain guidelines but they do not apply to the whole country. They are unpublished.
- 247 At the status hearing, judges sometimes discuss with the prosecutor whether the charge that has been laid is appropriate given the summary of facts, and judges may discuss with the defendant or their counsel the basis of the defence. Judges may also indicate the likely type of sentence (imprisonment, periodic detention, community service). This indication should be given only if requested, but practice does vary and there is evidence that some judges proffer an indication of sentence whether it is requested or not. Counsel can of course engage in charge negotiation with the prosecutor before the day of the status hearing but it appears that most do not approach the prosecution until the status hearing itself.<sup>147</sup>
- 248 The Commission considers the goals of status hearings in the summary jurisdiction to be administratively expedient. However, we have particular concerns in relation to the following issues:
- unrepresented defendants;
  - whether victims' interests are adequately met;
  - the use of sentence indication;
  - charge negotiation; and
  - the proper role of judges – are they, in effect, involved in the decision to prosecute?
- 249 The Commission understands that from a defence perspective the desired outcome of all charge negotiations concerns sentencing.

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<sup>146</sup> Jakob-Hoff, Millard and Cropper *Evaluation of the Status Hearing Pilot at the Auckland District Court* (unpublished paper prepared for the Department for Courts, 1996) 15 [*Evaluation of the Status Hearing Pilot*].

<sup>147</sup> *Evaluation of the Status Hearing Pilot*, above n 146, 10.

However, judicial involvement in such discussions, as occurs in status hearings, is problematic. *The Court of Appeal in R v Reece & Ors* strongly disapproved of what it termed:

the very unusual course of indicating a possible sentence . . . in the absence of any settled guidelines covering plea bargaining involving a Judge. There is obvious scope for manipulation and erosion of public confidence in the administration of justice if this is seen to be done in the course of informal and unstructured discussions between counsel and the trial Judge.<sup>148</sup>

250 There have also been some difficulties in practice; for example, in *Pickering v Police*<sup>149</sup> a District Court conviction was set aside because the same judge conducted the status hearing and the defended trial. More recently, in *R v Gemmell*,<sup>150</sup> the accused pleaded guilty to indictable offences in reliance on a sentence indication given by a District Court judge at a callover, but then received a sentence substantially in excess of that indication. The Court of Appeal set aside the convictions and remitted the matter back to the District Court to give the accused the opportunity to plead again. The Court of Appeal indicated its concern at the practice of judicial sentence indications:

In principle it seems inappropriate for matters of sentence to have any judicial consideration prior to conviction and without the aid of essential pre-sentence and victim impact reports. Any indication given in such circumstances must be so qualified as to be no real indication at all and certainly no reliable basis on which to plead.<sup>151</sup>

251 In the recent case of *R v Edwards*,<sup>152</sup> in which again the actual sentence considerably exceeded a sentence indication, the Court of Appeal confirmed that the principles expressed in *Gemmell* are of general application, and again expressed grave concern at the practice of sentence indications:

Although the District Court may regard sentencing indications as a useful means of keeping up with the volume of work, this appeal graphically illustrates the difficulties which can arise out of the sentence indication regime currently applying to indictable charges in the District Court. As this case demonstrates, a different Judge may have markedly different views as to the appropriate sentence to be imposed once he is in full possession of all the relevant material

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<sup>148</sup> *R v Reece & Ors* (22 May 1995) unreported, CA 74-78/95, 3-4.

<sup>149</sup> *Pickering v Police* (1999) 16 CRNZ 386.

<sup>150</sup> *R v Gemmell* [2000] 1 NZLR 695.

<sup>151</sup> *R v Gemmell*, above n 150, 698.

<sup>152</sup> *R v Edwards* (28 June 2000) unreported, CA 74/00.

and has had the advantage of full submissions. Furthermore, the citation from the Judge's remarks on sentencing shows that some Judges appear to regard an indicated sentence as no more than a "starting point" before consideration is given to the extent to which aggravating and mitigating factors should be taken into account. Others presumably regard a sentence indication as something which should not be departed from save in unusual circumstances; were it otherwise the indication would be more misleading than helpful. Notwithstanding the practical advantages there must be serious doubt about the wisdom of the Judges who are not fully informed of all relevant sentencing considerations involving themselves in a sentence indication process. That process is likely to be relied on by accused persons in determining their plea, and as this case illustrates, may do little to serve the interests of justice from any perspective.<sup>153</sup>

Problems of this kind indicate the need for legislative intervention to prescribe the proper conduct of status hearings, and to ensure consistency throughout the country.

- 252 The Commission is concerned that, if judges become too actively involved in sentence indication and charge negotiation, status hearings could evolve into mechanisms of resource allocation rather than a means of effecting principled outcomes. There is a very real danger of the judge descending into the arena by taking an active role to secure a result (that is, to prevent a defended hearing). There is also a real risk that defendants might plead guilty as a result of judicial charge 'negotiations' for reasons of administrative convenience or because they are presented with 'an offer they cannot refuse'. It is fundamental to the role of judges that they are independent and impartial. If judicial impartiality is undermined, then so too is the entire system of justice.
- 253 The Commission supports a regulated, ethical practice of charge negotiation. However, the majority of Commissioners does not believe that, at this stage, in the absence of a formally regulated process, sentence indication by judges should form a part of status hearing practice. One Commissioner dissents from that view. In that Commissioner's opinion the need for status hearings as a means of coping with the workload of the District Court is so great, and sentence indication such an integral part of status hearings, that the practice must continue.
- 254 The Commission also notes suggestions that status hearings be extended to the indictable jurisdiction. In the Commission's view this would constitute a major change to criminal procedure. In

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<sup>153</sup> *R v Edwards*, above n 152, para 14.

light of the above, the Commission recommends that the Government institute an evaluation of the practice and potential of status hearings in the summary and indictable jurisdictions. In the Commission's view, if status hearings are to continue, they should be established and regulated by legislation. The Commission has invited the Minister of Justice to give it a reference to review status hearings and propose such legislation.

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## Private prosecutions

### INTRODUCTION

255 **I**N THIS CHAPTER we make our final recommendations on the role of private prosecutions within the criminal prosecution system. In essence, we have concluded that the important constitutional and theoretical place of private prosecutions within our system warrants their retention. However, we have also identified dangers that exist with the current system for such prosecutions. To a large extent those dangers arise out of a lack of independent review or supervision of a private prosecution once commenced, and the consequent absence of protections for a defendant. Our proposals (see paragraph 224 above) that the disclosure requirements currently on the police be formally extended to private prosecutors, and that a section 347-type power to discharge be extended to the summary jurisdiction, will ensure that there is an acceptable level of safeguards for defendants in private prosecutions, whilst maintaining the independence that these prosecutions preserve.

256 In writing the Discussion Paper, the Commission envisaged four classes of private prosecutors (usually of summary offences, although in theory indictable offences may also be prosecuted privately).<sup>154</sup> Those prosecutors are:

- local and quasi-public bodies, including state-owned enterprises;<sup>155</sup>
- private agencies recognised or established by statute that either have the responsibility for the enforcement of particular enactments, or have assumed it, such as the Licensed Motor

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<sup>154</sup> Discussion Paper, above n 24, para 77.

<sup>155</sup> Prosecution by such entities may be characterised in another sense as *public* not private, despite not using the police or Crown solicitors, as their overall function is public (see generally Butler “Is This a Public Law Case?” in New Zealand Law Society *Public Law Update on Administrative Law and Judicial Review*, (1998) 98).



Vehicle Dealers Institute and the Real Estate Institute of New Zealand;

- organisations accepted as having an interest in enforcing particular statutes, such as the Society for the Prevention of Cruelty to Animals (SPCA); and
- individuals or commercial enterprises (such as insurance companies) acting in their own cause.

