ALTERNATIVE PRE-TRIAL AND TRIAL PROCESSES: POSSIBLE REFORMS

LAW·COMMISSION
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This consultation is open until **Friday 27 April 2012.**

Feedback on the possible reforms can be made using the online feedback form found at www.lawcom.govt.nz/alttrials.

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ABOUT THIS ISSUES PAPER

This Issues Paper is a compilation of consultation material taken from the online format released on 14 February 2012, available to view at www.lawcom.govt.nz/alttrials. The Commission is trialling a new format which is designed to be read online. Instead of a lengthy paper, the issues have been broken into shorter and more accessible segments outlining the problems and seeking feedback on a series of possible reforms.

The content of this Issues Paper corresponds to that in the online format but hyperlinks have been converted into footnotes and supplementary Law Commission materials have been included as appendices.

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SECTION 1: INTRODUCTION

BACKGROUND

CONTEXT OF THIS PROJECT

This project has arisen from the Law Commission's report *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*.[1] In that report the Commission recommended that the Government undertake an inquiry into whether the present adversarial trial process should be modified or replaced with some alternative model, either for sexual offences or for some wider class of offences.

Following that report the Commission received the following reference:

> *The Law Commission is asked to undertake a high-level review of pre-trial and trial processes in criminal cases. In particular, it should consider whether the adversary framework within which those processes operate should be modified or fundamentally changed in order to improve the system's fairness, effectiveness and efficiency.*
>
> *The Commission should include within its review, an examination of inquisitorial models and consider whether all or any part of such models would be suitable for incorporation into the New Zealand system.*
>
> *The Commission is asked to put particular emphasis upon the extent to which a new framework and/or new processes should be developed to deal with sex offence cases. However, it should also consider the desirability of alternative approaches in other categories of cases such as those involving child victims and witnesses and family violence, and it should consider the extent to which the system needs to be modified more generally.*

COLLABORATION

The Law Commission has been working in collaboration with Elisabeth McDonald and Yvette Tinsley from Victoria University of Wellington and Jeremy Finn from the University of Canterbury, who received a grant from the Law Foundation for research on alternatives to pre-trial and trial processes in cases of sexual offending. The Commission has also been working with a steering group consisting of Yvette Tinsley and Elisabeth McDonald, representatives from the judiciary, police, prosecution and defence bars, community service providers working with victims of sexual offending, and offender treatment services.

In 2010 Commissioner Warren Young, together with Elisabeth McDonald, Yvette Tinsley and Jeremy Finn, travelled to Europe to observe trial processes in Germany, Austria, The Netherlands, Denmark and Sweden.

In November 2011 Elisabeth McDonald and Yvette Tinsley published a book with Victoria University Press, based on the research carried out using the Law Foundation

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1 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008).

grant.[2] This book put forward a number of recommendations for reform of pre-trial and trial processes for sexual offence cases, and indicated areas where further research was required.[3]

SCOPE OF THIS CONSULTATION

The Law Commission's project is broader than the ambit of the McDonald and Tinsley book, which focused only on cases involving sexual offending. Accordingly, the Law Commission has drawn on this research but has also conducted its own. The Law Commission has also developed its own set of possible reforms. This online consultation is intended to get feedback on these possible reforms, some of which relate to sexual offence cases and some of which apply more generally. Some reforms are expressed more definitively than others (in particular, sections 5 and 6). In other places the possible reforms are expressed tentatively for the purposes of getting comment and prompting debate. The Commission has formed no final view on these reforms.

This consultation material is in summary form only and is designed for the purpose of getting feedback on preliminary ideas. Readers wanting to see fuller arguments should refer to the links and consult the McDonald and Tinsley book.

The Law Commission's project is a high-level review of pre-trial and trial processes and as such does not cover police investigations, victim support services, or specific evidence issues. Nor does it cover the substantive law or penalties for sexual offences.

Other Law Commission projects are relevant such as the Monitoring of the Evidence Act.[4] There are also government reviews taking place including the review of victims' rights[5] and the review of public prosecution services.[6]

OVERVIEW

TRIAL PROCESSES

The traditional criminal justice process is limited in its ability to deliver "justice". There is much research to suggest that it is often experienced by those participating in it as an artificial, alienating and disempowering process that does not produce an outcome in which they have confidence.[7] This is particularly the case in relation to sexual offences, but to a lesser extent the problem is of more general application.

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2 Elisabeth McDonald and Yvette Tinsley *From"Real Rape" Real Justice: Prosecuting rape in New Zealand*, (Victoria University Press , Wellington, 2011).

3 McDonald and Tinsley, above n 2 at ch 1. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

4 Monitoring of the Evidence Act, Law Commission Project. See <www.lawcom.govt.nz/project/monitoring-evidence-act>.

5 Enhancing Victims' Rights Review, Ministry of Justice. See <www.justice.govt.nz/policy/supporting-victims/enhancing-victims-rights-review/enhancing-victims-rights-review>.

6 Review of Public Prosecution Services, Ministry of Justice. See <www.justice.govt.nz/publications/global-publications/p/prosecution-review/review-of-public-prosecution-services>.

7 Ministry of Women's Affairs *Restoring Soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at 37 <www.mwa.govt.nz/news-and-

Moreover, the fact that it is an all or nothing process focused only on whether the accused is found guilty or not guilty means that the needs of the victim are often overlooked or peripheral. Even at the point of sentencing, while the impact of the offending on the victim is taken into account, it is only one of the factors determining sentence. Victims often feel they have been unable to tell their story.[8] It is likely that many defendants feel the same way about their experiences.

Our terms of reference directed us to examine inquisitorial models and consider whether all or any part of such models would be suitable for incorporation into our system. We have therefore considered the differences between inquisitorial and adversarial systems and the common criticisms of each model.

The terms "adversarial" and "inquisitorial" are used to describe models of justice systems. In reality these terms have no simple or precise meaning and no one country's system can be described as demonstrating the "pure" version of either model. It is important to note that over recent years, adversarial models have begun to incorporate some of the features of inquisitorial systems. Indeed, many of the reforms in the Criminal Procedure Act 2011 do have inquisitorial features to them – for example, the development of obligatory pre-trial case management processes. At the same time, inquisitorial models have undergone significant reforms that call on elements of adversarial models. For these reasons, it is important to be clear that we are not advocating a choice between an adversarial or an inquisitorial model of justice, but rather, considering the features of each system and identifying ways in which the criminal justice system could be adapted to improve its fairness, effectiveness and efficiency.

In general terms, an adversarial system can be described as one where the parties to a dispute bring the matter to court, define the issues to be determined, and identify and present the relevant evidence to the court. The judge is a neutral arbiter who ensures that the process operates fairly and decides on the verdict (or directs the jury on how to reach a verdict) on the basis of the evidence presented by each party and tested under cross-examination by the opposing party. In contrast, in an inquisitorial system the judge plays a much more active role: he or she may interview witnesses before trial; direct further lines of investigation; decide which witnesses should be called at trial; and play the dominant role at trial, including doing most of the questioning.[9]

A common criticism of adversarial systems is that the very nature of the model encourages aggressive and adversarial behaviour that may damage the interests of justice rather than promote them. That criticism often focuses on the presentation of evidence to the court (e.g. the treatment of witnesses while giving evidence which may cause trauma to witnesses and affect the quality of the evidence itself). One possible

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pubs/publications/restoring-soul-pdf-1>; Ministry of Women's Affairs *Responding to Sexual Violence: pathways to recovery* (2009) <www.mwa.govt.nz/news-and-pubs/publications/pathwatys-part-four#7-3-trial>; Report of the Fawcett Society's Commission on Women and the Criminal Justice System (United Kingdom) (2004) at 29 <www.fawcettsociety.org.uk/documents/Report%20of%20the%20Commission%20on%20Women%20and%20the%20Criminal%20Justice%20System%20March%202004%281%29.pdf>.

8 Elisabeth McDonald "Sexual violence on trial: An update on reform options" (2011) 25 (1) WSJ 63 < www.wsanz.org.nz/journal/docs/WSJNZ251McDonald63-69.pdf>.

9 For more detail, see Appendix 1.

way of addressing these issues is to put control of this process primarily in the hands of the judge. However, it should not be assumed that this would solve all of the perceived problems with the adversarial approach: a number of criticisms can also be made of a judge-controlled inquisitorial type process[10] and where these are relevant they are discussed in more detail throughout this online consultation document.

The limitations of the adversarial system in general are particularly profound in cases of sexual violence. The adversarial trial model is ill-suited to dealing with cases involving allegations of sexual offending. This is evident in the high attrition rates applying at all stages of the criminal justice system with respect to such cases.[11] The limitations of the system are also evident when dealing with other categories of cases, such as family violence and child abuse. It was these concerns that led to the Commission's current reference.

POSSIBLE REFORMS

We consider that options beyond the traditional trial/verdict/sentence model are required to deal with the large number of sexual offending cases that are not, and never will be, amenable to satisfactory resolution through that model, no matter what reforms may be made to it. The fact that there is a high attrition rate for sexual offending cases does not mean that the number of such cases going to court should be increased, without other changes, as this would simply result in higher acquittal rates at trial, with accompanying trauma to victims. Any formal system is likely to fail some victims, and there is no evidence that inquisitorial systems or a combination of systems produce lower attrition rates.

In light of this, the Commission considers that two reforms are worth considering for sexual offending cases that do not go through the current trial process:

- A sexual violence court that operates after a guilty plea but before sentence (see Section 5);
- An alternative process for sexual offence cases outside the criminal justice system (see Section 6).

We have also reached the view that reforms to the current trial process are necessary to improve the confidence of certain categories of victims in the process and address those aspects of the process that discourage participation and/or lead to adverse outcomes. As discussed above, this does not mean we are confronted with a choice between a purely adversarial and purely inquisitorial system. Moreover, even modern inquisitorial models have a very different legal culture and distinct judicial and legal career paths that could only be transplanted into our system with considerable difficulty and cost. We therefore do not contemplate a wholesale replacement of one system with another; rather we have set out to identify aspects of practice overseas that might be usefully incorporated here, without a total dismantling of our current system, and while retaining the parts of our current system that are working well.

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10 See Robert Fisher QC "The Adversarial Process" (paper presented to the NZ Bar Association and Legal Research Foundation Civil Litigation Conference, Auckland, February 2008) <www.robertfisher.co.nz/Adversarial_Process_76.aspx>.

11 Ministry of Women's Affairs *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (2009) < www.mwa.govt.nz/news-and-pubs/publications/attrition>.

In this online consultation the Commission is raising a number of possible options for reform of pre-trial and trial processes dealing specifically with sexual offences:

- A process for the complainant to be able to request a review of initial charging decisions (see Section 2);
- Guidelines for prosecuting sexual offence cases (see Section 2);
- Specialist judges (see Section 3);
- Accreditation of counsel (see Section 3);
- Independent Sexual Violence Advisors to assist the complainant before and during the trial process (see Section 4);
- Child protection orders (see Section 4).

The Commission also believes that consideration should be given to a range of other reforms that might be confined to sexual offences or could apply more generally. If they apply more generally, there are two options:

1. Extend the reforms to specific types of cases that are considered particularly problematic; or
2. Introduce them as general reforms into the system as a whole.

Possible reforms that could apply more generally to pre-trial and trial processes are suggested in these areas:

Section 2: Pre-trial

- A process for the victim to be able to request a review of any decision to amend or drop charges;
- Pre-trial evidence issues including preparation of a case dossier for the court containing prosecution and defence evidence; the judge to decide various matters such as which witnesses should be called, whether expert evidence was required, how evidence was to be given at trial, and whether to direct further investigation;
- A reduction in the number of pre-trial appearance of the accused.

Section 3: Characteristics of the trial court

- The decision-maker would be a judge-alone or judge and two jurors;
- The judge and jurors would give a set of written reasons for the verdict;
- The judge would impose the sentence after consultation with the two jurors.

Section 4: Trial procedure

- The judge would be in control of the trial process; the judge would decide the order of the witnesses and would question the witnesses; parties would question the witnesses after the judge had finished;
- The defendant would give evidence first and would be asked questions by the judge; the defendant could decline to answer questions, or could respond personally or through his or her lawyer;
- If the verdict was decided by a judge alone, or a judge and two jurors, fewer rules of evidence would be needed;
- Cases involving vulnerable witnesses would be fast-tracked where possible; where this is not, pre-recording of evidence would be considered; the definition of

"communication assistance" would be amended to allow for assistance in the process of answer questions for a wider group of witnesses.

SECTION 2: PRE-TRIAL

SECTION 2A: LAYING AND REVIEWING CHARGES

CURRENT POSITION

Unlike many other jurisdictions, New Zealand does not have a separate public prosecution agency. Rather, prosecutions are generally initiated and charges laid in court by the police officer (or the investigating officer in the relevant enforcement agency) that has responsibility for investigating the offence.[12] From that point, the responsibility for handling the case through to its conclusion is as follows:

- If the case is to be tried by a judge alone, the agency that laid the charge will generally retain responsibility for the case until its conclusion, although some employ Crown Solicitors to undertake the task on their behalf.
- Within the police, the task is undertaken by the Police Prosecutions Service, which is administratively separate from the front-line police officers who investigate offences and comprises a mix of police officers and lawyers who are employed by the Police for the purpose.
- If the case is to be tried by a jury, or if it is otherwise very serious or complex, it will be transferred to the local Crown Solicitor (a private practitioner appointed to prosecute under a warrant issued by the Governor-General) for the purposes of planning for and conducting the trial.
- At present, the transfer occurs after certain preliminary steps in the pre-trial process have been concluded. Under the Criminal Procedure Act 2011,[13] most of which will come into force in 2013, it is likely that Crown Solicitors will take over the case at an earlier stage (perhaps immediately after the entry of a not guilty plea). However, the precise point at which the Crown Solicitor will assume responsibility is to be defined by Regulations, which have not yet been enacted.
- If the case is transferred to the local Crown Solicitor, there will be a thorough scrutiny of the charge and the evidence supporting it. Until then, the scrutiny is more superficial. Primary initial responsibility for ensuring that the charges are appropriate rests with the officer who lays the charge and his or her supervisor. Police prosecutors (or their equivalent in other enforcement agencies) may not scrutinise the file in any detail at all until after there has been a not guilty plea.

More information about the prosecution process can be found in the McDonald and Tinsley book.[14]

PROBLEM

While there is some oversight of prosecution decisions both by a supervisor and by the prosecutor, there is no formal system for oversight and/or review of decisions not to lay

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12 See Review of Public Prosecution Services, Ministry of Justice. See <www.justice.govt.nz/publications/global-publications/p/prosecution-review/review-of-public-prosecution-services>.

13 Sections 185 – 193.

14 McDonald and Tinsley, above n 2 at 147 - 164. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

charges. This is a particular problem in sexual offence cases, where due to the nature of the evidence in many cases, judgements are required as to the relative credibility of witnesses – that is, the extent to which the witness is to be believed (usually the complainant versus the accused).

POSSIBLE REFORM 2A

The complainant would be able to request a review of initial charging decisions (whether or not to charge and which charge is laid).

The review would be conducted by a senior prosecutor who specialises in sexual offence cases.

This possible reform would apply to sexual offence cases only.

COMMENTARY

Some steps have been taken by the police in recent years to enhance the quality of file preparation and the extent to which decisions to lay charges are subject to early independent scrutiny. File Management Centres, that have the function of checking that all files have been properly checked and approved by a supervisor and that charges have been appropriately categorised, have been established and are progressively being rolled out to all police districts. In addition, a small number of districts have set up units called Criminal Justice Support Units, that take over responsibility for the file immediately after the charge has been laid; ensure that the charge is supported by the evidence and required in the public interest; arrange for disclosure of prosecution material to the defence at the required time; and otherwise ensure that the file has been properly completed for the prosecutor in court.

These are significant improvements in the prosecution process. They do much to ensure that the charges laid are justified by the available evidence and that weak cases do not get into the court system only to be subsequently withdrawn for lack of sufficient evidence.

However, these improvements do nothing to provide independent scrutiny of prosecution decisions where no charges are laid. Although these decisions are likely to be scrutinised by the investigator's immediate supervisor, they never come to the attention of the prosecutor and therefore do not receive the independent check that occurs when charges are laid.

Accordingly, a mechanism is required in sexual offence cases so that a complainant who is unhappy with a decision not to lay charges can seek a review of that decision. This should be confined to sexual offence cases because evidence is often equivocal and decisions not to prosecute are common. Given the seriousness of the alleged offence, a decision not to proceed can cause significant distress to and dissatisfaction amongst complainants. These are therefore cases where the costs involved in providing review and potential redress are justified.

SECTION 2B: ROLE OF VICTIM IN PRE-TRIAL PROCESS

CURRENT POSITION

The prosecutor is required to act in the public interest when conducting a criminal prosecution and does not act for victims in the same way as other lawyers do for their clients. However, despite not being a party to the proceedings, the victim will usually be a significant witness for the Crown. The Victims' Rights Act 2002 imposes an obligation on prosecutors (and others involved in the process) to provide certain information to the victim throughout the criminal justice process. The *Victims of Crime – Guidance for Prosecutors* guidelines[15] issued by the Crown Law Office state that prosecutors should seek to protect the victim's interests as best they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the Crown. These guidelines impose special requirements on prosecutors in relation to victims of sexual violence.

Section 12 of the Victims' Rights Act 2002 requires that a victim must, as soon as practicable, be given information about all charges laid or the reasons for not laying charges, and all changes to the charges laid. Similarly, the *Prosecution Guidelines* stress that provision of information to victims to ensure that they understand the process and know what is happening at each stage is important and state that the victim should be given adequate opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor before it is agreed to. Furthermore, it is arguable that the expectation in section 7 of the Victims' Rights Act that victims be treated with courtesy and that their dignity be respected should be given practical effect by ensuring at the least that the reasons for decisions are adequately communicated to them.

However, notwithstanding these various requirements and expectations, there is no general process to ensure that, before a decision is made to amend or withdraw a charge, the victim is consulted and his or her views taken into account. Nor, in many cases, would it be practicable to do so without causing further delay, since such decisions may be made during the course of a court hearing.

More information about the victim's role in the prosecution process can be found in the McDonald and Tinsley book.[16]

PROBLEM

The absence of a systematic opportunity for the victim to express his or her views about the proposed withdrawal or amendment of charges has two possible consequences. First, it may enhance the sense of alienation that many victims already feel and increases the perception that they are merely incidental to the process.[17] Secondly, it may prevent information relevant to the decision from being provided to the prosecutor. In either case, the overall justice and fairness of the process is likely to suffer.

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15 Crown Law *Victims of Crime – Guidance for Prosecutors* (2010) <www.crownlaw.govt.nz/uploads/victims_of_crime.pdf>.

