

# New Zealand Law Society

## CRIMINAL PROCEDURE (REFORM AND MODERNISATION) BILL

### Introduction

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on the Criminal Procedure (Reform and Modernisation) Bill (Bill).

### Overview

2. A major focus of the Society's submission is the implications of the Bill in terms of the New Zealand Bill of Rights Act 1990 (NZBORA).
3. In addition, the Society's submission identifies:
  - 3.1 Arguments for and against the proposed defence notification of disputed issues (DIDI) regime;
  - 3.2 Serious concerns about proposed amendments to the Bail Act 2000, particularly those which contemplate detention of a defendant resulting from failure to comply with procedural rules;
  - 3.3 Inconsistencies between parts of the Bill;
  - 3.4 The inappropriateness of carrying over some of the Summary Proceedings Act 1957 (SPA) provisions in the context of this Bill;
  - 3.5 The need to take into account issues raised by multiple defendant trials;
  - 3.6 Consistency with the Evidence Act 2006 and Courts (Remote Participation) Act 2010;
  - 3.7 The desirability of including the procedural provisions in regulations/rules or an appendix to the Bill with a mechanism to facilitate amendment (such as in the case of the High Court Rules). It would be desirable to be able to make changes if practical issues arise which require refinement of procedure without going through the process required to amend primary legislation. However, fundamental provisions should not be left to regulations.

### Amendment to the New Zealand Bill of Rights Act 1990

4. The Bill proposes to amend s24(e) of the NZBORA. This is the first amendment placing restrictions on any of the rights and freedoms in the NZBORA since its enactment in 1990. In particular, the Bill proposes to amend s24(e) so that the right to a trial by jury is engaged only when the penalty for the offence is or includes imprisonment for more than three years. Currently, the right is engaged where the maximum term of imprisonment is more than three

months. There will necessarily be a restriction on the availability of jury trials. The members of the Society are strongly divided on this proposal.

5. In particular, the effect of the Bill is that offences that carry a punishment of between three months' and three years' imprisonment will no longer have the opportunity of a jury trial. By way of example, jury trials will not be available in respect of the following offences (which are all punishable by a term of imprisonment not exceeding three years, or less):
  - 5.1 Indecent act on a dependent family member under the age of 18 years (Crimes Act 1961, s131(3)).
  - 5.2 Indecency with animal (Crimes Act 1961, s144).
  - 5.3 Injuring by unlawful act (Crimes Act 1961, s190).
  - 5.4 Aggravated assault (Crimes Act 1961, s192).
  - 5.5 Assault with intent to injure (Crimes Act 1961, s193).
  - 5.6 Assault on a child, including 'smacking' (Crimes Act 1961, s194).
  - 5.7 Forgery (Crimes Act 1961, s256(2)).
  
6. The offences listed above are ones that can currently be tried summarily (with a Judge alone), or indictably (with Judge and jury). There are some offences that Parliament has made purely indictable even though they are relatively minor in terms of maximum penalty. For example, the Electoral Act 1993 includes a number of offences, which are jury-only offences. It may be appropriate to consider whether there should be a schedule of offences that are required to be tried before a jury despite having maximum penalties of three years, or less.
  
7. In the Cabinet Paper<sup>1</sup> recommending the enactment of the Bill, the Government was presented, at paragraph 65, with two options for an increased penalty threshold for jury trials: (1) an increase to "more than 3 years' imprisonment"; or (2) an increase to "more than 5 years' imprisonment".
  
8. The Cabinet Paper stated that reasons against an increase to "more than 5 years' imprisonment" were that:
  - 8.1 this higher threshold is likely to result in more minor offences having a 5-year statutory maximum penalty in the future; and
  - 8.2 a possible public concern that there will no longer be a jury trial from some existing offences with a 5-year maximum that are considered 'serious', for example indecent act induced by threat, indecent assault on a person with significant impairment, and assault with a weapon.

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<sup>1</sup> The Cabinet Paper is available at <http://www.justice.govt.nz/policy/justice-system-improvements-1/criminal-procedure-simplification-project-1/documents/CPRAM%20Reform%20Package%20Paper%201.pdf>

9. In the Society's submission, these reasons could apply equally to the option to increase the threshold to "more than 3 years' imprisonment". In particular, the offences listed in paragraph 5 above are serious offences.
10. Moreover, as the Ministry of Justice has stated elsewhere (see paragraph 63 of the Cabinet Paper), changing the jury trial threshold may affect future maximum penalties for offences falling below the jury trial threshold. That is, there is a risk that a term of imprisonment not exceeding three years will become the default penalty for offences that are considered to be "minor" or "less serious".
11. The Society submits that because an amendment to s24(e) of NZBORA is such a fundamental change to a well-entrenched right, the Select Committee should seek detailed policy advice whether a lower threshold should be preferred, for instance two years' imprisonment. There will also be unintended effects. For example, at present, a member of Parliament (or a City or District Councillor) is entitled to a jury trial for any offence for which a conviction would result in the loss of their seat. With the proposed amendment to three years, this will not be the case.
12. As far as the Society is aware, there are no statistics on the number of trials that occur in the categories of offences proposed to be excluded from jury trial election. Many in the profession strongly believe that this is change for minor economic benefit.
13. A paper prepared in connection with the Criminal Procedure (Simplification) Project entitled "*Proposals relating to restricting availability of jury trials*" indicates, at paragraph 37, that there may not be a significant saving as between a two year and three year threshold.<sup>2</sup> If that is indeed that case, the Society submits that the right to a trial by jury should not be removed in the manner proposed for a minor efficiency benefit. Rather, the threshold should be, say, two years.

### ***Recommendation***

14. The Society recommends that further policy advice be obtained before these changes proceed.
15. The Society recommends that a lower threshold (such as two years) for jury trials should be considered.

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<sup>2</sup> Available at <http://www.justice.govt.nz/policy/justice-system-improvements-1/criminal-procedure-simplification-project-1/documents/Consultation-Proposals-relating-to-restricting.pdf>

## **SPECIFIC CLAUSE-BY-CLAUSE COMMENTS**

### **PART 2**

#### **Clause 12 Commencement of criminal proceedings**

16. Clause 12(2) allows the parties to a proceeding to agree to the filing of a charging document in a different District Court. However, prior to the commencement of proceedings there is no proceeding, and there are no parties.

#### ***Recommendation***

17. The Society recommends that clause 12(2) be redrafted.

#### **Clause 23 Manner of authentication and filing charging document**

18. Clause 23(2) is the first of many clauses using the phrase “in the prescribed manner”. As the intention of this Bill is to simplify criminal procedure, it should enable users of the legislation, who will not always be lawyers, to find detailed information as easily as possible. The words “in the prescribed manner” immediately present the question: *prescribed where?* As each requirement for a manner to be prescribed is met by rules under cl 382 or regulations under cl 383, it would be appropriate for clauses such as cl 23(2) to specify where the detailed information will be found.

#### ***Recommendation***

19. The Society recommends that cl 23(2) (and other similar clauses throughout the Bill) be amended to specify where the specific information can be found, as, for example “The charging document must be filed in the manner prescribed in rules made under the District Courts Act 1947”.

#### **Clause 30 Private prosecutions**

20. The Society accepts that private prosecutions can sometimes be taken inappropriately. The Society supports the addition of a power of the Registrar to refer a private prosecution to a Judge for directions or a decision that the evidence is sufficient to justify a trial or that the proposed prosecution is otherwise an abuse of process.
21. We note that of the 110 private prosecutions in the years 2008 and 2009, only 10 went to a defended hearing and none resulted in a finding of guilt, or a guilty plea.

### **PART 3**

#### **Clause 44 Previous acquittal**

22. Clause 44 (providing for dismissal of a charge under cl 147 if the person has been acquitted of an offence arising from the same circumstances) does not appear consistent with the provisions relaxing the double jeopardy rule (c11 151 and 154). Although cl 156(2) states the legal position, it would provide additional clarity if it was either moved, or repeated, in clause 44. (See also the comments on cl 147 below.)

#### ***Recommendation***

23. The Society recommends that cl 44 be amended by inserting “subject to sections 151 and 154”.

#### **Subpart 3 c11 52-57 Case management**

24. Clauses 52-57 are overly prescriptive and would more appropriately be contained in an appendix to the Bill with a mechanism facilitating amendment (as is the case with the High Court Rules), regulations or practice notes issued by Heads of Bench.

#### ***Recommendation***

25. The Society recommends that the provisions relating to case management be included in an appendix to the Bill with a mechanism facilitating amendment (as is the case with the High Court Rules), regulations or practice notes.

#### **Clause 59 Giving sentence indication**

26. Clause 59 gives the Court a discretion to deliver a sentencing indication. It would be desirable for a defendant to be entitled to apply for a sentencing indication (which would be given if the information available to the Court at that time is sufficient for that purpose). Subsequent sentencing indications would be discretionary and only available if there is a material change in circumstances under cl 60(3).
27. Clause 59 also limits the ability of a defendant to request a sentencing indication, to the period before trial. There are advantages to allowing sentencing indications to be given during trial, to allow for circumstances where the substance of the intended evidence changes during trial.

#### ***Recommendations***

28. The Society recommends that cl 59 be amended to:
- 28.1 Replace “may” with “must” in subcll (1) and (2);
- 28.2 Delete the reference to “made before trial” in subcl (1).

**Clause 61 Further provisions relating to giving and reporting sentence indication**

29. Clause 61(2) prohibits the publishing of information about a sentence indication until after a defendant has been sentenced or the charge has been dismissed. This clause raises freedom of expression concerns in terms of s14 of the NZBORA.
30. It appears that breach of the prohibition in cl 61(2) is intended to be a criminal offence. This is not achieved by the current drafting. As the clause is currently drafted, any such breach would have to be dealt with as either a contravention of statute under s107 of the Crimes Act 1961, or as a contempt of Court.
31. As sentencing indications are currently informal and usually in Court for Chambers, there is no current prohibition on publishing details of them. The Society is not aware of any problems that this has caused. The prohibition does not seem at all necessary in respect of category 1 and 2 offences, in respect of which no jury trial is possible. Moreover, an absolute prohibition does not seem necessary in respect of matters to be heard by a jury. If there are concerns in a particular case, a Judge should be permitted to suppress the request for (or giving of) a sentencing indication in the ordinary course. This would also be consistent with the provisions of the Bail Act as currently constituted, and as amended in this Bill.

