LAW·COMMISSION
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Study Paper 7

Simplification of Criminal Procedure Legislation

An Advisory Report to the Ministry of Justice

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The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

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Introduction

1 THREE RECENT CASES[1] have highlighted problems with criminal procedure legislation and, more specifically, with the criminal jurisdiction of the District Courts. The need for reform of the various legislation was articulated by Keith J:[2]

> Once again an appeal against a sentence imposed by a District Court judge for serious offences has been derailed by the unnecessary confusion caused by the complex provision divided between the District Courts Act 1947 and its schedules, the Summary Proceedings Act 1957 and its schedules and the Crimes Act 1961 . . . We call attention once again to the need to set out the law in an accessible form.

2 The current confusion arises from the need to refer to three or more different statutes when attempting to answer questions of criminal jurisdiction that should be straightforward. It is desirable that issues such as where an appeal is to be filed, or what the sentencing limits are for a particular offence, should be clear-cut and simple to determine. Simplifying the legislation relating to jurisdiction should result in court processes which are more streamlined and more efficient. Of greater concern, a failure to simplify these procedures may result in unfairness and delay, exposing the courts to claims of abuse of process.[3]

3 As long ago as 1982, R McGechan queried whether the time had come for criminal procedure legislation to be codified in a single enactment, accessible and comprehensible to all.[4] Since then the cases in which there has been judicial clamour for clarification of this legislation are too numerous to list. Examples include:[5]

> [T]he legislation is Byzantine in its complexity . . . [which] stems from the creation of no less than four ways in which the potential for trial by jury is addressed.

and[6]

> [W]e record our continuing strong concern that unnecessarily complex and confusing procedural provisions of the criminal legislation are causing difficulties for those engaged in the busy work of the criminal Courts. We recommend very early legislative consideration.

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1 *R v Binnie* (6 September 1999) unreported, Court of Appeal, CA 261/99; *R v Sao* (15 July 1999) unreported, CA 129/99; R v *Jones* (26 August 1999) unreported, CA 210/99.

2 *R v Binnie*, paras 1 and 3.

3 See Fisher J in CAA *v Halliwell* [1999] 3 NZLR 353, 359.

4 R McGechan "Trial by Triad – District Courts, Summary Proceedings, and Crimes Amendment Acts 1980" (1982) 10 NZULR 17, 26.

5 CAA *v Halliwell*, above n 3, 356.

6 *R v Webber* [1999] 1 NZLR 656, 662 (CA).

4 In August 2000 the Commission was asked to give urgent assistance to the Ministry of Justice in accordance with the following terms of reference:

> To simplify the statutory provisions governing the laying of criminal charges and infringement offences and their progress through the court system to the point of determination, including appeals, so as to remove current inconsistencies and introduce more efficient procedures.

The Commission has been specifically asked to assume that provisions regarding middle band offences[7] and the present court structure should continue to apply and not be the subject of reform. This restriction on the middle band means that the simplification process cannot be taken as far as it could logically extend. This unpublished paper was sent to the Ministry of Justice on 27 October 2000. Minor editorial changes have been made prior to publishing this paper.

5 In the course of preparing this paper the Commission has consulted with the following agencies: Ministry of Justice, Department for Courts, Ministry of Social Policy, Department for Child, Youth and Family Services, Crown Law Office, Police Prosecutions Service and the Criminal Law Committee of the New Zealand Law Society. The Chief Justice, Chief District Court Judge, Principal Youth Court Judge and their nominees from the Court of Appeal, High Court and District Courts have also been consulted. We are grateful for their prompt response and helpful comments. However, the final responsibility for this paper rests with the Commission. The Commissioner in charge of this project was Judge Margaret Lee. Lucy McGrath did the research and writing.

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[7] "Middle band" describes the offences contained in Part II Schedule 1A District Courts Act 1947 which may be referred by the High Court for trial in the District Court.

2
The proposed solution

6 THE TECHNICAL DIFFICULTIES with the current legislation are discussed later in this paper (paragraphs 37–49). What follows is a proposal for a new framework for classifying offences and laying charges, which aims to avoid the complexities of the current legislation.

7 The Commission proposes that offences be classified as being of five types:

(i) Infringement offences and minor offences;

(ii) Offences with a maximum penalty of three months imprisonment;

(iii) Offences with a maximum penalty of more than three months but less than 14 years imprisonment (with some exceptions). These are the current summary offences for which trial by jury may be elected, and the current indictable offences contained in Part I of the First Schedule to the Summary Proceedings Act 1957 and Part I of Schedule IA to the District Courts Act 1947. For brevity these will be referred to as "electable offences";

(iv) The middle band offences. These are the offences currently contained in Part II of Schedule IA to the District Courts Act 1947 and are listed as appendix A at the back of this paper. With a few exceptions they are offences with a maximum penalty of 14 or more years imprisonment;

(v) Offences only triable in the High Court. These include the most serious offences such as murder, manslaughter, treason and so on, and are indictable offences not currently listed in any of the above Schedules. They are listed as appendix B at the back of this paper. For brevity these will be referred to as "High Court only offences".

8 Other main features of our proposal are:

- elimination of the distinction between summary and indictable offences;
- electable offences to be tried in the District Courts by judge alone unless the defendant elects trial by jury;
- middle band and High Court only offences to be tried by jury unless either the defendant or prosecution applies for trial by judge alone;
- non-jury warranted District Court judges to be able to sentence up to the maximum provided by law.

INFRINGEMENT OFFENCES AND MINOR OFFENCES

9 Currently an infringement offence is defined as an offence under any Act in respect of which a person may be issued with an infringement notice.[8] An

[8] Section 2 Summary Proceedings Act 1957.

infringement notice can be issued in respect of certain specified offences or where a statute provides for the use of the infringement notice procedure under section 21 of the Summary Proceedings Act 1957.[9] Section 21 sets out the procedure for infringement offences, including the service of reminder notices.

10 Minor offences are those summary offences punishable by a fine up to $500 (or $2000 under the Transport Act 1962 or the Land Transport Act 1998) in respect of which a "notice of prosecution" is usually issued under section 20A of the Summary Proceedings Act 1957, rather than a summons.