16 McDonald and Tinsley, above n 2 at 164. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

17 Ibid, at 171 – 175.

POSSIBLE REFORM 2B

The victim would be able to request a review of any decision to amend or drop charges. If the decision was that of a police prosecutor, the review would be carried out by a senior prosecutor. If the decision was that of a Crown Solicitor, the review would be carried out by a Crown Solicitor based in a different area. This right of review would not apply to decisions to amend or drop charges in the context of a court appearance, where the decision is made in front of a judge.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

Due to the prosecutor becoming involved after charges have been laid, ongoing scrutiny of evidential sufficiency, and the fact that investigations may continue after charges have been laid, it is not uncommon for the initial charging decisions to be amended by way of alterations to, or dropping of, charges at a later point. While a victim must be informed about such decisions, there is no requirement to consult the victim and nor is there any mechanism by which he or she can seek review.

However, on occasion the decision to amend or drop charges occurs in court. It would be inappropriate for such judicially sanctioned decision to be subject to review by a prosecutor. Accordingly, any charging decision that occurs in the context of a court appearance would be excluded from the right to seek review.

This reform could apply more generally, rather than to sexual offence cases only, because the amendment of charges after they have been laid is a common practice, particularly after consultation with the defence. It has the potential to give rise to the dissatisfaction of victims.

SECTION 2C: GUIDELINES FOR PROSECUTION OF SEXUAL OFFENCES

CURRENT POSITION

Current *Prosecution Guidelines* issued by the Crown Law Office apply to the prosecution of all offences, covering whether criminal proceedings should be commenced; what charges should be laid; continuation or discontinuation of criminal proceedings; and conduct of criminal trials. There are no separate guidelines for prosecution of sexual offences.

PROBLEM

The prosecution guidelines require prosecution only if the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction. A recent study of attrition in sexual violence cases[18] in the New Zealand criminal justice system indicated that only 42 % of prosecutions (13 % of total cases) resulted in at least one conviction for sexual violation; of cases that go to trial about 50% are acquitted. This figure would suggest that the criteria that are currently being used in practice to make

18 *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* above n 11.

prosecution decisions in sexual offence cases are not well aligned with the criteria in the generic guidelines.

This might be because the guideline is not being appropriately applied, and prosecutions are being brought in cases where the evidence is too weak to justify it, or that the wrong cases are being prosecuted. Alternatively, it might indicate that the expectation in sexual offence cases that there always be a reasonable prospect of conviction is unrealistic, and that an alternative threshold should be applied. In either case, the conviction rate would suggest that the guideline, in its current form, is not suitable for sexual offences.

POSSIBLE REFORM 2C

Separate guidelines for the prosecution of sexual offence cases would be established. These would specify the particular approach needing to be taken to the decision to prosecute in sexual offence cases; however, it would not necessarily result in a change to the threshold for evidential sufficiency.

COMMENTARY

The prosecution guidelines test for whether to prosecute (including whether to continue with a prosecution) is a two stage test requiring that the evidence be sufficient to provide a reasonable prospect of conviction (the evidential test) and that the prosecution be necessary in the public interest (the public interest test). The guidelines go on to set out the way in which the evidential and public interest tests are to be applied. However, the criteria are generic and do not address the dynamics and particular evidential difficulties of sexual offence cases.

When the evidential test boils down to an assessment of credibility, as it often does with sexual offence cases, there is room for misconceptions about the nature of sexual offending to colour assessments of the relative strengths and weaknesses of the case. Australian research has found that some prosecutors consider that the age, intelligence, socio-economic status and cultural background of the complainant are relevant to her credibility.[19]

Accordingly, some guidance as to how to apply the evidence and the public interest tests in the context of sexual offence cases where evidential considerations and societal perceptions about the nature of such offending are particularly vexed, may be desirable in order to ensure that decisions taken in such cases sit more consistently with the criteria in the general prosecution guidelines. For example, guidelines might be given regarding the decision to charge in cases where one or both parties are intoxicated or there is no evidence that force has been used.

There might also be a case for saying that the evidential sufficiency ground in cases that revolve solely round an assessment of credibility might sometimes be outweighed by the

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19 Australian Institute of Criminology "Victim Credibility in Adult Sexual Assault Cases" *Trends and Issues in Crime and Criminal Justice* (November 2004) <www.aic.gov.au/documents/B/8/3/%7BB8374C06-4C85-4FA7-8BE9-A9361EA23423%7Dtandi288.pdf>; Australian Institute of Criminology "Prosecutorial Decisions in Adult Sexual Assault Cases" " *Trends and Issues in Crime and Criminal Justice* (January 2005) <www.aic.gov.au/documents/8/C/1/%7B8C1609DA-6C67-4BAB-BF86-5D92564410E1%7Dtandi291.pdf>.

broader public interest in having a determination as to credibility made at trial rather than in a non-transparent way before trial. Since this might simply result in an increase in the acquittal rate, whether it would serve the interests of victims is debatable.

The Australian research referred to above found that some prosecutors feel there is increasing public pressure to prosecute rape cases.[20] Where prosecutors consider that the case is unlikely to succeed, it effectively becomes a choice between denying the complainant her "day in court" or not proceeding in order to spare her the ordeal of trial where there is little prospect of a conviction.

SECTION 2D: PRE-TRIAL EVIDENCE ISSUES

CURRENT POSITION

The Criminal Disclosure Act 2008 codified and consolidated disclosure requirements for both the prosecution and the defence. The Act reflects the general principle that the prosecution must disclose all relevant information to the defence unless there is good reason to withhold it. The Act also imposes some limited disclosure obligations on the defence to disclose matters related to the evidence the defence case will be relying on where the defence intends to run an alibi defence and when the defendant proposes to call an expert witness. Otherwise, there are no legislative requirements on the defence to identify those aspects of the prosecution case that it intends to challenge or the evidence it intends to lead.

In jury trial cases, the prosecutor files formal witness statements in court. These statements must disclose sufficient evidence to show a *prima facie* case (that is, a case that is strong enough to justify holding a trial) but they do not need to cover all of the witnesses that the prosecution intends to call at trial. Either party may also apply to the court for an order that oral evidence be taken from a witness prior to trial.

If there is an application for the accused to be discharged, the judge will determine the application by reference to the formal written statements and any oral evidence that has been taken. Otherwise the trial judge is likely to refer to such statements and evidence before the trial only for the purpose of determining matters that are in dispute between the parties (e.g. admissibility of proposed evidence) or preparing for the trial itself shortly before it commences. More generally, the role of the judge before trial is largely confined to overseeing the progress of the case in an attempt to ensure that the parties are preparing for it expeditiously. In this capacity, judges have become more active "case managers" in recent years, in respect of both cases to be tried by a judge in the District Court and cases proceeding to a jury trial in either the District or High Court.

The Criminal Procedure Act 2011,[21] once enacted, will introduce more detailed statutory requirements for case management by the parties, with the judge only involved to the extent that the parties have not done what is required of them by statute or there is an issue in dispute to be resolved.

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20 Ibid ""Victim Credibility in Adult Sexual Assault Cases".

21 Sections 54 – 65.

PROBLEM

Although the judge in a jury trial case receives some of the statements of prosecution witnesses in advance of the trial, this does not apply to judge alone trials. Moreover, even in jury trial cases, the judge is not necessarily apprised of all of the evidence and may not be aware of what the trial is really about. We are proposing below that they would have greater control over the trial process (see Section 4). However, that would not be workable if the judge was not in a position to ensure that all appropriate evidence comes before the court and is not in a position to manage the way in which it is presented. Without changes to the judge's role in the pre-trial process, therefore, it would not be possible to give the judge greater control over the conduct of the trial process.

POSSIBLE REFORM 2D

A case dossier would be prepared by the prosecutor in consultation with the defence, through a case management process similar to that mandated by the Criminal Procedure Act 2011.[22] The dossier would include all of the evidence available at the time of its preparation, including evidential videos and other written statements of witnesses that the prosecution and defence intended to call. Any defence evidence would be provided by defence counsel to the prosecutor for inclusion in the dossier. This would not preclude other witnesses being called that were not in the case dossier, although there would be an expectation that witnesses that had been identified at the time of filing the case dossier would be included in it.

Ideally the judge at the pre-trial stage would be the same judge as at trial.

The judge would decide the following matters before the trial:

- whether the evidence was sufficient to go to trial;
- which witnesses should be called;
- whether any expert evidence was required, and if so which experts should be called;
- how evidence was to be given at trial, and the extent to which written statements would form the evidence; the complainant could apply to give evidence orally in court if he or she wished;
- whether to direct further investigation if the judge considered that it was required.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

In order to control the proceedings at trial, the judge would need to see as much of the available evidence as possible before trial, so that he or she would not be reliant on the parties at trial to ensure that all aspects of the case were explored and tested appropriately. In civil law jurisdictions this is achieved by the compilation of case dossier (the contents of which varies slightly from one jurisdiction to another). Much the same result could be achieved here by an extension of the present requirement to

22 Sections 87 – 89.

produce formal written statements in jury trial cases, which has been replicated in modified form in the Criminal Procedure Act 2011.[23] This would involve a requirement, following a not guilty plea, that the prosecution file in court the statements of evidence of the witnesses that it intended to call. There would also be a less formal expectation that the defence advise the court of any evidence that it proposed to call. This would enable the judge to become familiar with the evidence prior to trial.

The judge would also be in control of obtaining expert evidence (although, as in most civil law jurisdictions, the parties might be given the right to express a view as to the expert witnesses to be called and/or to appeal a decision to refuse to call a particular expert). Because experts are neutral and supposed to produce impartial evidence, they should not be partisan and seen as witnesses for one side or the other. Therefore, it is appropriate that the court decides which expert witnesses to call rather than the parties. That is partly because the parties call and pay the experts, so there may be the perception that, consciously or unconsciously, the experts frame their evidence to support the parties that call them.

SECTION 2E: PRE-TRIAL APPEARANCE OF ACCUSED

CURRENT POSITION

A defendant arrested and charged with an offence must be brought before the court as soon as reasonably possible if he or she is held in custody, or may be bailed or summoned to appear at a later date. There may be a number of further appearances before the court prior to trial to deal with matters such as the arrangement of legal representation, the entry of a plea, the giving of a sentence indication, the amendment or withdrawal of charges, a change of plea, pre-trial applications relating to evidence (oral evidence orders, admissibility), change of venue, joinder and severance of related criminal proceedings, and other matters that may require judicial input (e.g. problems with disclosure). If there is an early guilty plea, the case may be disposed of with only two or three court appearances or even less. However, if there is a not guilty plea and the case proceeds to trial, there may be a very large number of pre-trial court appearances, particularly if there are delays in resolving issues that arise.

PROBLEM

The Criminal Procedure Act 2011 is designed to reduce the number of court appearances before a case is finally disposed of, with the intent that the case will come before a judge only when there is an issue to be resolved or a decision to be made. However, even after this Act comes into force in 2013, there will be many court hearings in which the defendant is required to appear but is not an active participant. As a result, the expensive resource of a courtroom will continue to be used to deal with matters that are essentially preliminary to the trial and arguably do not require the full trappings of open justice in the public forum of a court.

[23] Sections 82 – 86.

POSSIBLE REFORM 2E

Unless a hearing potentially required the input of the accused, the issue would be resolved by the judge and counsel without a formal court hearing. As a result, the only purposes for which formal court hearings would be held would be as follows:

- for the entry of a plea after (and not before) legal representation was arranged;
- for the purposes of the case review/callover stage, which would occur only if the defendant's appearance was necessary to resolve the issue at hand;
- for the purposes of pre-recording of evidence before trial, if any;
- for trial;
- for sentence;
- whenever there was an application that the defendant be remanded in custody.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

In stark contrast to our own system, the first time the defendant appears in court in some European jurisdictions is at the start of the trial. This suggests that there may well be room in our system to reduce the number of pre-trial appearances and the churn that they produce.

Multiple pre-trial appearances are not only a drain on court resources, but lead to delays in getting cases disposed of. This has an impact on the quality of the evidence that will be given at trial as memories become hazy. Moreover, witnesses may disappear or complainants may change their mind about proceeding with the matter. In extreme cases, undue delay may give rise to a risk that the proceedings will be dismissed because of the unfairness to the defendant that can be caused by delay.

In addition, there are administrative costs such as the costs and inconvenience to prison authorities of arranging the appearance in court, personally or by way of audio-visual link, of defendants who are being held in custody.

Repeated appearances are also very stressful and inconvenient for complainants and defendants, as well as others with an interest in the proceedings. There is a strong interest on the part of both parties in having the matter determined finally.

Research conducted by the Ministry of Justice for the Criminal Procedure Act 2011 estimated that there were approximately 14,000 unnecessary appearances in the criminal jurisdiction every year.[24] That Act puts in place a number of procedural changes that are designed to reduce unnecessary court appearances and encourage the parties to work cooperatively outside of court appearances to prepare cases for trial.

However, even the Ministry's estimate of 14,000 unnecessary appearances understates the problem, since there are (and under the Criminal Procedure Act 2011 will continue

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24 Ministry of Justice *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (2009) at 1 <www.lawcom.govt.nz/sites/default/files/publications/2009/12/Publication_149_459_Part_2_Criminal%20Procedure%20%28Simplification%29%20Bill%20Plan%20Commentary.pdf>.

to be) a number of other court appearances that are sometimes or always regarded as necessary but have no substantive outcome to which the defendant actively contributes. These include first appearances before legal representation has been arranged, and appearances to resolve disclosure issues, to set trial dates, and more generally to ensure that the parties are ready for trial. Many or all of these hearings could be resolved by the judge and counsel, without the need for a formal court hearing attended by the defendant.

Our system operates on a principle of "open justice", which should require the defendant to attend court for a public hearing in relation to certain key events (in contrast to the European jurisdictions referred to above). However, arguably the only events to which such a requirement should attach are:

- the entry of a plea (which would occur after legal representation was arranged);
- to dispose of any issues at the case review/callover stage (which would only occur if the defendant's appearance was necessary to resolve the issues at hand);
- any pre-recording of evidence before trial;
- trial;
- sentencing; and
- for any application that the defendant be remanded in custody.

We suggest that these events need the attendance of the defendant because they are those in which the defendant will be potentially required actively to participate. Apart from these, matters that are currently heard in open court should be dealt with in other ways, such as by teleconference, email, applications on the papers (decided using written materials only), or meetings in judges' chambers.

SECTION 3: CHARACTERISTICS OF THE TRIAL COURT

SECTION 3A: WHO SHOULD DETERMINE THE VERDICT?

CURRENT POSITION

A criminal proceeding may proceed by way of a jury trial, in which the jury of 12 will make all of the decisions about the facts (deciding, based on the evidence, whether something happened or existed), or as a judge alone trial, whereby the judge makes the decisions about the facts and the law.

Jury trials are not available in all criminal cases. Under the Criminal Procedure Act 2011,[25] the threshold for election of trial by jury will shift from offences that carry a maximum penalty of more than 3 months imprisonment to offences with a maximum penalty of 2 years imprisonment or more. The Act will also remove the ability of the prosecution to elect a jury trial in respect of a certain category of offences that can be tried either way. The effect of this is that there are likely to be more cases heard by judge alone than previously.

PROBLEM

There are concerns that a contributing factor to the low conviction rate in sexual offence cases is that they are generally tried by jury and, even after the reforms in the Criminal Procedure Act 2011 (set out above) come into force, will probably continue to be. Research suggests that juries come to the task with an array of myths and prejudices about the nature of sexual offending that cannot easily be dispelled by judicial instructions.[26] Moreover, the use of generic judicial instructions may well introduce their own distortions into the decision-making process by leading jurors to take a particular view of the evidence that the judge does not intend.

Although that problem as described is peculiar to sexual offences, it may well exist in different ways in relation to other offences as well. Jurors may well bring prejudices to certain cases that are not transparent due to the secrecy of the reasoning process. There may be other cases in which jurors would have difficulty assimilating the evidence, such as long and complex fraud trials.

The continuation of jury trials in their current form may also be incompatible with our possible reform that judges play a much more active role in controlling the proceedings and questioning the parties. Part of the intent of that possible reform is to enable the fact-finder to make the decision by reference to the evidence that he or she wishes to hear, rather than the evidence that the parties wish to put to him or her. That feature of the proposed reform would be lost if the current distinction between judge and jury remained.

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25 Sections 6 and 50.

26 Australian Institute of Criminology "Juror attitudes and biases in sexual assault cases" *Trends and Issues in Crime and Criminal Justice* (August 2007); and McDonald and Tinsley, above n 2 at 40 - 44. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

POSSIBLE REFORM 3A

The facts in a trial would be decided either by a judge sitting alone or by a judge and two jurors, who would be selected to sit on a number of cases for a fixed term and receive some training before assuming the role. The jurors would sit on the bench together with the judge, and would receive a copy of the case dossier prior to trial so that they as well as the judge were familiar with the evidence. The judge and jurors would deliberate together as a joint panel.

There are three different options for using a judge and two jurors to decide the facts in a trial:

1. Sexual offences only;
2. A specific range of offences thought to be particularly problematic;
3. All cases currently able to be tried by jury.

COMMENTARY

The Criminal Procedure Act 2011[27] will give the option for serious cases that must currently be tried by a judge and jury to be heard by a judge alone, at the election of the defendant. However, it is still likely that the majority of such cases, both sexual and non-sexual, will be tried by jury.

Juries are often criticised for failing to do justice, particularly in cases involving sexual offending or complex and lengthy evidence. These criticisms may be summarised as follows:

- jurors bring prejudices, myths and stereotypes to bear in assessing the evidence and deliberating on their verdict, which cannot effectively be counteracted by judicial directions in the individual case;[28]
- they sometimes fail to comprehend or to assimilate scientific or technical evidence, or evidence that is complex or presented over a long period of time;[29]
- for both of these reasons, they sometimes bring in perverse verdicts (particularly acquittals) that cannot be justified by the evidence;
- because it is believed that they are not necessarily capable of weighing all relevant evidence appropriately and putting aside any prejudicial effect it might have on them, there is an elaborate set of evidential rules to shield juries from relevant evidence that may be given undue weight or wrongly interpreted;
- because juries do not need to give reasons for their decisions, their reasoning process is non-transparent and non-appealable.

These criticisms should not be overstated. There is research evidence that jurors are generally extremely conscientious in approaching their task and, to the extent that individuals bring prejudices and myths to the jury room, these are generally counteracted or at least mitigated by the collective jury process.[30] Moreover, judges themselves are not necessarily immune from the prejudices and myths (particularly in

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27 Sections 6 and 50.

28 "Juror attitudes and biases in sexual assault cases" above n 26.

29 McDonald and Tinsley, above n 2 at 40 - 44. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

30 Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP 37(2), 1999).

sexual offence cases) that may adversely affect jury decision-making. Further discussion of the arguments for retaining the jury in cases of sexual offending is available in the McDonald and Tinsley book.[31]

Moreover, the jury system has a number of other important functions. It allows community participation in the criminal justice system, thus assisting in the maintenance of public confidence in it; it acts as a safeguard against arbitrary or oppressive State conduct by allowing the community at large to determine the outcome of proceedings brought by the State; and, by allowing community input, it ensures that the system is sensitive to prevailing community values.

As a result, we do not think that there is any clear evidential basis for concluding that a judge is usually a better fact-finder than a jury, or vice versa. We therefore doubt that there is sufficient evidence to make out the case for the abolition of jury trials altogether and their replacement by trials before judges sitting alone.

