



16 June 2009

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Dear Malcolm

Criminal Procedure (Simplification Project) – Identification of the issues in dispute

The Society's Criminal Law Committee is grateful for the opportunity to comment on the above discussion document. The committee's responses to the questions in the discussion document are set out below.

1. *Do you agree that a new process should be introduced for identifying the issues in dispute, under which:*
 - (a) *The defence would be required to identify, at a specified time before a defended hearing in the summary jurisdiction or a trial in the indictable jurisdiction, the issues that are in dispute – that is, the particular elements of the charge that are denied, or the defences that is intended to run; and*
 - (b) *When there is a jury trial:*
 - *The defence would provide an opening statement at the commencement of the trial that identified the issues in dispute;*
 - *The judge would provide an opening statement to the jury that outlined the legal elements of the offence that needed to be provided in the light of the issues in dispute (with the proviso that other elements may need to be proved or other defences may emerge on the basis of evidence given during the trial).*
- (a) Committee members were divided in their views on this proposal. Some members believe that any substantive obligation on the defence to identify issues and/or elements in dispute must be accompanied by an obligation on the Crown to finalise its case before the trial. No new evidence or alterations to the Crown case should take place (unless there are exceptional circumstances) thereafter.

Significant changes to the Crown case often occur shortly before trial. Such changes place pressure on Court resources and scheduling, which results in problems for the defence, because the Court will expect the defence to deal with these matters at very short notice.

Most experienced counsel are willing to agree to the matters that are not in dispute prior to trial. However, the situation has now emerged where, at callovers, counsel indicate that they are reluctant to agree to these matters unless the Crown undertakes that there will be no late disclosure of new evidence or alterations to its case.

It follows that the accused must retain the right to place all elements of the offence in issue and that, in the absence of admitted facts, the onus remains on the Crown to prove all elements of the offence.

- (b) The opening statement should identify “the elements of the charge” rather than the “issues” that are in dispute and/or any positive defences intended to be run.

The Judge should provide an opening statement identifying the legal elements of the offence. The Judge should also identify all elements disputed by the defence. Where a positive defence is anticipated, the requirements of that defence should be outlined by the Judge.

2. *To what extent does identification of the issues in dispute occur already? What are the barriers to it occurring more often?*

It is unusual for a Judge to identify issues in dispute early on in the trial. A barrier to defence counsel identifying issues earlier might be of a tactical decision in order to raise doubt.

3. *Do you agree that any new process should be mandatory rather than voluntary?*

Yes.

4. *Is it necessary for both the defence counsel and the judge to provide an opening statement on the issues of dispute?*

Yes.

5. *Do you agree with the benefits we have identified of the proposed process? Are there any other benefits that may arise?*

Yes.

6. *What concerns do you have about the proposed process? See, in particular, the discussion from paragraphs 51-64. Do you agree with our response to those concerns?*

Defence counsel would need to carefully explain the process to defendants carefully and to take written instructions as to the elements in dispute, at the commencement of the trial. There appears to be an increasing tendency towards defence counsel error becoming a ground for appeal against conviction. These appeals require preparation of affidavits and court attendance, and are time consuming. Impugned counsel are also not currently funded for their time spent on appeals.

7. *What, if any, implications do you consider this proposal has for the content of a judge’s summing up (see paragraphs 71-73)?*

This proposal does not affect a Judge’s obligation in summing up to cover any defence that might be available on the evidence.

8. *Do you agree that the process should be implemented via legislation, rather than a Practice Note (see paragraphs 65-69)?*

Yes.

9. *What incentives and sanctions could be used to ensure compliance with the proposed process? In particular, what are your views about the options to require leave of the court before a defence can be raised at trial that was not identified earlier, or to allow the fact-finder to draw adverse inferences (see paragraph 78)?*

It is inappropriate for a jury to be able to draw adverse inferences as to guilt from non-compliance with the proposed processes.

There should be no sanctions on the accused for non-compliance, and defences not identified earlier should be allowed. Such proposals overlook or subvert the onus of proof and the right to a fair trial. To include sanctions at the sentencing stage for non co-operation with the Crown in relation to the trial process could turn the absence of a mitigating factor into an aggravating feature. It is appropriate to require judicial leave to introduce a defence not previously identified.

In relation to paragraph 79, it is unclear why mutually contradictory defences should be considered inappropriate or non-compliant. Mutually contradictory defences illustrate the principle that the defence should be able to challenge every aspect of the Crown case. The running of mutually contradictory defences should be an option available to the defence without penalty.

The committee hopes that the above comments are of assistance to the Ministry. If you wish to discuss any matters raised in this letter please contact me, or the committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



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Convener, Criminal Law Committee