257 Since the Discussion Paper was published an Auckland company, Private Prosecutions Ltd, has begun to undertake prosecutions.<sup>156</sup> This introduces a fifth category of private prosecutions – private prosecutions undertaken as a business.

258 Although in favour of retaining private prosecutions for their constitutional significance, the Discussion Paper pointed out that they lack many of the present safeguards in the prosecution system and fall outside the reforms suggested in other parts of that paper.<sup>157</sup> The main problems are:

- a private prosecutor is not bound by the Guidelines, which are designed to ensure that no prosecution is brought without an impartial and rigorous consideration of reasons for and against prosecution based on an objective assessment of the facts, and consideration of whether the public interest requires the prosecution to proceed;
- it is most unlikely that there will be the separation of the investigation and prosecution functions which is vital to the integrity of the prosecution system;

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<sup>156</sup> “Go private to fight fraud, prosecutor group says” *National Business Review*, Auckland, New Zealand, 28 August 1998, 15.

<sup>157</sup> The Discussion Paper asked whether private prosecutions should be retained, and whether there are currently problems with prosecutions by private agencies. Those who commented agreed that for historical and constitutional reasons private prosecutions should be retained. Views differed on the degree to which they create problems at present. The Criminal Bar Association considered that present controls are insufficient to safeguard a potential defendant. The police believe there is currently a real problem with private prosecutions brought against individual police officers by people convicted of serious offences. The police see such prosecutions as vexatious and inappropriate, and as an attempt to influence prosecution policies.

- there is no provision for disclosure of relevant information to defendants. The Official Information Act 1982 regime for disclosure does not apply, nor does the Privacy Act 1993 necessarily apply; and<sup>158</sup>
- some private prosecutions are unduly vengeful or vexatious.

259 An example of the risk of vengeful or vexatious motives for private prosecution is the case of Glenn Holden. Holden was accused of stalking two women, both of whom had protection orders against him under the Domestic Violence Act 1995. He mounted private prosecutions against both women, alleging they obtained the protection orders on perjured evidence. He forged the signature of a Justice of the Peace on the informations to commence the private prosecutions, and forged notes from one of the women to him, which he attached to an affidavit. He was convicted of forgery and uttering forged documents, and sentenced to 18 months imprisonment.<sup>159</sup>

## THE BUSINESS OF PROSECUTIONS: PRIVATE PROSECUTIONS LTD

260 In its submission to the Commission, Private Prosecutions Ltd stated that private prosecutions not only provide a safeguard against misuse of state power but “satisfy State deficiencies existing not through negligence or abuse but rather through economic limitations”. It cites “the failure by the State systems to adequately provide basic criminal justice services” and suggests that the police are too busy and too under-resourced to give priority to complaints from “corporate and business entities” of offences such as employee theft and insurance fraud.

261 Private Prosecutions Ltd proposes to deal only with property cases, and to use the following process:

- accept cases that may have been privately investigated, or to investigate them itself;

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<sup>158</sup> Although, see para 224 above, which recommends that disclosure responsibilities should apply equally to private prosecutors. Also, perhaps the courts might extend, by analogy, the Crown’s common law duty to disclose relevant information to the defence in the interests of justice: *R v Hall* [1987] 1 NZLR 616, 628.

<sup>159</sup> *R v Holden* (4 September 1998), unreported, High Court, Auckland, T981504; “Forgery Counts Earn Stalker 18 months Jail” *New Zealand Herald*, Auckland, New Zealand, 3–4 October 1998. Note also, the police proposal that informations should not be sworn (see para 55 above) would have meant that the signature of a Justice of the Peace was necessary for Holden to bring the prosecutions.

- notify the police of the offence and the alleged offender, and to continue only with cases that the police do not pursue;
- submit files to a review panel of retired police officers independent from the investigation, who would assess each file and draft charges bearing in mind police general instructions and the Guidelines;
- pass files to a lawyer or law firm to review and either confirm or change the charge/s, draft informations or veto a prosecution;
- the information would then be laid by the complainant;
- if the matter is to be dealt with indictably, pass to a Crown Solicitor. In Private Prosecution Ltd's ideal scenario a Crown Solicitor would be handling the case as a member of the law firm that had advised on the file. However, this is unlikely to happen because in July 1997 the Solicitor-General directed Crown Solicitors not to accept instructions from private prosecutors;
- clients/complainants would be contractually bound to accept the prosecution decision of the company and its legal advisors.<sup>160</sup>

262 In addition to the concerns set out in paragraph 258 above, there are other problems specifically related to private prosecution *as a business*. There have been a number of public objections to the commercialisation of prosecutions:

... the development paves the way to a two-tier criminal justice system. There will be one law for the rich, another for the poor. The system patronised by the rich will result in complaints being promptly investigated and offenders brought to book. For the rest – too bad. Like varicose veins surgery and a host of other medical complaints, maybe the state can deliver its service in three years. Or four. Or never.<sup>161</sup>

263 Justice Baragwanath has expanded the argument by suggesting that basic principles of justice may be ignored for profit:

“If the Crown knows of warts in its case it has to disclose those, whether they are physical or legal warts, but in the market model a trader doesn't tell his competitors about his defects ... At the moment the profit motive doesn't come into it.” He added that New Zealand's dozen or so Crown Solicitors must uphold the public interest and the

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<sup>160</sup> It is questionable whether such a contractual term would be upheld on public policy grounds if the constitutional right of a citizen to bring a private prosecution remains. Also, in practical terms, presumably a client/complainant could not be prevented either from contracting another private prosecution firm, or laying their own information and engaging a lawyer to prosecute the case.

<sup>161</sup> Editorial, *The Independent*, Auckland, New Zealand, 18 July 1997, 8.

need for justice rather than uphold a company's desire to see a case succeed.<sup>162</sup>

264 The former Solicitor-General has stated that:

Private prosecution has traditionally been a last resort for those victims or concerned citizens who believe the outcome of a criminal investigation should have been but is not a prosecution . . . private prosecution has emerged instead as a process that substitutes for the perceived lack of police resources to investigate prosecution of certain types of white collar crime. In my view the Police should look to addressing themselves the outcome of private criminal investigation with a view to deciding objectively whether or not they the Police should prosecute. If a police prosecution follows then it should be taken over on indictment by the Crown Solicitor with police assistance in the normal way. If no prosecution follows a private prosecution should be permitted. The Crown Solicitor would however, on my policy, not be involved in it. I believe it damaging to the system of Crown prosecution to allow those who undertake it to prosecute also some cases in a Solicitor/counsel/client relativity.<sup>163</sup>

265 The criminal prosecutor, acting for the State, is expected to present all evidence fairly and dispassionately, and not to strive to get a conviction at all costs. There is a risk that if prosecutors identify too closely with their client's interest in achieving a conviction they may not act with the necessary balance (see also paragraphs 70–76 above in relation to the SFO). In commercial private prosecution there is a real risk of conflict of interest, with the client pressuring the prosecutor to proceed where it is inappropriate to do so, or to conceal information.

266 It is arguable that the criminal justice system already has enough safeguards. In both summary and indictable matters, the Solicitor-General has power to stay proceedings,<sup>164</sup> or to take over prosecutions started privately.<sup>165</sup> The High Court has an inherent jurisdiction to stay or dismiss a prosecution for abuse of process.<sup>166</sup> The District Court, being a creature of statute, has no inherent jurisdiction,<sup>167</sup> but it does have inherent power to prevent abuse of

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<sup>162</sup> "Whose Job Is It To Prosecute?" *New Zealand Herald*, Auckland, New Zealand, 15 July 1997.