11 The Commission is not able, within the time allowed for the completion of this project, to make detailed recommendations regarding the current system of infringement offences and minor offences, although our preliminary view is that some consolidation would be desirable. For example, there should be a single infringement procedure, with common forms in so far as this is possible. Statements which are common to all infringement notices are variously expressed, some more clearly than others. Such statements should be uniformly expressed. Other statements in the notices which are specific to the offences, such as a description of the offence and the agency responsible for administering the particular Act (usually where fines should be sent), will need to be retained but there may be room for simplification. It may be possible to subsume what are currently termed minor offences into the infringement notice procedure. The consolidation and simplification of infringement offences and minor offences will involve much detailed redrafting of legislation and is best left as an exercise in its own right.

OFFENCES WITH A MAXIMUM PENALTY OF THREE MONTHS IMPRISONMENT

12 These offences will be heard in the District Courts (before a District Court judge, Community Magistrates or Justices of the Peace), with appeals going to the High Court.

13 Currently, appeals from decisions of Justices of the Peace are heard in the High Court[10] but appeals from decisions of Community Magistrates are heard by a District Court judge.[11] The opportunity should be taken to introduce uniformity. From a theoretical point of view, it can be argued that decisions of both Justices and Magistrates are decisions of the District Courts and, therefore, appeals from both should be heard in the High Court. Pragmatically, however, it makes little sense for appeals against minor sentences, which will never involve imprisonment, to be required to go to the High Court. We understand that District Court judges have dealt satisfactorily with appeals from decisions of Magistrates – we recommend that for practical reasons the same procedure should apply to decisions of Justices. Currently the right of appeals to the High Court on questions of law is dealt with under section 107 and also under section 114B of the Summary Proceedings Act. We recommend that these two sections be amalgamated into one.

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[9] Section 2 Summary Proceedings Act 1957. Examples of specified offences include s 42A Transport Act 1962 and s 14 Litter Act 1979.

[10] Section 115 Summary Proceedings Act 1957.

[11] Section 114A Summary Proceedings Act 1957.

ELECTABLE OFFENCES

14 The distinction between summary and indictable offences will be abolished. A single form of charge will be laid for this range of offences. Currently when an information is laid a police officer must swear the information. The Police Prosecutions Service has recommended that this requirement be removed. In practice the swearing officer often has no prior involvement with the charge and so the additional requirement of swearing does not seem to add any weight to the content of the information. We agree that this requirement should be removed.

15 Unless pleading guilty, the defendant will have the right to elect trial by jury. If no election is made, the defendant will be tried by judge alone in the District Courts.

16 If the defendant pleads guilty before election, any District Court judge will be able to sentence up to the maximum provided by law. Appeals will lie to the High Court, with a further right of appeal to the Court of Appeal on points of law.

17 Unless jury trial is elected, any District Court judge could try the case and, if the defendant is found guilty or pleads guilty, sentence up to the maximum provided by law.[12] Appeals will lie to the High Court, with a further right of appeal to the Court of Appeal on points of law.

18 The alternative – preserving the difference in sentencing range between jury warranted and non-jury warranted District Court judges – would in effect retain the summary/indictable distinction. It would render this exercise in simplification futile, and many of the existing confusions, complexities and inconsistencies would remain. It is anticipated that, in the vast majority of cases, defendants facing serious charges will elect jury trial: the occasions where non-jury warranted judges will try and sentence defendants facing serious offences will be relatively rare. Administrative arrangements (for example, rostering and judicial training) can be made by the Chief District Court Judge to ensure judges have the experience to handle this work.

19 If trial by jury is elected, the preliminary hearing will be held in a District Court. If committed for trial, the defendant will be tried by a jury presided over by a jury warranted District Court judge. That trial judge will sentence if the defendant is found guilty or pleads guilty.[13] Once a defendant is committed for trial, all appeals thereafter will lie to the Court of Appeal. This will preserve the current position in relation to appeals from pre-trial applications, rulings in the course of trial, and jury directions. It is undesirable for a defendant who has elected trial by jury to be able, after committal, to apply under section 361B of the Crimes Act 1961 for trial by judge alone. Such a defendant should not have that further option of choosing trial by judge alone after committal and the statute should be amended accordingly.

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[12] Currently non-jury warranted District Court judges can only sentence up to the summary limit, that is, a maximum of five years.

[13] The only exception to this provision would be if the District Court judge considered that a sentence of preventive detention may be appropriate, in which case sentencing must take place in the High Court.

20 Currently, the prosecution is able in effect to influence the way in which a charge will proceed through the courts by laying an information summarily or indictably.[14] Consequently, the abolition of the summary/indictable distinction will bring an end to an established practice. There is a public interest involved, in the sense that jury trials enable the community, as represented by a randomly selected jury, to make decisions about the guilt of persons charged with having committed offences. As a result, jury verdicts tend to be more readily accepted by the community. This may be of particular significance in controversial or high-profile cases. We consider, however, that our proposal for all middle band and High Court only offences to be tried by jury (unless the defendant applies to be tried by judge alone) makes appropriate provision for the community's input in the public interest.

MIDDLE BAND AND HIGH COURT ONLY OFFENCES

21 These offences will be tried by a judge and jury unless the defendant applies to be tried by judge alone. The form of the charge will reflect this.

Middle band offences

22 If the defendant pleads not guilty, the preliminary hearing will be heard in a District Court and the defendant, if committed, will be sent to the High Court for trial. The High Court may transfer the case to a District Court, in which case a District Court trial judge can preside and, if the defendant is found guilty or pleads guilty, sentence. Appeals will lie to the Court of Appeal.

23 With the abolition of the summary/indictable distinction, any District Court judge will be able to sentence a defendant who pleads guilty to a middle band offence before or at the preliminary hearing, up to the maximum provided by law.[15] Appeals will lie to the High Court, with further appeals to the Court of Appeal by leave.

24 Currently, once a defendant is committed to a District Court for trial for a non-middle band offence, if the prosecutor wishes to amend the indictment to a middle band offence, the prosecutor must have the case transferred to the High Court for the amendment to be made. Thereafter, the case must be tried in the High Court because the legislation does not allow the High Court to transfer the case back to a District Court.[16] We recommend changing the legislation so that, once a defendant has been committed for trial in a District Court, the indictment may be amended and the trial continued in a District Court. An application can still be made to the High Court under section 28J of the District Courts Act 1947 to have the case transferred there.