***Recommendation***

32. The Society recommends that cl 61(2) be deleted, and that consideration be given to whether general suppression powers need to be amended in order to enable a Judge to suppress the details of a sentence indication in a given case.

**Clauses 64-67 Notification of Issues in Dispute**

33. The introduction of a regime requiring defence identification of disputed issues (DIDI) represents a fundamental change in New Zealand's criminal law. A DIDI regime requires the defendant to identify one or more (not mutually inconsistent) matters in dispute. In most cases, this will result in the defendant settling on a single matter, or a restricted range of matters, as exculpating the defendant - or to face the drawing of adverse inferences at trial from the failure to advance the exculpatory account initially adopted.
34. A significant issue for the Select Committee is the appropriateness of a DIDI regime. The Society has consulted amongst its members who practise in the area of criminal law and the profession is strongly divided whether or not it supports the DIDI regime. The Society does consider it important that the arguments for and against are carefully identified and examined. The rationale for introducing this significant change to New Zealand's criminal procedure has

implications for other procedural rules that apply to the advantage of the defence, which the Society's submission identifies below (see submissions on cll 110, 119 and 133 below).

35. DIDI represents a shift away from a philosophy which sees as appropriate and proper a defendant being able to:
  - 35.1 Put the prosecution to proof of every matter relating to the offence, in the knowledge that if the prosecution fails to establish some element to the required standard, there should be a dismissal of the charge; and
  - 35.2 Retain avenues of potential challenge to the prosecution case, so as to be able to focus the defence over the course of the proceedings where it offers the best chance of success.
  
36. It may assist the Select Committee to place the issue in an analytical and historical context.
  
37. From an analytical point of view, criminal law can be analysed as serving the following purposes (these "normative conceptions of the proper purpose of the criminal trial" are taken from A Duff, L Farmer, S Marshall and V Tadros *The Trial on Trial: Volume Three* (Hart Publishing, Oxford and Portland, 2007) at 61):
  - 37.1 *Participation*, involving the defendant being called to account, put to the test, or brought face to face with his accusers.
  - 37.2 *Due process*, where the focus is on the conduct of the trial and the effectiveness of procedures in protecting citizens against the State and its potentially oppressive power.
  - 37.3 *Efficient management* (the most recent, which seeks to find cost-effective ways of managing trials to increase the frequency of "correct" outcomes while limiting the quantum of resources required of the State, and of the parties to the proceedings including witnesses and victims.
  
38. On this analysis, New Zealand currently focuses on the first and second of these normative conceptions. This Bill gives greater emphasis to the third, and seems to be driven by fiscal imperatives over prevailing jurisprudential philosophies of participation and due process.
  
39. In the *due process* model, little emphasis is placed on the frequency of "factually incorrect" verdicts where a person who is in fact guilty is acquitted, and great emphasis on minimising the frequency of "legally incorrect" verdicts where an innocent person is convicted. This can lead to more factually incorrect verdicts, where a factually guilty person is not convicted because the pre-trial and trial process gives the defence a range of opportunities to contest guilt, and freedom as to the selection of the issues on which the issue of guilt or innocence will be contested.

40. In terms of historical context, the current philosophy underlying New Zealand criminal procedure has developed over 70 or more years since *Woolmington v DPP* [1935] AC 462 (HL) in the 1930s, subject to some minor amendments in relation to matters such as alibi evidence. At the time of *Woolmington* (and the high point of the onus being on the Crown to establish every matter, whether or not the defence had indicated it might be in dispute), there was no system of prosecution disclosure to the defence, nor was legal representation (other than, in some cases, by way of a dock brief) available to criminal defendants in the vast majority of cases.
41. The position has changed and the defence now enjoys a significantly more equal position. However, there is still a great deal of support for the view that the defence is entitled to preserve a high degree of flexibility as to the issues contested. See for example the statements of the High Court of Australia in *HML v The Queen* (2008) 183 A Crim R 159; [2008] HCA 16, at [9]: “It is important not to overlook the legitimate opportunism that may be involved in the conduct of a trial under an accusatorial system of trial. It is one thing to require a prosecutor to give particulars. It is another thing to bind defence counsel to a certain line of argument.”
42. Arguments that have been made against DIDI are:
  - 42.1 It will infringe the defendant’s right to silence or right to a fair trial. (DIDI does not prevent a defendant refusing to answer Police questions or refusing to give evidence. Instead it makes it difficult for a defendant who wishes to rely on his/her own exculpatory evidence to adapt the thrust and content of that testimony as the case progresses).
  - 42.2 It is a shift towards an inquisitorial mode of trial. This concern seems misplaced. An inquisitorial approach involves the Court determining the issue to be ventilated at the trial. Requiring the defence to state the issues on which it intends to contest guilt is an affirmation of the adversarial process, albeit more akin to the civil form of adversarial process than is currently the case.
  - 42.3 It will cause difficulties for the lawyer-client relationship. It appears that a DIDI regime will pose challenges for defence counsel where a defendant does not wish to cooperate with DIDI and instructs counsel accordingly.
  - 42.4 It may allow the prosecution to determine the areas of its case which need strengthening. If it cannot do so, the defendant will be acquitted. If it can do so sufficiently to justify a conviction, the defendant will be convicted.
  - 42.5 It shifts the balance inappropriately in favour of the prosecution, taking into account the superior resources and the coercive powers of the State.
  - 42.6 There is particular concern in relation to the effect of DIDI in prosecutions in the Youth Court. Young people facing charges (at any level, but particularly in respect of serious

charges) do not usually have the necessary maturity or understanding to instruct counsel at an early stage in the way in which a DIDI scheme would require. Adverse inferences may be able to be drawn in circumstances where the lack of maturity of a defendant has rendered them incapable of properly completing the requirements of DIDI. This concern can also arise with vulnerable adults, including those with intellectual disabilities.

43. Arguments for DIDI are:

- 43.1 Overall efficiency. It is possible that cases will be conducted on a more focused basis. This could involve a saving of time and stress for victims and other witnesses who will less often be required to give evidence as to matters that are not really in dispute. It may enable Judges and juries to focus on the issues in dispute and return decisions in a shorter time.
- 43.2 Public confidence in the criminal justice system. Unmeritorious acquittals detract from public confidence in the criminal justice system, with consequences in terms of reporting of offences (most often observed in the context of sexual offending).
- 43.3 Fairness to participants other than the defendant. There is some level at which the prosecution should be entitled to expect a proper opportunity to obtain a conviction where the evidence warrants it. Victims should also be entitled to expect that persons who have offended against them will be convicted if there is sufficient evidence placed before the trier of fact in a fair proceeding.
- 43.4 Limiting the possibility of deliberately false defences. One of the reasons for introducing a DIDI regime in England was to limit the ability of defendants to escape liability by constructing a fictitious alternative narrative that could sufficiently explain incriminatory evidence. See Sir Igor Judge, "*The criminal justice system in England and Wales - Greater efficiency in the criminal justice system: Time for change?*", a speech delivered in Sydney in August 2007.<sup>3</sup>

- 44. Concern as to the propriety of DIDI must take into account that a defendant can, in almost all cases, indicate at a very early stage any matter which is both truthful and exculpatory because the matters relevant to it will be peculiarly within the defendant's own knowledge. In the case of a positive defence (such as self defence, compulsion) or of a belief in consent or a claim of right, or a mistake as to a matter of fact or law, the defendant can reasonably be expected (if the matters alleged are true) to be able to raise them at a stage after the provision of legal advice and full disclosure.

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<sup>3</sup> Available at [http://www.judiciary.gov.uk/media/speeches/2007/speech-pqbd-30102007.htm?wbc\\_purpose=Basic&WBCMODE=PresentationUnpublished%2cPresentationUnpublished](http://www.judiciary.gov.uk/media/speeches/2007/speech-pqbd-30102007.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished%2cPresentationUnpublished).

45. The DIDI regime is likely to be particularly useful in relation to regulatory offences of strict liability. Where the defence has the burden of proof of due diligence or reasonable mistake, it necessarily relies on matters that are within the defendant's knowledge. It does not seem unreasonable that the defendant should have to raise these at an appropriate stage.

**Subpart 4: Clauses 68-72: Determination of level of trial Court for category 3 offences**

46. The procedure set out in subpart 4, which aims to identify various charges in category 3 and circumstances that might require them to be determined in the High Court rather than the District Court, is unnecessarily cumbersome and prescriptive. The District Court's current power to decline jurisdiction has not given rise to difficulties so far as the Society is aware. It would be preferable for a District Court to have the power, on application by either party, to refer a matter to the High Court for determination. Appropriate protocols would be established by the Heads of Bench and case law would develop to provide guidance. The exact status of a "protocol" as a form of delegated legislation is also unclear.

***Recommendation***

47. The Society recommends that cll 68-72 be deleted and replaced with a provision for a District Court Judge on application by any party to refer a category 3 offence to the High Court for determination as to the appropriate level of trial Court for the offence.

**Subpart 6: Clauses 78-80: Provisions applying only to Judge-alone procedure**

48. The Society welcomes the inclusion of a procedure to determine admissibility issues before a Judge-alone trial.
49. Clause 79(2) however only gives the Judge the power to order that evidence is admissible, and no power to order that evidence is inadmissible. Clause 79(4) reinforces this distinction by providing that nothing in ss78 or 79 or any order made under s79 affects the right of the parties to seek to adduce evidence that they claim is admissible during the trial. This makes it unlikely that the procedure will save time and increase predictability. Instead it merely adds a toothless and questionable step to the process.
50. If the Court is given the power to exclude evidence there will inevitably be cases where a change in circumstances means that the order needs to be revisited. But at least there would be a strong presumption that such evidence cannot be relied on. Without the power to make such an order, the process seems pointless. So, for example, a defendant may prepare his or her defence on the basis that the Court has not ordered certain evidence to be admissible, only to

find at trial that the prosecutor seeks to produce the evidence in any event. If such evidence is produced, the result would usually be a mistrial.