<sup>163</sup> Letter to Attorney-General, above n 47, 4.

<sup>164</sup> Section 378 Crimes Act 1961 (indictable cases after committal), Summary Proceedings Act 1957 s 173 (indictable cases before committal) and s 77A (summary cases).

<sup>165</sup> Huscroft, above n 15, 134.

<sup>166</sup> *Moevao v Department of Labour* [1980] 1 NZLR 464.

<sup>167</sup> See generally Turner "Civil Procedure" [2000] NZ Law Rev 155, 162–163.

its own process.<sup>168</sup> For indictable cases there is also the filter of preliminary hearings (or the proposed disclosure regime), Crown Solicitors' ability not to present an indictment, and the section 347 Crimes Act 1961 procedure. It is therefore only in summary matters that additional protection is required.

## PROPOSALS FOR REFORM

267 In the Discussion Paper the Commission considered two options for reform designed to preserve the citizen's right to prosecute privately, whilst ensuring adequate safeguards against vexatious and oppressive conduct by private prosecutors:

- requiring a prosecutor to provide security for costs. This was not favoured because it was felt that this might unfairly discriminate against private prosecutors who had a legitimate case but were without the means to provide security,<sup>169</sup> or
- require the leave of a District Court judge, with a right of appeal to the High Court, to bring a private prosecution. It was considered that this approach would allow some consideration of the merits of the case, and also allow the motives of the private prosecutor to be examined by the judge.<sup>170</sup> However, upon further reflection it appears to us that a simpler solution

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<sup>168</sup> *Watson v Clarke* [1990] 1 NZLR 715, 719–720.

<sup>169</sup> The general view from submissions was that security for costs was either unnecessary, or would be ineffective. The police considered that private prosecutors should be required to give security for costs and that those who could not afford it should be legally aided. The Crown Law Office supported the idea of security for costs, but also thought that leave of the court should be sought.

<sup>170</sup> Most submissions did not favour this option. However, the Crown Solicitors thought that it should be introduced for private prosecutions of public officers (such as Crown Solicitors and judges). They did not favour its introduction more widely, especially in respect of prosecutions by entities such as Private Prosecutions Ltd, because if that work develops the volume of such applications could well clog up an already over-burdened court system. The Crown Law Office supported the requirement of leave. The police also supported it because private prosecutors are not bound by the Guidelines. The Ministry of Justice was equivocal; it questioned how leave would interact with, or add anything to, the Attorney-General's power to stay a prosecution and the Court's power to stay proceedings to prevent an abuse of process. It suggested the stress and expense for a potential defendant in dealing with a leave application may be the same as if proceedings were commenced. None of the submissions thought a leave requirement appropriate for local or quasi-public bodies, private statutory agencies or organisations accepted as having an interest in enforcing particular statutes, such as the SPCA.

would be to extend the section 347 discharge procedure to the summary jurisdiction.

### **Leave of the court or security for costs?**

- 268 Despite some support in the submissions for security for costs, the Commission considers that it is not appropriate. Security for costs would unfairly discriminate against those without the means to provide security. The police suggestion that legal aid could be provided for those litigants without the means to provide such security is not a realistic option because the legal aid budget is already under considerable strain. Nor would requiring security for costs solve the problem of an unjustified prosecution, unless the court also looked at the merits of the case at least in a preliminary way.
- 269 The Commission does not consider that the Crown Solicitors' suggestion that leave of the court should be sought only for private prosecutions of public officers is compatible with the main reason for maintaining private prosecutions – that they are an important safeguard against misuse of state power, such as a failure or refusal to prosecute a state official.
- 270 On balance, we consider that there is a need for an accused person to be able to obtain an independent review of private prosecutions as soon as the prosecution is initiated. This is to ensure that the process of the court is not abused, and to protect defendants from vexatious or oppressive conduct by a private prosecutor. Practically, we consider the entity in the best position to review objectively the merits of a private prosecution is the court itself. The procedure described in paragraphs 161–166 above, namely that the Summary Proceedings Act 1957 be amended to provide:
- (a) a District Court judge may require an informant to provide the accused, before a hearing date is set, with disclosure of all material in its possession relevant to the case and copies of briefs of evidence of all witnesses whom it proposes to call; and
  - (b) once that information has been provided, a procedure equivalent to section 347 of the Crimes Act 1961 shall be available to the accused,
- will ensure that that accused can obtain a prompt, independent review of a private prosecution.

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APPENDIX A

Summary of report  
recommendations

**Chapter 1 – The Prosecution System – its objectives and the scope of this report**

*Te ao Māori*

A1 **I**T IS CLEAR THAT MANY MĀORI believe that the criminal justice system as a whole is defective because it does not take account of Māori values nor meet Māori needs. They perceive criminal justice processes as monocultural and therefore unfair and hostile to Māori. However, a broad analysis of the issues relating to Māori and the criminal justice system was beyond the scope of this paper. The Ministry of Justice has recently undertaken a project entitled ‘Māori Perspectives on Justice’ that should address some of these issues. In the meantime, we reiterate the following modest but useful proposals first made in our Discussion Paper:

- Police prosecutors should be trained in tikanga Māori, with a view to improved understanding of and sensitivity to Māori cultural values.
- The recruitment of more Māori police and police prosecutors should be encouraged.
- The appointment of Māori within the Crown prosecution system should be encouraged.
- All Crown Solicitors should receive training in tikanga Māori, with a view to improved understanding of, and sensitivity to, Māori cultural values.
- Court staff and lawyers should emulate the initiatives of judges to improve their understanding of, and sensitivity to, Māori cultural values. Training should be ongoing.
- Judges, counsel and court officials should be able to pronounce Māori words and names properly.

- The involvement of more Māori personnel in court processes as judges, Justices of the Peace, lawyers and court staff should be encouraged.

## **Chapter 2 – The structure of the prosecution system in New Zealand**

- A2 The present prosecution system is not fundamentally flawed and the best model for reform is to build on its existing strengths. An entirely new model is not required.
- A3 The constitutional roles of the Attorney-general and the Solicitor-General do not require amendment. The current system works well and does not require alteration.
- A4 Where the Attorney-General issues prosecution policy guidelines, or makes a decision in an individual case (for example, a stay of proceedings or immunity from prosecution) the policy guidelines or decision in an individual case should be publicly disclosed.
- A5 No change should be made to the discretion to prosecute.
- A6 The conduct of prosecutions should not be further privatised. It is not necessary to introduce a Crown Prosecution Service.

## **Chapter 3 – Control and accountability**

- A7 The Solicitor-General's Prosecution Guidelines ('Guidelines') should reiterate the fact that all prosecutors bound by the Guidelines are ultimately responsible to the Attorney-General for the exercise of their prosecution function.
- A8 There is no need for the power to prosecute to be formally delegated by the Attorney-General to the Solicitor-General and then down to the Commissioner for Police and the chief executive officers of government prosecuting agencies. The present position is satisfactory.
- A9 Summary prosecutions should be brought in the name of the agency (eg, the police) rather than in the name of an individual swearing the information, although the information should still contain the name of the individual who made the decision to prosecute.
- A10 Indictable proceedings should continue to be brought in the name of the Crown.
- A11 The Commission recommends no change to the power of the Police Complaints Authority to review prosecution decisions of the police.