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[14] If a charge is laid summarily, it will be heard before a judge alone, unless the defendant elects a jury trial under s 66 Summary Proceedings Act 1957. If a charge is laid indictably, it will be heard before a judge and jury, unless the defendant applies for and is successful in obtaining a trial by judge alone under s 316B Crimes Act 1961.

[15] Currently a defendant who pleads guilty to a middle band offence before or at the preliminary hearing may be sentenced by a non-jury warranted District Court judge up to the summary limit (five years imprisonment) or by a jury warranted District Court judge up to the maximum provided by law.

[16] Because s 168AA Summary Proceedings Act 1981 only applies where a defendant "is committed to the High Court for trial" for a middle band offence.

High Court only offences

25 Defendants who plead guilty before or at the preliminary hearing will be committed to the High Court for sentencing. If the defendant pleads not guilty, the preliminary hearing will be held in the District Courts and if committed the defendant will be sent to the High Court for trial. Appeals will lie to the Court of Appeal and from there to the Privy Council by leave.

26 Currently section 361B(5) of the Crimes Act 1961 precludes a defendant charged with an offence carrying a maximum sentence of 14 or more years imprisonment applying to be tried by judge alone. Whether this prohibition should be abolished and whether the prosecution should also have the right to apply for such defendants to be tried by judge alone are matters that will be dealt with in the Law Commission's final report following on from NZLC PP37 *Juries in Criminal Trials: Part Two* (1999).

LEGISLATIVE FRAMEWORK – HOW SHOULD THIS REFORM BE ACHIEVED?

27 A flowchart illustrating the proposed reforms is attached in appendix C. Rather than making further amendments to the already piecemeal legislation, the Commission recommends that a single Criminal Proceedings Act be enacted, drawing together all of the legislative provisions governing the progress of criminal charges through the courts. For example, sections 28A–F should be removed from the District Courts Act 1947 so that that statute covers civil jurisdiction only. Identifying which provisions of the existing legislation will need to be consequentially amended or repealed will be an exacting task.[17] In addition, there are offences that are contained in a number of statutes which provide different penalties for the same offence, depending on whether they are charged summarily or indictably.[18] These provisions should be reviewed to provide for a single maximum penalty.

28 The touchstone for determining how a case proceeds through the courts will in the main be the maximum penalty that can be imposed for the offence with which a defendant is charged.[19] Maximum penalties reflect how comparatively seriously society views different crimes, and provide a suitable basis for determining how cases should be handled. This criterion has the advantage of being much simpler to administer than the current summary/indictable distinction. Only two schedules of offences will need to be drawn up and maintained: one for the most serious offences which are always tried in the High Court, and one for the middle band offences which are tried in the High Court unless transferred to a District Court. Everything else may be dealt with in the District Courts. Further simplification could be achieved by eliminating the middle band. This possibility is discussed in paragraphs 32–36 below.

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[17] For example s 8(1) Criminal Justice Act 1985 provides that a person under 16 years of age cannot be imprisoned except for a purely indictable offence, which is defined as "any offence for which the defendant may be proceeded against by indictment". Offences contained in the First Schedule Summary Proceedings Act 1957 are therefore included. Section 8(1) will have to be redrafted if the summary/indictable distinction is discontinued, possibly as applying to offences punishable by 14 years or more imprisonment.

[18] Examples include s 6 Misuse of Drugs Act 1975 and s 58 Securities Act 1978.

[19] The exception to this principle being those middle band offences with a maximum penalty of less than 14 years, which would be listed in a schedule.

MIXED CHARGES

29 Where a defendant is charged with offences spanning two jurisdictions, arising out of the same incident or series of incidents, all charges should be heard in the High Court (unless they are middle band offences transferred by the High Court to the District Courts). We recommend that section 168A(2)(a) of the Summary Proceedings Act 1957 be re-enacted so that in these circumstances offences can be heard in the High Court which would otherwise be tried in the District Courts.

30 A further problem has been identified where a defendant is facing a number of charges, and elects jury trial in respect of one or more charges, but not for others (effectively requiring two trials covering the same ground). Currently, the prosecution can prevent this by laying all charges indictably. Since the Commission recommends dispensing with the summary/indictable distinction, we further recommend that the court be empowered to determine that an election of trial by jury on one charge applies to all related charges.

31 Similarly co-defendants can effectively require the prosecution to hold two trials by exercising their right of trial election differently. Again this can currently be avoided by the prosecution laying the charges indictably. We recommend that the court be empowered to order that an election of trial by jury by one defendant should bind all co-defendants. Members of the New Zealand Law Society Criminal Law Committee have pointed out that in some cases where a defendant funds their own defence it may be unjust for them to incur the cost of defending a jury trial they did not elect. This however is not a significantly different outcome from that which currently occurs where a defendant is obliged to have a jury trial, which he or she would not have chosen, solely on account of the prosecution electing to lay the charges indictably.

ELIMINATING THE MIDDLE BAND

32 The middle band was introduced as a means of moving work from the High Court to the District Courts according to criteria which include the gravity of the offence, the complexity of the issues, the need for prompt disposal of trials, and the interests of justice generally (see section 168AA(3) of the Summary Proceedings Act 1957). Almost everyone who commented on the draft paper expressed regret that the middle band was "out of bounds" for the purposes of this project. Many commentators volunteered the view that the middle band should be abolished and the offences currently in that category dealt with in the District Courts.

33 The elimination of the middle band could, as a matter of statutory drafting, be done quite simply. There would then be only the one schedule, containing High Court only offences. The abolition of the middle band schedule would effectively merge the middle band offences with the electable offences. The prosecution could be expected to apply for cases to be transferred to the High Court on the same grounds that High Court judges currently are obliged to consider when sending cases to the District Courts. Defendants could also apply. The cut-off point beyond which jury trial would be the norm could be set at sentences of 14 years or more imprisonment, although there would also be those High Court only offences with a lesser maximum penalty. The problem discussed in paragraph 24 would be eliminated, as would the problem identified in paragraph 29

to the extent that charges would no longer straddle middle band and non-middle band offences.

34 We do not so recommend. The formulation of our terms of reference, excluding consideration of the middle band, has meant that the Commission's normal processes of consultation have not been followed and, in particular, the views of the referees acknowledged in paragraph 5 have not been solicited.