When the Law Commission considered the jury system in 2001[32] it explored whether there were particular types of cases that were not amenable to trial by jury – in particular fraud and sexual offence cases. The Commission concluded in the case of sexual offence trials that the recommendations it was proposing on the laws of evidence were sufficient to protect complainants, and abrogation of the right to trial by jury was not justified. Notwithstanding that conclusion we now have reservations about the retention of the current jury model for at least some types of cases. We have three reasons for that view:

- Firstly, although judges may have many of the prejudicial attitudes as jurors, they can receive information and training on an ongoing basis to change those attitudes. This cannot be provided to jurors who sit only on one case; if attempts are made to provide them with equivalent information through, for example, expert evidence in the individual case before them, that is unlikely to change their attitudes and may well have unintended and adverse effects on their decision-making.

- Secondly, the fact that jurors deliberate in secret and do not provide reasons for their verdict means that their decisions are not transparent and open to scrutiny. Even if their reasoning process cannot be faulted, the veil of secrecy leaves room for speculation that they were improperly influenced by irrelevant considerations and thus undermines public confidence in the outcome.

- Thirdly, the removal of the current jury model would eliminate the need for most of the substantial and complex array of evidence rules that currently dictate what can be presented to the judge or jury at trial.

While these weaknesses with jury trials have particular force in sexual offence cases, they are obviously of more general applicability. This suggests that the current jury trial model should perhaps be replaced in other types of cases as well. In any case, there would be some difficulty in implementing a trial by a judge and two jurors solely for

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31 McDonald and Tinsley, above n 2 at 246 - 252. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

32 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

sexual offence cases. The role of lay juror might not be an attractive one if it involved sitting only on such cases. Moreover, the small number of such cases in certain parts of the country might make a system of lay jurors either unworkable or unjustifiable in resourcing terms. We are therefore inclined to think that, if such a system were to be introduced, it should be extended at the least to other specified categories of case as well.

If the current jury model were to be replaced, either in sexual offence cases or more generally, the question arises as to whether some other form of lay participation in the decision-making process is desirable. In European jurisdictions this is achieved in a number of ways:

- in Austria most serious cases are heard by a judge sitting with two lay jurors and a very small number of extremely serious cases are decided solely by a jury of eight (who sit with a panel of three judges to determine sentence);[33]
- in Germany relatively minor cases are heard by either a single judge or a single judge and two lay jurors; serious cases are heard by two judges sitting with two lay jurors; and top end serious cases are heard by three or five judges with no lay jurors; [34]
- in Denmark, where the prosecution is not seeking a sentence of four years imprisonment or more, or the defence waives the right to a "jury trial", the trial is held before a judge and two lay jurors; more serious cases where the defence does not waive the right to a "jury trial" are heard by three judges and six jurors in the District Court or (in relation to top end serious cases) three judges and nine jurors in the High Court.[35]

Further discussion on the use of lay assessors in European jurisdictions and in sexual offending cases can be found in the McDonald and Tinsley book.[36]

We do not think that models involving substantial panels of judges and jurors can be justified. They would be resource intensive and there is little evidence that they would add much, if anything, to the quality of the decision-making. If judges were to be involved in determining the verdict, we think that some of the benefits of the current jury system could be retained if a single judge were to be accompanied in their task by two lay jurors.

These lay jurors would not be the same as those operating under the current system. As in European jurisdictions, they would be appointed for a fixed term tenure (perhaps 12 months or two years), and receive some training in the task. During the period of their tenure, they would be expected to sit on a certain number of cases per year (perhaps up to a dozen or more, depending upon the length of the trials).

More on enhancing the quality of decision-making can be found in the McDonald and Tinsley book.[37]

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33 For more detail, see Appendix 4.

34 For more detail, see Appendix 3.

35 For more detail, see Appendix 5.

36 McDonald and Tinsley, above n 2 at 255 - 259. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

37 McDonald and Tinsley, above n 2 at 241 - 245. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

SECTION 3B: VERDICT

CURRENT POSITION

While judges are required to give reasons for their decisions, there is no similar requirement imposed on juries. The deliberations of the jury are confidential and the reasons for the decision are unknown (and may vary from one juror to another). Accordingly, there is no way of knowing why or how a jury reached the verdict they did.

PROBLEM

In jury trial cases, the confidentiality of jury deliberations means that there is a lack of transparency and a corresponding inability to scrutinise the nature and quality of the reasoning process employed in the case. If there is an appeal, it can only be allowed on the basis that there was an error in law (usually in the judge's directions to the jury) or in the conduct of the trial, or that no reasonable jury could have brought in the particular verdict on the available evidence. That can lead to a lack of confidence in jury decisions and a belief that they have been driven by prejudice, a lack of understanding of the evidence or an inappropriate assessment of it.

POSSIBLE REFORM 3B

The judge and jurors if present would give written reasons for the verdict, reflecting the views of the majority about the facts.

In the event of a conflict between the judge and either or both of the jurors on a decision about a fact, this would be noted in written reasons. However, they would all need to be satisfied beyond reasonable doubt as to the verdict; there would be no majority verdicts.

The view of the judge would prevail on matters of law.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

Requiring written reasons for the verdict would provide transparency that is currently absent in jury verdicts. It would allow for scrutiny of the reasoning behind the verdict and how the evidence had been considered.[38]

At present, appeals are often based upon alleged errors or omissions in the judge's directions to the jury. However, the impact of any such error or omission on the actual verdict is unknown. Under a system that instead required reasons for the verdict always to be provided, appeals would instead be based (as they are now when appeals brought against decisions by judges sitting alone) on errors or misconceptions in the basis for the verdict. This could increase public confidence in the decisions.

The verdict would reflect the majority view as to the facts but all would need to be satisfied that the accused was guilty beyond reasonable doubt. In other words, members

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38 McDonald and Tinsley, above n 2 at 241 - 245. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

of the group could have different views about certain facts or weighing of facts (that would be reflected in the written decision) but would need to agree as to the final result.

The verdict would need to be unanimous. Without a unanimity requirement, the question of whether there was guilt beyond reasonable doubt would be determined, under a panel of three, by a simple majority. That would seem to leave significant room for miscarriages of justice. As is the case in most civil law jurisdictions, therefore, the majority verdict would need to be accompanied by much more extensive grounds for appeal, so that there was more opportunity for the verdict of the decision-maker at first instance to be reviewed. That would be more inefficient and less desirable than a requirement of unanimity.

In the vast majority of cases (as is currently the case with judges are sitting alone), the verdict would be delivered at the conclusion of the trial after the panel had deliberated for a short period, with detailed reasons provided later in writing. However, in short and straightforward trials, the reasons might be given orally at the time.

SECTION 3C: SENTENCING

CURRENT POSITION

A judge imposes sentence after a finding of guilt has been reached, either by the judge in a judge alone trial, or by the jury where the offender has been tried by jury. If there is a jury trial, the jury decides the verdict but without articulating the reasons for it. Before a hearing to decide the sentence is held, there is then usually an adjournment (postponement of the hearing) so that relevant information such as a pre-sentence report and victim impact statement can be obtained.

The judge sentences on their own view of the facts provided that that view is consistent with the verdict. If the judge thinks that the verdict is wrong, the sentencing has to be on the view of the facts that is most advantageous to the offender while still being consistent with the verdict.

The judge decides the sentence by reference to the purposes and principles of sentencing in the Sentencing Act 2002,[39] any guideline judgments of the Court of Appeal, which set out sentencing ranges and common aggravating and mitigating features of certain offences, and precedents established by other cases that involved similar offending. The judge gives the reasons for the sentence.

PROBLEM

Following a jury trial, the judge imposes the sentence without knowing the decisions about the facts that the jury has made, apart from any necessary inferences that he or she must draw from the verdict. There is therefore a potential lack of alignment between the jury's views of the evidence and the facts upon which the sentencing is based.

39 Sentencing Act 2001, sections 7 and 8.

POSSIBLE REFORM 3C

In those cases being tried by a judge and two jurors, the judge and jury would need to reach a majority view about the factual basis for the offending on which sentencing should proceed. If facts relevant to sentencing had not been determined in reaching the verdict, the judge would ensure that those decisions are reached at the end of the trial. The judge would then impose the sentence using the current process.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

When jurors have been involved in decisions about the facts during the trial and are therefore familiar with the details of the offender's case, there is considerable advantage in allowing them direct input into the facts on which the sentencing will be based as well. If there are disputed facts that need to be resolved for the purposes of sentencing, the panel that decided on the verdict rather than the judge alone should make those determinations.

In some inquisitorial jurisdictions, the lay jurors who have determined the verdict along with the judge have input into determining the substance of the sentence. Some might argue that the involvement of lay jurors in the sentencing process would increase inconsistency between sentences because a greater range of perspectives were being taken into account. However, this argument is of dubious validity, given the substantial inconsistency that presently exists when a judge alone is responsible for the decision.[40] However, there are a number of other factors that make the involvement of lay jurors in the determination of sentence undesirable:

- Only the judge would be in a position to assess what the appropriate sentence should be, because lay jurors would not have sufficient familiarity with precedents from other cases, Court of Appeal guideline judgments and the purposes and principles of sentencing;
- If the judge is constrained by case law, the involvement of lay jurors may therefore be regarded as tokenistic. Judges would be bound to apply the law and follow precedent, and would have limited flexibility to adjust the sentence in accordance with the views of lay jurors, particularly in more serious cases (although jurors would be in a position to assist in determining the weight to be placed on relevant aggravating and mitigating factors).
- If the objective is to provide community input, two lay jurors cannot really be seen to be representative of the community at large. It is unlikely for that same reason that allowing the input of juries into the sentence would generate greater community confidence in the sentence.
- If the input of the jurors were needed, they would need to be appropriately informed. The current sentencing process generally requires an adjournment for pre-sentence information to be prepared. If this system were retained, it would therefore be necessary to bring the jurors back for the sentencing stage of the process, with the attendant costs and only marginal benefit.

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40 Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at 74 Appendix).

- Sentencing decisions need to be clear and decisive to give finality and certainty; if they were made by a majority, this could foster victim dissatisfaction, a sense of grievance among offenders and a greater number of appeals.

The preferable approach, in our view, is that the judge decides the sentence, but the judge and jurors together decide the facts of the offending on which the sentence is based.

SECTION 3D: SPECIALIST JUDGES

CURRENT POSITION

Most judges are appointed generically to preside over all types of cases in the High Court or District Court. However some District Court judges are appointed and given a warrant to preside in particular courts (for example, the Youth Court or Family Court) or to preside over particular types of cases (for example, jury trials).

There are also some specialist courts that have been established administratively and allocated to particular judges. For example, Family Violence Courts[41] operate in Whangarei, Auckland, Waitakere, Manukau, Palmerston North, Masterton, Porirua and Lower Hutt. A Youth Drug Court[42] also operates in Christchurch and a pilot has been proposed for one or two courts in Auckland.[43] However, there is no requirement that the judges receive specialist training in these areas.

New judges receive some initial orientation and training when they take up the role, through the Institute of Judicial Studies. The Institute of Judicial Studies runs ongoing programmes focused on core judicial skills and knowledge for judges from all courts. It also runs programmes focused on specialist skills and knowledge for judges from individual courts, such as the Family Court, covering developments in the law, jurisprudence and disciplines associated with the work of specialist benches.

There are no judges specialising in sexual offence cases. Nor is there any requirement for judges to undertake specialised training in dealing with sexual offences, although it might be covered in continuing legal education that they undertake.

PROBLEM

Unlike civil law jurisdictions, judges do not emerge through a judicial career path. They are appointed to the Bench after an extensive period in legal practice, usually as a lawyer in the private sector. They may have specialised in commercial, family, environmental or another specialist legal area, or they may have had a general practice with little criminal law. They therefore do not necessarily have an extensive background in criminal litigation. What training they do receive is generally "on the job" and through seminars arranged by the Institute of Judicial Studies.

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41 See <www.justice.govt.nz/publications/global-publications/f/family-violence-courts>.

42 Dr Sue Carswell *Process Evaluation of the Christchurch Youth Drug Court Pilot* (2004) <www.justice.govt.nz/publications/global-publications/p/process-evaluation-of-the-christchurch-youth-drug-court-pilot>.

43 Simon Power and Georgina te Heuheu "Drug Court Pilot Announced for Auckland" (Government Press Release, 19 October 2011) <http://beehive.govt.nz/release/drug-court-pilot-announced-auckland>.

Moreover, in the absence of any training or additional information, they may approach particular sorts of cases (notably sexual violence and family violence cases) with some of the array of myths and prejudices about such offending that jurors will bring to the task.[44]

POSSIBLE REFORM 3D

Specialist judges would sit on sexual offence cases. There would be a specialist training programme that judges would elect to participate in before they were able to preside over such cases.

After completion of the initial training, judges would be required to undergo regular ongoing training to ensure that they were up-to-date with recent developments.

This possible reform would apply to sexual offence cases only.

COMMENTARY

In difficult areas such as sexual offending, where there is a great deal of community misunderstanding and prejudice, it is highly desirable that judges have appropriate training in that particular area before presiding over trials in that area. This has been recognised in other jurisdictions in a variety of ways, for example the "sex ticket" system in the United Kingdom.[45]

Specialisation could be given effect in two ways:

1. Only judges warranted to undertake those trials would be able to do so. This would be a formal system that would make sexual offence trials the equivalent of jury trials or Family Court cases, where only judges with warrants to preside over jury trial or Family Court cases can do so.
2. More informal specialisation, as has been done with the establishment of Family Violence Courts, where only judges with the interest and training to do so would be rostered to sit in those courts.

We doubt that the first model is realistic, at least if it were to be applied to all sexual offence cases. Given the large number of courts across the country and the need for judges to travel in order to preside at those courts, a high proportion of judges would need to be warranted, which might in the end defeat the purpose. Even the second model, if it were to take the form of a separate court like the Family Violence Court, may not be realistic at the pre-trial stage, since the numbers of such cases would be much smaller than the numbers of family violence cases.

In order to ensure appropriate knowledge and training, it seems more realistic and ultimately more effective to ensure that judges with appropriate interest and aptitude

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44 "Juror attitudes and biases in sexual assault cases" above n 26; McDonald and Tinsley, above n 2 at 40 - 44. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

45 Baroness Vivian Stern, Government Equalities Office *Stern Report: Independent Review into how Rape Complains are Handled by Public Authorities in England and Wales* (2010) (United Kingdom) at 92. <http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf>.

receive extensive training in the area and as far as possible to roster them to preside over sexual offence trials and deal with pre-trial issues in relation to those trials.

More discussion on specialist training of judges sitting on sexual offence cases can be found in the McDonald and Tinsley book.[46]

SECTION 3E: ACCREDITED COUNSEL FOR SEXUAL OFFENCE CASES

CURRENT POSITION

As with judges, there is no need for lawyers to undertake specialised training on sexual offending in order to conduct sexual offence proceedings.

Generally speaking, any lawyer with a practising certificate may conduct a trial involving a sexual offence. Inevitably, therefore, the level of experience and expertise possessed by both prosecution and defence counsel is highly variable. This leaves open the potential for counsel, without adequate supervision, to be dealing with a case that is beyond their level of aptitude and competence.

There are, however, ethical obligations that apply to the type of work that lawyers accept. In particular, lawyers have ethical obligations under the Rules of Conduct and Client Care in the Lawyers and Conveyancers Act 2006 to always act competently and with reasonable care, and may refuse instructions on the ground that they are outside of the lawyer's normal field of practice.

In theory, these ethical obligations should prevent a completely inexperienced lawyer from appearing in a serious sexual offence trial. However, the enforcement of those obligations require a complaint to be made; there is no positive duty on a lawyer to reach a certain level of expertise before taking on cases in a particular area of practice.

In order to mitigate this risk, there are already some restrictions on the types of cases lawyers can undertake when they are funded through legal aid. Lawyers appearing in the Youth Court must be accredited as Youth Advocates. More generally, lawyers funded through legal aid are approved for particular tiers of case graded according to their seriousness and complexity and are not assigned cases beyond their level of approval. Since the passage of the Legal Services Act 2011, legal aid providers will be more systematically monitored for their fitness to undertake the cases at the level for which they are approved. There is nothing that applies specifically to sexual offence trials.

PROBLEM

Lawyers appearing in cases that require particular specialisation (for example, because of the difficulties and dynamics of dealing with the sorts of witnesses involved or the complexities of the evidential rules) may generally appear without any additional training and without restriction or supervision. That may lead to the presentation of evidence in an inappropriate way; to unduly aggressive or oppressive cross-examination; and to outcomes that depend more on the performance of counsel than on the intrinsic

46 McDonald and Tinsley, above n 2 at 264 - 269. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

merits of the case. That has been the feedback the Commission has received from victim support agencies.[47]

POSSIBLE REFORM 3E

Both prosecution and defence counsel would be required to be accredited before they could act on sexual offence cases. Gaining accreditation would involve undergoing specialist training. Further ongoing training would be required for counsel to remain accredited. For the purposes of transparency and accountability, guidelines would set out the standards against which accreditation would be judged and obligations applying to accredited counsel.

This possible reform would apply to sexual offence cases only.

COMMENTARY

Specialised training and accreditation for counsel would be necessary in sexual offence cases to ensure knowledge and skills needed to deal with such cases. This would address concerns about unprofessional and inappropriate behaviour at trial in sexual offence cases.

The risks of inexperienced and unspecialised counsel have been particularly identified in cases involving sexual offences, but they may apply in other areas as well – such as family violence or complex fraud cases. However, we consider that this possible reform should be confined to sexual offence cases. At least at first instance, it might be difficult to extend to family violence or fraud cases; for example there might be difficulties with what constitutes family violence for the purpose of defining the type of case that would require accreditation.

In some areas there are already de facto specialist prosecutors who handle all of the sexual offence trials in their area.

More discussion on specialist training of counsel acting on sexual offence cases can be found in the McDonald and Tinsley book.[48]

It would be desirable for there to be transparency as to the standards that are being applied for accreditation of counsel. In Australia, Victoria has a Charter of Advocacy[49] that sets out guidance as to "good conduct" for both prosecutors and defence counsel involved in sexual offence cases. The Charter sets out the guiding principles, reminds practitioners of special arrangements applying in sexual offence cases (such as alternative arrangements for giving evidence), and elaborates on the particular

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47 See also *Responding to Sexual Violence: pathways to recovery* above n 7 at 7.3.3; New South Wales Parliamentary Library Research Service Briefing Paper No 18/03 "Cross-examination and Sexual Offence Complaints" (2003) <www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/e56cf3e8f110c020ca256ecf0009db55/$FILE/18-03.pdf>.

48 McDonald and Tinsley, above n 2 at 268 - 271. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

49 Department of Justice, Victoria, Australia *Charter of Advocacy for Prosecuting or Defending Sexual Offence Cases* (2010) < www.justice.vic.gov.au/home/the+justice+system/legal+profession/justice+-+charter+of+advocacy+-+prosecuting+or+defending+sexual+offence+cases>.

obligations of both prosecutors and defence counsel. The stated aim of the Charter is to promote a culture that is sensitive and respectful of the experiences of victims without compromising a defendant's right to a fair trial.