***Recommendation***

51. The Society recommends that cl 79(2) be amended to add “or that the evidence is inadmissible”.

**Clause 82 Requirements for formal statements**

52. Clause 82(5) allows formal statements to include inadmissible evidence, provided that the prosecutor indicates at the time of filing the parts that he/she considers to be admissible and proposes to adduce at trial. This is highly problematic as a matter of principle and because of the evidential status given to formal statements by cl 86.
53. There is no basis for allowing the prosecution to include evidence in formal statements that the prosecution knows is inadmissible. As a matter of principle there should be an expectation that all parties endeavour to only adduce admissible evidence at every stage of the process. The prosecution should never file inadmissible evidence in Court.
54. The problematic nature of cl 82(5) is exacerbated by cl 86(1)(a), which provides for these formal statements to be admissible as evidence for the purposes of any pre-trial application, to the same extent as oral evidence to the same effect. So there is every chance that such material could be relied on by the Court.
55. In addition, cl 86(1)(b) provides that a formal statement is to be treated as a previous statement of the witness at the trial. A previous statement will often be used to impugn the credibility of witnesses and can be put to the jury in its entirety. It is inappropriate for a statement which the prosecutor knows to contain inadmissible evidence to go to a jury.

***Recommendation***

56. The Society recommends that cl 82(5) be deleted.

**PART 4**

**Clause 102 and 103 Trials by a Judge-alone**

57. Under the Bill, trials by a Judge alone in respect of category 3 and 4 offences may be ordered:
- 57.1 under clause 102, provided the offence is punishable by less than 14 years’ imprisonment, where the trial is likely to be long and complex; or
- 57.2 under clause 103, where intimidation of jurors has occurred, is occurring, or may occur.

58. Clauses 102 and 103 re-enact ss361D and 361E of the Crimes Act 1961. The Society has previously commented on such provisions.
59. The Society acknowledges the potential need for Judge-alone trials for long and complex cases. However, clause 102 should be limited to serious fraud cases and to any case where the defendant applies for a Judge-alone trial.
60. In relation to intimidation of jurors, the Society submits:
- 60.1 There is no evidence that jury intimidation occurs to such an extent as to justify the inclusion of cl 103 in the Bill. If it does occur, steps can be taken under the current law to deal with it.
- 60.2 The clause as drafted applies to every jury trial, no matter how minor or serious.
- 60.3 The clause as drafted is ineffective and extremely limited in its scope. It does not address in an effective way the issues that are likely to occur.

### ***Recommendation***

61. The Society recommends that cl 102 be limited to serious fraud cases and to any case where the defendant applies for a Judge-alone trial.
62. The Society recommends that cl 103 be deleted or, at a minimum, substantially redrafted to address the points made in paragraphs [58.2] and [58.3] above.

### **Clause 105 Conduct of Judge-alone trial**

63. Clause 105, a clause carried over from the Summary Proceedings Act 1957 (SPA), limits prosecutors' opening statements to an outline of the charge(s) faced by the defendant and provides that neither party may make submissions on the facts nor address the Court on the evidence to be given by either party (unless the judicial officer directs otherwise).
64. It seems likely that Judges would generally be assisted in their task if the prosecution provides an outline of the nature of the evidence to be called, and identifies the issues which have been put in dispute by the defence (in light of the proposed DIDI regime).
65. The provision in the Bill is particularly inappropriate for Judge-alone trials for serious or complex offences (such as fraud), or cases where multiple defendants advance mutually contradictory accounts of events. In such cases it is highly desirable that the prosecution be able to address the Court on the evidence called by the defendant(s) and vice versa, and that co-defendants be able to address the Court on the evidence called by other defendants.

66. Given that the provision is concerned with the sequence of the parties' addresses to the Court, it would be appropriate for it to address the order in which co-defendants should make submissions, give evidence and cross-examine - witnesses for example, by enacting the common law rule that defendants exercise their rights in the order in which they appear in the indictment, unless a Judge orders otherwise. The Select Committee needs to note that some special rules apply in cross-examination by multiple defendants as to who may cross-examine last. The same issue arises in respect of cl 110 (conduct of jury trial), discussed below.
67. The matters dealt with in cl 105 may also more appropriately be dealt with in regulations/rules or an appendix to the Bill with a mechanism facilitating amendment (as is the case with the High Court Rules).

### ***Recommendations***

68. The Society recommends:
- 68.1 That cl 105 provide for the prosecution to indicate the nature of the evidence to be called and the matters put in dispute by the defence;
  - 68.2 That cl 105 provide that parties have a right to make submissions on the facts and address the Court on the evidence;
  - 68.3 If it is considered necessary, that the judicial officer be given a residual discretion to limit or prohibit submissions, but only if doing so is consistent with a fair trial;
  - 68.4 That cl 105 provides for the order in which co-defendants are to make submissions, call evidence and cross-examine witnesses;
  - 68.5 That consideration be given to dealing with these matters in regulations/rules or an appendix to the Bill with a mechanism facilitating amendment (as is the case with the High Court Rules).

### **Clause 107 Decision of Court**

#### ***Recommendations***

69. The Society recommends that the possibility of a verdict of "not guilty by reason of insanity" (as provided for in s20 Criminal Procedure (Mentally Impaired Persons) Act 2003) be specifically provided for in cl 107(1).
70. The Society recommends that, cl 107 should require the giving of reasons. This would be consistent with current requirements and clause 340 of the Bill (judgment of appeal Court to be accompanied by reasons) (which is already required).

**Clause 108 Judicial officer may order retrial or rehearing as to sentence/ clause 185 Application to correct erroneous sentence**

71. Clause 108 is another clause carried over from the SPA. It is not appropriate in its current form in the context of Judge-alone trials, for the following reasons:
- 71.1 As a matter of general principle, it is not appropriate for there to be a retrial or rehearing of any charge: that is the purpose of the appeal process.
- 71.2 It does not make sense for appeal to be the only procedure available where a charge is heard by a jury, but a retrial to be available if the same charge is heard by a Judge alone.
- 71.3 The Society understands the original SPA provision to have been designed to deal with cases where a defendant was convicted in his or her absence. But this situation is now provided for under cl 131, as is recognised by cl 108(5). This raises the question of what type of case cl 108 is intended to deal with.
- 71.4 In a regime involving DIDI, along with case management and full prosecution disclosure, there is no reason to expect trials to be defective in such a way that the appropriate remedy is a retrial (as opposed to an appeal).
- 71.5 Clause 185 (Application to correct erroneous sentence) appears to cover some of the same ground, although there is no provision in respect of cl 185 for the consequences for defendants convicted to a sentence of imprisonment (cf cl 109(2)).

***Recommendations***

72. The Society recommends that:
- 72.1 Clause 108 (and consequently cl 109) be removed from the Bill;
- 72.2 A provision indicating the consequences, pending re-sentencing, of a decision that the initial sentence was incorrect (preferably modelled on cl 109(2) for consistency) be inserted following cl 185, possibly as a subclause of cl 187.

**Clause 110 Conduct of jury trial**

73. It is likely that the jury's understanding of rival contentions (particularly by expert witnesses) would be assisted if the trial Judge had the power to allow the prosecution to call rebuttal evidence immediately after the defence has called a particular witness or witnesses (as is provided for in respect of the defence at cl 110(4)).
74. The same issue arises in respect of the order in which co-defendants exercise their rights as is discussed above in relation to cl 105 (Conduct of Judge-alone trial), for example there is no provision for any rules governing this order.

***Recommendations***

75. The Society recommends that:
- 75.1 Clause 110(4) be amended to apply to the prosecution as well as the defence;
  - 75.2 If cl 105 is amended to include a provision for the order in which defendants exercise their rights, that provision should be inserted into cl 110 as well.

**Clause 111 Procedure if charge alleges previous conviction**

76. Clauses 111(1) and 111(2) contain somewhat archaic language, which may not be readily understood by non-lawyers. The words “given in charge to [the jury]” and “given on the part of the defendant” are unnecessarily vague.

***Recommendation***

77. The Society recommends that cl 111 be redrafted with plain language.

**Clauses 112 -114 References by prosecutor and Court in jury trial to failure to notify adequately issues in dispute**

78. Clauses 112 and 113 need to be amended to take into account trials involving multiple defendants. Where defendants are running inconsistent defences, it would be appropriate for a defendant who has complied with DIDI processes to be permitted to point to any failure by a co-defendant as a matter that the jury could properly take into account.

***Recommendations***

79. The Society recommends that:
- 79.1 Clause 112 be amended to provide for the Judge to have the power to grant leave to a defendant to comment on a failure by another defendant to notify adequately an issue in dispute;
  - 79.2 Consequential amendments to cl 112 be made to provide for co-defendants to be heard on the question whether there was such a failure and whether there is a reasonable explanation for any failure;
  - 79.3 Clause 113 be amended to allow co-defendants to be heard on whether there was a failure to adequately notify and on whether there is a reasonable explanation for any failure;
  - 79.4 Clause 114(1) be amended to include reference to a co-defendant commenting on the failure of another co-defendant to comply with DIDI.

**Clause 116 Part of murder charge proved**

80. The predecessor to clause 116, s339(2) of the Crimes Act 1961, reflects an old rule that an indictment should not include other counts when it includes a count of murder. That rule has

long been abrogated. It would make better sense not to have this rule, in light of the Court's general power (currently in s339(1) Crimes Act, and in cl 144 of the Bill) to convict on any offence included in the indictment that is proved.

***Recommendation***

81. The Society recommends deleting cl 116.

**Clause 119 Adjourning trial for witness**

82. In a system with effective prosecution disclosure and DIDI, there is no longer the same justification for the previous law limiting the power to adjourn or discharge to cases where the defence is disadvantaged. These powers should apply equally where the prosecution is disadvantaged. The position of co-defendants where a defendant produces a witness without sufficient notice also needs to be taken into account.

***Recommendation***

83. The Society recommends that cl 119(1) be amended so that it applies where any party is disadvantaged by the production of a witness without sufficient notice.