- A12 The law relating to judicial review of decisions to prosecute does not require amendment. Section 20 of the Serious Fraud Act 1990, which exempts the prosecution decisions of the SFO from judicial review, does not require amendment.
- A13 The Crown Law Office, through whatever means the Solicitor-General thinks appropriate, should develop mechanisms that allow it to:
- assist all prosecuting agencies with the development of compliance and prosecuting guidelines and to ensure that their practices are consistent with the Guidelines; and
  - review the Guidelines to ensure their relevance to summary prosecutions.
- A14 Section 48(3) of the Serious Fraud Office Act 1990 should be amended to read:
- No proceedings relating to serious or complex fraud shall be conducted on behalf of the Director except by a member of that panel *selected by the Solicitor-General after consultation with the Director.*

## **Chapter 4 – Prosecutors’ powers**

- A15 The current method of appointment and nature of tenure of Crown Solicitors does not require amendment.
- A16 Crown Solicitors should have oversight of all indictable prosecutions once a plea is entered or the defendant has elected trial by jury. Crown Solicitors should review prosecution files to confirm that the original charges are appropriate, and to give guidance to police on evidential issues. Responsibility for conducting the preliminary hearing itself would remain with the police, except in cases where they elect to instruct the Crown Solicitor (as is the present practice in relation to particularly serious or complex cases).
- A17 Crown Solicitors should remain responsible for all indictable prosecutions brought by public prosecuting agencies.
- A18 The initial decision to charge is part of the investigative function and therefore as a general rule should remain the function of the police rather than a Crown Solicitor.
- A19 Crown Solicitors should not have the power to divert offenders.
- A20 Crown Solicitors should not be given an express power to discontinue a prosecution. The existing practice of seeking the leave of the court to discontinue proceedings or not calling

evidence, is preferable because it is done publicly. The power to veto or stay a prosecution should remain reserved exclusively to the Law Officers of the Crown.

- A21 The Law Officers of the Crown should retain the residual power, in exceptional circumstances, to direct that a prosecution take place.
- A22 The police should retain the prosecution of summary offences, subject to appropriate guidelines and mechanisms of accountability being put into place.
- A23 We welcome the establishment of the Police National Prosecution Service, which will ensure the full separation of investigation and prosecution functions and raise the standard of prosecuting at the summary level.
- A24 The Solicitor-General should establish prosecution standards for all state prosecuting agencies. The standards should:
- apply to summary as well as indictable proceedings;
  - suggest measures for ensuring an appropriate separation of investigation and prosecution functions; and
  - reiterate that departmental prosecutors are responsible to the Attorney-General for prosecution decisions, not the Minister in charge of their department.

## **Chapter 5 – Prosecution decisions and the discretion to prosecute**

- A25 The discretion to prosecute should be retained. Mandatory formal prosecution is not in the public interest.
- A26 The test to be used for deciding whether a case should be prosecuted (evidential sufficiency and public interest) should not be changed. However, the current public interest factors set out in the Solicitor-General's Guidelines, while they are a useful, non-exhaustive list, should be reviewed to improve their relevance and utility. Specific changes that we recommend to the Guidelines are:
- the grounds of prohibited discrimination in paragraph 3.3.4 of the Guidelines should include the complainant;
  - the prohibited grounds of discrimination (such as sexual orientation) should be the same as those in section 21 of the Human Rights Act 1993.

## **Chapter 6 – Court review and supervision of the discretion to prosecute**

- A27 Section 347 of the Crimes Act 1961 should be and is legitimately used in two ways:
- to filter out cases where there is insufficient evidence to continue with the prosecution. The proper test to be applied is whether there is sufficient evidence that a properly directed jury *could* convict;
  - to ensure that the continuation of prosecutions conforms with the public interest.
- A28 Section 347 of the Crimes Act 1961 should be amended to provide the Crown with the right to reserve a point of law so that the discharge is conditional upon the ultimate determination of that reservation.
- A29 The Summary Proceedings Act 1957 should be amended to provide that:
- (a) A District Court judge may require an informant to provide the accused, before a hearing date is set, with disclosure of all material in its possession relevant to the case and copies of briefs of evidence of all witnesses whom it proposes to call.
  - (b) Once that information has been provided, a procedure equivalent to section 347 of the Crimes Act 1961 shall be available to the accused.
- A30 Sections 345(5) and (6) of the Crimes Act 1961 serve no practical function that cannot be achieved by the broader section 347 provision, and are seldom used in practice. Therefore they should be revoked.

## **Chapter 7 – Preliminary hearings**

- A31 Section 28C of the District Courts Act 1947, which forbids a judge who has conducted the preliminary hearing of an offence from also conducting the trial of that offence, should be abolished.
- A32 A preliminary hearings Bill should be introduced to require that, in preliminary hearings, prosecution evidence should be presented in written form, and that an application to hear the oral evidence of a witness, and to cross-examine, may be granted to either party only if:
- (a) the witness is to give evidence concerning identification of the defendant; or

- (b) the witness is to give evidence of an alleged confession of the defendant; or
- (c) the witness is alleged to have been an accomplice of the defendant; or
- (d) the witness has made an apparently inconsistent statement; or
- (e) it is in the interests of justice for the witness to be required to give oral evidence.

AND in each of (a)–(e) the evidence of the witness is required to establish a prima facie case.

- A33 Applications to hear oral evidence in preliminary hearings should be heard by a District Court judge, but that oral evidence should continue to be heard by Justices of the Peace or Community Magistrates, except where the complexity of the case requires a District Court judge. The same District Court judge should be permitted to hear both the application to have oral evidence presented and also the preliminary hearing itself.
- A34 Any amendments to the conduct of preliminary hearings should not affect the provisions of Part VA of the Summary Proceedings Act 1957, which gives explicit special protection to complainants of serious sexual offending.
- A35 Preliminary hearings should not be amended without also introducing a statutory disclosure regime.

## Chapter 8 – Criminal disclosure

- A36 In the Commission’s 1990 report *Criminal Procedure: Part One: Disclosure and Committal NZLC R14*, we recommended that a comprehensive disclosure regime be introduced. We repeat that recommendation. The regime should apply to both summary and indictable cases, and to prosecutions both by the State and by private prosecutors.
- A37 We also endorse the previous recommendation that defence disclosure of alibi evidence should occur in summary cases.
- A38 There should be two types of disclosure:
- Initial disclosure of the charge, its statutory authority, the maximum (and any minimum) penalties upon conviction, a summary of facts, the original complaint (for example a constable’s notebook entry, or a complainant’s written statement), and information relevant to sentence, should be required as soon as possible before a defendant is asked to enter a plea;

or as soon as practicable and in no cases beyond 14 days after service of a summons.

- Full disclosure of all relevant information, being that which tends to support or rebut or have a bearing on the prosecution case, should be an ongoing obligation from the time of initial disclosure until the trial is over, and should be an automatic obligation on the person in charge of prosecuting a case at any given time.

A39 The prosecutor should be entitled to withhold information if that is necessary in the public interest, but should disclose to the defendant the existence of such information, a description of its nature, and the grounds on which it is claimed to be properly withheld.

A40 Disclosure should be enforced by way of timetabling orders. If orders are not complied with, the sanctions should be: further timetabling orders, orders for costs to be paid by the prosecuting agency, and, as a last resort, dismissal of the case. Any provision for costs in a disclosure statute should contain a provision analogous to section 7 of the Costs in Criminal Cases Act 1967. If the prosecution seeks to adduce undisclosed evidence at trial the court should have the power to exclude or accept it, to adjourn and/or order costs.

A41 It is not necessary for a statutory disclosure regime to deal specifically with material held by third parties. That is better left to the general law of evidence, counter-balanced by the third parties' rights to privacy of third parties.

A42 The disclosure regime should operate alongside the Official Information Act 1982 and the Privacy Act 1993. Any conflict between those Acts and the disclosure statute would be resolved under section 52 of the Official Information Act 1982 and section 7 of the Privacy Act 1993, both of which provide that neither Act derogates from other provisions that require or authorise the disclosure of information.