Having such a guideline document would also provide a standard against which behaviour could be measured; breaches of that standard might justify a lawyer having his or her accreditation revoked.

Requiring that defence counsel receive specialist accreditation before acting on sexual offence cases is likely to be controversial, given that this may be perceived to impact negatively on an accused's right to counsel of his or her own choosing (along with the expansion of the Public Defender Service).

SECTION 4: TRIAL PROCEDURE

SECTION 4A: HOW IS EVIDENCE PRESENTED AND WHO IS IN CONTROL OF THE PROCESS?

CURRENT POSITION

The prosecutor and the defence are largely in control of the process in the sense that they determine the arguments that will be run, the elements of the case that are disputed, and the evidence that is called in support.

The prosecution presents its case first, with the prosecutor deciding the order of witnesses. The defence case follows.

PROBLEM

The key feature of the adversary system – that the best way of determining the question of guilt is through the presentation of powerful arguments of their cases by both sides – has a number of inevitable consequences.

First, it allows, and indeed fosters, a confrontational and aggressive testing of the evidence of witnesses for the opposing party through cross-examination. That in turn can lead complainants to feel that they, rather than the accused, are on trial and can turn the trial into a traumatic and revictimising experience.

Secondly, it places a great deal of faith in the ability of the parties to present their cases as persuasively as possible. That faith is perhaps misplaced; in reality, the effectiveness of the prosecution and defence is often significantly related to the availability of resources, the effort put into the case and the competence of counsel.

Thirdly, it can lead to questioning that is designed not to clarify but to obfuscate the issues and to confuse the fact-finder.

POSSIBLE REFORM 4A

The judge would be in control of the process during the trial and would be largely responsible for the way in which the evidence was given. The parties would have a more limited role.

On this model, the judge would decide the order in which witnesses gave evidence. He or she would question witnesses first. Parties would only ask questions of a witness after the judge had finished questioning.

The style of questioning engaged in by both judges and counsel would be substantially different from the style to which judges or lawyers in New Zealand have been accustomed. Significant training would therefore be required to ensure that evidence was elicited in the most effective way.

The witness' statement in the case dossier would form their evidence but the witness would still be required to answer questions by the judge. However, evidence would be given in more of a narrative than a question-and-answer form, thus enabling witnesses

to present their account of events in a more natural and conversational way (see Section 4A – Admissibility of Evidence).

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

The terms "adversarial" and "inquisitorial" have no precise or simple meaning and no one country operates a system that can be described as constituting the "pure" form of either system. However, in general terms an adversarial system can be described as one where the parties to a dispute bring the matter to court, define the issues to be determined, and identify and present the relevant evidence to the court. An inquisitorial system is one where the judge has primary responsibility for managing the process once the matter has been brought to the court.

A common criticism of adversarial systems is that the very nature of the model encourages aggressive and adversarial behaviour that may damage the interests of justice rather than promote them. That criticism often focuses on the presentation of evidence to the court (e.g. the treatment of witnesses while giving evidence which may cause trauma to witnesses and affect the quality of the evidence itself). One possible way of addressing these issues is to put control of this process primarily in the hands of the judge.

As has been pointed out, arguments can be mounted for and against the judge having greater control over the process, as occurs in inquisitorial systems.[50] The arguments supporting greater judicial control include that it is less labour-intensive, expensive and time consuming. A system that is controlled by the judge is also less likely to produce distortions caused by so-called 'inequality of arms', i.e. the idea that the Crown enjoys advantages over the defence as it can draw on much greater resources than an individual defendant. However, inquisitorial systems that feature greater judicial control of the process are frequently criticised as paternalistic. Such systems are also subject to the inefficiencies that are common to all bureaucracies, and arguably more vulnerable to influence, coercion and corruption. It is sometimes said that these systems lack the democratic and participatory benefits of an adversarial system.

However, on balance, a system where the judge bears primary responsibility for managing the presentation of evidence to the court may be preferable in order to address the problem we have identified.

Moreover, we do not regard the criticism of the inefficiencies of bureaucracies as compelling. We note the case management processes enacted in the Criminal Procedure Act 2011[51] have been criticised on precisely the same basis. However, while those processes carry their own costs, they can, if implemented appropriately, generate substantially more by way of savings. The same applies to the possible reform presented here. In particular, the change to a judge-driven pre-trial and trial process is likely to be more efficient and to reap benefits for all participants at trial.

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50 Fisher, "The Adversarial Process" above n 10.

51 Sections 54 – 59; 87 – 89.

SECTION 4B: EVIDENCE BY THE DEFENDANT

CURRENT POSITION

There is no requirement for the defendant to give evidence and no inference can be drawn from his or her failure to do so. Where the defendant does give evidence, he or she does so at the end of the prosecution case.

PROBLEM

The fact that the accused can choose whether or not to have questions put to him or her, and gives evidence, if at all, towards the end of the case can give the appearance (particularly in cases of sexual or violent offending) that the focus is on the complainant's actions rather than the defendant's actions. In particular, if the complainant's actions are under scrutiny (for example, in a sexual offence case where consent is in issue) the complainant can be vigorously and aggressively questioned and challenged while the defendant does not need to even present his or her version of events. That leads to a perception by complainants that they, rather than the accused, are on trial.

POSSIBLE REFORM 4B

The defendant would give evidence first, unless the judge decided otherwise. The defendant would be subject to questions by the judge, but would not be obliged to respond to questions. The defendant could respond to questions, if he or she chose to do so, by speaking personally or through his or her lawyer.

The defendant would be under an obligation to submit to questions whether or not he or she had provided a statement to the Court in the case dossier.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

The defendant giving evidence first would remove the perception that the complainant is "on trial". As the judge would lead the questioning, the defendant would always face questions although he or she could decline to answer (either by declining to answer any questions or on a question by question basis).

Some might argue that this is contrary to the right to silence, since the defendant would be under pressure to answer the questions put to him or her. We do not agree. The nature and scope of a defendant's right to silence is commonly misunderstood. If the defendant can refuse to answer questions that are put to him or her, that is consistent with the right to silence, and has been held to be so in international human rights jurisprudence. [52]

[52] See Appendix 2.

SECTION 4C: ADMISSIBILITY OF EVIDENCE

CURRENT POSITION

The Evidence Act 2006 has codified the rules of evidence and has made them more accessible. They are also framed more clearly around the key principles of relevance, reliability and fairness/prejudice, so that some of the more arcane distinctions that had developed in the common law have disappeared.

Nevertheless, the rules of evidence are still fairly detailed and strict in order to prevent the admission of potentially prejudicial evidence. That is primarily because the adversary system assumes that the evidence in criminal trials is to be presented to laypersons rather than to judges and that laypersons are less capable than judges of identifying potential prejudice and taking it into account in assessing the evidence as a whole.

PROBLEM

Notwithstanding the fact that the rules of evidence are clearer and more accessible than they were prior to the passage of the Evidence Act, they often require a fact-finder (and in particular a jury) to determine the case without knowledge of all of the available information. That in turn can lead to public dissatisfaction with, and lack of confidence in, the operation of the criminal justice system.

POSSIBLE REFORM 4C

If the fact-finder were to be changed to judge alone or to a judge sitting with two lay jurors, many rules of evidence could be dispensed with. Relevant evidence, including the defendant's criminal history, would generally be admissible, with its weight being determined by the fact-finder.

Rules requiring evidence to be relevant and avoid unnecessary repetition would still be required. So too would rules about the complainant's sexual history, because of the impact on the complainant of the admission of such evidence.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

The willingness to admit all evidence, including that improperly obtained or normally excluded as prejudicial in adversarial systems, is often described as an important aspect of the search for truth in civil law systems. What is overlooked in this is that the rules of evidence in our system primarily exist to protect the accused from the prejudicial effect of such evidence. The need for protection from potential prejudice arises because of our jury trial model – and more particularly, our distrust of a jury's ability to properly distinguish probative value from prejudicial effect. Furthermore, as juries do not give reasons for decisions, any inappropriate assessment or application of evidence will not be transparent.

Without a jury, or where a jury is guided by a judge in its decision-making role, such rules designed to exclude what is seen as relevant are rendered unnecessary, as proper

judgements as to relevance and probative force are made and explained in written reasons that can be assessed and reviewed (see 3A Who should determine the verdict? and 3B Verdict).

Only the most fundamental of the evidential rules would be required. This would include those relating to relevance and repetition, and those that serve to protect parties other than the defendant. Rules relating to evidence of the complainant's sexual history would fall into this latter category (most inquisitorial jurisdictions have restrictions around the admissibility of such evidence). There would also be provision in certain circumstances for exclusion of evidence that is obtained through coercion or through unlawful means or in breach of the New Zealand Bill of Rights Act 1990. The defendant's interests would be protected by judicial involvement in weighing relevance and probative value.

The present question-and-answer style of eliciting evidence stems in part from the need to keep the content of evidence tightly controlled to ensure that it complies with the rules of evidence. The removal of many of those rules would likely result in a more free-flowing and narrative style of giving evidence that arguably would enable witnesses to give their evidence in a way that would enable its probative value to be more readily assessed.

SECTION 4D: EVIDENCE OF VULNERABLE WITNESSES

CURRENT POSITION

There are some protections for vulnerable witnesses (including child complainants) through the availability in certain cases of alternative means of giving evidence, such as behind a screen or by way of video link from outside of the court room. Communication assistance (including translation services, written, technological or other assistance) is available for witnesses who do not have sufficient proficiency in English to understand the proceedings or give their evidence or who have a communication disability.

PROBLEM

While changes that result from judicial control of the trial process will mitigate some of the distress and confusion that can result from the current process of cross-examination, it will not wholly obviate the problems that some witnesses experience in giving formal evidence in the courtroom. In particular, complainants will continue to find it difficult to give intimate details in sensitive cases such as those involving sexual offences; and witnesses with limited competency through age or disability may find it difficult to understand and respond to questions asked in the normal way.

POSSIBLE REFORM 4D

Cases involving vulnerable witnesses should be fast-tracked wherever this can be achieved, so that the trial occurs as quickly as possible. Where fast-tracking is not possible, pre-recording of evidence (including cross-examination) ought to be considered.

An amendment should be made to the definition of "communication assistance" in section 80 of the Evidence Act in order to allow for assistance in the process of answering questions for a wider group than just witnesses with a "communication

disability". This would allow for an incremental and careful approach to the introduction of intermediaries, who could assist with the phrasing of questions in an appropriate way. Their primary initial role would be to assist with communication and questioning issues rather than actually question witnesses.

This possible reform could apply to sexual offence cases only; to a specific range of offences; or to all cases.

COMMENTARY

The Government has recently agreed to a package aimed at assisting child witnesses, including a statutory presumption in favour of the pre-recording of the evidence of child witnesses, a requirement that pre-recording hearings be held within a specified timeframe, amendments to the Evidence Act to allow the use of intermediaries for child complainants, and a mandatory judicial direction regarding the demeanour of child witnesses.[53]

The intention behind pre-recording of evidence is to remove the stresses caused to the witness by delay before the matter goes to trial and to improve the quality of the witness' evidence. The pre-recording of evidence by way of cross-examination can presumably only occur when defence counsel is sufficiently far advanced in terms of preparation for trial that he or she knows what issues need to be explored during that cross-examination; at that point the matter is likely to be ready to go to trial. In those cases, there seems no reason why fast-tracking would not be a better option than pre-recording of evidence. Fast-tracking of cases should be the priority. In cases where fast-tracking is not possible, pre-recording would obviously be useful to minimize the impact of the delay on the complainant and the quality of his or her evidence.

The use of intermediaries is intended to reduce the impact of questioning on children and deal with communication issues arising in the context of cross-examination. Intermediaries can take the form of an interpreter style intermediary (receiving questions from the lawyer and passing these on to the child, rephrasing as necessary) or a questioner style (undertaking all cross- and re-examination of the witness using guidance from lawyers on which areas of evidence to test). There are difficulties associated with both models. For example, the use of intermediaries to ask and rephrase questions put by counsel may raise many of the issues associated with use of foreign language interpreters such as stilted, awkward, or disrupted flow of evidence from the witness, which may be problematic for both the witness and the court. It might also be exploited by the defence to disrupt the process (e.g. repeatedly asking for questions put by the intermediary to be rephrased as they do not get at the point the defence wanted to put to the witness). The Government proposal is for an interpreter type model, although much of the detail remains to be spelt out. A better alternative may be to make a minor amendment to the definition of "communication assistance" in section 80 of the Evidence Act in order to allow for assistance for a wider group than just witnesses with a "communication disability". This would allow for an incremental and careful approach to the introduction of intermediaries, with their primary initial role being to assist with

53 Ministry of Justice "Child Witnesses in the Criminal Courts" <www.justice.govt.nz/policy/justice-system-improvements/child-witnesses-in-the-criminal-courts>.

communication and questioning issues rather than actually question witnesses. Further discussion on intermediaries is available in the McDonald and Tinsley book.[54]

Due to evidence that some jurors do not believe child witnesses if they are not visibly distressed while giving evidence, the Government has decided to introduce a mandatory judicial direction that is to be given to juries to the effect that no inference is to be drawn from the demeanour of the child while giving evidence by an alternative mode. While the benefit of oral testimony as a means of assessing the credibility of witnesses may well have been greatly exaggerated in adversarial systems, it is surely stretching the point to say that demeanour can never be relevant. To say that demeanour has no relevance raises the question of why the evidence is not just admitted by way of a written statement as the witness' delivery of the evidence is rendered irrelevant. The use of judicial directions has, in general, been found to be problematic – jurors often do not understand that the direction is standard, or do not see them in that light, thinking that the judge is trying to provide them with some clue as to his or her view of the case. Further discussion on judicial instructions is available in the McDonald and Tinsley book.[55]

SECTION 4E: ROLE OF THE COMPLAINANT

CURRENT POSITION

As noted in Section 2, the victim is not a party to a criminal proceeding and as such has no right to be represented in the proceeding. However, there are various duties to provide the victim with relevant information throughout the proceeding.

PROBLEM

Because victims are merely "witnesses" for the prosecution, they have very limited input into, and no control over, the way in which evidence is presented to the court. That can lead to a sense of disempowerment and alienation: a belief that the system is not designed to protect their interests or concerns and that their needs are largely irrelevant to it.

The suggestion that the victim should be represented by "their" lawyer in sexual offence cases illustrates the belief that prosecutors do not adequately represent victims' interests and needs.[56] To a large extent, of course, this is true: prosecutors are first and foremost serving the wider public interest, which does not necessarily coincide with the interests of the victim. The problem is that, if that does engender a sense of disempowerment and alienation in the victim, he or she is likely to feel dissatisfied and aggrieved with the process, regardless of the outcome.

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54 McDonald and Tinsley, above n 2 at 309 - 314. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

55 McDonald and Tinsley, above n 2 at 200 - 219. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

56 *Stern Report*, above n 45 at 97; McDonald and Tinsley, above n 2 at 200 - 219. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

POSSIBLE REFORM 4E

A victim of sexual offending would have an Independent Sexual Violence Advisor (ISVA) allocated to them from the first contact with the Police or another agency, based on the model in the United Kingdom.[57] The ISVA would provide support, advice and assistance for the victim until their complaint is resolved. The ISVA would liaise with the Officer in Charge of the case and the prosecutor during any investigation and prosecution.

The ISVA would have the necessary expertise to inform a complainant, where relevant, about issues such as name suppression, the trial process, the stages of the criminal justice process, the role of the prosecutor, the complainant's ability to have a support person (at trial, when giving evidence, or during pre-trial interview), the role of the complainant as a witness, what to expect from cross-examination and general witness preparation, and other applicable rules of evidence, including the availability of alternative ways of giving evidence.

This possible reform would apply to sexual offence cases only.

COMMENTARY

In European jurisdictions representation is sometimes available to victims in cases involving violence/sexual offending.

We considered various options for the introduction of representation of the complainant, including representation across the board in all cases or at least in all sexual offending cases. We rejected such universal representation because it would be costly; it would be of only limited value in addressing victim concerns; and it would run the risk of making the process more adversarial, and lengthening trials, thereby militating against the benefits of the other reforms we are proposing. We considered confining representation to cases where the complainant's credibility was in issue, but concluded that there would be problems in defining and identifying such cases.

We therefore think that a better solution might be to ensure that there is a consistent and reliable source of information and advice for complainants, both before and at trial, about the nature of the process, what they can expect, what their entitlements are, the roles of the parties at trial, and other relevant matters. This role might be performed by an Independent Sexual Violence Advisor that could be assigned to the complainant throughout the process. Some ISVAs would need further specialised training to work with victims with specific needs such as intellectual or physical impairments, mental disorders, or cultural needs.

Further discussion of legal representation of victims and specialist victim advisors is available in the McDonald and Tinsley book.[58]

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57 See Amanda Robinson *Independent Sexual Advisors: A process evaluation* (2009) <www.cardiff.ac.uk/socsi/resources/isvareport.pdf>.

58 McDonald and Tinsley, above n 2 at 200 - 219. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

SECTION 4F: CHILD PROTECTION ORDERS

CURRENT POSITION

In cases where there is alleged sexual offending against children, the Family Court is only able to respond if the process is initiated by someone (in "private law cases" a guardian or other family member and in "public law cases" by Child, Youth and Family) applying to the Court. After the completion of the criminal process, there is not necessarily any follow-up in the Family Court.

The focus of Family Court proceedings (whether private law or public law cases) will be on the individual child and not the broader risk that the alleged abuser poses. Additionally, the Court is limited in its ability to see the extent of the risk that the alleged abuser poses – in protection order proceedings the Family Court may only access the criminal court files pertaining to the particular incident giving rise to the application for a protection order and not the alleged abuser's wider criminal history.

PROBLEM

Community agencies working with victims of sexual abuse consider that the current Family Court processes are not effective in ensuring the safety of children. The Court can only act if an application is made to the Court, and even then, the focus will be on the risk posed by the alleged abuser to that particular child rather than children more broadly.

There is a perception that the Family Court places too much weight on the outcome of criminal proceedings in determining proceedings before it, and where there is an acquittal in the criminal justice system, it tends to be the end of the matter as far as the Family Court process is concerned too.

Even if the Court does deal with a case, it does so only in terms of the care and protection of that individual child and possibly those immediately at risk (e.g. siblings of that child or other children living in the household). Accordingly the alleged abuser could move to a different relationship and come into contact with other children who would not be protected.

POSSIBLE REFORM 4F

Where a criminal case involved child complainants (or where the complainant was a child at the time of the offending), the trial court would be required to make an automatic referral to the Family Court. There would be an assessment of risk regardless of the outcome of the trial. This could be achieved in one of two ways:

1. The criminal court could retain jurisdiction as a kind of one stop shop and make an assessment of whether any further order was needed to protect the child at the conclusion of the trial.
2. There could be a referral to the Family Court for the risk assessment (with the criminal court able to make a temporary safety order to cover the time before the assessment was made in the Family Court).

Whichever court was responsible for the risk assessment, if it was determined on the balance of probabilities that the defendant had offended and either the victim in this

case or other children were still at risk, the court would have the ability to make child protection orders in relation to the accused. This would be a civil order that would be time-limited, subject to appeal and regular review. Such orders would not involve detention but might cover treatment and non-association with children.