**Clause 122 Effect of sentence indication**

84. It would be desirable for the safeguard of withdrawing a guilty plea (under cl 121) to be available in cases where a different sentencing Judge departs from the sentence indication given earlier by another Judge.
85. In cl 122(2)(b) the word "it" could be read as referring back to the information rather than the sentence indication. It would be better to repeat the phrase "the sentence indication".

***Recommendations***

86. The Society recommends that:
- 86.1 Clause 122 provide that a guilty plea may be withdrawn under cl 121 in cases where another judicial officer departs from the earlier sentence indication given;
- 86.2 Clause 122(2)(b) be amended to read "the judicial officer is satisfied that the information materially affects the basis on which *the sentence indication* was given".

**Clause 124 Defendant generally may be present at all hearings**

87. The right of the defendant to be present should be stated as a right in cl 124(1).

***Recommendation***

88. The Society recommends replacing “may” with “has the right to” in the heading to cl 124 and in cl 124(1).

**Clause 125 Hearings at which defendant must be present**

89. There are other circumstances where it would not be sensible to require the defendant to be present, such as hearings concerned with the timing of the trial or admissibility of evidence. While the defendant should have a right to be present at these hearings, it should not be mandatory.

***Recommendation***

90. The Society recommends that cl 125(2)(c) be amended to include reference to hearings concerned with the timing of the trial and also hearings concerned solely with the admissibility of evidence.

**Clauses 126 to 129: Powers of Court when defendant does not appear**

91. Section 25(e) of NZBORA provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be present at the trial and to present a defence.
92. The Bill proposes to extend the ability of the Courts to proceed with trials in the absence of the defendant. A trial undertaken in the absence of an accused necessarily limits his or her right to be present at the trial.
93. In respect of the process that applies when a defendant does not appear, the Bill draws a distinction between, on the one hand, category 1 offences, and, on the other hand, category 2, 3 or 4 offences.

**Clause 126 – category 1 offences**

94. Clause 126(2) applies to category 1 offences. It provides that a Court “may” (a) proceed with a hearing in the absence of the defendant, or (b) adjourn the hearing to a time and on any conditions the Court thinks fit.
95. In his report to Parliament,<sup>4</sup> the Attorney-General said (at [21]), in respect of clause 126, that he did not consider the power to proceed in the absence of the defendant in the case of a

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<sup>4</sup> [http://www.parliament.nz/NR/rdonlyres/992E1518-B554-48FE-8645-8DBC86077F55/165900/DBHOH\\_PAP\\_20778\\_AttorneyGeneralReportoftheunderthe.pdf](http://www.parliament.nz/NR/rdonlyres/992E1518-B554-48FE-8645-8DBC86077F55/165900/DBHOH_PAP_20778_AttorneyGeneralReportoftheunderthe.pdf).

category 1 offence limits the right to be present, because the Court is left with a discretion whether or not to continue. The Attorney-General was satisfied that Judges will exercise their discretion in a manner that does not limit s25(e) of NZBORA.

96. The Society submits that, on a plain reading of clause 126, Judges are not directed to exercise their discretion in accordance with s 25(e) of NZBORA. The clause would be enhanced if it expressly required that Judges exercise their power in accordance with s 25(e) of NZBORA.
97. Under clause 130, a defendant who has been found guilty of a category 1 offence following a trial that proceeded in his or her absence, may apply to a Court for a retrial of the charge. Under clause 130(5), a retrial must be ordered if the defendant did not receive a summons to appear at the trial and was not aware that a summons had been issued. Accordingly, it appears that where a defendant's absence was for some other reason, there may be limited or no ability to order a retrial pursuant to clause 130. That means that if the defendant had a good excuse for not being present for the trial, and the Judge ordered the trial to proceed, then there is no ability to obtain a retrial.

**Clause 128 – category 2,3 or 4 offences**

98. Clause 128 applies where the offence charged is a category 2, 3, or 4. In his report to Parliament, the Attorney-General raised serious concerns in relation to clause 128. At [39] of his report to Parliament, the Attorney-General states that clause 128 is an unjustified limit on the right to be present.
99. The Society agrees with the Attorney-General's assessment and urges the Select Committee to address the Attorney-General's concerns in respect of clause 128 by enhancing the ability of the Courts to consider the defendant's right to be present.
100. The Society also urges the Select Committee to consider whether the proposed provisions relating to absent defendants are a proportionate response to the problem of delay. In reality, the absence of the defendant results in a warrant for arrest to issue. Other Court business is brought forward, and the real loss in Court time and productivity is minimal. It would be unfortunate if a significant transgression on the right to be present was made merely for the sake of a minor increase in efficiency. In addition, the Courts will in all likelihood strive to ensure that the fundamental rights of an accused receive sufficient protection, which may mandate that the Court orders a retrial. Any perceived efficiency gains fall away if the Court has to order a retrial.

***Recommendations***

101. The Society urges the Select Committee to ensure that clauses 126 and 128 are re-drafted to address the concerns outlined above.

**Clause 131 Court may order retrial where defendant found guilty of category 2, 3, or 4 offence in his or her absence**

102. Clause 131 provides that a retrial may be ordered only if the Court is satisfied that the defendant has a defence that would have had a reasonable prospect of success if he or she had attended the trial.
103. It would make sense for the grounds for a retrial to reflect the basis on which the Court is required to proceed to trial in the defendant's absence - which in the case of category 2, 3 or 4 offences is that the Court is satisfied that the defendant does not have a reasonable excuse for his/her non-attendance (cl 128).

***Recommendation***

104. The Society recommends that cl 13 be amended so that a retrial may also be ordered where the defendant can establish that he or she had a reasonable basis for not attending the trial.

**Clause 132 Procedure relating to application for retrial**

105. Clause 132 does not address the question whether the Judge, the prosecution or other co-defendants may comment at a retrial, on a failure by the defendant to call a witness whose formal statement supported the application for retrial, or on a defendant's reliance on a defence not identified in the application for retrial.

***Recommendation***

106. The Society recommends that cl 132 be amended to specifically provide whether or not the Judge, prosecution, and other co-defendants can comment at the retrial on any failure by the defendant to advance the case relied on in the application for retrial.

**Clause 133 Powers of court when prosecutor does not appear**

107. Clause 133 provides that the Court must adjourn the hearing if the defendant is in custody or has been released on bail and the prosecutor has not had adequate notice of the hearing of the hearing. In any other case the Court may dismiss the charge or adjourn the hearing.
108. There does not seem to be any reason why the grounds for adjournment and dismissal where the prosecutor fails to appear should not be the same as where the defendant fails to appear. For example, the charge should be dismissed unless the prosecutor has a reasonable excuse for

not appearing. Section 25(b) of NZBORA guarantees the right to be prosecuted without undue delay. Delaying a trial (rather than dismissing it) because of an unreasonable non-appearance by the prosecutor is not likely to be a reasonable limitation on that right.

***Recommendations***

109. The Society recommends that:

109.1 Clause 133(2) be amended to provide that the Court must adjourn the hearing where the prosecutor has a reasonable excuse for not appearing;

109.2 Clause 133(3) be amended to provide that in all other cases the Court must dismiss the charge.

**Clause 138 Procedure if charge amended during trial**

110. Clause 138 gives the Court a discretion to amend the charges in certain circumstances. (The Court is currently required to make such an amendment unless the defendant is prejudiced). It would be desirable for cl 138 to make it clear that in the circumstances identified, the Court must amend the charges, consistent with the previous law. If there is to be a discretion, there should be provision for some criteria for its exercise.

***Recommendation***

111. The Society recommends that cl 138 be amended to require the Court to amend the charge provided that the defendant will not be or has not been misled or prejudiced in his or her defence by the amendment.

**Clause 139 Proceedings against parties to offences, accessories, and receivers**

112. It would be desirable for cl 139 to be extended to apply to receivers of property. They can obtain property which has been stolen by dishonest dealing with it after possession was ceded with consent (compare the changes made to the Crimes Act 1961 consequent on the decision in *Anderson v Police* [1983] NZLR 509).

113. There is also a logic to integrating the proposed new s 243A Crimes Act (to be inserted by Schedule 6 of the Bill) into cl 139. The proposed s 243A provides that a person charged with an offence against s 243(2) or (3) or s 12B of the Misuse of Drugs Act 1975 in respect of any property that is the proceeds of a serious offence (money laundering) may be charged whether or not the person who committed that serious offence has been charged or convicted or is amenable to justice.

***Recommendations***

114. The Society recommends that:

- 114.1 The words “stolen or” be inserted before “dishonestly obtained” in each case where they appear;
- 114.2 Clause 139 subsume the proposed new s 243A Crimes Act.

**Clause 142 Conviction where alternative allegations proved**

115. Clause 142 provides that, in a case where a charge includes alternative allegations, the Court must limit a conviction to one of the alternatives charged. This has the potential to cause difficulties in the context of a jury trial. If the charge includes alternative allegations, a jury verdict of guilty will not be able to be so limited.

116. This raises the question whether it is proper to have a single charge which contains alternative allegations, rather than alternative charges. The inclusion of alternative allegations may make the charge bad for duplicity.

***Recommendations***

117. The Society recommends either that cl 142:

- 117.1 Be amended by limiting it to Judge-alone trials; or
- 117.2 Be substituted with a provision that charges should not contain alternative allegations and that alternative allegations should be made in alternative charges.

**Clause 146 Withdrawal of charge/ Clause 196 Power of Solicitor-General or Crown prosecutor to withdraw charge**

118. The relationship between cl 146 (which requires the prosecutor to obtain the leave of the Court to withdraw a charge before trial) and cl 196 (which permits the Solicitor-General or a Crown prosecutor to withdraw a charge without leave within a certain period) is not obvious. The relationship between the two provisions should be clarified in both provisions.

119. There is potential scope for abuse of the cl 196 power because it enables the prosecution to withdraw charges which the Court is about to dismiss under cl 147 (with the effect that the defendant would be deemed to be acquitted), so as to allow the charges to be brought again without procedural obstacles.

***Recommendations***

120. The Society recommends that:

- 120.1 Clauses 146 and 196 be amended so that their relationship is clear. At a minimum “subject to cl 196” should be inserted at the beginning of cl 146(1).