A43 Section 31 of the Privacy Act 1993, which has not yet come into effect, and which denies inmates access to personal information related to their conviction, should be repealed.

## **Chapter 9 – Charge negotiation**

A44 We do not recommend the use of legislation to regulate charge negotiation as there is no demonstrable need for it and legislation would be premature while there is a developing situation with sentence indication in summary matters that requires further study.

However, clear principles should be articulated. The Guidelines do not currently regulate charge negotiation in sufficient depth, and the following features need to be addressed:

- All public prosecution agencies should be bound by charge negotiation guidelines. The Guidelines should be the benchmark for all prosecution conduct.
- Prosecutors should endeavour to ensure, in the course of negotiations, that suspects in similar circumstances receive equal treatment.
- Charge negotiations are not relevant to the sentencing judge's duty and details should not be mentioned in open court, unless raised by the defence.
- To ensure transparency and accountability in the exercise of charge negotiation discretions, prosecutors should be required to record the outcome of charge negotiations on the file.
- To ensure that the human rights and dignity of suspects are respected, there should be:
  - an express prohibition on prosecutors initially laying more charges or more serious charges than the circumstances warrant so as to obtain leverage in charge negotiations;
  - an express prohibition on prosecutors making any offer, threat or promise, the fulfilment of which is not a function of his or her office;
  - an express prohibition on misrepresentation;
  - a requirement that prosecutors offer suspects entering charge negotiations a reasonable opportunity to seek legal advice and to have their counsel present;
  - guidance should be given to prosecutors regarding their obligations when entering charge negotiations with an unrepresented defendant. When suspects are represented, prosecutors should not enter charge negotiations except when counsel is present or a written waiver of counsel is given;
  - where reasonably practicable, an entitlement for suspects to be present at charge negotiations concerning them, should they so wish (based on an informed decision on advice from counsel); and
- To ensure that the interests of victims are appropriately considered in the process, prosecutors should be required:
  - to take into account the victim's views and interests (as far as they are appropriate) in considering whether and on what terms charge negotiations should be conducted;<sup>171</sup> and

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<sup>171</sup> In closely balanced situations where a decision either way is appropriate.

- without compromising the confidentiality obligation to a defendant or the safety of any person, to inform the victim of the outcome of any charge negotiations made and the justification for those negotiations.
- A45 Guidance for defence counsel undertaking sentence negotiation needs to be developed and could be included in the Rules of Professional Conduct or a litigation best practice manual.
- A46 The current prohibition on prosecutors initiating charge negotiation in indictable matters should remain. In summary matters, it appears that police prosecutors do initiate charge negotiations. Although it may be inevitable with unrepresented defendants that police prosecutors will have to raise the issue, apart from that the practice should be stopped. The extension of the duty Solicitor scheme to status hearings, or the provision of limited grants of legal aid for status hearings, would mean that more defendants would have counsel to assist them with charge negotiations at status hearings.
- A47 The development of status hearings in the summary jurisdiction is administratively expedient but raises concerns, particularly in relation to charge negotiation and sentence indication, and the role of the judiciary. The conduct of status hearings is not consistent across the country. The suggested extension of status hearings to the indictable jurisdiction would be a major change to criminal procedure. Before it happens, an evaluation of the practice and potential of status hearings in both the summary and indictable jurisdictions should be carried out. If status hearings are to continue, they should be established and regulated by legislation. The Commission has invited the Minister of Justice to give it a reference to review status hearings and propose such legislation.

## **Chapter 10 – Private prosecutions**

- A48 Private prosecutions have an important constitutional and theoretical place in the criminal justice system and should be retained. Currently, problems arise because there is no independent or impartial review of the decision to prosecute, no separation of investigation and prosecution functions and no provision for disclosure of relevant information to defendants.
- A49 Defendants should have the right to an independent review of a private prosecution as soon as one is initiated. The recommendation in chapter 6 above, namely that the Summary Proceedings Act 1957 be amended to provide that:

- (a) A District Court judge may require an informant to provide the accused, before a hearing date is set, with disclosure of all material in its possession relevant to the case and copies of briefs of evidence of all witnesses whom it proposes to call.
  - (b) Once that information has been provided, a procedure equivalent to section 347 of the Crimes Act 1961 shall be available to the accused,
- will ensure that a defendant can obtain this independent review.
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## APPENDIX B

# Consultation and submitters

- B1 **I**N MARCH 1997 the Commission published the Discussion Paper. It was sent to judges, lawyers, academics, community organisations and interest groups for comment on the Commission's proposals.
- B2 The Commission received extensive written submissions on the issues raised in the Discussion Paper from parties including:
- Judge Jaine, Judge Administrator for the Chief Justice on behalf of the High Court judiciary;
  - the Deputy Solicitor-General;
  - the Commissioner of Police;
  - the Police Association;
  - the Ministry of Justice;
  - the Police Complaints Authority;
  - the New Zealand Law Society;
  - Crown Solicitors;
  - the Criminal Bar Association;
  - individual lawyers, individual District Court judges, individual police officers, and other individuals;
  - community groups (including victims' interest groups);
  - three Crown prosecuting agencies (Department of Labour, New Zealand Customs Service, Ministry of Fisheries);
  - the Ministry of Transport;
  - Private Prosecutions Ltd; and
  - the Office of the Privacy Commissioner.
- B3 In addition, the Commission held meetings with:
- the Solicitor-General and Deputy Solicitor-General;
  - Justice Robertson (representing the views of High Court judges);
  - the police;
  - the Police Complaints Authority; and

- a number of prosecuting agencies, including the Serious Fraud Office.

B4 We wish to acknowledge the assistance provided by the Commission's Māori Committee which consists of the Right Reverend Bishop Manuhua Bennett ONZ CMG, Justice ET Durie, Judge Michael Brown CNZM, Dr Mason Durie, Whetumarama Wereta and Te Atawhai Tairaoa.

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APPENDIX C

**Solicitor-General's**  
**prosecution guidelines**  
(as at 9 March 1992)

**1. Introduction**

- 1.1 Almost invariably it is the responsibility of officers and agencies of the State to investigate offences and prosecute offenders. It is the Attorney-General and Solicitor-General, as the Law Officers of the Crown, whose responsibility it is to ensure that those officers and agencies behave with propriety and in accordance with principle in carrying out their functions.
- 1.2 The State bears a dual responsibility in its administration of the criminal law. Behaviour classified as criminal has been deemed so harmful to society generally that the State, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.
- 1.3 The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.
- 1.4 Those dual responsibilities are often in tension. The individual subjected to the criminal justice process will rarely believe that it is working in his or her favour; the investigating and prosecuting agencies will not wish to see someone they believe guilty elude conviction.
- 1.5 The decision to begin a prosecution against an individual has profound consequences. The individual is no longer a suspect, but is formally and publicly accused of an offence. Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and, possibly, a loss of liberty while awaiting trial.
- 1.6 It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis. The purpose of these guidelines is to indicate, in a

general way, the bases on which the Law Officers expect those decisions to be made.