Referral for assessment of risk would be limited to cases where there had been a criminal prosecution (whether that led to an acquittal or a conviction), so a civil order would be available only in those cases. There might be an argument that given that the order is based on the balance of probabilities, it should be available on application whether or not there had been a prosecution.

This possible reform would apply to sexual offence cases only.

COMMENTARY

The Court would be able to refer to the evidence admitted at trial for the purposes of the risk assessment, but would also be able to seek further information, if necessary.

There are likely to be New Zealand Bill of Rights Act implications arising from the Court's jurisdiction to make orders limiting the accused person's right to associate or requiring treatment to be undertaken. Accordingly, the scope of this jurisdiction would need to be carefully tailored to ensure any limitations on rights are reasonable.

Although this possible reform is aimed at cases where allegations of sexual offending are involved, there may be an argument that it should be made available in cases of family violence as well.

SECTION 5: SPECIALIST SEXUAL VIOLENCE COURT

CURRENT POSITION

The maximum sentences for sexual offences are set out in the Crimes Act 1961 – in the case of sexual violation 20 years' imprisonment. The Sentencing Act 2002 describes the purposes and principles of sentencing and the procedures that are to be followed when a sentence is being imposed. It also sets out all of the sentences that are available to a sentencing judge and the way in which they are to be implemented.

Subject to these statutory prescriptions and limitations, judges have discretion to impose any sentence within the maximum that is just in the circumstances of the individual case. However, one of the principles in the Sentencing Act is that judges "must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances".[59] In order to give effect to this need for consistency, judges routinely refer to the sentences imposed by other courts in similar circumstances. Moreover, the Court of Appeal provides a variety of sentencing guidance which judges are obliged to follow. In relation to sexual offences, this includes guideline judgments for sentencing of certain categories of offending, including rape and unlawful sexual connection. These guideline judgments provide guidance in terms of the appropriate starting point and range of sentences for particular types of case and outline common aggravating and mitigating factors and how they should be factored into the process. Although the most recent of guideline judgment of the Court of Appeal in *R v AM*[60] has mandated a greater range of sentencing levels following conviction, the guideline still contemplates substantial terms of imprisonment in almost every case: the ranges set down for rape vary from 6 years at the bottom of Band 1 (the lowest band of seriousness) to 20 years at the top of Band 4 (the highest band of seriousness).

The Sentencing Act 2002 recognises as a purpose of sentencing the need to provide opportunities for the offender's rehabilitation. This may be given effect through particular community-based sentences such as supervision or intensive supervision. However, because serious sexual offences almost always attract substantial terms of imprisonment, there is little incentive or indeed opportunity for the offender to engage in any rehabilitative programme until the latter stages of his or her prison sentence.

PROBLEM

The fact that the outcome of a conviction for a sexual offence (almost invariably a substantial term of imprisonment) is presently an inflexible one has a number of adverse consequences. Particularly in cases that rely on circumstantial evidence and assessments of credibility, guilty defendants may be reluctant to admit guilt because the penalty is so high; police and prosecutors may question the likelihood of conviction; and fact-finders may not be willing to convict, especially when the defendant does not fit the stereotype of the "real" rapist.

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59 Sentencing Act, section 8(e).

60 *R v AM* [2010] NZCA 114 available at <www.courtsofnz.govt.nz/cases/r-v-am/>.

A long sentence of imprisonment may also be at odds with the resolution sought by the victim (particularly when sexual offending occurs in the context of an ongoing relationship). It fails to take the opportunity presented by the offender's appearance in the criminal court to address the factors that led to the offending (such as the offender's attitudes to sexual relationships), and to draw on the range of expertise now available in the community to enable it to do so. It does little to encourage defendants to accept responsibility for their behaviour. It uses the blunt and expensive instrument of long terms of imprisonment that (with the exception of those child sex offenders who undergo the treatment programmes run in two specialist prison units) largely fail to reduce the risk that the behaviour will recur.

POSSIBLE REFORM 5

Where there is a complaint to the Police and an offender pleads guilty to a sexual offence, there would be an option of referral to a specialist sexual violence court.

The key features of the proposed specialist court and its process would be:

- A guilty plea, informed victim agreement, and the suitability of the offender for participation in some form of intervention would be the governing criteria for whether the case was dealt with in the specialist court;
- Following entry of a guilty plea in the criminal court, the court would refer cases that appeared to meet the governing criteria to the specialist court for consideration;
- The referral would be assisted by a victim impact statement that would indicate the victim's views regarding the impact of the offending on them, but might also include reasons why they support referral to the specialist court in this particular case;
- Once referred to the specialist court, the judge would remand for a full assessment by a team of specialists to ensure suitability of the case for the specialist court process;
- Any cases not meeting the criteria or otherwise being found unsuitable would progress to sentencing in the usual way;
- After assessment, a report addressing the suitability of the case for the specialist court process and the development of an intervention plan would be delivered to the court; the intervention plan would comprise a tailored set of actions for the individual to complete, to enable them to take responsibility for their behaviour and address its causes, and could include treatment, education, reparations, apologies or other actions as appropriate to the case;
- If the specialist court judge was satisfied on the basis of the specialist report that the case was suitable for the specialist court process, the offender would be offered entry into the court and asked to commit to the proposed intervention plan;
- Supervision of the intervention would be the responsibility of the specialist team who would have the ability to bring the case back before the court at any time should concerns about the offender's compliance with the plan arise;

- The specialist court judge would also have discretion to seek periodic reports on the offender's progress with the intervention plan and bring the offender back before the court;
- If the offender was declined entry to or refused to commit to the intervention (or entered but later withdrew his agreement to participate), the case would proceed to sentencing in the usual manner;
- All counsel appearing in the court would be required to undergo specialist training;
- At the conclusion of the intervention, the offender would receive a sentence that would reflect his participation in and progress after the intervention, which may or may not involve imprisonment.

COMMENTARY

A specialist post-guilty plea court would allow for a more flexible response to a conviction for a sexual offence than the current system. It would provide offenders with a strong incentive to complete the elements of the intervention plan since their final sentence would recognise their participation. It would address concerns about the "all or nothing" nature of the criminal justice system and long sentences of imprisonment that may prevent victims from reporting offences and offenders from acknowledging responsibility; and it may encourage guilty pleas which would be a requirement for entry into the specialist court. It would also provide for greater opportunities for rehabilitation of offenders which could in turn reduce the likelihood of reoffending, a key concern of many victims. This focus on rehabilitation and treatment of the offender increases protection for the community.

While there are various models for specialist courts, a pre-sentence model is preferable. Under this model, a sentence is deferred until an intervention is undertaken and the participant has either completed it or has been removed from or voluntarily discontinued it. When the court comes to sentence the offender, it takes into account the offender's progress and gives credit for participation.

While it is arguable that such an approach (pre-sentence referral of appropriate cases to some form of specialist intervention) could be implemented in a mainstream court, there are considerable benefits to be gained from the case being dealt with by a specialist judge who has continuity with the case and access to/knowledge of the resources necessary to address sexual offending. That is the model that the Government has agreed to adopt in the establishment of an adult drug court model in New Zealand[61] based on recommendations by the Law Commission.[62] Specialist counsel would also need to be involved (see 3E Accredited counsel for sexual offence cases). A pre-sentence approach provides a powerful incentive for offenders to complete the programme. Because the sentencing process has not been completed, the offender is incentivised to do well on the programme to gain the most credit and positively influence his sentence.

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61 "Drug Court Pilot Announced for Auckland" above n 43.

62 Law Commission *Controlling and Regulating Drugs – A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011) at 332.

Unlike the drug court models, however, for this specialist court, intensive judicial supervision is not required. Rather, a multi-disciplinary approach involving specialists in sexual violence is necessary due to the particular dynamics of sexual offending. While we are not proposing judicial supervision of the process in the way it occurs in most drug court models, we do think the judge should have the option of seeking reports and having the offender brought back before the court (similar to judicial supervision that is available as a condition of intensive supervision under the Sentencing Act 2002).

There would also need to be a robust mechanism to ensure that victims are kept informed of progress. Groups working with victims/survivors of sexual violence have stated that many victims feel strongly about ensuring that what happened to them is not repeated with other victims, so being kept informed of the offender's progress will be important in addressing this concern. Being well informed about the process will also hopefully ensure that victims are accepting of the sentence that is imposed following the successful completion of any programme or other intervention.

In order to maximise the potential of the specialist court, it is proposed that it should be available not only for cases involving adult victims, but also in cases where the victim is a child or young person. However, protocols would need to be in place to ensure that their consent and participation was obtained in a manner that was appropriate to their level of understanding and maturity; and that they were not subject to exploitation or pressure.

As with the alternative resolution option described in Section 6, a specialist court and the intervention plans would inevitably involve considerable resources, even without intensive judicial supervision. However, again there would be cost-benefit justifications, as the cases going to the specialist court would otherwise be requiring a perhaps lengthy trial and a long prison sentence that might incorporate a treatment programme as part of it.

A specialist court for sexual offences only does raise the possibility that it could create a perception that such offenders are receiving more lenient treatment than comparable serious offending. This could lead to public dissatisfaction with the sentences that would follow from participation, if the public are not sufficiently informed about how the specialist court operates. There is also a risk that a specialist court could diminish the perceived seriousness of sexual offences if they are treated separately within the justice system.

Further discussion on a specialist court can be found in the McDonald and Tinsley book.[63]

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63 McDonald and Tinsley, above n 2 at 388 - 392. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

SECTION 6: ALTERNATIVE PROCESS FOR SEXUAL OFFENCE CASES

CURRENT POSITION

There is a wide discretion whether or not to prosecute suspected offences of any kind that come to the notice of law enforcement agencies. For more minor offences, the exercise of this discretion may result in an informal warning, a formal caution, police diversion or referral to some other community agency.

However, in relation to more serious offences, including sexual offences, there are few mechanisms other than prosecution. In general the system takes an "all or nothing" approach. If there is sufficient evidence to prosecute, prosecution will generally follow. If there is believed to be insufficient evidence, nothing will happen.

However, there are some forms of community resolution prior to and during the court process. One of the most common comes under the umbrella of "restorative justice". That is a term that covers a wide range of practices and there is no single agreed definition. However in general it involves a process that is voluntary, requiring the agreement of the victim and the offender. The offender usually must admit responsibility for the offending before entering the process. The focus is on acknowledging the impact of the offending and redressing the harm done to victims and the community. The offender is encouraged to take responsibility and be held accountable for their actions. The process usually involves a meeting or conference between the victim and the offender, run by a skilled facilitator, with an emphasis on safety of the participants. Often there will be an agreement from the conference that the offender will complete certain actions such as reparation or address the causes of their offending.

Restorative justice processes can operate at a variety of stages in the criminal justice system. Pre-sentencing processes are common; under the Sentencing Act 2002 the court can delay sentencing in order for a restorative justice process to be undertaken and consider the outcome of that process in the sentencing decision. However, restorative justice as an alternative to the court system is much less common, and is relatively rare in serious cases.

An overview of restorative justice in New Zealand can be found on the Ministry of Justice website.[64] In 2004 the Ministry of Justice, in consultation with restorative justice providers, produced the Principles of Best Practice for Restorative Justice in Criminal Cases.[65]

Due to the particular dynamics of the offending, including inherent power imbalances and risk to the safety of victims, restorative justice has not traditionally been used in sexual offending cases. Despite this, there is some limited use of restorative justice processes in cases of sexual offending. Project Restore, an Auckland-based service,

64 Ministry of Justice "Restorative Justice" <www.justice.govt.nz/policy/criminal-justice/restorative-justice>.

65 Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (2004) <www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice>.

launched in 2005, employs a conference model with some modifications to reflect the features of sexual offending, using specialist facilitators to ensure a safe process and avoid re-victimisation. Project Restore was inspired by the RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) programme in Arizona.[66] It deals with cases that are referred by the court and from the community, but due to limited capacity and resources, has so far only handled a small number of cases. A study of Project Restore[67] was conducted in 2010, describing the way that the process operates, implementing best principles of restorative justice practice, and the outcomes of the processes.

A discussion of the potential benefits and disadvantages of a restorative justice approach in sexual cases can be found in the McDonald and Tinsley book.[68]

PROBLEM

Despite changes in the past 15 to 20 years, there is widespread consensus that the current criminal justice system still does not deal well with sexual offending. Research in New Zealand and overseas has consistently found that only a small proportion of offences are reported to the Police. When they are reported, only a small proportion of complaints lead to a prosecution, and those that do result in prosecution have higher rates of not guilty pleas and acquittals at trial than other offences.[69]

As a result, it is commonly reported by victim support agencies that victims do not have confidence that the system will be able to deliver them justice.[70] That is partly because the current process for determining guilt beyond reasonable doubt often re-victimises the victim. Other reforms we propose here will go some way towards ameliorating that. However, it is also because the nature of the evidence available in cases of sexual offending sometimes makes proof beyond reasonable doubt (and acceptance of it by a jury) an unlikely outcome.

Moreover, even if a criminal prosecution leads to conviction, the outcome of that (almost invariably a substantial term of imprisonment) may be at odds with the resolution sought by the victim (particularly when sexual offending occurs in the context of an ongoing relationship). It also does nothing to address the attitudes that led to the offending, and it accordingly fails to reduce the risk that the behaviour will recur.

In the vast majority of cases, therefore, the limited options available to the criminal justice system (either a conviction and imprisonment or an acquittal and no action at

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66 McDonald and Tinsley, above n 2 at 402 - 407. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

67 John Buttle *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (2010) <http://aut.academia.edu/JohnButtle/Papers/221442/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence>.

68 McDonald and Tinsley, above n 2 at 414 - 423. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

69 *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* above n 11.

70 Ministry of Women's Affairs *Responding to Sexual Violence: Environmental Scan of New Zealand Agencies* (2009) at p 130 <www.mwa.govt.nz/our-work/svrproject/environmental-scan-pdf>.

all) mean that offenders are too infrequently held to account; the rights of victims are too infrequently vindicated; and their needs are seldom met.

POSSIBLE REFORM 6

An alternative process outside of the criminal justice system would resolve certain sexual offence cases.

The features of this process would be:

- The victim would opt for an alternative process, either instead of a complaint to the Police or at the point of complaint to the Police, and the accused would have to agree to participate.
- The case would be assessed by specialist providers to determine whether it was suitable for an alternative resolution process or whether it was unsuitable, for example because the accused's previous convictions indicated that he or she posed too great a risk to community safety.
- This assessment of suitability would be carried out in consultation with the police and other agencies where appropriate, such as the Child, Youth and Family Service, in order to properly assess the risk to community safety.
- The accused would need to accept that there had been a sexual encounter (although he may view its nature differently from the victim) and be willing to engage in an alternative resolution process. This willingness to engage would need to include agreement to participate in an appropriate intervention.
- Proceedings would be privileged, i.e. nothing the accused said in the course of the process could be used as evidence in any later criminal proceedings. However, information provided by the accused could be used to trigger further investigation by police, the outcome of which could be used if prosecution for that offence or any other offence ensued.
- The process would be tailored to the nature of the case, the wishes and needs of the victim, and the need to ensure victim safety.
- The process would result in a set of agreed outcomes that might include a requirement for the accused to undergo treatment or education; if an agreed outcome were treatment, then a further assessment would be required to assess the suitability of the accused for participation in treatment.
- There would be the ability for the case to be referred back to the criminal justice system if no agreed outcome could be achieved or an accused failed to participate in an acceptable way and to fulfil any undertakings he had made; protocols would be needed for what constituted acceptable participation.
- Before the accused fulfilled all undertakings agreed to through the process, there would be protocols for referral back to the criminal justice system where information emerged that made it unsuitable for the case to continue to be dealt with alternatively, such as additional offending;

- If the accused participated in good faith and fulfilled all undertakings, referral back to the criminal justice system would be precluded.

COMMENTARY

Due to the shortcomings of the current system for many cases involving sexual offending, there is a strong case for making an alternative process available for those who choose to use it. This alternative process could deliver a tailored response which better meets the needs of victims, outside of the traditional investigation and trial process offered by the criminal justice system. It would be necessary for any alternative process to keep a balance between the safety of the community and the rights of the accused.

Under this possible reform, the victim would be advised about the option of the alternative process either by the Police, or by a community support agency. The victim could choose for the case to enter into the alternative process instead of the criminal justice system. The alternative process would offer flexibility in both the process and the possible outcomes, instead of a criminal trial and sentence of imprisonment if the accused is convicted. It may be a preferable option for victims in some cases, perhaps where there is a family relationship or other ongoing association, or the victim is reluctant to for the case to enter the criminal justice system because the accused could be subject to a substantial term of imprisonment. An accused person may be more likely to take responsibility for their actions if there is not the risk of imprisonment.

The victim would need to opt for the alternative process and the accused would need to agree to participate. Specialist providers would then assess the circumstances of the case, in consultation with the Police, to determine whether it was suitable for an alternative resolution process. They would consider factors such as the risk posed by the accused person, the nature and strength of the evidence, and the nature of the offending. Cases where it would be inappropriate would include those where there was a broader community safety issue or where the dynamics of the situation made it unsuitable for an alternative resolution process (e.g. an offender who had no willingness to engage). Cases where the accused posed a risk to the safety of the community would not be suitable for the alternative process.

In order for the case to be eligible, the accused would have to accept that there had been a sexual encounter and be willing to engage in an alternative resolution process. This does not mean that the accused would have to acknowledge guilt, because one of the purposes of the alternative resolution process might be to confront the accused with the nature of their inappropriate sexual behaviour that the accused does not perceive to be inappropriate at the outset. For example, the accused may believe that the victim was consenting because of a misconstruction of the victim's behaviour. It should therefore be sufficient for the accused to acknowledge the sexual encounter rather than an acknowledgement of the absence of consent.

It is expected that the process would generally be available only for victims aged 16 or over at the time of entering the process. However this might be departed from in exceptional circumstances, for example if the victim and the accused were both under the age of 16, but great care would need to be taken to ensure that the power imbalance did not make the process unsuitable.

Specialist providers, who are experienced in managing the dynamics of sexual violence, would develop a process to fit the individual case. The process would be tailored to the nature of the case, the wishes and needs of the victim, and the need to ensure victim safety. While in some cases this might involve a restorative type process (with the necessary protections to deal with the dynamics of sexual violence), in others it might involve a quite different type of process (e.g. a marae justice process that does not necessarily involve the victim). In appropriate cases there might be involvement in the process of family/whanau, or other persons (e.g. peer groups in so-called "date rape" cases).

The process would involve the development of an outcome that was agreed between the victim and accused. Outcomes might include acknowledgement by the accused of the harm caused to the victim, apologies, participation in treatment, education or other programme that addressed the behaviour and/or its causes, or agreement to pay reparation to the victim.

The case could still be sent back into the criminal justice system in several situations. First, there would need to be robust protocols for referral back to the criminal justice system where information emerged that made it unsuitable for the case to continue to be dealt with through an alternative process (i.e. the process revealed a heightened risk of reoffending because information cast new light on the nature of the current offending or disclosed further offending). Secondly, there would need to be the ability for the victim or the accused to opt out of the alternative process. In the event that one or the other opts out, there would need to be a decision about whether a prosecution should result. The same applies if no agreed outcome can be achieved or an accused fails to participate in an acceptable way and to fulfil any undertakings he had made.