120.2 Some restriction be placed on withdrawal of a charge where an application has been made under cl 147 to dismiss the charge or the Judge has raised the possibility of such a discharge of his or her own motion.

### **Clause 147 Dismissal of charge**

121. Clause 147 replaces s347 Crimes Act 1961. The Crimes Act empowered a Judge to grant a s347 discharge even after the defendant was found guilty (see *R v Momo* (1983) 1 CRNZ 67). It is not clear why cl 147 has been limited to discharges before conviction. No reason has been identified to depart from the previous position.
122. Clause 147 simply repeats that the effect of the dismissal is a deemed acquittal. The Court of Appeal has held that a discharge is not necessarily final – either because a discharge in the District Court can be judicially reviewed in the High Court, or because the decision can be reversed on the basis the Judge was misinformed as to some material matter (see *R v Holt* [2009] 1 NZLR 325; [2008] NZCA 388). It would be desirable for cl 147 to clarify whether or not that decision is good law.
123. The Court of Appeal has also held that a pre-trial discharge does not amount to an acquittal for the purposes of the double jeopardy rule (*R v Taylor* [2009] 1 NZLR 654; [2008] NZCA 558). Clause 44 of the Bill (consequences of entering a plea of previous acquittal) does not address this question, and it would be desirable for this issue to also be addressed in cl 147 (or cl 44).

### ***Recommendations***

124. The Society recommends that:
- 124.1 Clause 147(1) be amended to give the Court the power to enter a discharge after verdict;
- 124.2 Clause 147 clarify the status of discharges: whether they can be revoked prior to trial and whether they amount to prior acquittals for the purposes of the double jeopardy rules (along the lines of existing case law, unless good reasons can be identified for diverging from that case law).

### **Clause 148 Prosecutor must notify Court if defendant completes programme of diversion**

125. It is constitutionally undesirable for a Judge (or Registrar) to be required to dismiss a charge simply because the Police or the prosecutor gives the Court a particular piece of information.
126. It would be more appropriate for the Court to have a discretion in this regard, to be exercised according to criteria such as whether the case was one in which the Police could properly offer

diversion. It is appropriate for the Court to have some supervisory power to take issue with Police conduct.

***Recommendation***

127. The Society recommends that cl 148 be amended to provide that where the Judge or Registrar is satisfied that a programme of diversion was appropriate for the offence and has been completed, a discharge under cl 147 may be entered.

**Clause 150 Offence proved when attempt is charged**

128. Clause 150 provides for the Court to either amend the charge, or convict the defendant of the attempt in circumstances where an attempt is charged but the evidence establishes the commission of the full offence.
129. Clause 150 introduces a new power of the court to amend the charge rather than simply leaving the accused to be convicted of the attempt. It would be desirable to clarify whether this new power is a stand-alone discretion under this clause, or whether any amendment should be according to the terms of cl 138 (Procedure if charge amended during trial). The latter is preferable because it would make clear that the power to amend may only be exercised where the accused is not prejudiced or misled in her/his defence.

***Recommendation***

130. The Society recommends that “in accordance with section 138” be inserted into cl 150(1)(a).

**Clauses 151 and 154 Retrial of acquitted defendants**

131. Section 26(2) of NZBORA provides that no-one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again (“double jeopardy rule”).
132. The Bill provides, in clauses 151 and 154, for two exceptions to the double jeopardy rule. These exceptions are in all meaningful respects identical to those set out in the Crimes Act 1961 ss378A to 378F, which were introduced by the Crimes Amendment Act (No 2) 2008 (part of the Criminal Procedure Bill 2004). The Society notes that in her report to Parliament on the Criminal Procedure Bill 2004, the then Attorney-General considered that the second exception (the ability to order a re-trial of an acquitted person where there is new and compelling evidence) constituted an unjustified limit on s 26(2) of NZBORA, because that exception applied to too broad a range of offences. The Society notes that in his report to Parliament on the Bill, the current Attorney-General still considers that the second exception constitutes an unjustified limit on s26(2) of NZBORA, again because that exception applies to too broad a range of offences.

133. The Society made a submission on the Criminal Procedure Bill 2004 when it was before Select Committee. That submission addressed, inter alia, the two exceptions to the double jeopardy rule that this Bill proposes to re-enact.
134. The Society's position on re-trial of acquitted defendants is the same as it was in 2004.
135. In respect of the ability to order a re-trial of an acquitted person where that acquittal is "tainted", the Society submitted:
- 135.1 There is no need to enact these provisions. It is an unwarranted reaction to a single case.
- 135.2 There is a simple alternative which addresses the issue of a person gaining a benefit from their offending and which keeps fundamental legal principles intact.
- 135.3 The range of offences for which a retrial could be ordered is too broad: it covers every offence punishable by imprisonment.
136. In respect of the ability to order a re-trial of an acquitted person where there is new and compelling evidence, the Society submitted:
- 136.1 There is no principled basis for such a provision.
- 136.2 It is opposed by both the Attorney-General and the Law Commission.
- 136.3 The definition of specified offences is too broad.

### ***Recommendation***

137. The Society recommends that the exceptions to the double jeopardy rule not be re-enacted. At the very least, the Society urges the Select Committee to stringently reconsider the appropriateness of the proposed exceptions to the double jeopardy rule.

### **Clause 159 Order for taking evidence of witness at a distance**

138. Clause 159, which reflects the position that has been in place for more than 50 years, should be reconsidered to ensure that it meets the aims of simplification and modernisation of the law, and that it is consistent with the relevant provisions of the Evidence Act 2006 dealing with giving of evidence in alternative forms (ss103-106 in particular) and the Courts (Remote Participation) Act 2010 (which provides for appearances of participants by audio-visual link). It is undesirable for three relevant Acts to each apply somewhat different tests to the same issue.

139. It is not clear whether it is intended that a video record of evidence under s106 Evidence Act 2006 should be required in all cases to be taken before another Court in accordance with cl 159. It appears that this is the case.
140. It is also not clear why cl 159 does not refer to the recording of evidence in any medium as is provided for in the circumstances of a witness who is dangerously ill in cl 161(2).

***Recommendations:***

141. The Society recommends that:
- 141.1 Clause 159 be amended to clarify its relationship with the Evidence Act 2006 by providing that viva voce examination before a Court or Registrar to produce a written record under cl 159 should only be ordered where evidence cannot properly be given by video-link at trial or pre-recorded by way of video record under ss103-106 of the Evidence Act;
- 141.2 Evidence taken at a distance under cl 159 may be recorded in any medium including by video record under s106 of the Evidence Act 2006.

**Clause 160 Order for taking evidence of person about to leave country**

142. It may be more desirable in many cases for the evidence of a person about to leave the country to be taken by video-link or recording rather than in advance of the trial.

***Recommendation***

143. The Society recommends that cl 160 clarify its relationship with cl 159 and the Evidence Act 2006 by, for example, providing in subcl (2)(b) for a District Court Judge or Registrar to grant an application that evidence be taken before the District Court if he or she is satisfied that “(b) it is desirable or expedient that the person’s evidence be so taken *rather than by audio-visual link under ss103-106 Evidence Act 2010, or before another Court under s159.*”

**Clause 162 Provision for person in custody to be present at taking of statement**

144. Clause 162 does not address the situation where the evidence to be recorded is that of a complainant or victim. The presence of a defendant during the taking of evidence of a seriously ill victim or complainant may be highly distressing to the victim. Clause 162 should provide for evidence to be taken in such cases consistently with the way such a person might give evidence at the trial under s105 of the Evidence Act 2006, for example using screens so there is no ability for the witness to see the defendant, or by taking evidence by video record.

***Recommendation***

145. The Society recommends that “This provision is subject to s103 of the Evidence Act 2006” be inserted into cl 162 as a new subcl (2).

**Clause 165 Summons to witness to non-party disclosure hearing**

146. It would be desirable to provide for the possibility of the non-party to appear by video-link.

***Recommendation***

147. The Society recommends that cl 165 be amended to include as subcl (3) “A person summoned under this section may appear by audio-visual link subject to ss103-105 of the Evidence Act 2006.”

**Clause 169 Treatment of person arrested under warrant**

148. It would be preferable to provide that the person arrested is entitled to seek bail under the Bail Act and to amend the Bail Act to expressly deal with this situation, rather than providing for certain provisions of the Bail Act to apply with specified modifications and “any necessary modifications”.

***Recommendations***

149. The Society recommends that:
- 149.1 Clause 169 be amended to provide that a person who is arrested under a warrant issued under s166 may apply for bail under a new provision to be inserted into the Bail Act;
  - 149.2 A new provision providing for the appropriate regime contemplated by cl 169, be inserted into the Bail Act.

**Clause 170 Witness refusing to give evidence may be imprisoned**

150. On its express wording (and in particular the reference to “any person present in Court”), cl 170 provides that the defendant may be required to give evidence, as may counsel and indeed the Judge.
151. Clearly clause 170 does not apply to persons summoned to give evidence by way of video link, and does not allow that witnesses may give evidence on affirmation, rather than on oath.
152. In addition, it would be desirable for there to be an express restriction on remanding in custody witnesses who are children or young persons. For example, it would be appropriate to provide that a person under the age of 16 shall not be remanded in custody under cl 170, and a person of 16 but not yet 17 years of age should only be remanded in Police or prison custody where no

other suitable facility is available. This would be consistent with the treatment of children and young persons who are defendants.

***Recommendations***

153. The Society recommends that:

153.1 Clause 170(1) be amended to provide that any person present at Court who could have been compelled to give evidence for the party seeking to call the person as a witness may be required to give evidence whether or not previously summoned;

153.2 Clause 170(2) be amended to make it clear it applies to persons summoned to give evidence by way of video-link from another location who refuse to do so;

153.3 A provision be included expressly limiting the powers to remand children or young persons in custody.

**Clause 173 Dealing with defendant on adjournment or pending sentence**

154. Clauses 178 and 179 reflect the fact that it may be inappropriate to issue a warrant for the defendant's detention in a prison under cl 173(4) where the defendant is a young person. It would be desirable to include the necessary parts of cll 178 and 179 in cl 173, or cross-refer to those clauses.