## 2. **Who may Institute Prosecutions**

- 2.1 Any person may institute a prosecution for an offence against the general criminal law and, with some specific exceptions, for regulatory offences. Some prosecutions require the prior consent of the Attorney-General; the procedure for obtaining that consent is outlined in Section 4. Every prosecution is commenced by way of an Information laid under the provisions of the Summary Proceedings Act 1957 and the person bringing the prosecution is known as the “informant”. In practice almost all prosecutions for offences against the general criminal law are brought by the Police and those for regulatory offences by officers of Government Departments or Local Authorities.
- 2.2 In the case of prosecutions brought by Crown agencies for offences triable only on Indictment, or those on which the accused has exercised a right of electing trial by jury, the informant ceases to be the prosecutor from the point at which the accused is committed for trial. At that point the prosecution becomes a “Crown” matter and only the Attorney-General, Solicitor-General or a Crown Solicitor may lay an Indictment. The laying of Indictments is dealt with in Section 5.
- 2.3 The Attorney-General as the Senior Law Officer of the Crown has ultimate responsibility for the Crown’s prosecution processes. Successive Attorneys-General however have taken the view that it is inappropriate for them, as Ministers in the Government of the day, to become involved in decision making about the prosecution of individuals.
- 2.4 In New Zealand the Attorney-General and Solicitor-General have co-extensive original powers. With some specified exceptions the Solicitor-General may perform any function given to the Attorney-General. In practice the Solicitor-General exercises all of the Law Officer functions relating to the prosecution process.
- 2.5 The initial decision to prosecute rests with the Police in the case of the general criminal law, or an officer of some other central or local government agency charged with administering the legislation creating the offence. It is frequently the case that the Police or agency will consult a Crown Solicitor or the Solicitor-General for advice as to whether a prosecution would be well founded. It is however never for the Solicitor-General or the Crown Solicitor to make the initial decision to prosecute; it is their function to advise.

### 3. **The Decision to Prosecute**

In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.

#### 3.1 **Evidential Sufficiency**

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

#### 3.3 **The Public Interest**

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute, or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not it will result in a conviction. This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending e.g., driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

- a the seriousness or, conversely, the triviality of the alleged offence; i.e., whether the conduct really warrants the intervention of the criminal law.
- b all mitigating or aggravating circumstances.
- c the youth, old age, physical or mental health of the alleged offender.

- d the staleness of the alleged offence.
- e the degree of culpability of the alleged offender.
- f the effect of a decision not to prosecute on public opinion.
- g the obsolescence or obscurity of the law.
- h whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr.
- i the availability of any proper alternatives to prosecution.
- j the prevalence of the alleged offence and the need for deterrence.
- k whether the consequences of any resulting conviction would be unduly harsh and oppressive.
- l the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction.
- m the attitude of the victim of the alleged offence to a prosecution.
- n the likely length and expense of the trial.
- o whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so.
- p the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

- a the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused.
- b the prosecutor's personal views concerning the accused or the victim.
- c possible political advantage or disadvantage to the Government or any political organisation.
- d the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

#### 4. **Consent to Prosecutions**

4.1 A number of statutory provisions creating offences require that, before a prosecution is commenced, the consent of the Attorney-General is to be obtained. This is a function carried out in practice

by the Solicitor-General (see Section 2). The consent, if given, is signified by way of endorsement on the Information. Requests for consent should be directed to the Solicitor-General with full details of the alleged offence and the evidence available to be called.

- 4.2 The reasons for requiring that consent vary. In general terms however the consent requirement is imposed to prevent the frivolous, vengeful or 'political' use of the offence provisions.
- 4.3 A list of provisions creating offences for which the Attorney-General's consent is required is given in Appendix I.

## 5. **Indictments**

- 5.1 The power of the Attorney-General and Crown Solicitors to present an Indictment is recognised in s.345 of the Crimes Act 1961. Almost invariably it is a Crown Solicitor who does so. In exercising that power, the Crown Solicitor acts entirely independently of the Police or other investigating agency and is not subject to their instructions.
- 5.2 A Crown Solicitor may present an Indictment "... for any charge or charges founded on the evidence disclosed in any depositions taken against such person ...". A Crown Solicitor may therefore present an Indictment containing a charge different from, or additional to, that originally contained in the Information, so long as it is founded on evidence contained in the depositions. In exercising that power a Crown Solicitor is exercising, de novo, the discretion to prosecute. All factors affecting that discretion arise again for consideration.
- 5.3 Where the District Court has committed on some charges only, the prosecution has a number of options available if it wishes nevertheless to proceed to trial on the charges in respect of which there has been no committal:
  - a the Crown Solicitor may exercise the power of laying an indictment under s. 345 notwithstanding the lack of a committal on those charges.
  - b an application may be made to a High Court Judge for written consent to present an Indictment notwithstanding the lack of a committal on that or those charges.
  - c the Attorney-General (in practice the Solicitor-General) may present an Indictment (known as an "ex officio Indictment") or give written consent to the presentation of an Indictment notwithstanding the lack of a committal on that or those charges.

d the Information or Informations on which there has been no committal may be relaid and taken to depositions again.

5.4 The use of an ex officio indictment or the giving of consent by the Attorney-General has been very rare and is likely to remain so.

## 6. Stay of Proceedings

6.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in ss. 77A and 173 of the Summary Proceedings Act 1957 and s. 378 of the Crimes Act 1961.

6.2 In New Zealand the power of stay has been sparingly exercised. That conservative approach is likely to continue.

6.3 Generally speaking the power of entering a stay will be exercised in three types of situation:

a where a jury has been unable to agree in two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. Unless the Solicitor-General is satisfied that some event not relating to the strength of the Crown's case brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice, a stay will be directed.

b if the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust, a stay will be directed.

c a stay will be directed to clear outstanding or stale charges or otherwise to conclude an untidy situation; e.g., where for instance an accused has been convicted on serious charges but a jury had disagreed on others less serious, or a convicted person is serving a substantial sentence and continuing with the further charges would serve no worthwhile purpose.

6.4 The possible circumstances which may justify a stay under heads b and c above are almost infinitely variable. In general terms however the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.



## 7. **Withdrawal of Charges and Arrangements as to Charges**

- 7.1 Circumstances can change, or new facts come to light, which make it necessary to reconsider the appropriateness of the charges originally laid.
- 7.2 If after a review against the relevant criteria, it is clear that a charge should not be pursued, it should be discontinued at the first opportunity. The mode of discontinuance will depend on the court before which the charge is pending and the stage the proceedings have reached. Similarly, if it is plain that a charge should be amended, that should be done at the first opportunity.
- 7.3 If a charge is not to be proceeded with because a witness declines to give evidence and there are acceptable reasons why he or she should not be forced to do so, it will generally be preferable to ask the Court to dismiss the charge for want of prosecution. That course should be followed, rather than seeking a stay from the Solicitor-General, to ensure that the reasons for the discontinuance are publicly stated.
- 7.4 Arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice, subject to constraints which must be clearly understood and followed by prosecutors.
- 7.5 Those constraints are:
- a no such arrangement is to be initiated by the prosecutor.
  - b no proposal to come to such an arrangement is to be entertained by a prosecutor unless:
    - i there is a proper evidential base for the charges to be laid or proceeded with and, conversely, there is not evidence which would clearly support a more serious charge.
    - ii the charges to be proceeded with fairly represent the criminal conduct of the accused and provide a proper basis for the Court to assess an appropriate sentence.
    - iii the accused clearly admits guilt of those charges which are to be proceeded with.
  - c the prosecutor must not agree to promote or support any particular sentencing option. In every case the informant or the Solicitor-General will reserve the possibility of an appeal against sentence if the sentence imposed is considered manifestly inadequate or wrong in principle.

- d a prosecutor must not lay charges or retain them after it is clear that they should not be proceeded with for the purpose of promoting or assisting in any discussions about such an arrangement.
- e in the case of summary prosecutions every such arrangement must be approved by the Officer in Charge of the relevant Police prosecution section or, in the case of another Crown prosecuting agency, the senior legal officer of that agency. After committal for trial approval must be given by the relevant Crown Solicitor personally. In cases involving homicide, sexual violation or drug dealing offences involving class A drugs the approval of the Solicitor-General must also be obtained.