35 Beyond this however, it can be argued that it is unwise to consider what is to be done with the middle band offences separately from consideration of the structure of the courts – this is a question that will require greater inquiry in the event that appeals to the Privy Council are abolished. Although there are a range of peripheral factors, the principal argument in favour of dispensing with the middle band is likely to be:

- Moving the middle band offences to the District Courts would allow the simplification project to go as far as logically possible, by completing the transfer of middle band jurisdiction to the District Courts. To move files from the District Courts to the High Court and then back to the District Courts as a matter of routine is less conducive to efficient case management than making applications to shift cases from the District Courts to the High Court.

The principal opposing argument is likely to be:

- It is a reasonable expectation of the New Zealand community that serious or high-profile offending should be tried in the High Court. Since High Court judges must continue to preside over the most serious cases, they need the present volume of jury trials to maintain their level of skills. Furthermore, it is in the public interest that judges of the Court of Appeal have significant criminal trial experience. Only by the High Court's retaining authority to determine work allocation in middle band cases can these results be ensured.

36 These arguments raise weighty constitutional issues not to be answered without proper deliberation. We would invite a Ministerial reference calling on us to undertake such an inquiry.

3
Current problems

37 THE WAY IN WHICH a criminal case currently proceeds though the courts depends, to a large extent, on how the charges are laid. Charges can be laid either summarily or indictably, and each involves different procedures. Summary charges are laid on Form 1, and indictable charges on Form 2.[20] Leaving aside minor offences and infringements, there are six categories of offences in respect of which charges can be laid. They are:

- *Purely indictable offences* that can only be tried in the High Court, such as treason, murder and manslaughter.
- *Purely indictable offences* that may be transferred to a District Court from the High Court pursuant to section 168AA(2) of the Summary Proceedings Act 1957 – these are also known as the "middle band" offences. These offences are listed in Part II of Schedule 1A to the District Courts Act 1947.
- *Purely indictable offences* that can be tried before a jury in the District Courts. These offences are listed in Part I of Schedule 1A to the District Courts Act 1947.
- *Indictable offences triable summarily*, which are listed in section 6(2) and the First Schedule to the Summary Proceedings Act 1957.
- *Summary-indictable offences*, which are summary offences punishable by more than three months imprisonment; accordingly the defendant can elect for trial by jury pursuant to section 66 of the Summary Proceedings Act 1957.
- *Purely summary offences*, which have a maximum sentence of three months imprisonment or less. Most of these offences are listed in the Summary Offences Act 1981.

38 Historically, indictable offences were heard in the Supreme Court and summary offences in the Magistrates Courts. The Magistrates Courts could try some indictable offences summarily (without a jury) but only had jurisdiction to impose up to three years imprisonment. Following the 1979 report of the Royal Commission on the Courts, the Supreme Court became the High Court, and the Magistrates Courts the District Courts, by virtue of the Judicature Amendment Act 1979. The introduction of the District Courts Amendment Act 1980 brought more significant change, conveying upon the District Courts much of the High Court's first-instance criminal jurisdiction, including the power to conduct jury trials in respect of certain offences.

39 The Commission is doubtful as to the worth of continuing to classify offences as summary or indictable. The classification only adds to the confusion inherent in the current criminal procedure legislation, and the reason behind the original differentiation (the separate criminal jurisdictions of the Supreme Court and Magistrates Courts) no longer seem relevant, given the District Courts' wide jurisdiction today.

[20] These Forms are contained in the Second Schedule Summary Proceedings Act 1957.

APPEALS FROM SENTENCE IMPOSED BY THE DISTRICT COURTS

40 Confusion arose in both *R v Binnie* and *R v Jones* as to whether an appeal from sentence imposed by a District Court should be heard by the High Court or by the Court of Appeal. In *R v Binnie* the defendant pleaded guilty to eight charges of burglary, which is a First Schedule Summary Proceedings Act offence, and was sentenced to six years imprisonment. An appeal against sentence was filed and heard in the High Court. However it should have been heard in the Court of Appeal as "the informations were laid indictably and the penalty imposed exceeded five years".[21] The relevant section of the District Courts Act 1947 is section 28H, which applies wherever a sentence is imposed under section 28F(4). Section 28H(2) provides:

> (a) In any case where the sentence imposed exceeds the maximum term of imprisonment or the maximum fine that may be imposed by a District Court under section 7 of the Summary Proceedings Act 1957, the person sentenced, and the Solicitor-General with the leave of the Court of Appeal, may appeal to the Court of Appeal against the sentence as if the sentence had been imposed by the High Court after the person's conviction in the High Court . . .
>
> (b) In any other case, the person sentenced, and the prosecutor with the consent of the Solicitor-General given under section 115A(2) of the Summary Proceedings Act 1957, may appeal against the sentence, and Part IV of the Summary Proceedings Act 1957, with any necessary modifications, shall apply.

Since the sentence exceeded five years imprisonment, it had been imposed under section 28F(4)(a) and section 28H(2)(a) applied, requiring appeal to the Court of Appeal.

41 The reverse situation arose in *R v Jones*. A sentence of three years was imposed in respect of offences of injuring with intent, and wilfully ill-treating children (First Schedule Summary Proceedings Act and summary-indictable offences respectively). As the sentence imposed was within the summary limits, the appeal should have been heard in the High Court. As it was mistakenly filed in the Court of Appeal, that Court consented to hear the case, sitting as a full court of the High Court.[22]

42 It seems undesirable that the court where an appeal is heard depends on whether the sentence imposed is more or less than five years, which is the effect of section 28H. This can lead to inconsistent treatment of offenders who have committed the same offence. In addition it is currently possible, where more than one sentence is imposed on a defendant in the District Courts, for appeals from sentence to be required to be heard in both the High Court and the Court of Appeal, which results in the duplication of hearings and the attendant inefficiencies and costs that that entails. If a defendant has an appeal against sentence before the Court of Appeal, and also has appeals against sentences before the High Court, there should be a legislative provision empowering all appeals to be heard and determined by the Court of Appeal. While a sentencing judge in the District Courts may currently impose appropriate sentences reflecting the totality of the mixed offences, this may be distorted on appeal where the sentences are appealed to different courts. For example, if a defendant

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[21] *R v Binnie*, above n 1, para 2, per Keith J.

[22] *R v Jones*, above n 1, para 1, per Doogue J.

were sentenced to two years imprisonment on a summary conviction for burglary and to six months imprisonment on indictment for threatening to kill (to be served concurrently) the two years would reflect the totality of the offending but the Court of Appeal would only have jurisdiction to vary the six month sentence.