However, if the accused participated in good faith and fulfilled all undertakings, referral back to the criminal justice system would be precluded. There are several reasons for this. Without such an arrangement there may be little incentive for the accused person to participate in the process. When the accused and the victim do participate it is arguably important that the outcome provides a final resolution for them and therefore closure. It would in any case involve an element of double jeopardy and therefore be unfair to require the accused to fulfil a number of undertakings, some of which may involve an element of punishment, and then subsequently be exposed to the criminal justice system as well.

The content of the process would be privileged i.e. nothing the accused said in the course of the process could be used as evidence in any later criminal proceedings, although the accused's statements could result in further investigations that might be used in any prosecution for the offence in question or for other disclosed offending.

An alternative resolution process of this nature would likely be resource-intensive. However, this is likely to be justifiable in cost-benefit terms, as the cases that would be affected are those that would not make it into the criminal justice system at all at present, or if they did would not result in conviction. Providing some form of resolution might prevent further offending and address victimisation. For many victims there might be benefits arising from participation in the process itself (e.g. empowerment arising from the opportunity to confront the offender and tell him about the impact of the offending), as well the obvious benefits of any agreed outcome.

Further discussion of an alternative process can be found in the McDonald and Tinsley book. [71]

[71] McDonald and Tinsley, above n 2 at 423 - 428. Extracts are available to view in the Law Commission's online consultation <www.lawcom.govt.nz/alttrials>.

APPENDIX 1: ADVERSARIAL AND INQUISITORIAL SYSTEMS: A BRIEF OVERVIEW OF KEY FEATURES

BLURRING OF THE DISTINCTION BETWEEN ADVERSARIAL AND INQUISITORIAL MODELS

The terms "adversarial" and "inquisitorial" are used to describe models of justice systems. In reality these terms have no simple or precise meaning and no one country's system can be described as demonstrating the "pure" version of either model. Nevertheless, we have attempted to set out the key characteristics and differences of the two models in order to give a sense of each.

It is important to note that over recent years, adversarial models have begun to incorporate some of the features of inquisitorial systems. Indeed, many of the reforms in the Criminal Procedure Act 2011 do have inquisitorial features to them – for example, the development of obligatory pre-trial case management processes. At the same time, inquisitorial models (which have generally been criticised for being inefficient, overly bureaucratic and placing too little weight on the presumption of innocence) have undergone significant reforms that call on elements of adversarial models.

For this reason, the key differences between the two models as we have set them out below, are in much sharper relief than is now currently the case in any system.

KEY CHARACTERISTICS OF ADVERSARIAL SYSTEMS VS INQUISITORIAL SYSTEMS

1. *Responsibility for marshalling evidence for trial*

    - In an adversarial model, responsibility for gathering evidence rests with the parties – police and defence – and an independent evaluation of that evidence by a neutral judge is left to the trial.

    - In an inquisitorial model, criminal investigation, at least in serious cases, is typically overseen by either an "independent" prosecutor or an examining magistrate (in France termed a "juge d'instruction"). The prosecutor or examining magistrate can seek particular evidence; direct lines of inquiry favourable to either prosecution or defence; interview complainants, witnesses and suspects; and ultimately determine whether there is sufficient evidence to take a case to trial.

2. *Relative faith in the integrity of pre-trial processes*

    - An adversarial model is based on mistrust in the reliability of the prosecution evidence. It proceeds on the assumption that mistaken verdicts of guilt can best be avoided by allowing the defence to test and counter that evidence at the trial itself, largely in the manner in which it chooses to do so. The trial is the exclusive forum for seeking out and determining the truth – or, perhaps more accurately, for determining whether there is a reasonable doubt as to guilt.

    - An inquisitorial model has faith in the integrity of pre-trial processes (overseen by the prosecutor or examining magistrate) to distinguish between reliable and unreliable evidence; to detect flaws in the prosecution case; and to identify evidence that is favourable to the defence. In many jurisdictions,

this culminates in the preparation of a "dossier" for the trial court that outlines all aspects of the case and forms the basis for the trial itself. Pre-trial processes are therefore an indispensable part of the process for seeking out the truth. By the time a case reaches trial, there is a greater presumption of guilt than in an adversary model.

3. *The extent of discretion*

- Because in an adversarial model decision making is left largely in the hands of the parties, there is a recognised prosecutorial discretion not to proceed with the case, even when there is evidence to support a criminal charge. There is also an ability, recognised in statute, for the defendant to plead guilty and avoid a trial.

- In an inquisitorial model, discretion is much more limited. In some jurisdictions, "the legality principle" dictates, in theory if not in practice, that prosecution must take place in all cases in which sufficient evidence exists of the guilt of the subject. Moreover, there was traditionally no such thing in civil law jurisdictions as a plea of guilty. Regardless of the accused's wishes, trial processes continued, albeit on a sometimes more accelerated path.

4. *The nature of the trial process*

- In an adversarial model all parties determine the witnesses they call and the nature of the evidence they give, and the opposing party has the right to cross-examine. The court's role is confined to overseeing the process by which evidence is given (to ensure that it is within the rules) and then weighing up that evidence to determine whether there is a reasonable doubt. There are strict rules to prevent the admission of evidence that may prejudice or mislead the fact finder.

- In an inquisitorial model, the conduct of the trial is largely in the hands of the court. With the dossier of evidence as its starting point, the trial judge determines what witnesses to call and the order in which they are to be heard, and assumes the dominant role in questioning them. Cross-examination as we know it does not exist, although the parties and their counsel are generally permitted to ask questions. There are far fewer rules of evidence and much more information available to the court at the outset. The offender's criminal history, for example, may be read to the court before the trial begins.

5. *The role of the victim*

- In an adversarial model, the victim is largely relegated to the role of witness. They have no recognised status in either the pre-trial investigation or the trial itself.

- In an inquisitorial model, on the other hand, victims have a more recognised role. In some jurisdictions they have a formal role in the pre-trial investigative stage, including a recognised right to request particular lines of inquiry or to participate in interviews by the examining magistrate. At the trial itself, they generally have independent standing. Although this is partly

for the purposes of claiming compensation, they are sometimes also permitted to ask questions of witnesses.

APPENDIX 2: THE RIGHT TO SILENCE

The right to silence is often characterised as a single overarching right, which applies coherently across a number of contexts. However, this is not the case. In the House of Lords decision of *R v Director of Serious Fraud Office, ex parte Smith* Lord Mustill said that the right to silence: [72]

> … does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance and also to the extent to which they have already been encroached upon by statute.

His Lordship set out the following specific immunities:

1. a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies;
2. a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them;
3. a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers and others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind;
4. a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;
5. a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority;
6. a specific immunity (at least in certain circumstances, which it is unnecessary to explore) possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

In New Zealand only two of these immunities are specifically addressed by the Bill of Rights Act - the third and the fourth, which are protected by sections 23(4) and section 25(d) respectively.

Section 23(4) provides that everyone who is arrested, or detained under any enactment, for any offence or suspected offence "shall have the right to refrain from making any statement and to be informed of that right."

Section 25(d) simply affirms the right of a person charged with an offence "not to be compelled to be a witness or to confess guilt." While the section 25(d) right can be undermined by pre-trial acts, it is regarded as protecting the right against self-incrimination:[73]

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72 [1993] AC 1 (HL) at 30.

73 *Adams on Criminal Law – Bill of Rights* (Brookers, Wellington, 2012) at [Ch10.18.01].

The common law immunity against being compelled to answer any questions which may incriminate is protected in various places throughout New Zealand law, including in the Evidence Act 2006.

The broader common law immunity against being compelled to answer *any* questions (whether or not these are likely to incriminate) is not, however, subject to specific legislative protection, although legislative provisions which compel the answering of questions are the exception and must be justified as a matter of policy. There are a number of exceptions to this immunity that are usually very specific about the type of questions that may be asked and the circumstances in which a person must answer. It is usual to apply the privilege against self-incrimination and/or to impose a use-immunity in relation to any information obtained.

Some might argue that the right in section 25(d) not to be compelled to be a witness extends to a right not to have questions asked. However, in our view the right is not violated where the defendant is able to refuse to answer and there is no adverse inference drawn from silence. Although the defendant is compelled to submit to questions, the underlying right can be sufficiently safeguarded by ensuring that the defendant understands that there is no obligation to answer.

APPENDIX 3: GERMAN CRIMINAL PROCEDURE

This description was drafted based on observation and interviews during a visit to the jurisdiction in 2010, as well as a review of the relevant English-speaking literature. It will not reflect any legislative or procedural changes since that time.

INTRODUCTION

German criminal procedure is largely inquisitorial in nature. German lawyers and judges described it to us as having adversary features, and it is certainly true that there is less focus on the pre-trial stage than, for example, in the Netherlands and France. Nevertheless, the characteristics that we would regard as core to an adversary system are substantially absent.

Like the substantive law, procedural law is codified and described in a fair amount of detail. However, it was apparent from our discussions that practice often deviates from the letter of the procedural code, at least at the level of detail.

INDEPENDENT PROSECUTION SERVICE

There is a prosecution service that is entirely independent of the police and the judiciary. However, it has a similar career path to the judiciary and is regarded as a quasi-judicial authority. Indeed, many prosecutors become judges and it is not uncommon for judges at some time in their careers to become prosecutors.

The prosecution office is hierarchically structured and is responsible to the Ministry of Justice within the particular state. As in other European jurisdictions, the Minister is entitled to give directions to the prosecution office both as to policy and as to prosecution decisions in individual cases. However, it is rare for the Minister to give a direction in an individual case.

Because the prosecutor is regarded as part of a quasi-judicial authority rather than a party to adversary proceedings, he or she is regarded as neutral and objective, and is trusted to weigh up the case for both the prosecution and the defence. In particular, in making decisions he or she is expected to take into account, and to present to the Court, not only inculpatory evidence but also any evidence that might exonerate the accused.

THE INVESTIGATIVE STAGE

The role of the police and the relationship between the prosecution and the police

The police, when investigating an offence, are theoretically under the control and direction of the prosecution service. However, in practice the police conduct the vast majority of investigations independently of the prosecutor and present him or her with the completed file only at the conclusion of the investigation.

However, there are two main exceptions to this:

- The police will advise the prosecution of the commencement of an investigation in serious cases and cases involving complex economic crimes. In some of these cases the prosecution will merely have a watching brief. In others, such as very

serious crimes like homicide, they will be more actively involved throughout the investigation and may even attend the scene of the crime.

- In any case where the police wish to exercise coercive powers that require a judicial warrant or are seeking the pre-trial detention of a suspect on remand, they must advise the prosecutor, who is responsible for seeking the warrant or detention order.

The so-called "principle of legality" requires the police to investigate all offences that come to their attention. However, in practice some discretion is exercised. In particular, the police may decide not to record a complaint as an offence and may therefore choose not to open an investigation file (that is, they can decide it is not a crime – they have the "power of definition"). Obviously this is more likely to happen when the alleged offence is trivial.

The role of the prosecutor

When the investigation is completed and the file is handed to the prosecutor, he or she must then decide whether or not to prosecute. Again, this decision is primarily governed by the principle of legality. There is thus no general discretion not to prosecute: the prosecution is generally required to proceed with the case if there is sufficient evidence. However, this is tempered by the so-called "principle of expediency", which permits the prosecutor, even in the face of sufficient evidence, to waive prosecution or to withdraw the charges after they have already been laid in two main circumstances:

- where the offence is a misdemeanour, the offender's guilt is considered to be of a minor nature and there is no public interest in the prosecution;

- where the offence is a misdemeanour, and both the defendant and the court competent to hold the trial agree to a form of pre-trial diversion (such as payment of a sum of money to a charity or the Treasury, community work, reparation, victim-offender mediation etc.).

Victim-offender mediation (TOR) may also be used in all kinds of cases as an addition rather than alternative to prosecution (see s 155a of the Criminal Code). It may be employed at any stage of the process. Under s 46 of the substantive Criminal Code, the fact that mediation has occurred and has resulted in a mediated agreement may be a ground for discontinuing the proceedings. However, the discontinuance of proceedings would never occur in serious cases such as those involving sexual violation because of the public interest in the outcome. Where the prosecution continues notwithstanding a mediated agreement, the judge will take into account the agreement in determining the sentence, but will only accept it if he or she agrees with it.

The arrest, detention and questioning of the suspect

When a suspect is initially detected for an offence, there is a power for the police to arrest him or her, without a judicial order, under what is called a "provisional arrest". This power of arrest is slightly more limited than that available in New Zealand: the main grounds upon which it is exercised are that there will be potential prejudice to the process if the accused is not arrested (for example because he or she may flee and thereby delay proceedings); however, secondary grounds for arrest include other factors such as the risk of further offending or police cannot establish the suspect's identity.

When the suspect is questioned by the police, no video record is taken. This means that, unless there is a subsequent interview of the suspect by the prosecutor, the defendant's statement in the case dossier that goes to the court is a written construction by the police of what the suspect has said to them orally.

The suspect must be told of the right to a lawyer. The lawyer is not automatically State-funded (even during the initial questioning). However, legal aid may be available, although as in New Zealand recompense may subsequently be sought from the defendant.

If the suspect is detained by the police on the basis of an arrest warrant or a provisional arrest and the prosecution want pre-trial detention continued, the suspect must be brought before a judge of the local court on the next day at the latest (within 24 hours). The judge will then determine whether the grounds for pre-trial detention are made out. In the area we visited, this work in the Amstgericht (the District Court) was allocated to two judges, who also dealt with applications for search warrants and the like.

The pre-trial detention hearing does not occur in open court and does not involve the bringing of a formal charge. The judge is merely advised in chambers, in the presence of the parties, what offence the suspect is believed to have committed and the grounds upon which his or her detention is sought. The first time the accused appears in open court, in the presence of the media and public, is at the trial itself. Indeed, if the prosecution does not seek a judicial warrant (for example, for a search) and does not ask for pre-trial detention, the first time the accused will appear before a judge at all is at the trial; all pre-trial matters will be addressed without a court hearing, largely on the basis of the case dossier (see below). The pre-trial judges who deal with the detention and search and seizure decisions are not those who preside at trials – it is believed that trial judges would be, or be seen to be, biased if they had previously signed penal orders in respect of defendants.

Whether or not the suspect has been the subject of an earlier arrest, he or she may be summoned for an examination by either the police or the prosecution during the investigation. However, while the suspect is obliged to attend the examination, there is a right to silence and a privilege against self-incrimination which protects him or her from any obligation to answer questions. He or she also has the right to consult counsel before being examined. Counsel have the right to be present during the examination. As with any initial interview after arrest, the examination is not video-recorded, and any written statement taken is a summary construction of what the suspect says orally.

Time limits

There is no statutory time limit on the period of the investigation. However, if the suspect is remanded in custody, he or she must be released after six months unless the time period is suspended by order of the regional High Court upon application by the prosecutor. If the High Court does order suspension (for example, because of the complexity of the investigation), it must continue to review the case at least once every 3 months thereafter until the case comes to trial. The effect of this time limit is that custody cases are given priority and the substantial majority of them come to trial within 6 months.

THE PRE-TRIAL STAGE

If the prosecutor decides to bring charges following the completion of the investigation, he or she files those charges in court by way of a "bill of indictment", together with a supporting case dossier. This dossier contains the statements of all of the witnesses regarded by the prosecution as relevant to the case (including those that might provide exculpatory evidence). It is thus similar to, but potentially more extensive than, the formal written statements filed by the prosecution in relation to cases proceeding by way of indictment in New Zealand.

In addition to the statement of witnesses that are relevant to a determination of guilt, the case dossier includes information relevant to sentence, such as the defendant's previous conviction list and other background information prepared by court workers (the equivalent of those who prepare our presentence reports). This is because, as discussed further below, the trial does not have separate conviction and sentence stages. Both are addressed in a single hearing, before the court retires to consider them together.

When the case dossier reaches the court, it is put into the hands of a judge. In both the Amstgericht (the District Court) and the Landgericht (the High Court), the judge to whom the trial is allocated as the presiding judge is responsible for pre-trial decisions – other than those relating to pre-trial detention and search and seizure. The role of this judge is pivotal: once the charges are laid in court, he or she is in control of the case and determines whether there is sufficient evidence for the matter to go to trial, and if so what charges are appropriate and what evidence should be called. (However, it is uncommon for judges to suggest that the charge should be amended; those we interviewed estimated that this occurred in in only 2% or 3% of cases.) Judges may direct further investigations, including that particular witnesses be interviewed or re-interviewed. The Code also contemplates the possibility that they may conduct some of these further investigations themselves, although that rarely happens. It is, however, common for judges to summon their own experts from a list held by the court.

If the judge decides that there is sufficient evidence for the case to proceed to trial, he or she will advise the prosecution and the defence of this decision and formally "open the case for trial". This involves setting the trial date and directing the prosecution to summon the required witnesses. The accused has the opportunity to object to the decision and to ask the judge to consider additional evidence. The judge's decision on the accused's request is final and is not appealable.

The accused may also request that the judge summon additional witnesses to give evidence at trial or may summon them directly at his or her own expense.

Judges sometimes have case conferences with the prosecution and defence prior to trial in order to narrow down the issues and limit the number of witnesses, although this is more common in the Amstgericht than the Landgericht. There is also a kind of plea bargaining before trial, involving the prosecution, defence and judge, that may result in an amendment to the charges originally laid. Neither case conferences nor plea bargaining obviate the need for a trial itself, since the court must still always be satisfied as to guilt on the available evidence (see further below).

Defence counsel have access to the case dossier. Given that the dossier is not generally held in electronic form, they are also entitled to uplift it, with the exception of exhibits,

and take it to their private premises for inspection and copying, unless there is a significant reason (such as prejudice to the case) to refuse to permit them to do so. If the accused is unrepresented, it appears that it is discretionary whether or not the accused is given full access to the case dossier. In practice, he or she will be unless that would be contrary to the interests of justice (for example, because it would lead to tampering with evidence or the intimidation of witnesses).

THE TRIAL STAGE

There are three levels of first instance trial courts:

a) *The Amstgericht (the District Court)*: This court deals with less serious criminal matters. Where the prosecutor is seeking no more than one year's imprisonment, the case will be heard by a professional judge sitting alone, and the sentence will be limited to the one year threshold. Rape trials may be heard here (minimum penalty is one year) and case will proceed to trial more quickly (4 months instead of one year) but if charges are heard in the Landgericht there is no right to a factual re-hearing (only an appeal on the law). Where the prosecutor is seeking more than one but not more than 4 years' imprisonment, and the prosecutor has chosen to lay the charge in the Amstgericht rather than the Landgericht because of its lesser seriousness, it will be heard by one judge and two lay assessors. Again, the sentence will be limited to the four-year threshold.

b) *The Landgericht (the High Court):* This court deals with more serious criminal matters. The case is heard by two professional judges and two lay assessors. Cases must be heard here if the minimum penalty is four years imprisonment.

c) *The Oberlandesgerichte (the Higher Regional Court of Appeal)*: This court deals with special criminal matters, primarily those involving offences against the State, treason etc. The case is heard by three or sometimes five professional judges; no lay assessors are involved.