7.6 In addition to the matters outlined above a decision to enter into such an arrangement should be based on the following considerations:

- a whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so.
- b whether the sentence that is likely to be imposed if the charges are pursued as proposed would be appropriate for the criminal conduct involved.
- c the desirability of prompt and certain despatch of the case.
- d the strength of the prosecution case.
- e the likely affects on witnesses of being required to give evidence.
- f in cases where there has been a financial loss, whether the accused has made restitution or arrangements for restitution.
- g the need to avoid delay in the despatch of other pending cases.

## 8. **The Role of the Prosecutor in Sentencing**

8.1 Until relatively recently the “traditional” view of the prosecutor’s role at sentencing prevailed; i.e., the prosecutor should maintain disinterest in the sentence imposed. That view cannot survive in the face of the Crown’s right to appeal against a sentence considered to be manifestly inadequate or wrong in principle.

8.2 At sentencing counsel for the prosecution should be prepared to assist the Court, to the degree the Judge indicates is appropriate, with submissions on the following matters:

- a the Crown’s version of the facts.
- b comment upon or, if necessary, contradiction of the matters put forward in mitigation by the accused.

- c the accused's criminal history, if any.
  - d the relevant sentencing principles and guideline judgements.
- 8.3 Counsel for the prosecution should not press for a particular term or level of sentence. It is the Crown's duty to assist the sentencing Court to avoid errors of principle or sentences which are totally at odds with prevailing levels for comparable offences and offenders.

## 9. **Witness Immunities**

- 9.1 It is sometimes the case that the Crown will need to rely upon the evidence of a minor accomplice or participant in an offence in order to proceed against an accused considered to be of greater significance in the offending.
- 9.2 Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.
- 9.3 In such a case it will be necessary for the Crown to consider giving the witness an immunity from prosecution. An immunity takes the form of a written undertaking from the Solicitor-General to exercise the power of stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.
- 9.4 It is to be noted that the only person able to give such an undertaking is the Solicitor-General.
- 9.5 The purpose of giving an immunity must clearly be borne in mind. That purpose is to enable the Crown to use otherwise unavailable evidence. In exchange for that it will, with reluctance and as a last resort, grant immunity on specified offences. In particular, the giving of an immunity is not to be seen as an opportunity for an informer to wipe the slate clean.
- 9.6 Immunities are given reluctantly and only as a last resort in cases where it would not otherwise be possible to prosecute an accused for a serious offence.
- 9.7 Before agreeing to give an immunity the Solicitor-General will almost invariably require to be satisfied of at least the following matters:
- a that the offence in respect of which the evidence is to be given is serious both as to its nature and circumstances.
  - b that all avenues of gaining sufficient evidence to prosecute, other than relying upon the evidence to be given under immunity, have been exhausted.

- c that the evidence to be given under immunity is admissible, relevant and significantly strengthens the Crown's case.
- d that the witness, while having himself or herself committed some identifiable offence, was a minor participant only.
- e that the evidence to be given under immunity is apparently credible and, preferably, corroborated by other admissible material.
- f that no inducement, other than the possibility of an immunity, has been suggested to the witness.
- g that admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

9.7 In order to preserve the integrity of the evidence to be given under immunity it will almost always be desirable for the witness to have independent legal advice. Preferably that advice should be obtained before the witness signs a brief of evidence or depositions statement. Counsel for the witness should, if the witness wishes to seek immunity, obtain instructions to write to the officer in charge of the case or, if the Solicitor-General is already involved, to the Solicitor-General direct. The letter should set out in full detail the evidence able to be given by the witness but without naming him or her. If satisfied that an immunity is justified the Solicitor-General can then advise the witness's counsel that an immunity will be given. Counsel will then be able to name the witness in the knowledge that a formal immunity will be forthcoming.

## 10. Disclosure and Discovery

10.1 The aim of the prosecution is to prove its charge beyond reasonable doubt and it is therefore clearly in the interests of justice that accused persons are fully informed of the case against them. At present, voluntary pre-trial disclosure of information relating to the Crown case is largely a matter for the prosecutor's discretion to be exercised in accordance with the guiding principle of fairness to the accused. Nevertheless there are a minimal number of legal obligations with which the prosecution must comply.

## 10.2 Trial on Indictment

10.2.1 Before trial on indictment an accused person is entitled to peruse depositions taken on his committal for trial or the written statements of witnesses admitted instead of depositions. Section 183 Summary Proceedings Act 1957.

10.2.2 The prosecutor does not have to put forward all the evidence at depositions. However s. 368(1) of the Crimes Act 1961 provides that the trial may be adjourned or the jury discharged if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Therefore in practice the prosecutor should provide adequate notice of intention to call any additional witness and provide the defence with a brief of the evidence that witness will give.

### 10.3 **Information which the Prosecutor does not Intend to Produce in Evidence**

10.3.1 The prosecutor must make available to the defence the names and addresses of all those who have been interviewed who are able to give evidence on a material subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility (*R v Mason* [1975] 2 NZLR 289). It is for the prosecutor to decide whether the evidence is "material" (*R v Quinn* [1991] 3 NZLR 146) but that decision must be reached with complete fairness to the defence.

10.3.2 In the absence of an Official Information Act request there is no general common law duty placed on the prosecution to make available to the defence written statements obtained by the Police from persons the prosecution does not intend to call as witnesses at the trial. However in "truly exceptional circumstances" the Court may exercise its discretion to order production if it considers that a refusal to do so might result in unfairness to the accused and perhaps a miscarriage of justice. *R v Mason* [1976] 2 NZLR 122.

10.3.3 A statutory exception to the general principle against production of written statements is contained in s. 344C Crimes Act 1961 which deals with identification witnesses.

### 10.4 **Statements made by Witnesses to be called by the Prosecution**

10.4.1 In the absence of an Official Information Act request there is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence. An exception to this general rule is where the witness has made a previous inconsistent statement. Where there is any conflict that may be material between the evidence of a witness and other statements made by the witness the defence is entitled to see those other statements. *R v Wickliffe* [1986] 1 NZLR 4; *Re: Appelgren* [1991] 1 NZLR 431; *R v Nankervill* (CA 342/89 4 May 1990).

10.4.2 A second exception is where a statement is specifically shown to an accused for the precise purpose of noting his reaction thereto; in such cases the accused is entitled to obtain production of the statement. *R v Church* [1974] 2 NZLR 117.

## 10.5 Character of Witness

10.5.1 Before all defended trials the prosecution has a duty to disclose any previous convictions of a proposed witness where credibility is likely to be in issue and the conviction could reasonably be said to affect credibility. *Wilson v Police and Elliot* (CA 90/91 20 December 1991).

10.5.2 For trials on indictment a prosecuting agency entitled to access to the Wanganui computer should make a computer check as a matter of course. For summary trials the agency should make such a check if requested by the defence. If the prosecuting agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions should be supplied a reasonable time before trial (normally at least a week). If the prosecuting agency intends to withhold details of convictions the defence should be notified in sufficient time to enable rulings to be sought from the trial Court.

## 10.6 Disclosure of any Inducement or Immunity given to a Witness

The defence must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defence. This includes the fact that the witness is a paid Police informer. *R v Chignell* [1991] 2 NZLR 257.

## 10.7 Identity of Informer

There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information is necessary or desirable in order to establish the innocence of the accused. *R v Hughes* [1986] 2 NZLR 129, 133.

10.7.1. A statutory restriction on disclosure of the true identity of undercover police officers is contained in s. 13A Evidence Act 1908.