EVIDENCE ADMISSIBLE IN RESPECT OF SUMMARY AND INDICTABLE OFFENCES

43 The way in which an offence is laid can also have implications regarding the evidence that is admissible if the case proceeds to a trial. In *Police v Barens*[23] the prosecution sought to withdraw summary charges and substitute them with charges laid indictably, in order to benefit from section 13A of the Evidence Act 1908, which permitted the identity of an undercover officer to be concealed in proceedings on indictment. Judge Callander refused to allow the substitution of charges, which would have exposed the defendant to a significant increase in the maximum penalty for the offence, merely because the prosecution had not foreseen the problem of identification of the undercover officer when the charges were originally (and summarily) laid.[24]

44 It is undesirable that different rules of evidence should apply to the same offences simply because they are charged summarily or indictably. This point was made by the Legal Services Board in a submission[25] on NZLC PP32 *Juries in Criminal Trials: Part One* (1998), that it was farcical that charges should be laid indictably (with the attendant increase in maximum penalty) for the purpose of seeking the protection afforded by section 13A.

45 The elimination of the summary/indictable distinction will dispose of this problem. We recommend that applications for witness anonymity should only be available in serious cases. The legislation should set out those offences (either identified by maximum penalty or listed in a schedule) to which sections 13A to 13J of the Evidence Act 1908 would apply.

46 Similar issues arose in *Palmer v Attorney-General*[26] in which the applicant sought judicial review of a decision by a District Court judge to allow the substitution of indictable for summary charges. In doing so, the judge had exercised a discretionary power under section 36 of the Summary Proceedings Act 1957. The defendant had been charged with committing indecent assault, and the police sought to have admitted videotaped interviews with the complainants under section 23E of the Evidence Act 1908. While section 23C(a)(ii) provides that section 23E applies where the defendant is charged with child sexual abuse, the defendant contended that, as the charges had been laid summarily, the videotapes could not be admitted, as section 23D refers to the defendant being "committed for trial" and to a judge of the Court before which "the indictment"

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[23] (1989) DCR 106.

[24] Above n 23, 109.

[25] Submission dated 8 September 1998, in response to question 4: "Should the distinction between summary and indictable offences, and the relevant legislation, be reviewed with the aim of codifying the law into a single enactment?" See NZLC PP32 *Juries in Criminal Trials Part One* (Wellington, 1998) para 147.

[26] [1992] 3 NZLR 375.

is to be tried. Hillyer J held that while the District Court judge could have used section 44 of the Summary Proceedings Act to transfer to the High Court, the power to allow withdrawal and relaying of the charges had been exercised reasonably.[27] He further observed that the way in which evidence may be given in cases of sexual violation should be the same in summary cases as it is in indictable ones, and commended this thought to the legislative authorities for consideration.[28] In our view section 23E should be amended to apply in all cases involving child sexual abuse, regardless of whether the case is to be determined by judge alone or by judge and jury.[29]

ADDITIONAL PROBLEMS AND INCONSISTENCIES

47 Currently cases may be transferred for sentencing from a District Court to the High Court under section 28G of the District Courts Act 1947, or section 44 of the Summary Proceedings Act 1957. There is some overlap in that both provide for the removal to the High Court for sentencing in respect of First Schedule Summary Proceedings Act offences.

48 There is also confusion over which court should sentence when a defendant pleads guilty before or at a preliminary hearing. In *R v Withers*[30] the defendant pleaded guilty to charges of cultivating cannabis and possessing a Class B drug: the District Court declined jurisdiction to sentence and committed the defendant to the High Court. Doogue J held that there was no basis for declining jurisdiction as one of the offences was purely summary, and while the other was transferred under section 153A, jurisdiction had not been declined under section 44. The cases were referred back to the District Courts. This is an example of how the complexity of these provisions can prejudice the efficiency of court procedures as cases are passed from court to court to determine issues of jurisdiction.

49 Currently, when a non-jury warranted judge declines jurisdiction the defendant must be sent to the High Court for sentence even if the offence is within the sentencing jurisdiction of a jury warranted District Court judge. By contrast, the same non-jury warranted judge can sentence in respect of a middle band offence (if the defendant has pleaded guilty) despite the fact that these offences must be tried in the High Court unless transferred by that Court to a District Court.

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[27] Above n 26, 381.

[28] Above n 26, 384.

[29] Note that s 102 Evidence Code 1908 would require the prosecution to apply for directions about the way in which a child complainant is to give evidence in any criminal proceeding, not just those involving child sexual abuse. See NZLC R55 *Evidence* 2, 232.

[30] (8 March 1991) unreported, High Court, Rotorua Registry, S 14/91 and 18/91, Justice Doogue.

4
Youth Court

50 In October 1999 the Minister of Justice forwarded a background paper prepared at the Ministry of Justice on the transfer of cases between the Youth Court and the District and High Courts, and requested that the Law Commission consider it in the context of its paper on Simplification of Criminal Procedure Legislation. That background paper identified two primary concerns:

- the complexity of the legislation; and
- that current procedures may result in "disparate sentencing outcomes".

51 As the background paper noted, the legislative complexities (requiring linkages between at least six enactments) generally also apply to the transfer of cases from the District Courts to the High Court under adult criminal jurisdiction, and are not confined to the jurisdiction of the Youth Court. The proposals for simplifying the adult criminal jurisdiction will eliminate some of the complexity in the current relationship between the Youth Court, the District Courts and the High Court.

52 For example, under the proposed reform the only "purely indictable" offences will be those listed in the two schedules containing High Court only and middle band offences, although the term "purely indictable" will disappear with the elimination of the summary/indictable distinction. All other offences (except murder, manslaughter and non-imprisonable traffic offences) can be dealt with in the Youth Court unless the young person elects jury trial.

53 The proposed reform will have the effect of lessening the advantage that is bestowed upon a young person in being offered the opportunity to forego the right to trial by jury and have the case dealt with in the Youth Court (sections 275 and 276 of the Children, Young Persons, and their Families Act 1989). Currently, once that opportunity is taken (to forego trial by jury), the Youth Court can transfer the case to a District Court for sentence under section 283(o), but any sentence imposed by that District Court must be within the five year summary limit, because the District Court cannot then decline jurisdiction and remit the case to the High Court for sentence. Under the proposed reform, a District Court judge will be able to sentence up to the maximum provided by law.

