



19 May 2009

Malcolm Luey
Policy Manager, Criminal Law Team
Crime Prevention and Criminal Justice
Ministry of Justice
PO Box 180
Wellington 6140

By email: malcolm.luey@justice.govt.nz

Dear Malcolm

Criminal Procedure (Simplification Project) – Sentencing jurisdiction and appeals

The Society's Criminal Law Committee is grateful for the opportunity to comment on the Ministry of Justice's discussion document. Its response to the questions in the discussion document is set out below.

Sentencing jurisdiction

JPs and Community Magistrates

1. *Do you agree that the sentencing jurisdiction of Community Magistrates should be reviewed, with a particular focus on their jurisdiction under section 9C of SPA? This review would:*
 - (a) *Reconsider the ability for Community Magistrates to sentence those who have been found guilty by a court presided over by a District Court judge;*
 - (b) *Reconsider the ability for Community Magistrates to impose community detention under section 9C but not home detention;*
 - (c) *Review the offences to which the section 9C jurisdiction applies (i.e. offences where the maximum term of imprisonment does not exceed 3 months imprisonment and the maximum fine does not exceed \$7,500).*

Since there are only a limited number of Community Magistrates, and they preside only in a few Courts, it is unnecessary to review their particular jurisdiction, as the potential efficiency gains of such a review would be minimal. If such a review were carried out, then it would be logical for a Community Magistrate not to impose a sentence on a person found guilty of an offence by a District Court Judge.

The ability for Community Magistrates to impose community detention under section 9C, but not home detention, could be reviewed, taking into account that those sentences are similar in effect.

Community Magistrates may not impose a sentence of imprisonment, so a review of the offences to which the section 9C jurisdiction applies would not be required.

Sentencing jurisdiction on summarily conviction

2. *Do you agree that, subject to a review of data on High Court transfers and to obtaining the views of the defence bar (see paragraph 18), the summary sentencing limit should be abolished? Abolishing the summary sentencing limit will require the repeal of:*

- (a) *Section 7 of SPA;*
- (b) *Those provisions in other Acts that identify a prescribed maximum penalty that applies, notwithstanding section 7, when a person is summarily convicted of a particular offence;*
- (c) *Sections 28F(3) and (4) of the Districts Courts Act 1947*

The summary sentencing limit should not be abolished. Advantages of laying a charge summarily are:

- It is quicker and less cumbersome;
- The difference between an indictably and summarily laid charge is significant to both the defence and prosecution. The laying of a charge in summary form could be seen by the defence as an indication that the prosecution considers the offence to be at the lower end of the scale. If the offence were considered to be at the higher end of the scale, the charge would be laid indictably. If all charges were laid indictably, it would expose a defendant to the maximum penalty available at law, and there would be no indication as to how seriously the case is viewed by the prosecution for an indictable “triable summarily” charge; and
- A Judge will usually accept jurisdiction for sentence. With a summarily laid charge, the defendant can be reassured that the Court could only impose a maximum sentence of 5 years imprisonment, if found guilty. If all charges were laid indictably, defence counsel would be unable to advise their clients that the potential maximum penalty is capped at 5 years imprisonment, unless the rarely used s44 is applied by the Court.

Abolishing the summary sentencing limit may lead to more clogging of the Courts because more defendants would elect trial, as it would be pointless to remain in the summary jurisdiction. By way of background, attached are the *Police Prosecution Service Guidelines - Why lay a charge indictably or summarily*.

The effect of a “summary conviction” when the charge has been laid indictably should be clarified. For example, the Misuse of Drugs Act 1975 causes problems for a sentencing Court when a charge is laid indictably, and the defendant elects to enter a guilty plea prior to

committal. A conviction would then be deemed to be a summary one, and the penalty would be limited, creating an offence upon summary conviction.

Section 6(3) of the Misuse of Drugs Act 1975 provides that:

“Notwithstanding anything in section 7 of the Summary Proceedings Act 1957, where any person is summarily convicted of an offence against this section relating to a Class C controlled drug, the District Court may sentence him to imprisonment for a term not exceeding one year or to a fine not exceeding \$1,000.”