***Recommendation***

155. The Society recommends that cl 173 be amended to make it expressly "subject to clauses 178 and 179".

**Clause 174 Warrant for detention of defendant in hospital or secure facility**

***Recommendation***

156. The Society recommends that the reference to "section 173(2)" in cl 174(1) is amended to a reference to "section 173(1)", to correct the apparent drafting error.

**Clause 177 Mode of issuing summons and warrants issued under this Act**

157. Clause 177(2) requires that the warrant be authenticated, but subs (3)(b) and (c) treat the unauthenticated version as valid.

***Recommendation***

158. The Society recommends that cl 177(3) be amended to refer to "a true copy of the original *authenticated* summons or warrant" and "an *authenticated* printout".

**Clause 179 Defendants aged 16 must not be imprisoned pending hearing or sentence except in certain circumstances**

159. It would be preferable for cl 179(4) to be dealt with as an amendment to the Bail Act.

***Recommendation***

160. The Society recommends that cl 179(4) be deleted and included as an amendment to the Bail Act 2000.

**Clause 183 Stay of proceedings**

161. The current s378 provision for a stay of proceedings requires a written record of the stay, and it would be desirable for this requirement to be repeated in cl 183. It is also necessary to address whether, and if so how, the stay can be lifted to allow proceedings to continue, for example, where the Attorney-General has proceeded on a view of the facts later found to be erroneous.

***Recommendations***

162. The Society recommends that:

162.1 Clause 183 be amended to include provision for the Attorney-General's direction to be in writing, and possibly for a method of recording it;

162.2 Provision be made for whether and, if so, how, a stay can be lifted.

**Clause 189 Permanent Court record**

163. It may be desirable to specify in cl 189 whether the record must be in hard-copy or can be in electronic form.

***Recommendation***

164. The Society recommends that cl 189 specifically provide for a hard copy and/or electronic form of record.

**Clause 190 Solicitor-General responsible for general oversight of public prosecutions**

**Clause 192 Assumption of responsibility for Crown prosecutions by Solicitor-General**

**Clause 194 Crown prosecution notice must be filed**

165. Clauses 190 and 192 appear to cover the same ground and it would make sense for them to be integrated. It also seems sensible to include clause 194 in the same provision.

***Recommendation***

166. The Society recommends that cll 190, 192 and 194 be merged.

**Clause 193 Duty of Crown prosecutor to comply with Solicitor-General's directions**

167. Clause 193 raises the question of what the position is if the Solicitor-General gives instructions that require the prosecutor to act inconsistently with her/his professional obligations and/or duty to the Court.

***Recommendation***

168. The Society recommends either omitting cl 193 or inserting “unless the prosecutor has reasonable excuse for acting otherwise which is not contrary to his/her obligations under the Rules of Conduct and Client Care”.

**Clause 195 Power of Solicitor-General or Crown prosecutor to amend charge**

169. The prosecutor should have the right to change the charges only where the trial has not started and where the defendant is not prejudiced (rather than providing for a “prescribed period” within which charges can be changed). Provision could be made for the proceedings to be adjourned to address the prejudice to the defendant.

***Recommendation***

170. The Society recommends that cl 195 be amended to provide that the power to amend a charge cannot be exercised once the trial has started, and that where it is exercised after a trial date has been set, that the defendant has a right to seek an adjournment if he/she is prejudiced by the change.

**Clause 200 Court proceedings generally open to public**

171. Clause 200 is inconsistent with s18 of the Bail Act 2000 which provides for bail hearings to be in private if the Judge so orders (although the Bill proposes an amendment to s19 of the Bail Act to allow reporting, which also does not seem entirely consistent with s18). It is also inconsistent with s329 of the Children, Young Persons and Their Families Act 1989, which restricts the persons entitled to be present in the Youth Court.

***Recommendation***

172. The Society recommends that cl 200(2) be amended to make cl 200 subject to any other statute empowering or requiring the Court to sit in private or limiting those entitled to be present in court.

**Clause 201 Power to clear Court**

173. Clause 201(1)(f) is too wide. There may well be cases where it is inappropriate to allow a Police “employee” (a term much wider than “police officer” or “constable”) to be in Court.

174. The Criminal Justice Act 1985 s138 currently provides for a power to clear the Court if it is of the opinion that the reputation of any victim of any alleged sexual offence or offence of extortion so requires. While cl 201(2)(v) and cl 203 may cover such cases, express provision may be appropriate.
175. More generally, the Society notes that in cl 201 the Bill clarifies the circumstances in which a Court may clear the courtroom. In that regard, the Bill is an improvement on s138 of the Criminal Justice Act. In addition, the Bill states that the power should only be exercised where a suppression order is not sufficient to avoid the given risk or prejudice.
176. All of that said, the Society notes that the factors listed in cl 201(2) are capable of being applied in a wide range of circumstances. The Society recommends that clause 201 could be enhanced by including express references to the principles of open justice and freedom of expression, to ensure that those values are given appropriate weight.

### ***Recommendations***

177. The Society recommends that:
- 177.1 Clause 201 be amended to restrict the reference to “any Police employee” to “any Police employee whose duties require his or her presence at the hearing”.
- 177.2 Consideration be given to adding as cl 201(2)(a)(vi) “undue hardship to a witness, victim, or connected person”.

### **Clause 204 Court may suppress identity of defendant**

178. The test of “extreme” hardship in cl 204(2)(a) is pitched too high, particularly where the defendant still enjoys a presumption of innocence or where he or she has been acquitted, and also where the hardship would be suffered by a person connected with the defendant. “Serious” hardship or the “undue” hardship test in cl 204(2)(b) and (c) is more appropriate, particularly prior to conviction, or following an acquittal.
179. Clause 204(3) requires redrafting.
180. It is not clear why the proposed new s19 of the Bail Act involves different rules for the suppression and publication of identity in relation to bail hearings. It seems preferable to either apply the same rules to bail hearings or, if it is considered necessary, to integrate any special rules relating to reporting of bail hearings into cl 204.

181. More generally, the Society notes that the circumstances listed in cl 204(2) are wide. There may be a risk that the principles of open justice and freedom of expression are not given appropriate weight in determining whether name suppression should be granted.

***Recommendations***

182. The Society recommends that:

- 182.1 Clause (2)(a) be redrafted so that the “extreme hardship” test applies only to a person convicted of an offence and a “serious hardship” test applies in the other cases.
- 182.2 Clause (3) be redrafted to provide that the fact that a person is well-known does not mean that *identification* will of itself cause extreme/serious hardship for the purposes of subsection (2)(a).
- 182.3 The relevant parts of the proposed s19 Bail Act be integrated into cl 204, (if different rules are considered necessary).
- 182.4 Clause 204 be enhanced by including express references to the principles of open justice and freedom of expression, to ensure that those values are given appropriate weight.

**Clause 205 Automatic suppression of identity of defendant in specified sexual cases**

**Clause 207 Automatic suppression of identity of victim in specified sexual cases**

183. Clause 205(4) raises the age at which victims can apply for publication to be permitted of identifying information about the person who has offended against them, from the current 16, to 18 years of age. Given that the Judge must be satisfied that the victim knows the nature and effect of the decision to apply for such an order, there seems no basis for increasing the age at which victims can apply for publication to be permitted.

184. Similarly, cl 207(4) raises the age at which victims can apply for publication to be permitted of identifying information about themselves from 16, to 18 years. Clause 207(4) also requires that the Court be satisfied that the victim knows the nature and effect of the decision to apply for such an order.

***Recommendation***

185. The Society recommends that cl 205(4) and cl 207(4) be amended to replace “18” with “16”.

**Clause 206 Court may suppress identity of witnesses, victims, and connected persons**

186. It would be desirable for cl 206 to refer to the automatic suppression rules in cll 207 and 208.

***Recommendation***

187. The Society recommends that cl 206(1)(b) be amended by adding at the end of the subclause “other than those victims to whom ss207 and 208 apply”.

**Clause 208 Automatic suppression of identity of child victims and witnesses**

188. It is not clear that it is appropriate to raise the general limiting age for identification from 17 to 18 years of age.

***Recommendation***

189. The Society recommends that cl 208(1) and (4) be amended to replace “18” with “17”.

**Clause 210 Power of Registrar to make and renew interim suppression orders**

190. The law currently allows the Registrar to make a temporary suppression order in cases where a defendant is remanded in custody. There seems no good reason not to include cases of that kind within the new provision.

***Recommendation***

191. The Society recommends that cl 210(1)(a) be amended to include provision for cases where the defendant is remanded in custody.

**Clause 212 Duration of suppression order and right of review****Clause 214 Standing of members of media**

192. It would be desirable, in cl 212 or in cl 214, to indicate who is entitled to seek to have a permanent order revoked. Clause 214 entitles media representatives to be heard on any such application, but it does not make it clear whether they may initiate proceedings to revoke a suppression order.
193. It may also be appropriate to provide that a suppression order preventing the publication of the identity of a defendant lapses on the death of the defendant, unless publication of the identity of the defendant would lead to the identification of victims whose names have been ordered to be suppressed.

***Recommendations***

194. The Society recommends that cl 212 be amended:
- 194.1 To provide that an order for suppression of the identity of the defendant will lapse on his or her death, unless publication would lead to the identification of victims of the offending where their details have been suppressed;

- 194.2 Add a further subsection setting out who has standing to seek the revocation of a permanent suppression order.

### **Clause 214 Standing of members of media**

195. In contrast with cl 202(2)(b), which recognises persons other than official journalists may nonetheless be treated as members of the media for the purpose of reporting on a trial, cl 214 restricts the right to be heard in respect of suppression orders to official members of the media, subject to the jurisdiction of either the Press Council or the Broadcasting Standards Authority. This seems an arbitrary basis on which to deny a right to be heard in respect of a suppression order. Media not subject to the jurisdiction of one of the two complaints bodies may have a proper interest in being heard.
196. Until relatively recently, ACP Media (publishers of the *Women's Weekly*, *North & South* and *Metro*), as well as the *National Business Review* refused to accept the jurisdiction of the Press Council. Other legitimate news media organizations, including on-line media, should be allowed standing to be heard in appropriate cases.