## 10.8 Preliminary Hearings

Special provisions for preliminary hearings in cases of a sexual

nature are set out in Part VA Summary Proceedings Act 1957. Section 185C(4) requires the prosecutor to give the complainant's written statement to the defence at least 7 days before the hearing.

## 10.9 Minor Offences

In the case of minor as opposed to summary offences, defined in s. 20A Summary Proceedings Act 1957, the prosecution must serve on the defence a notice of prosecution which will provide information in a brief form as to the essential nature of the charge and other relevant matters outlined in the section.

## 10.10 DSIR Examinations

As a matter of ethical obligation the prosecutor is required to provide access to the defence to forensic evidence prepared by the DSIR. (New Zealand Law Society, Rules of Professional Conduct, Appendix 2).

## 10.11 Obligations on Request under Official Information Act 1982

10.11.1 Crown Solicitors are not part of a 'department or organisation' and are not, therefore, subject to the Official Information Act 1982. While, as a matter of practical convenience, they may facilitate responses to requests for information they are not, as a matter of law, obliged to do so. The responsibility to provide information rests on the Police or other prosecuting agency and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

10.11.2 Personal information i.e., that particular category of official information held about an identifiable person, is the subject of an explicit right of access, upon request, given to that person, unless it comes within some limited exceptions. Relevance is not the test under the Official Information Act.

10.11.3 The effect of the Court of Appeal decision in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 is that the exercise of a defendant's right to personal information will not ordinarily prejudice the maintenance of the law (and fair trials), as shown by the traditional disclosure of prosecution information for indictable trials. The practice should therefore be that there will be disclosure on request of briefs of evidence, witness statements or notes of interviews containing information about the defendant. Where briefs, statements or job sheets do not exist the prosecution should as a matter of practice provide to the defence a summary of the facts on which the prosecution will be based.

10.11.4 The duty will generally apply only after criminal proceedings have been commenced, and information may be withheld if a specific risk (such as fabrication of evidence or intimidation of a witness) is shown. Any disputes should be determined as incidental or preliminary matters by the trial court.

10.12 The aim of pre-trial disclosure is to ensure fairness to the accused and to achieve efficiency in the prosecution process. Bearing those aims in mind, any doubt as to whether the balance is in favour of, or against disclosure should be resolved in favour of disclosure.

## 11. **Victims of Offences**

11.1 Victims of offences are entitled to be treated by prosecutors with courtesy, compassion and respect for their personal dignity and privacy. Section 3 Victims of Offences Act 1987.

11.2 The prosecuting authority or officers of the court (to use the language of the Act) are required to make available to a victim information about the following:

- a progress of the investigation of the offence;
- b the charges laid or the reasons for not laying charges;
- c the role of the victim as a witness in the prosecution of the offence;
- d the date and place of the hearing of the proceedings; and
- e the outcome of the proceedings including any proceedings on appeal.

11.3 For the purposes of the Victims of Offences Act, Crown Solicitors are not “prosecuting authorities”.

11.4 Responsibility for notifying the victim of these matters has been allocated as between prosecuting authorities and the officers of the court as follows:

- a The Police accept that all information about actions before a prosecution is commenced are within their ambit.

### b **Before verdict:**

In the case of a not guilty plea the prosecuting authorities are normally in contact with the victim until the verdict is given. In the case of a guilty plea, the prosecuting authority which is laying the charge must inform the victim of the first date of a court appearance. At the same time it [is] required to hand to the victim information about the court process beyond that point, describing the processes of appeal, remand, adjournment, etc and informing the victim that it is his or her choice



whether to follow the case through the court process. If the victim is unable to attend the hearing in person, he or she can obtain information from the court.

**c After verdict:**

Once a verdict has been reached the prosecuting authority will inform the victim of the outcome of the case. The letter containing the information should give further information about possible actions after the outcome: e.g., appeal and rehearing.

**d After sentence:**

The prosecuting authority should hand to the court information about the victim's name and address so that the court may notify the victim of any rehearing.

**e Appeal:**

In the case of an appeal after trial on indictment the Crown Law Office will notify the victim of the date on which it will be heard, and after the appeal, send a copy of the Judgment to the victim.

11.5 In addition to providing information about the proceedings, a prosecutor has responsibilities in relation to Victim Impact Statements. A sentencing Judge is to be informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim. Such information is to be conveyed to the Judge by the prosecutor, either orally or by means of a written statement. The courts have indicated that Crown Solicitors have a certain responsibility to ensure that Victim Impact Statements fulfil their proper purpose i.e., a brief description of the impact on the victim and not a supplementary statement of facts adding additional offences and circumstances of aggravation.

11.6 The Victims of Offences Act also requires that in the case of a charge of sexual violation or other serious assault or injury the prosecutor should convey to the judicial officer any fears held by the victim about the release on bail of the alleged offender.

**12. Crown Appeals against Sentence**

12.1 It is for the Solicitor-General to determine in all cases whether an appeal against sentence should be taken. In respect of sentences passed on conviction on indictment the appeal is taken in the name of the Solicitor-General; in respect of sentences imposed under the summary jurisdiction of the District Court

the appeal is taken in the name of the informant, with the written consent of the Solicitor-General.

12.2 The guiding principles for prosecutors in deciding whether a matter should be referred to the Solicitor-General for consideration of a Crown appeal are whether there are good grounds to argue that:

- a the sentence is manifestly inadequate; or
- b there has been a serious error in sentencing principle.

### 12.3 **Manifestly Inadequate**

The sentence imposed must be manifestly inadequate: – the Crown’s right of appeal is not intended to be a corrective procedure for every sentence considered to be lenient.

12.4 The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction. Even where a sentence is found to be manifestly inadequate the court will increase it only to the minimum extent required in the interests of justice.

12.5 A particular sentence, or sentences generally for a particular type of crime, may be considered manifestly inadequate if they do not fulfil their deterrent or denunciatory functions. A Crown appeal may be considered where it is clear that the offence requires a heavier sentence in the public interest for the purposes of general or individual deterrence or to express community denunciation because of the nature of the offence.

### 12.6 **Error of Principle**

Where a sentence is based upon a wrong principle the error involved must be one that is important in a sense that it is likely to have implications beyond the particular case in which it has arisen.

12.7 The court is reluctant to interfere if this would cause some other injustice to the offender e.g., by changing what is generally deemed a wholly inappropriate sentence to which the offender is nevertheless responding. The court is also reluctant to uphold a Crown appeal if the prosecution did not do all that could reasonably have been expected of it to avoid the error at first instance. In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial. Section 389 Crimes Act 1961.

12.8 **Time Limits**

Appeals against sentences imposed in the indictable jurisdiction must be filed within 10 days. The time limit for the summary jurisdiction is 28 days. Given the short time limits for filing an appeal, particularly to the Court of Appeal after trial on indictment, and the uncertainty which a Crown appeal poses for the defendant in question, the need to refer materials speedily to the Solicitor-General is paramount. For the same reason it is only in exceptional cases of unavoidable delay that the Solicitor-General will seek leave to appeal out of time.

12.9 The information required for consideration of appeals includes:

- a Indictment or information;
- b notes of Evidence or Summary of Facts;
- c copies of the Pre Sentence Report; Victim Impact Report and any other Reports made available to the sentencing Judge;
- d a list of any previous convictions;
- e a note of the Judges or District Court Judges remarks on sentence;
- f the comments and recommendations of the Crown Solicitor or prosecutor.

12.10 In general the main purpose of a Crown appeal is to ensure that errors of principle are corrected and not perpetuated and that sentences for offences of generally comparable culpability are reasonably uniform and appropriate having regard to the seriousness and prevalence of the offence.

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