Section 9(3) of the Misuse of Drugs Act 1975 provides that:

“Notwithstanding anything in section 7 of the Summary Proceedings Act 1957, where any person is summarily convicted of an offence against this section, the District Court may sentence him to imprisonment for a term not exceeding 2 years or to a fine not exceeding \$2,000 or to both.”

This anomaly could be remedied by an amendment to the Misuse of the Drugs Act 1975, so that charges laid indictably remain so regardless of when a plea of guilty is entered. Section 7 of the SPA should therefore be retained, but amended to cater for problems caused by indictably laid charges deemed to be a “summary conviction” if an early guilty plea is received prior to committal for trial under ss153A and 168 of the SPA. Section 7 should be amended to state that if the charge is laid indictably, and a plea of guilty is made under ss153A or 168 SPA, then the conviction to be entered should be in indictable form. The maximum penalty upon conviction would then remain available to the sentencing Court. Sections 153A and 168 of the SPA would also need to be amended to show that the conviction upon early guilty plea remains as a conviction upon indictment.

Summary maximum penalties prescribed in other enactments can be retained, if the above solution is used, and ss 7, 153A and 168 are amended as stated above. Sections 28F(3) and (4) District Courts Act 1947 would both need to be amended to reflect the position of an indictable charge (with early guilty pleas) remaining as a conviction upon indictment for sentencing purposes.

Appeals

Appeal structure

3. *Do you agree that:*

- (a) *Decisions of JPs and Community Magistrates should be “appealed” to the District Court, with a further appeal to the High Court on points of law with leave;*
- (b) *The appeal structure otherwise should reflect current arrangements so that in the first instance:
Appeals from decisions of District Court Judges sitting alone are heard in the High Court;
Decisions of District Court judges pre-committal are heard in the High Court;
Decisions of District Court judges post-committal are heard in the Court of Appeal;
Decisions from the High Court are heard in the Court of Appeal.*

The committee supports the proposed appeal structure. However, the “appeals” of decisions by JPs and Community Magistrates to the District Court might delay justice, given that District Courts are so busy. The numbers of JPs decisions currently appealed to the High Court should be considered, along with the capacity of the District Court to deal with these new “appeals”.

Pre-trial appeals

4. *Do you agree that:*

- (a) *Further consideration should be given to the matter of pre-trial applications, including whether the number of pre-trial applications could be restricted or more could be done to streamline the application process;*
- (b) *Criteria for granting applications for leave to appeal should be codified, based on those identified in the Court of Appeal’s Practice Note;*
- (c) *The ability to make pre-trial appeals should remain (rather than requiring that any appealable issues be dealt with in one hearing after trial)?*

The number of pre-trial applications should not be restricted. However, consideration should be given to any other ways in which the application process might be “streamlined”.

The criteria for granting applications for leave to appeal should not be codified. The criteria in the practice note on pre-trial appeals are not “checklist” criteria. They are factors, which may indicate whether or not leave to appeal should be granted. How those factors operate in any particular appeal will be affected by various matters, including the nature of the application. There is no need to codify the matters covered in the practice note. The committee is concerned that it would halt the development of jurisprudence in this area.

The ability to make pre-trial appeals should remain. However, the position of the Crown is not considered in the paper. If there is no pre-trial right to challenge decisions regarding the admissibility of evidence, then acquittals may result following trial. An appeal post-trial to establish the wrongness of the decision on admissibility would result in a further trial. This would cause delays and inconvenience to victims, witnesses, the accused, lawyers and courts.

The paper does not consider the value of guidance provided by the Court of Appeal on admissibility issues pre-trial to District and High Court Judges, the Crown, Defence Counsel and the Police. If the ability to appeal pre-trial on questions of admissibility were removed, then the extent of the guidance provided by the Court of Appeal would be limited.

Further issues: Practice notes

- 5. *Do you agree that relevant Practice Notes should be looked at to identify any matters of substance that could be addressed as part of the Criminal Procedure (Simplification) Project?*

Yes, the committee agrees.

The committee hopes that the above comments are of assistance to the Ministry of Justice. 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

A handwritten signature in black ink, appearing to read 'Jonathan Krebs', written in a cursive style.

Jonathan Krebs
Convener, Criminal Law Committee