### ***Recommendation***

197. The Society recommends that cl 214(2) be amended to read "A person to whom this section applies, or any other person with leave of the Court, has standing..."

### **Clause 215 Offences and penalty**

198. On its face cl 215 provides for an offence of absolute liability.
199. It would be desirable for there to be some requirement of mens rea or, perhaps more practically, for the offence to be one of strict liability given the substantial penalties for this offence and the fact that, by comparison, liability of Internet service providers under cl 216 requires at least negligence.
200. It would be appropriate to provide for a defence if the defendant has made all reasonable efforts to ensure compliance with the suppression order. For example, if a Court official wrongly informs the media that no suppression order exists, the media should not be criminally liable for breaching the order.

### ***Recommendation***

201. The Society recommends that cl 215 be amended by adding a provision clarifying that it is an offence of strict liability and that a defendant will not be liable under cl 215 if he or she acted in

reliance on information provided by a Court official or had otherwise taken all reasonable steps to ensure compliance with all existing suppression orders.

## **PART 6 APPEALS**

### **Clauses 220, 222, 223: pre-trial appeal rights**

202. The effect of cl 220 as currently drafted is to remove some of the current pre-trial appeal rights where a defendant chooses a Judge-alone trial. The only pre-trial appeal right which is expressly provided for in a Judge-alone case is in respect of decisions as to admissibility of evidence. For example, it appears that the Bill does not contemplate either defendant or prosecutor appealing against orders refusing to amend charges or amending a charge pursuant to s135, making or refusing to make a witness an anonymity order etc. There does not seem to be any basis to exclude such appeal rights where a Judge-alone trial is selected.

### ***Recommendation***

203. The Society recommends that cll 220, 222 and 223 be amended to provide for appeals against the pre-trial decisions identified in cll 222 and 223 (so far as relevant) in Judge-alone cases.

### **Clause 224 First appeal Courts**

204. Category 3 offences which are presided over by a District Court Judge in a Judge-alone trial are appealed to the High Court, whereas the same category 3 offences which are tried before a jury are appealed to the Court of Appeal.

205. This raises issues of consistency and the contrasting authority of decisions because the same types of legal issues will be dealt with regularly by a single High Court Judge on appeal in some cases but three Judges in the Court of Appeal in other cases.

206. This concern arises in relation to all types of appeal (pre-trial, sentence, conviction etc) as the same appeal path is provided.

207. The effect of cl 220 (in conjunction with cl 224) is that pre-trial admissibility appeals in respect of category 3 offences will be determined by different Judges according to whether or not it is proposed that there will be a jury trial or a Judge-alone trial following the pre-trial decision. This does not make sense when it is the same Judge making these decisions. It will mean the development of bodies of jurisprudence from the High Court and the Court of Appeal on the same issues on appeal. It is more appropriate that only one Court has this role.

***Recommendation***

208. The Society recommends that cl 224(b) be amended to provide consistently for appeals either to the High Court or to the Court of Appeal from jury and Judge-alone cases.

**Clause 236 First appeal Court to determine appeal**

209. Clause 236 sets out the basis on which the first appeal Court must allow an appeal. The test has been changed from that which currently applies. The onus placed on an appellant by cl 236 is, on its face, much higher. Currently the Court of Appeal must allow the appeal if it is of the opinion that there has been a miscarriage of justice, rather than a substantial miscarriage of justice. The appellant does not currently have to establish that a “substantial” miscarriage of justice has occurred; rather, once the appellant has established that there has been a miscarriage of justice, it is for the respondent (the Crown in public prosecutions) to satisfy the Court that this miscarriage of justice is not substantial.

210. It is not clear whether this was an intentional change (the Explanatory Note to the Bill is silent on this issue) and there does not seem to be any basis for it.

***Recommendation***

211. The Society recommends that cl 236(3) be amended to reflect the current law, by removing the word “serious” and redrafting as follows:

- “(3) The first appeal Court must allow a first appeal under this sub-part if satisfied that,—
- (a) in the case of a jury trial, having regard to the evidence the jury’s verdict was unreasonable; or
  - (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
  - (c) in any case, a miscarriage of justice has occurred as a result of—
    - (i) an error in or in relation to the trial, which error may be an error of law or any other error; or
    - (ii) an irregularity in or in relation to the trial; or
  - (d) in any case, a miscarriage of justice has occurred for any other reason;
- and
- the respondent fails to satisfy the first appeal Court that no substantial miscarriage of justice has actually occurred.”

**Clause 251 First appeal Courts**

212. The effect of cl 251 is that where a jury trial is elected for a category 3 offence, the person pleads guilty prior to trial and the sentence exceeds five years, the appeal Court will be the Court of Appeal. If the sentence imposed in those circumstances is less than five years then the appeal Court will be the High Court.
213. In comparison, all category 3 offences where a District Court Judge presides alone, no matter what the sentence is, are appealable to the High Court.
214. While accepting the limitation on sentence appeals where the sentence imposed is less than five years where a jury trial has been elected, it is not clear why sentences of greater than five years which are imposed by a District Court Judge following a Judge-alone trial should be treated differently to sentences of the same length imposed by the same Judge following a jury trial. In both cases the issue will be appropriateness of the nature and length of sentence imposed. It would be more appropriate for all sentence appeals for category 3 offences where a sentence of more than five years has been imposed, to be determined by the Court of Appeal rather than a split system of some being heard by the High Court and some by the Court of Appeal dependent on whether or not the sentencing process was preceded by a jury trial or a Judge alone trial.

***Recommendation***

215. The Society recommends that cl 251 be amended to provide consistently for appeals either to the High Court or to the Court of Appeal from both jury and Judge-alone category 3 cases where a sentence of more than five years has been imposed.

**Clause 257 Right of appeal against determination of first appeal Court**

216. The effect of cl 257 as currently drafted is that a party can only appeal against a decision on their own appeal to a second appeal Court, for example if it is a Crown appeal and the first appeal Court grants the appeal and increases sentence. Clause 257 does not provide for any right on the part of the respondent (defendant) to then appeal to the second appeal Court, and vice versa. This is a change from the current position and is unfair and not in the interests of justice. There is no need to restrict the ability to appeal sentence decisions. (Clause 318 does not solve this problem because the result of a reference does not alter the outcome in the particular case, which may be the very injustice that the Crown wishes to rectify: c 318(6). Nor does this provision assist the convicted person).

***Recommendation***

217. The Society recommends that cl 257 be amended to replace subcls (1) and (2) with “A party may, with the leave of the second appeal court, appeal to that Court against the determination of a first appeal under this subpart.”

**Clause 264 Appeal against finding of or sentence for contempt of Court**

218. Clause 264(1) appears to give credence to continuing a distinction between criminal and civil contempts of Court (which may nevertheless result in imprisonment). Given that the consequences of a civil contempt of Court may be no different from those of a criminal contempt of Court, the appropriateness of continuing with the distinction should be considered.

***Recommendation***

219. The Society recommends that consideration be given to simplifying the rules and appeal processes in respect of all contempts of Court, not merely those classified as criminal contempts under the somewhat archaic definition of the term.

**Clause 303 Deferral or adjournment of trial if notice of application for leave to appeal filed**

220. Clause 303(4) requires that where an application for leave to appeal on a question of law is filed during a trial, the trial Court must continue with the trial if it is a jury trial. There will be cases where both parties prefer to have the question of law determined without having to go through an entire jury trial (thus causing witnesses and complainants the stress of having to give evidence, possibly twice).

***Recommendation***

221. The Society recommends that cl 303(4)(a) be amended to read “must continue with the trial if it is a jury trial unless both parties consent to the jury being discharged and the Judge considers that is in the interests of justice”.

**Clause 304 First appeal Court to determine first appeal**

222. Clause 304(1)(b) provides for the powers of the Court if the Court considers a ruling is erroneous and, in the case of a person’s conviction or acquittal or of a direction by a Judge to stay the prosecution or to dismiss the charge under cl 147, also resulted in a substantial miscarriage of justice.

223. Given the different circumstances that give rise to appeals on questions of law (for instance the person may have been discharged prior to trial), it would be appropriate for the alternative of a “substantial wrong” to be reinstated, along with “substantial miscarriage of justice”, as the

former phrase is more apt for such a situation (see the current wording in s382(2) of the Crimes Act 1961).

***Recommendation***

224. The Society recommends that “a substantial wrong or” be inserted before “substantial miscarriage of justice” in cl 304(1)(b).

**Clauses 315-318 Solicitor-General’s references**

225. Clauses 315 to 318 create a new process by which the Solicitor-General can seek to have a question of law determined after criminal proceedings have ended. The process can change the law, but does not affect the acquittal or conviction in the case.

226. The process does not provide for the defendant’s involvement in the appeal, or for the involvement of any person other the Solicitor-General and the Court-appointed counsel to assist the Court.

227. It is easy to imagine circumstances in which an appeal will have ongoing importance to those involved (and acquitted) in the criminal proceedings from which a Solicitor-General’s reference arises – tax matters, or various Commerce Act offences can have ongoing direct relevance to the parties. Similarly, the overturning of a ruling that resulted in someone’s acquittal could have a detrimental effect on that person’s reputation.

228. While a defendant may not wish to be involved in an appellate process that cannot change the conviction or acquittal they received, their involvement should be permitted. As the questions are likely to be of general importance, other parties should be permitted to be heard by leave. Similarly, the right to apply for leave to appeal to the Supreme Court in respect of the matter should not be a right limited to the Solicitor-General, but to any party represented in the Court of Appeal, including the Court-appointed counsel.

229. Given the importance of any question on which leave has been granted to the Solicitor-General under these clauses, it would be appropriate that such appeals be heard by a full Court of the Court of Appeal, and s56D of the Judicature Act 1908 could be amended accordingly.

***Recommendations***

230. The Society recommends that:

230.1 Clauses 315 and 318 be amended to permit the defendant, and any other person by leave, to be heard on the appeal.

- 230.2 Clause 317 be amended to permit any party heard in the Court of Appeal on a Solicitor-General's reference to apply for leave to appeal that decision to the Supreme Court.
- 230.3 That a consequential amendment be made to s56D of the Judicature Act 1908 to provide that in the Court of Appeal, the hearing of a Solicitor-General's reference is by a full Court.