Lay assessors are different from jurors in our system. The way in which they are selected differs from one state to another. It is common for them to be selected by a committee upon application for five-year terms and to sit about ten times a year. They play a limited role in the trial itself. For example, they rarely ask questions of a witness, and if they wish to do so some presiding judges will expect that the questions are directed to the witness through them. However, judges and lawyers agree that the lay assessors play a significant role in decision-making and are not unduly dominated by the professional judges. They are regarded as being particularly useful in determining factual issues that depend upon assessments of credibility. Lay assessors have the same voting power and there must be a two-thirds majority decision for both conviction and sentence. Those who we interviewed expressed the view that lay assessors tend to be more pro-conviction in rape cases, although women lay assessors may be less inclined to believe women victims in such cases.

The German system does not recognise the possibility of a guilty plea. Regardless of any admissions made by the accused, either before or at trial, the court must be independently satisfied on the evidence that the accused is guilty of the crime charged. As a result, there is a trial in every case, although its length is obviously dictated by the extent to which the accused disputes the prosecution's version of events.

Although inquisitorial models are often regarded as preferable to adversary models because they involve a search for the truth, this has no basis in fact. A criminal trial in the German system is not concerned with determining whether the truth lies in the complainant's version of events rather than that of the accused; it is rather concerned with whether there is a reasonable doubt as to the accused's guilt. In this respect, its objective does not differ from that of a criminal trial in New Zealand. It merely has a different method of pursuing this objective. So when the participants in inquisitorial models describe themselves as searching for the truth, they are really referring, not to a different objective, but to a different process by which they achieve that objective (that is, a different process by which the evidence is gathered and considered).

As noted above, the trial itself is not divided between the conviction and sentencing stages of the process. It deals with both issues together. As a result, information that, from a New Zealand perspective, is relevant only to sentence is collected both on the case dossier that is prepared before trial and from witnesses (including the accused) during the trial itself. This includes the defendant's previous convictions. Indeed, during the trials that we observed in Bremen, the judge spent some time asking the accused a large number of questions about their background and personal circumstances. The victims when giving evidence were also asked questions about the impact of the crime upon them, thus providing the information during the trial that we would include in a victim impact statement following conviction. The result, of course, is the large amount of information is presented during the trial that, in the event of an acquittal, is of marginal relevance to the outcome. Some of those we interviewed saw some advantages in drawing a more formal distinction between the trial and sentencing stages.

Both prosecution and defence state what they believe the sentence should be before the court retires to consider the verdict. However, the conflation of the conviction and sentencing stages means that, at least in cases where the accused is denying responsibility for the offence altogether, there is little or no opportunity for defence counsel to make the sort of plea in mitigation that occurs prior to sentence in New Zealand.

The case dossier presented to the court when the charge is laid by the prosecution is read before the commencement of trial not only by the presiding judge but also by any other professional judges involved in the trial. However, the case dossier is not made available to the lay assessors until the commencement of the trial itself. They therefore do not have the same background information (including the previous convictions of the accused) as the judges. However, they are able to glean some of that information by leafing through the dossier quickly during the course of the trial itself.

Notwithstanding the availability of the case dossier, the trial operates on the basis of what is described as the principle of "orality" or "immediacy". That is, the fact-finder needs to be persuaded of the guilt of the accused on the basis of the oral evidence presented in court rather than the material presented in the written statements of witnesses. Written statements cannot be used in lieu of oral evidence except where both the court and the parties agree to permit it in the following circumstances:

- where the witness has died or cannot be examined by the court for another reason within a foreseeable time; or

- where the evidence concerns the presence or level of asset loss; or
- where illness, infirmity or other obstacles prevent the witness from appearing at the hearing for a long or indefinite period; or
- where the witness cannot reasonably be expected to appear at the trial given the distance involved, having regard to the importance of the evidence.

In the event that written statements are used in lieu of evidence, they are read out to the court. If there is an audio-visual recording of the earlier statement, however, that will be played to the court instead.

Nevertheless, the material contained in the case dossier is used by the presiding judge and other parties in questioning, not only when there is an inconsistency with the oral evidence but also more generally. In this sense, the case dossier comprises the starting point of the trial, even though the decision itself must be based upon evidence given orally. Indeed, the case dossier itself is regarded by judges as essential in preparing for the trial. The defence counsel and prosecutors we talked to did not think that this limited the trial to the issues that the judge decides to focus on – judges are obliged to consider all the issues raised by the evidence, and the parties can raise other issues not canvassed by the judge if they choose.

There are a number of features of the way in which evidence is presented in the German system that are markedly different from the procedure followed in common law jurisdictions:

- When a prosecutor commences the trial by setting out the charge and summarising the evidence, he or she outlines not only his or her view of the nature of the offence but also evidence that may exonerate the accused or mitigate the offence. For example, in one of the trials that we observed the prosecutor included in his initial summary the fact that the defendant may have had diminished responsibility as a result of alcohol and cocaine consumption at the time of the offence.
- Evidence is initially presented in narrative (rather than question and answer) form, prompted by an initial question from the presiding judge. Thus the witness is left to recount events in a rather more natural fashion without significant interruption. This is partly because there are few rules as to the admissibility of evidence and therefore less fear that witnesses will present irrelevant or prejudicial material unless guided through the evidence in a controlled way. The trial is also less formal in nature – the witnesses and the lawyers may all approach the judges to discuss aspects of the evidence in the dossier. The police officer in the case we observed did not come in uniform. The witnesses do not take an oath, it being assumed they will tell the truth.
- There is no formal distinction between prosecution and defence witnesses. The same rules (which are relatively few in number) apply to evidence given by all witnesses and to the types of questions that can be asked of them. There is thus no formal distinction between examination-in-chief and cross-examination.
- The presiding judge is in control of the questioning, and always starts that process. Questioning by prosecution and defence usually occurs only when the

judge has exhausted all the questions that he or she and any of his or her fellow judges want to ask. Thus the order in which questions are asked is: judge, prosecutor, defence counsel, defendant. However, this is not invariably the case: the parties (especially the defence) have the right to ask questions at any time, although in practice they generally refrain from doing so until the judge has finished.

- For these reasons, questioning by the defence is arguably less confrontational and more neutral than in our system. In particular, aggressive questioning tends to be avoided because it would suggest that the presiding judge in his or her questioning has not done the job properly. Nevertheless, if the credibility of the witness is in issue, vigorous questioning can occur. Indeed, we were told of one case that went on appeal to the Federal Court where defence counsel had questioned the complainant's mother for five days. Moreover, allegedly because of the influence of Anglo-American drama series, it was alleged that defence counsel are becoming more aggressive in their questioning than they used to be. Judges can forbid counsel from asking questions that the judge has already asked. However, they are reluctant to intervene to prevent questions that are in substance the same but being asked in a different way. More generally, they have difficulty in intervening to stop questioning, partly because the absence of elaborate rules of evidence means that they do not have the tools to enable them to do so.

- Unlike cases that are tried by jury in New Zealand, reasons must always be given for the decision as to verdict and sentence. Where there is more than one professional judge, it is usually the practice that the second judge rather than the presiding judge writes the decision. In the Landgericht, the decision is typically lengthy - often between 50 and 100 pages. In the Amstgericht, it is typically much briefer.

As in our system, the defendant can choose to remain silent both before trial and at trial. He or she can also refuse to identify the issues in dispute. In practice, however, the issues in dispute are almost always evident from the case dossier. Where they are not, they become apparent at the beginning of the trial. That is because, while the defendant can choose when he or she gives evidence, it is the practice that the defendant always goes first in the trial, although he or she also has the opportunity to have the last word in the trial after other evidence has been given. Moreover, defence counsel does not decide whether or not to call the defendant as a witness; the defendant is simply asked questions by the presiding judge and, if he or she wishes to exercise the right to remain silent, must positively take the step of refusing to answer those questions. While defence counsel may intervene to say that the defendant will not answer a question, the dynamics of the situation mean that the defendant (or perhaps more commonly, counsel on his or her behalf) will generally answer. The result is that, if the issues in dispute were not made apparent earlier, they generally become clear at the outset of the trial. The judges we talked to thought it much better to hear from defendants themselves rather than through counsel.

The nature of the trial process means that the defendant (and arguably the complainant) is much more involved in the trial than would generally be the case in New Zealand. Indeed, in the trials that we observed in Bremen, the defendants did a substantial proportion of the talking (although this may have been atypical). Moreover,

as in other European jurisdictions the defendant personally is always given the last word in the trial – that is, the defendant is asked by the presiding judge whether there is anything else that he or she wishes to say.

After the delivery of the verdict, both the prosecutor and the defendant has one week to decide whether they wish to appeal against it. The appeal may be against conviction or sentence or both. The defence need not give reasons for a rehearing but this right can be open to abuse as can take a while and then the time delay can be used in mitigation at sentence (i.e. no offending occurred while waiting for re-trial).

PENAL ORDER PROCEDURE

In relation to offences that do not exceed a specified imprisonment threshold (translated as "misdemeanours"), there is provision for an accelerated procedure. Before the trial, the prosecutor may apply to the judge for a written penal order if he or she does not consider that the trial is necessary given the outcome of the investigation. The proposed penal order may involve a fine, forfeiture, disqualification from driving, or a suspended prison sentence combined with probation. The prosecutor may make a similar application during the trial itself if the defendant's failure to appear at the trial or some other factor constitutes an obstacle to the continuation of the trial.

The application must be refused if there are insufficient grounds for suspecting that the accused is guilty of the offence. The application must also be refused and the matter set down for trial if the judge has reservations about deciding the case without a trial. Otherwise the application must be granted.

If the judge grants the application, the defendant has two weeks following service of the order to lodge an objection to it. Unless the objection relates only to the amount of the fine, the case must be set down for trial upon receipt of the objection. Effectively, therefore, the use of accelerated proceedings is dependent upon the ultimate consent of the defendant.

PROTECTION FOR VULNERABLE WITNESSES

The following protections exist for vulnerable witnesses:

- If there is an imminent risk of serious detriment to the well-being of a witness if that witness were to give evidence in the presence of others at the trial, the court may order that the witness give evidence from another location and that his or her testimony be relayed by audio-visual link if this is available.

- If it is feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant, the court may order that the defendant leave the courtroom. However, given the strength of the oral tradition, courts are reluctant to do this and generally do so only if witnesses say that they will not tell the truth.

- Unless the judge is of the view that direct questioning by the prosecution and defence would cause no detriment to the well-being of a witness under the age of 16, they are required to put any questions which they wish to ask through the judge, who is the only one entitled to ask questions directly.

- If it is feared that the giving of evidence in the presence of the defendant by a witness under 16 will cause "considerable detriment to the well-being" of that witness, the court may order that the defendant leave the courtroom:

- If it is feared that the giving of evidence in the presence of the defendant by an adult witness will pose an imminent risk of serious detriment to the health of that witness, the court may also order that the defendant leave the courtroom

- In relation to specified sexual offences and other specified offences involving ill-treatment, the examination of a witness under 16 may be replaced by the showing of a video-recording of the witness' previous judicial examination if the defendant and his or her defence counsel were given the opportunity to participate in that examination (see s 255a of the Code). Supplementary oral testimony from a witness is still possible.

- A support person may sit with the complainant as a matter of practice but there is no Code provision either way regarding this process.

If the court does order the defendant to leave the courtroom, the presiding judge is required to inform the defendant of the essential contents of the proceedings, including the evidence, that occurred during his or her absence. Under s 247 of the Code, defence counsel is allowed to remain and the defendant can watch the testimony via CCTV or video-link where this is possible.

THE ROLE OF VICTIMS

Various provisions of the Code provide some protection for victims. There are the protections for vulnerable witnesses set out above. There are also provisions, similar to those existing in New Zealand, that require victims to be kept informed as to the progress of the case and, if they have a legitimate interest, to access the prosecution and court files.

However, there are three sets of provisions providing a role for victims that differ from those in New Zealand: the ability for victims to object to a prosecution decision not to lay charges; the ability of victims to lodge reparation claims directly as part of the criminal proceedings; and the Nebenklage procedure.

Objecting to a decision not to lay charges

Section 374 of the Code provides that there are a small number of specified offences entitling the victim to bring a private prosecution without the involvement of the public prosecutor. Apart from that, however, there is no general right of private prosecution.

Instead, if the prosecutor decides not to prefer charges, the victim is entitled to lodge a complaint with the head of the public prosecution office within two weeks of being notified of the decision. If the head of the office dismisses the complaint, the victim may apply to the court for a review of the prosecution decision. The court may request the prosecution to submit its records of the investigation and may ask the accused for a reply to the victim's complaint. The court must dismiss the application if there are no sufficient grounds for preferring charges. Otherwise it must order the prosecution to lay charges. There is no appeal against the court's decision.

It is apparently uncommon for victims to avail themselves of this right.

Lodging a compensation claim

If the victim alleges that he or she has suffered property loss as a result of the offence, he or she is entitled to bring a property claim as part of the criminal proceedings and may have legal representation for that purpose. In that event, the victim and his or her representative may participate in the proceedings, ask questions of witnesses and set out the basis for the claim before the closing addresses by prosecution and defence. The court is then obliged to make a finding as to the claim as part of the overall verdict.

Ordinarily victims bear the cost of their legal representation. However, they are entitled to means-tested legal aid on the same basis as in civil proceedings, and they may recover the costs of their representation (from the defendant) if the request for compensation is successful and the accused is convicted.

The Nebenkläger procedure

In addition to this general right to appear in the criminal proceedings in support of a property claim, the victims of more serious offences (such as serious physical assault, kidnapping and sexual assault) have the more general right to be joined to the proceedings as an "auxiliary prosecutor" or "private accessory prosecutor" by way of the Nebenkläger procedure. This is a long-standing right that was introduced into German criminal procedure as early as 1877, but it underwent a major reform in 1986 that extended it to sexual offences.

If victims avail themselves of the right (to be a Nebenkläger), they are entitled to legal representation (paid for by the state if they cannot afford it) both before and during the proceedings. Through their lawyer, they may examine the case dossier (including the defendant's statement) in advance of trial and suggest further factual investigations; ask questions of witnesses; object to the questions asked by other parties; and make closing statements. They also have a right to be present throughout the trial even before they have given evidence. It is relatively common for victims of sexual assault to exercise this right, but apparently fairly uncommon for victims of other offences to do so. The Nebenkläger sits where the prosecutor does, but the judge can ask the victim (but not his or her counsel) to leave while the defendant gives evidence. Some lawyers' whole practice is as counsel for Nebenkläger, but others will work as defence counsel as well. They are paid 400-500 Euro per day. If it transpires that the alleged victim has made a false complaint, the victim is required to reimburse the state of the cost of the trial aspect of the representation.

Views were mixed as to the benefits of the Nebenkläger procedure. The prosecutors with whom we discussed the matter thought that it is useful backup, because the lawyer for the victim sometimes asks questions that the prosecutor has inadvertently overlooked. The defence counsel with whom we discussed the matter thought that it is useful in cases of admitted guilt, because it enables the prosecution and defence to enter into a compensation contract with the victim's lawyer. However, he thought that if the defendant denies guilt, there are two problems with the procedure: first, it leads the victim's lawyer to try and act as a more effective prosecutor than the prosecutor and therefore to be unnecessarily aggressive in questioning; and it potentially enables the victim to be apprised of all of the evidence in the prosecution file before giving evidence, thus affecting the reliability and authenticity of his or her evidence. The judges' view was that the procedure greatly complicates trials. One example was provided where the

trial involved five Nebenkläger lawyers as well as the prosecutor. All of the lawyers wanted to be much more active in questioning than the prosecutor would normally be, thus having a significant impact on the length of the trial. Some thought it makes the process more adversarial, and that there is more "cross-examination" in sexual cases than there used to be. It is the task of the judge and the prosecutor to object to the questions of defence counsel but some judges are cautious about intervening and may be worried about being appealed. One of the judges we spoke to thought that judges should be able to take care of the needs for victims (although neither judges nor lawyers receive any particular training or supervision to enable them to do this effectively).

APPENDIX 4: AUSTRIAN CRIMINAL PROCEDURE

This description was drafted based on observation and interviews during a visit to the jurisdiction in 2010, as well as a review of the relevant English-speaking literature. It will not reflect any legislative or procedural changes since that time.

INTRODUCTION

In most respects, Austrian criminal procedure closely resembles German criminal procedure.

Like the substantive law, procedural law is codified and described in a fair amount of detail. The Code of Criminal Procedure underwent fundamental reform in 2008 with the enactment of the Code of Criminal Procedure Reform Act. Prior to that time, there was an investigating judge who (at least in theory) took over the case from the public prosecutor after the "pre-investigation stage" and was actively involved in the investigation of the case and the gathering of evidence. Since 2008, the role of the investigating judge has been restricted to decisions relating to pre-trial detention and the use of coercive investigative measures such as search and surveillance.

At least before the reforms in 2008, practice often deviated from the letter of the procedural code, at least at the level of detail. In particular, notwithstanding the role ascribed to the investigating judge in the Code, the police largely conducted investigations without input from or supervision by the investigating judge (see further below).

INDEPENDENT PROSECUTION SERVICE

The prosecution service is entirely independent of the police and the judiciary. But prosecutors are formally considered organs of the judiciary by Art 90a of the Constitution. The career path is similar to the judiciary and the prosecution service is regarded as a quasi-judicial authority.

Prosecution offices are hierarchically structured and are bound by the instructions of the office of the senior public prosecutor and ultimately of the Federal Minister of Justice. As in other European jurisdictions, the Minister is entitled to give directions to the prosecution office both as to policy and as to prosecution decisions in individual cases. However, it is rare for the Minister to give a direction in an individual case. If he or she does so, the instruction must be in writing and accompanied by reasons.

Because the prosecutor is regarded as part of a quasi-judicial authority rather than a party to adversary proceedings, he or she is regarded as neutral and objective, and is trusted to weigh up the case for both the prosecution and the defence. In particular, in making decisions he or she is expected to take into account, and to present to the Court, not only inculpatory evidence but also any evidence that might exonerate the accused.

THE INVESTIGATIVE STAGE

The role of the police and the relationship between the prosecution and the police

Prior to 2008, there was a distinction between the "provisional enquiries" or "pre-investigation" stage (Vorerhebungen) and the "preliminary investigation" that determined whether charges should be laid (Voruntersuchung). The former was under the control of the public prosecutor, while the latter was under the control of an investigating judge (although the decision whether or not to prosecute was eventually still made by the prosecutor rather than the investigating judge).

In practice, the reality was very different. The police generally conducted both preliminary enquiries and preliminary investigations on their own, without effective supervision from either public prosecutors or the judge, although the judge did have some input in the 20% of cases that resulted in a remand in custody. The prosecutor only became involved in deciding whether or not to lay charges at the conclusion of the investigation.