54 We have recommended that in the adult jurisdiction, where a defendant is charged with multiple offences spanning the jurisdictions of the District Courts and High Court, District Court offences should be transferred so that all the charges can be heard in the High Court. A similar provision should be enacted to deal with the situation where a young person faces mixed charges arising out of the same incident or series of incidents, some of which are offences which must be tried by a jury (under section 274 of the Children, Young Persons, and their Families Act 1989) and some of which are not (in which case section 273 applies). If the young person is not offered, or does not accept, the opportunity

to forego jury trial and have the former offences dealt with in the Youth Court, they will proceed to the High Court for trial. In such cases there should be a provision empowering a Youth Court judge to send all charges to the High Court, provided they are offences for which jury trial may be elected.

55 The Principal Youth Court judge has expressed the view that the sentencing regime in the Youth Court is not adequate for young offenders who require a longer period of rehabilitation and supervision. For example it may be desirable for a young sex offender to attend a STOP programme followed by a lengthy period of supervision, but the Youth Court cannot currently impose a sentence beyond what effectively amounts to nine months.[31] We recommend that section 283 be amended to include a two-year term of supervision with residence in exceptional cases.

56 Currently there is no jurisdiction under section 283(o) to transfer a case to the District Courts where the young person is aged under 15 years at the time of the offending.[32] Thus young persons aged under 15 years who have been given the opportunity under sections 274–276 to be dealt with in the Youth Court can only be sentenced in the Youth Court, irrespective of the gravity of the offence or offending. It would seem the only way to avoid this result is to require the young person to stand trial in the District Courts or High Court, foregoing the advantage of the relative informality of Youth Court procedures available to older youth offenders. It is recommended that the age requirement in section 283(o) be removed.

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[31] The nine month period consists of a three month residence order made under s 311 followed by a six month supervision period imposed under s 283(k) Children, Young Persons, and their Families Act 1989.

[32] See *Police v BCS* [1996] DCR 985, 990.

5
Summary of recommendations

R1 A single Criminal Proceedings Act should be enacted (paragraph 27).

R2 The distinction between summary and indictable offences should be eliminated (paragraphs 14, 28 and 39).

R3 Only two schedules of offences will need to be drawn up and maintained: one for the most serious offences which are currently always tried in the High Court, and one for the middle band offences (paragraph 28).

R4 There will be four broad categories of offences: those punishable by a maximum of three months imprisonment, those punishable by more than three months but less than 14 years imprisonment (with exceptions), the middle band, and High Court only offences (paragraph 7).

R5 Offences with maximum penalties of over three months but less than 14 years imprisonment will be tried in the District Courts by judge alone unless the defendant elects trial by jury; appeals will be to the High Court if the defendant pleads guilty or is found guilty by judge alone, and to the Court of Appeal if found guilty by a jury (paragraphs 14–20).

R6 High Court only and middle band offences will be tried in the High Court by jury (or in a District Court if transferred there by the High Court) unless either the defendant or the prosecution applies for trial by judge alone; appeals will be to the Court of Appeal (paragraphs 21–26).

R7 The possible reform of infringements and minor offences should be considered as a separate exercise (paragraph 11).

R8 Appeals from decisions of both Community Magistrates and Justices of the Peace should be heard before a District Court judge; consequentially sections 107 and 114B of the Summary Proceedings Act 1957 should be amalgamated into one (paragraph 13).

R9 All District Court judges should be able to sentence up to the maximum provided by law (paragraphs 17–19).

R10 If a charge is laid in the District Courts, and the prosecution wishes to amend it to a middle band charge, there should be a provision allowing the amendment to be made in the District Courts and for the case to be continued in that court (paragraph 24).

R11 Offences which provide different penalties for the same offence, depending on whether it is charged summarily or indictably, should be reviewed to provide for a single maximum penalty (paragraph 27).

R12 Where multiple charges arise out of the same incident but span different jurisdictions, and at least one charge must be heard in the High Court, the District Courts should be empowered to transfer all charges to the High Court (paragraph 29).

R13 When facing mixed charges arising out of the same incident, if the defendant elects trial by jury in respect of one charge, the Court should have a discretion to order that the other charges be tried by jury also (paragraph 30).

R14 When facing joint charges, an election of trial by jury by one defendant should bind all co-defendants unless the court orders otherwise (paragraph 31).

R15 If a defendant has an appeal against sentence before the Court of Appeal, and also has appeals against sentences before the High Court, the Court of Appeal should be able to hear and determine all appeals (paragraph 42).

R16 Witness anonymity should only be available in serious cases. The legislation should set out those offences (either identified by maximum penalty or listed in a schedule) to which sections 13A–J of the Evidence Act 1908 should apply (paragraphs 43–45).

R17 Section 23E of the Evidence Act 1908 should apply in all cases involving child sexual abuse (paragraph 46).

R18 Where a young person faces multiple charges, one of which is a middle band or High Court only offence, and where he or she has not been offered or has not accepted the opportunity to be dealt with in the Youth Court, then all related charges punishable by three months imprisonment or more should also be heard in the jury jurisdiction (paragraph 54).

R19 An addition should be made to section 283 of the Children, Young Persons, and their Families Act 1989 to empower the Youth Court to make a supervision with residence order for up to two years in exceptional circumstances (paragraph 55).

R20 The age requirement in section 283(o) of the Children, Young Persons, and their Families Act 1989 should be removed so that offenders under 15 years old may also be transferred to the District Courts for sentence (paragraph 56).

APPENDIX A

MIDDLE BAND OFFENCES

This Appendix reproduces Part II of Schedule IA to the District Courts Act 1947, in which the middle band offences are listed.