**Clause 322 Duty of Solicitor-General**

231. The duty of the Solicitor-General to represent the Crown is a matter of convention and it is unnecessary to provide for it in statutes.
232. If this duty is to be provided for in statute, there is no reason to limit it to appeals against conviction or sentence to the Court of Appeal and Supreme Court. In other words the duty to represent the Crown should include pre-trial or question of law appeals and appeals to the High Court.

***Recommendations***

233. The Society recommends that either:
- 233.1 Clause 322 be deleted; or
- 233.2 Clause 322 be amended so that the Solicitor-General's duty to represent the Crown is extended to pre-trial and question of law appeals, and to appeals to the High Court.

**Clause 323 Duties of Registrar**

234. Clause 323 does not include the current duties of the Registrar to prepare the case on appeal and provide copies to the parties and to the Legal Services Agency (on request) under s392(1A) and (1B) of the Crimes Act. These matters may also more appropriately be dealt with in regulations/rules or an appendix to the Bill with a mechanism to facilitate amendment (such as in the case of the High Court Rules).

***Recommendation***

235. The Society recommends that clause 323 provide for the Registrar's duties in respect of the case on appeal, and that consideration be given to including this provision in regulations/rules or an appendix to the Bill with a mechanism to facilitate amendment (such as in the case of the High Court Rules).

**Clause 326 Right of attendance at hearing**

***Recommendation***

236. It would be desirable to consider the possibility of providing for a party in custody to be present at appeals and applications for leave to appeal via video-link.

**Clause 331 Provisions about hearing on papers*****Recommendation***

237. Clause 331(4) should be amended by adding the words “or application, after the words “The appeal”.

**Clause 350 Successful appellant entitled to return of amount paid under sentence*****Recommendation***

238. Clause 350 provides that a successful appellant is entitled to the return of a fine or other monetary amount paid in accordance with a sentence. It is not clear whether “other monetary amount” includes amounts paid by way of reparation. This issue has arisen in appeals and it would be desirable to clarify what the position is.

**PART 8: MISCELLANEOUS AND TRANSITIONAL PROVISIONS****Clause 362 Contempt of Court*****Recommendation***

239. Consistent with international best practice, the Judge sentencing someone for a contempt of Court should not be the Judge against whom the contempt was perpetrated. No person should be both witness and victim, and Judge, in the same matter.

**Clause 391 Absconding defendants**

240. The basis for cl 391(1)(c) (“the defendant is not located until more than 6 months after the commencement date”) is not clear. It is not obvious why cl 391 should not apply to an absconding defendant who is located less than 6 months after the new legislation commences.

***Recommendation***

241. The Society recommends that subs(1)(c) be removed.

**Clause 402 Consideration of just cause for continued detention**

242. It is not appropriate for the possibility that the defendant may fail to take the steps necessary for proceedings to be progressed within a reasonable timeframe, to be a criterion for refusing bail to a person awaiting trial. Such a person is entitled to the presumption of innocence. The s8(1) Bail Act criteria identify matters of sufficient social importance that may reasonably be expected to outweigh the presumption of innocence and rights to liberty. The likelihood of non-compliance with procedural orders is not of this nature.

243. Although the defendants most likely to be affected by such a criterion will be those who have a substantial history of non-compliance with other Court orders, the proposed new criterion will also be of real relevance to defendants who are not legally represented. A lack of legal representation will almost certainly increase the likelihood, objectively viewed, of non-compliance. The proposed provision is also likely to be counterproductive, especially in the case of defendants who are not legally represented, as detention before trial will decrease the opportunities for the defendant to have access to the facilities and assistance necessary to comply where he or she attempts to do so.
244. Detention of a defendant on this basis may also be an unreasonable limit on the right to bail guaranteed in s24(b) NZBORA and the right not to be arbitrarily detained in s22 NZBORA.

***Recommendations***

245. The Society recommends that:
- 245.1 Clause 402(2) be omitted;
  - 245.2 Consideration be given to omitting cl 402(3).

**Clause 403 Section 19 Bail Act substituted**

246. It appears that a policy decision has been made to allow reporting of bail decisions, and the Court has been given a discretion to prohibit such publication. Some criteria for the exercise of the statutory discretion should be provided (compare cl 204(2)). There is simply no guidance in cl 403.
247. However, it seems unnecessary to provide for publication to be prohibited in the bail context. It is difficult to envisage cases where details relating to the defendant that might be properly suppressed pending trial in the bail context, would not also be able to be restrained under the proposed cl 204, principally on the grounds of prejudice to a fair trial, but possibly also on other grounds provided for in the proposed cl 204(2), such as endangering the safety of other persons or prejudicing the prevention, investigation and detection of offences.

***Recommendation***

248. The Society recommends that, if it is considered necessary to provide for restrictions on publication in the bail context (in addition to cl 204), criteria be provided for the exercise of the Court's discretion, consistent with those set out in cl 204(2).

**Clause 405 Conditions of Bail (proposed amendment to s31 Bail Act)**

249. The effect of cl 405 is to allow the Courts, when granting bail, to impose conditions which will ensure that the defendant takes the necessary steps for the proceedings to be progressed. This is not appropriate.
250. Under s35, a defendant may be arrested without warrant for a failure to comply with a condition of bail, at which point the whole issue of bail is reconsidered. Thus a defendant who fails to progress proceedings properly may be deprived of liberty, temporarily or permanently. While it is highly unlikely any Judge would ever do so, it is most undesirable that such a condition be on the statute book.
251. On its face, the new provision would also allow the Court to insist that a defendant who wished to represent him or herself employ counsel so as to ensure proceedings were progressed.

***Recommendation***

252. The Society recommends deleting cl 405.

**Clause 431 Aggravating and mitigating factors (proposed amendment to s9 Sentencing Act).**

253. Clause 431(1) provides that a failure by the defendant to comply with procedural rules may be an aggravating factor in sentencing if it has either delayed the disposition of the proceeding or has had an adverse effect on a victim or witness.
254. This clause is problematic for a number of reasons.
255. While there might be some basis for considering that deliberately causing further distress or other adverse effects to a victim is objectionable behaviour possibly aggravating the consequences of the offending to that victim, it is not obvious that it is appropriate to regard the causing of adverse effects to witnesses as an aggravating factor.
256. It is difficult to see that simply delaying the resolution of the process is of itself behaviour deserving of additional criminal punishment.
257. There is also a serious issue of principle in that cl 431(1) allows a Court to have regard to conduct post-dating the criminal behaviour, which constituted the offence when deciding on sentence. A defendant is sentenced for the offending and not for subsequent behaviour.
258. The clause is also likely to give rise to significant practical problems in that there would be no aggravating factor if any delay was due to the conduct of the defendant's lawyer (for reasons

other than those to do with the instructions of the defendant). How is this to be shown? And how can it be shown that there has been a failure or refusal to cooperate with the lawyer? A defendant is entitled to resist enquiry into such matters on the grounds of privilege.

***Recommendation***

259. The Society recommends that cl 431(1) be deleted.

**Schedule 6 Amendments to other enactments**

**Crimes Act 1961 New section 243A: Charges for money laundering**

***Recommendation***

260. The content of this provision ought to be integrated into the proposed cl 139 of the Bill. See comments on cl 139 above.

**Reverse onus provisions**

261. Reverse onus provisions recast the onus of proof in respect of specified matters from the prosecution to the defence. Provisions of this type, as confirmed in *R v Hansen* [2007] 3 NZLR 1 (SC), place an onus on an accused to prove on the balance of probabilities the matter in issue.
262. Section 25(c) of NZBORA provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. The presumption of innocence is a fundamental aspect of our democratic society and it should not be lightly curtailed. As Dickson CJ for the majority in *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200, 212-213 (SCC), said:

“The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law abiding members of the community until proven otherwise.”

263. Reverse onus provisions are the antithesis of the presumption of innocence since they require the accused to positively demonstrate that they are innocent.
264. The Bill repeals s 67(8) of the Summary Proceedings Act 1957. The Society welcomes the repeal of that provision. However, the Society is concerned that a number of reverse onus provisions have been retained or introduced.
265. The Bill contains amendments to offence provisions in certain statutes that will place a burden of proof on the defendant to establish an exception, exemption, proviso, excuse, or qualification, namely:
- Animal Welfare Act 1999: ss14, 21, 22, 23, 34, 35, 36, 36, 54, and 130.
- Civil Aviation Act 1990:
- “reasonable excuse”: ss44A(1), 46C(1), 49(1)(b) and (c), 50A(1), 51, 52A, 52B(1), 52C(1), 53, 56A(1)(b), 65P(6), 77I(1), 96B(1) and (2), 99C(1)(a) and (b).
  - “lives or safety endangered”: s53A(4).
  - “under medical care”: s65I(1).
  - “lawful authority or reasonable excuse”: s80H(3).
  - exception, exemption, proviso, excuse, or qualification pursuant to rules or regulations: s100A.
- Fisheries Act 1996: ss105, 113, 113A, 191, 192, 192A.
- Securities Act 1978: s59.
- Takeovers Act 1993: s44A.
266. In the Society’s submission, any enactment or re-enactment of a reverse onus provision ought to be given strict scrutiny. It is not clear that the rationale for the inclusion of the provisions listed above has been articulated.
267. In general, the Society is opposed to reverse onus provisions. As alluded to above, reverse onus provisions constitute a limitation on the presumption of innocence and a departure from the fundamental principle that the prosecution must prove all elements of an offence beyond a reasonable doubt.

### ***Recommendation***

268. In his report to Parliament, the Attorney-General identified two reverse onus provisions, namely s53A(4A) of the Civil Aviation Act 1990 and s113A of the Fisheries Act 1996, that he considered could not be justified under s5 of NZBORA. The Society urges the Select

Committee to address the Attorney-General's concerns by amending these provisions to remove the reverse onus. In addition, the Society urges the Select Committee to seek policy advice on the other reverse onus provisions noted above, so that Parliament can make a considered analysis as to whether those provisions are appropriate.

**Conclusion**

269. The Society wishes to appear in support of this submission.

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

Jonathan Temm  
**President**  
22.2.11