PART II

Part A. Offences Against the Crimes Act 1961

Section of Act	*Offence*
Part VII – Crimes Against Religion, Morality, and Public Welfare	
128	Sexual violation
129	Attempt to commit sexual violation
129A	Inducing sexual connection by coercion
132(1)	Sexual intercourse with girl under 12
[144A	Sexual conduct with children outside New Zealand
144C	Organising or promoting child sex tours]
Part VIII – Crimes Against the Person	
188	Wounding with intent
191	Aggravated wounding or injury
198	Discharging firearm or doing dangerous act with intent
198A(1)	Using firearm against law enforcement officer
199	Acid throwing
200(1)	Poisoning with intent
201	Infecting with disease
203(1)	Endangering transport
208	Abduction of woman or girl
209	Kidnapping

Part X – Crimes Against Rights of Property

235(1)(a) and (c)	Aggravated robbery

Part B. Offences Against the Misuse of Drugs Act 1975

Section of Act	*Offence*
6	Dealing with controlled drugs, but only where the charge relates to a class B controlled drug
[12C	Commission of offences outside New Zealand, other than offences against subsection (1)(a)]

Part C. Offences Against the Securities Act 1978

Section of Act	*Offence*
58	Mis-statement in advertisement or registered prospectus]

APPENDIX B

HIGH COURT ONLY OFFENCES

THESE ARE INDICTABLE OFFENCES not appearing in the First Schedule to the Summary Proceedings Act 1957 or Schedule 1A to the District Courts Act 1947 (and therefore falling into the default category of High Court only). Highlighted in bold are those offences that the Commission believes should remain as High Court only offences. Offences which are not highlighted should, we recommend, be included in the broad range of electable offences which can be heard in the District Courts.

ANTI-PERSONNEL MINES PROHIBITION ACT 1998

Section 7	**Using etc an anti personnel mine**	**7 years**

AVIATION CRIMES ACT 1972

Section 3	**Hijacking**	**Life**
Section 5	**Other crimes relating to Aircraft**	**14 years**
Section 5A	**Crimes relating to international airports**	**Life/14 years**
Section 11	Carrying dangerous devices	5 years

CHEMICAL WEAPONS (PROHIBITION) ACT 1996

Section 6	**Chemical Weapons**	**Life**
Section 8	**Riot control agents**	**Life**

CITIZENS INITIATED REFERENDA ACT 1993

Section 43(4)(a)	Making false return	1 year
Section 43(4)(b)	Illegal practice regarding returns	$20 000

CORONERS ACT 1988

Section 43(4)	False Statement	7 years

CORPORATIONS (INVESTIGATION AND MANAGEMENT) ACT 1989

Section 9	Information offences	12 months
Section 17	Hindering inspection	12 months
Section 20(1)	Hindering inspection	12 months
Section 20(2)	Information offences	$25 000
Section 23	Information offences	12 months
Section 35(1)	Contravening registrar	$25 000
Section 35(2)	Obstruction	$10 000
Section 36	Unauthorised disclosure	12 months
Section 43	Unauthorised removal of assets	3 years

CRIMES ACT 1961

Section 68(1)	**Party to murder outside New Zealand**	**14 years**
Section 68(2)	**Inciting murder outside NZ (not committed)**	**10 years**
Section 69(1)	**Party to any other crime outside New Zealand**	**14 years**
Section 69(2)	**Inciting treason outside NZ (not committed)**	**10 years**
Section 69(3)	**Aiding and abetting crime outside NZ**	**7 years**
Section 73(a)–(f)	**Treason or conspiracy to commit treason**	**14 years**
Section 74(3)	**Attempted treason**	**14 years**
Section 76	**Accessory to or failure to prevent treason**	**7 years**
Section 77	**Endeavouring to seduce armed forces from duty**	**10 years**
Section 79(1)	**Sabotage**	**10 years**
Section 92(1)(a),(b)	**Piracy**	**Life/14 years**
Section 93, 94	**Piratical acts**	**Life/14 years**
Section 95	**Attempt to commit piracy**	**14 years**
Section 96	**Conspiring to commit piracy**	**10 years**
Section 97	**Accessory to piracy**	**7 years**
Section 98(1)(a)–(j)	**Dealing in slaves**	**14 years**
Section 100(1)	**Judicial corruption**	**14 years**
Section 100(2)	**Judicial officer accepting bribe**	**7 years**
Section 101(1)	**Bribing judicial officer**	**7/5 years**
Section 102(1)	**Corruption and bribery of Minister of the Crown**	**14 years**
Section 102(2)	**Bribing Minister**	**7 years**
Section 103	**Bribing MP**	**7/3 years**
Section 172	**Murder**	**Life**
Section 173	**Attempted murder**	**14 years**
Section 174	**Attempting to procure murder (not committed)**	**10 years**
Section 175	**Conspiracy to murder**	**10 years**
Section 176	**Accessory after the fact to murder**	**7 years**
Section 177	**Manslaughter**	**Life**
Section 178	**Infanticide**	**3 years**
Section 179	**Aiding and abetting suicide**	**14 years**
Section 180(2)	**Surviving party of suicide pact**	**5 years**
Section 182	**Killing unborn child**	**14 years**
Section 183(1)(a)–(c)	**Procuring abortion**	**14 years**
Section 238(1)	**Extortion by certain threats**	**14 years**
Section 301	**Wrecking**	**14 years**

CRIMES (INTERNATIONALLY PROTECTED PERSONS, UNITED NATIONS AND ASSOCIATED PERSONNEL AND HOSTAGES) ACT 1980

Section 3	**Crime against a protected person**	**3 years**
Section 4	**Crime against premises or vehicles**	**various**
Section 5	**Threats against persons**	**7 years**
Section 6	**Threaten premises or vehicle**	**3 years**
Section 8(1)	**Hostage taking**	**14 years**

CRIMES OF TORTURE ACT 1989

Section 3(1)	**Acts of torture**	**14 years**
Section 3(2)	**Torture offences by a public official**	**10 years**

INDUSTRIAL & PROVIDENT SOCIETIES ACT 1908

Section 15(c)(iii)	False declaration	2 years

INSOLVENCY ACT 1967

Section 128A[33]	Offence by undischarged bankrupt	2 years

GENEVA CONVENTIONS ACT 1958

Section 3(4)	**Grave breaches of conventions or first protocol**	**Life**

JUDICATURE ACT 1908

Section 56C(2)	**Contempt of Court**	**3 months**
Section 56O	**Contempt of Federal Court of Australia**	**3 months**

LAND TRANSFER ACT 1952

Section 228A[34]	Fraudulent removal of records	7 years

LIFE INSURANCE ACT 1908

Section 29	False statement	Imprisonment[35]

MARITIME CRIMES ACT 1999

Section 4(1)(a)–(h)		**14 years**
Section 4(2)(a),(b)	**Crimes relating to ships**	**Life/14 years**
Section 4(3)(a),(b)		**14 years**
Section 5(1)(a)–(e)		**14 years**
Section 5(2)(a),(b)	**Crimes relating to fixed platforms**	**Life/14 years**
Section 5(3)(a),(b)		**14 years**

MEDICAL AUXILIARIES ACT 1966

Section 18	Fraudulent registration	3 years

MISUSE OF DRUGS ACT 1975

Section 6(2)(a),(b)	**Dealing with controlled drugs (Class A)**	**Life/14 years**
Section 6(2A)	**Conspiring to deal with controlled drugs (Class A)**	**14/10 years**
Section 10(1)(a),(b)	**Aiding offences against law of another country**	**14 years**

NEW ZEALAND NUCLEAR FREE ZONE, DISARMAMENT, AND ARMS CONTROL ACT 1987

Sections 5–8, 14	**Offences against Act**	**10 years**

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[33] This offence may also be charged summarily in which case the maximum penalty is six months imprisonment.

[34] Section 228A says a person committing an offence under this section ". . . shall be deemed for the purposes of the Crimes Act 1961 to have stolen that property, and shall be liable to the penalty prescribed by paragraph (b) of section 227 of that Act as if the property were an object to which that paragraph applies." As s 227 of the Crimes Act is in the First Schedule Summary Proceedings Act 1957, arguably an offence under s 228A could also be subject to the same procedure. This is not stated explicitly in s 228A however.

[35] No maximum term is specified. This offence can also be charged summarily in which case the maximum penalty is a $100 fine.

NUCLEAR TEST BAN ACT 1999

Section 5	**Offences against Act**	**10 years**

PAWNBROKERS ACT 1908

Section 13	Licence offences	2 years
Section 20	Pledge ticket offences	2 years
Section 32	Pledging other's property	2 years

PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

Section 45(3)	False statement	3 years

RESERVE BANK OF NEW ZEALAND ACT 1989

Section 29	Illegal issuing	3 years
Section 176	Offence against Act	1 year

SECRET COMMISSIONS ACT 1910

Section 3–10[36]	Offences against Act	2 years

TERRITORIAL SEA AND EXCLUSIVE ECONOMIC ZONE ACT 1977

Section 8(f)	Breach of regulations	$10 000

TRADE UNIONS ACT 1908

Section 29	Falsifying rules	2 years

TRUSTEE ACT 1956

Section 83B(9)	False statement	2 years

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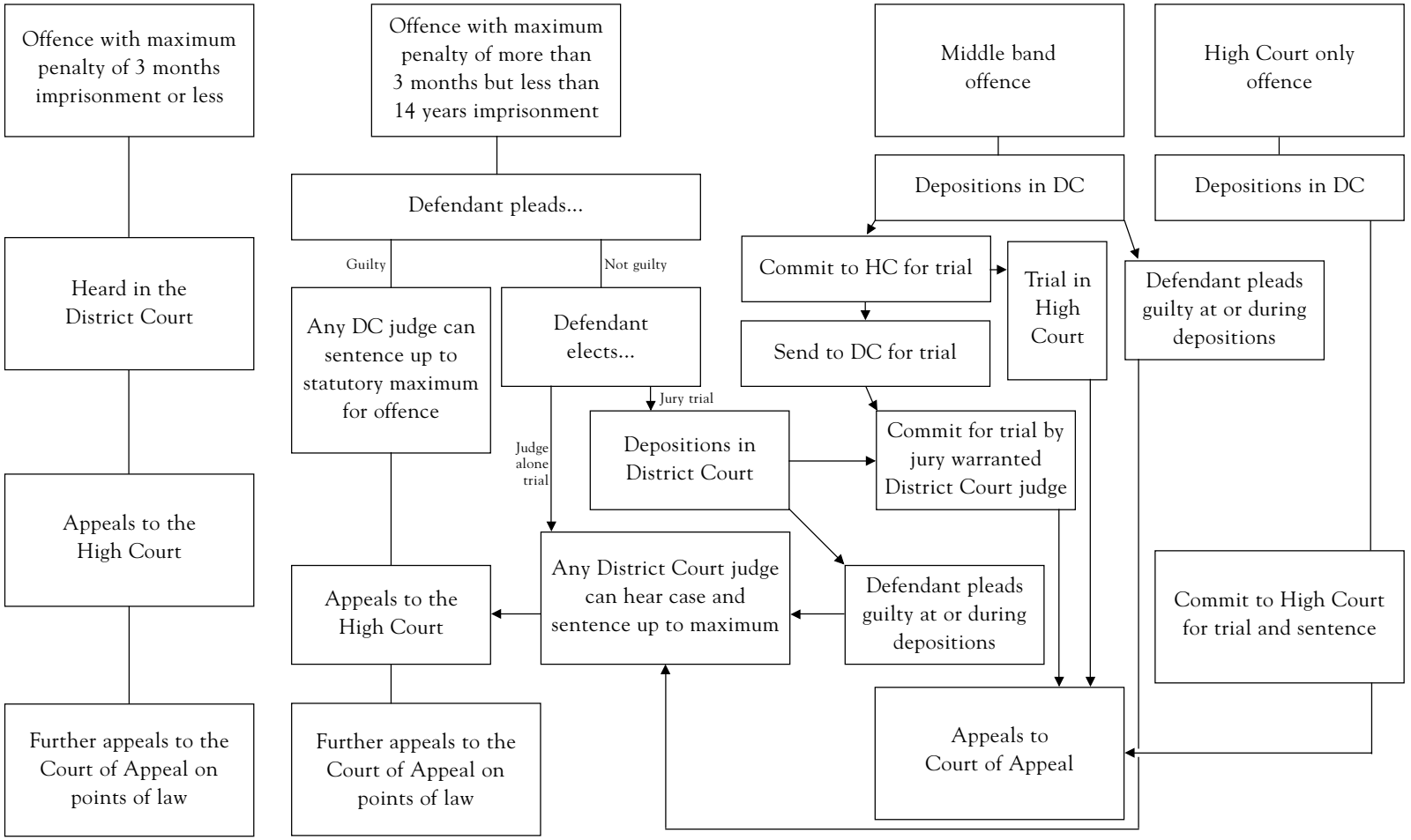
[36] These offences can also be charged summarily, in which case the maximum penalty is three months imprisonment (s 13).

Flowchart detailing proposed reforms for the simplification of criminal procedure legislation



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