The 2008 reforms have abolished the distinction between the two stages of the investigation and have introduced a unified process under the control of the public prosecutor. As in Germany, the judge's role is confined to determining remands in custody and authorising coercive measures such as search and surveillance (and the defence counsel who we saw maintained that even the latter role was largely a rubber stamping exercise, since judges rarely refuse a prosecution application for a warrant).

In practice the police continue to conduct the vast majority of investigations independently of the prosecutor and present him or her with the completed file only at the conclusion of the investigation. The prosecutor's day-to-day functions during the investigative phase fall into two categories:

- The police will generally advise the prosecution of the commencement of an investigation. In the vast majority of cases the prosecution will merely have a watching brief. Although the 2008 reforms contemplated that prosecutors would more often become actively involved in investigations (and direct them or even carry them out themselves), it appears that most are still reluctant to do so.
- In any case where the police wish to exercise coercive powers that require a judicial warrant or are seeking the pre-trial detention of a suspect on remand, the prosecutor is responsible for seeking the warrant or detention order.

The so-called "principle of legality" requires the police (and the prosecutor) to investigate all offences that come to their attention. However, in practice some discretion is exercised. In particular, the police may decide not to record a complaint as an offence and may therefore choose not to open an investigation file. Obviously this is more likely to happen when the alleged offence is trivial.

The role of the prosecutor

A very small number of offences (such as offences against the person's honour, the disclosure of business secrets and various offences against property committed by a relative) cannot be prosecuted by the public prosecutor but only by the victims themselves. These comprise only 1.5% of all charges. In these cases, the victim is acting as a private prosecutor, with the right to view the police investigative files and to pass

on to the court anything that supports the charge. Essentially, although with some exceptions, the victim has the same rights as a public prosecutor. He or she is supervised by the court. As his or her request the public prosecutor may take over the prosecution. If private prosecution does not result in a conviction, the private prosecutor has to bear the cost of the trial.

In relation to all other offences, the public prosecutor conducts the prosecution. When the investigation is completed by the police and the file is handed to the prosecutor, he or she must then decide whether or not to prosecute. As in Germany, the defence has access to this file and can request that the prosecutor follows up further lines of inquiry or interviews additional witnesses. The prosecutor (and the police) are obliged to act on this request, by carrying it out or denying it. In the latter case the defence has a right to appeal.

The decision whether or not to prosecute is primarily governed by the principle of legality. There is thus no general discretion not to prosecute: the prosecution is generally required to proceed with the case if there is sufficient evidence. Unlike Germany, this is not tempered by explicit recognition of any "principle of expediency" that would allow the prosecutor, even in the face of sufficient evidence, to waive prosecution or to withdraw the charges after they have already been laid. Nevertheless, if there is sufficient evidence to prosecute, the prosecutor may decide not to lay charges in four main circumstances:

- for reasons of procedural efficiency under section 192 of the Procedural Code (for example, where the defendant is already charged with committing a crime and the laying of additional charges is likely to have no appreciable influence on the sentence that will be imposed);
- where the time limit for prosecution has expired;
- where the offence is a misdemeanour (offence punishable by not more than three years imprisonment), the offender's guilt is considered to be of a minor nature, the offence has had only slight consequences for the victim, the offender has made almost full reparation to the victim, and punishment is not necessary for the purposes of individual or general deterrence (section 191 of the Procedural Code);
- where the offence falls within the jurisdiction of the district court or of a single judge of the regional court (generally being offences punishable by not more than five years imprisonment), the offence did not result in the death of person, the guilt of the offender is not high, the public prosecutor or the court is satisfied that the evidence clearly establishes guilt, and the offender agrees to a prosecution offer of pre-trial diversion (payment of a fine, community work, supervision or victim-offender mediation) (section 198 of the Procedural Code).

It is also generally accepted that the prosecution has a right not to bring charges if the investigation and prosecution of a minor offence would incur excessive costs.

Moreover, if charges are laid and the judge reaches the view that the offence meets the criteria in section 191 or 198 of the Code, the judge is obliged to dismiss the case (before or at trial).

The use of diversion, since it was made available for adult offenders in 2000, is widespread. In 2007, 54,000 offenders were offered the possibility of diversion (termed "non-penal settlement") and over 45,000 accepted the offer. Diversion does not result in a conviction or a criminal record.

The arrest, detention and questioning of the suspect

When a suspect is initially detected for an offence, there is a power for the police to arrest him or her, without a judicial order – for example, where the police cannot establish the suspect's identity or have reason to suspect that the suspect will flee or presents a risk of further offending. Once the police have arrested a suspect they call the prosecutor.

If the suspect is arrested by the police, he or she can be detained in the police cells for up to 48 hours. Thereafter the prosecutor can order further detention in a "judicial detention facility" but if so must immediately inform a judge. The judge then determines within 48 hours whether the grounds for further pre-trial detention are made out. The judge will make that determination either by asking for the suspect to be brought before him or her at court or by seeing the accused in the judicial detention facility. It is an obligation for the judge to see the suspect in order to make the order.

Any such pre-trial detention hearing before the judge does not occur in open court and does not involve the bringing of a formal charge. The judge is merely advised, in the presence of the parties, what offence the suspect is believed to have committed and the grounds upon which his or her detention is sought. The first time the accused appears in open court, in the presence of the media and public, is at the trial itself. Indeed, if the prosecution does not ask for pre-trial detention, the first time the accused will appear before a judge at all is at the trial; all pre-trial matters will be addressed without a court hearing, largely on the basis of the case dossier (see below). The only role of the judge will be to approve the use of powers that infringe individual rights, primarily search and surveillance.

None of those to whom we talked saw the non-open nature of the process prior to trial as a problematic issue. The judge, prosecutor and defence lawyer all agreed that it provided greater protection of the presumption of innocence (that is, if it were made public that the defendant was in custody, it might be thought he or she were guilty). They also pointed out that, in the event that there were issues that needed to be made public, it was open to the defendant, the defence lawyer or the prosecution to make those issues public. The issue of who may issue a statement to the press and when is governed by media law.

A defendant who is appearing before a judge at a pre-trial detention hearing is entitled to be represented by counsel free of charge. However, this does not generally happen. The explanation given by defence counsel was that there is generally no time for the defendant to arrange legal representation. There are no public defenders as such. Private lawyers are obliged to provide legal aid on a pro bono basis, and as compensation a lump sum is paid every year to the pension fund. The judge has to determine if the financial criteria are met and then send a request to the Bar Association to nominate such a "pro bono" lawyer. There was some dispute between those who we saw about whether defendants are generally told by the police or prosecutor about the right to counsel free of charge. It may be that it is only the judge

who in practice advises the defendant of his or her right to counsel. In any case all agreed that the process does not generally allow time to get a lawyer anyway (at least for the first pre-trial detention hearing). But after that first hearing, the defence counsel must be present.

After a defendant has been remanded in custody, there will be periodic appearances at prescribed intervals before the judge to determine whether detention should continue. The prosecutor, defendant and defence counsel will be present, but again the hearing is not open to the public or the media. The judge in deciding whether or not detention should continue will look at the evolving nature of the investigation and the strength of the evidence obtained by the prosecution to date. However, it is rare for a judge to determine the question of detention on the basis of the strength of the evidence. Generally the offender will be released either because the risks that led to the original detention have diminished or because the length of the detention is disproportionate to the seriousness of the offence alleged.

Whether or not the suspect has been the subject of an earlier arrest and detention, he or she may be summoned for an examination by either the police or the prosecution during the investigation. However, while the suspect is obliged to attend the examination, there is a right to silence and a privilege against self-incrimination which protects him or her from any obligation to answer questions. If a defendant declines to say anything at the pre-trial stage, the trial judge may draw an adverse inference from this, so defence counsel are in a difficult position when advising the defendant whether or not to exercise the right to silence.

Since 2008, the defendant must be asked before being examined whether he or she wants counsel to be present. However, most examinations still take place without counsel. Where counsel are present, they are not allowed to ask questions during the examination, although they can ask questions at the end. Counsel can be excluded from the examination if their presence would endanger the investigation. As with other witnesses, the interview with the defendant is not videotaped but merely transcribed in the form of a statement that forms part of the case dossier. The prosecutor may also later question the defendant if the police have missed anything or more evidence has been discovered.

Time limits

There is no statutory time limit on the period of the investigation. However, if the suspect is remanded in custody, he or she must be released after 2 months if the only reason for the pre-trial detention is the risk of destruction of evidence, 6 months if the offence is punishable by not more than three years imprisonment, 1 year if the offence is punishable by more than 3 years imprisonment and 2 years if the offence is punishable by more than 5 years imprisonment. Pre-trial detention for 2 years is not rare, but it is rare for no charges to be brought in such cases. Hearings on the continuation of pre-trial detention are held at 14 days, 1 month, 2 months and then at 2-monthly intervals, although the defendant can ask for a hearing at any time.

THE PRE-TRIAL STAGE

If the prosecutor decides to bring charges following the completion of the investigation, he or she files those charges in court, together with a supporting case dossier. This dossier contains the statements of all of the witnesses regarded by the prosecution as

relevant to the case (including those that might provide exculpatory evidence). It is thus similar to, but potentially more extensive than, the formal written statements filed by the prosecution in relation to cases proceeding by way of indictment in New Zealand. Statements are generally prepared by the police, although since the 2008 reforms prosecutors are expected to oversee their preparation or do it themselves. Written statements are not governed by specific rules of evidence. So long as information is relevant, it may be presented in the dossier.

In addition to the statement of witnesses that are relevant to a determination of guilt, the case dossier includes information relevant to sentence, such as the defendant's previous conviction list and other background information. This is because, as discussed further below, the trial does not have separate conviction and sentence stages. Both are addressed in a single hearing, before the court retires to consider them together.

The defence has access to the case dossier that is filed in court and may request that further statements be added to it, that additional matters be investigated or (as noted below) that additional witnesses be called at trial. If they do ask the police to investigate further and they do nothing, then the defendant must ask the prosecutor. If the prosecutor declines, then the judge must decide. In practice it is uncommon for the prosecutor to refuse – the police usually just ask the prosecutor what to do.

When the case dossier reaches the court, it is put into the hands of a judge. The role of this judge is pivotal: once the charges are laid in court, he or she is in control of the case and determines whether there is sufficient evidence for the matter to go to trial, and if so what evidence should be called. He or she may direct further investigations, including that particular witnesses be interviewed or re-interviewed.

If the judge decides that there is sufficient evidence for the case to proceed to trial, he or she will advise the prosecution and the defence of this decision, set a trial date and summon the required witnesses. The prosecution and defence have the opportunity to ask the judge to call additional witnesses. The judge's decision on any such request is appealable.

In the pre-trial phase, the prosecutor will sometimes determine that an expert witness is required for the purposes of proving the case and will therefore call for one. In the trial phase only the judge can determine that an expert is necessary and call for one. Since 2008 the defence has the right to call their own expert witness at trial if they wish, but those witnesses are considered "regular" witness by the court.

THE TRIAL STAGE

There are three types of first instance trial courts:

a) *Minor cases in either the District Court or the Regional Court*: These cases will be heard by a professional judge sitting alone.

b) *More serious cases in the Regional Court (including offences such as rape)*: These are heard by one professional judge and two lay assessors.

c) *The most serious criminal matters in the Regional Court*: These are primarily offences against the State, murder, treason etc. They are tried solely by a jury of 8. Unlike other cases, the jury brings in a verdict of guilt or acquittal

without giving reasons. They then sit with 3 professional judges to determine sentence. Only a handful of cases are dealt with in this way each year.

Like Germany, the Austrian system does not recognise the possibility of a guilty plea. Regardless of any admissions made by the accused, either before or at trial, the court must be independently satisfied on the evidence that the accused is guilty of the crime charged. As a result, there is a trial in every case, although its length is obviously dictated by the extent to which the accused disputes the prosecution's version of events.

Although inquisitorial models are often regarded as preferable to adversary models because they involve a search for the truth, this has no basis in fact. A criminal trial in the Austrian system is not concerned with determining whether the truth lies in the complainant's version of events rather than that of the accused; it is instead concerned with whether there is a reasonable doubt as to the accused's guilt. In this respect, its objective does not differ from that of a criminal trial in New Zealand. It merely has a different method of pursuing this objective.

As noted above, the trial itself is not divided between the conviction and sentencing stages of the process. It deals with both issues together. As a result, information that, from a New Zealand perspective, is relevant only to sentence is collected both on the case dossier that is prepared before trial and from witnesses (including the accused) during the trial itself. During the trial, too, the victims may be asked questions about the impact of the crime upon them, thus providing the information during the trial that we would include in a victim impact statement following conviction.

The parties may ask for a lenient or a harsh sentence before the court retires to consider the verdict, but they are not allowed to ask for a specific sentence. The conflation of the conviction and sentencing stages means that, at least in cases where the accused is denying responsibility for the offence altogether, there is little or no opportunity for defence counsel to make the sort of plea in mitigation that occurs prior to sentence in New Zealand.

The case dossier presented to the court when the charge is laid by the prosecution is read before the commencement of trial not only by the presiding judge but also by any other professional judges involved in the trial (but not by lay assessors or, in jury trials, by the jurors). Indeed Judges see this preparation as an indispensable part of their role in controlling the case and giving a reasoned verdict. If they did not know about the case in detail in advance of the trial, they would not be able to determine which witnesses should be heard and they would not be able to ensure that all of the relevant evidence was presented. Rather, they would, as in New Zealand, be dependent on the evidence presented by the parties.

Notwithstanding the availability of the case dossier, the trial operates on the basis of what is described as the principle of "orality" and "immediacy". That is, the fact-finder theoretically needs to be persuaded of the guilt of the accused on the basis of the oral evidence presented in court rather than the material presented in the written statements of witnesses. Although the witness's statement may be read out in court as an alternative to oral testimony and the witness asked to confirm that it is correct before being questioned, it may only be used in lieu of any form of oral evidence in the following circumstances:

- where the witness died before trial;

- where the witness cannot be found or is unavailable (for example, out of the country for a long period or only in Austria for a short period but domiciled elsewhere);

- where the witness gave evidence by way of the "contradictory interrogation" procedure (see below);

- where both parties agree that the statement can be read and that the witness does not need to appear.

Notwithstanding the limitations on the use of written statements in lieu of oral testimony, the material contained in the case dossier is used by the presiding judge and other parties in questioning, not only when there is an inconsistency with the oral evidence but also more generally. In this sense, the case dossier comprises the starting point of the trial, even though the decision itself must theoretically be based upon evidence given orally. Indeed, it was suggested to us that the statements collected at the pre-trial stage really dictate the course of the trial, not only because they form the basis for the questioning of witnesses but also because, in the event that the witness does not remember some of the details or changes his or her mind about the evidence, judges tend to place more weight on what was said at the pre-trial stage, in the belief that this was closest in time to the events in question and therefore more likely to be reliable.

The fact that written statements collected at the pre-trial stage assume such significance in the case has been the subject of criticism. We were told, for example, that there is no equality of arms at the pre-trial stage and insufficient protection for the rights of the accused. For example, when witness statements are obtained (and constructed by the police) at the pre-trial stage, defence counsel has no right to be present or to ask questions of witnesses.

There are a number of features of the way in which evidence is presented in the Austrian system that are markedly different from the procedure followed in common law jurisdictions:

- When a prosecutor commences the trial by setting out the charge and summarising the evidence, he or she outlines not only his or her view of the nature of the offence but should also present evidence that may exonerate the accused or mitigate the offence.

- Evidence is initially presented either by way of a recitation of the witness's written statement (as discussed above), or in narrative (rather than question and answer) form prompted by an initial question from the presiding judge. Thus the witness is left to recount events in a rather more natural fashion without significant interruption. This is partly because there are few rules as to the admissibility of evidence and therefore less fear that witnesses will present irrelevant or prejudicial material unless guided through the evidence in a controlled way.

- There is no formal distinction between prosecution and defence witnesses. The same rules (which are relatively few in number) apply to evidence given by all witnesses and to the types of questions that can be asked of them. There is thus no formal distinction between examination-in-chief and cross-examination.

- The presiding judge is in control of the questioning, and always starts that process. Questioning by prosecution and defence only occurs when the judge has exhausted all the questions that he or she and any of his or her fellow judges want to ask.

- For these reasons, questioning by the defence is arguably less confrontational and more neutral than in our system. In particular, aggressive questioning tends to be avoided because it would suggest that the presiding judge in his or her questioning has not done the job properly. Some Judges even take the view that, if they are doing their job properly, the presence or absence of defence counsel both at the pre-trial stage and at the trial itself should make no difference to the outcome.

- Unlike cases that are tried by jury in New Zealand, reasons must always be given for the decision as to verdict and sentence.

As in our system, the defendant can choose to remain silent both before trial and at trial. He or she can also refuse to identify the issues in dispute. In practice, however, the issues in dispute are almost always evident from the case dossier. Where they are not, they become apparent at the beginning of the trial. That is because, while the accused can choose when he or she gives evidence, it is the practice that the accused always goes first in the trial. Moreover, defence counsel does not decide whether or not to call the accused as a witness; the accused is simply asked questions by the presiding judge and, if he or she wishes to exercise the right to remain silent, must positively take the step of refusing to answer those questions. Defence counsel may, of course, indicate at the outset that the defendant does not intend to answer questions and that the judge will need to rely upon the case dossier. Defence counsel may also intervene to say that the defendant will not answer a question. However, the dynamics of the situation mean that the accused or their counsel will generally answer. Moreover, we were told that they will generally testify because they will not want to give the impression they are guilty by failing to speak. The result is that, if the issues in dispute were not made apparent earlier, they generally become clear at the outset of the trial.

When the accused does give evidence, then as in Germany he or she is not required to tell the truth. However, a defendant cannot untruthfully implicate some other person in the offence.

The nature of the trial process means that the defendant (and arguably the complainant) is much more involved in the trial than would generally be the case in New Zealand. Moreover, as in other European jurisdictions the defendant personally is always given the last word in the trial – that is, the defendant is asked by the presiding judge whether there is anything else that he or she wishes to say.

THE ROLE OF VICTIMS

Various provisions of the Code provide some protection for victims. There are provisions, similar to those existing in New Zealand, that require victims to be kept informed as to the progress of the case and, if they have a legitimate interest, to access the prosecution and court files. Victims of sexual offences can access free "psycho-social" support and can have a person of trust accompany them to interviews that take place throughout the investigation and trial.

There are also four sets of provisions providing a role for victims that differ from those in New Zealand: the ability for victims to appeal against a prosecution decision not to lay charges; in the event that the prosecution does not proceed with the charges, the ability to take over the case as a "subsidiary prosecutor"; the right to be represented at the trial, whether or not that is accompanied by a claim of reparation; and the "contradictory interrogation" procedure.

Appealing against a decision not to lay charges

As noted above, the Code provides that there are a small number of specified offences that must be brought by way of a private prosecution, although the public prosecutor can take it over at the request of the victim. Apart from that, however, there is no general right of private prosecution.

Instead, if the prosecutor decides not to prefer charges, the victim is entitled to appeal to the court against this decision. Appeals are brought frequently, but in 90% of cases they are overruled without any action by the court. We understand that the appellate court has been overrun with appeals, particularly in sexual offence cases - perhaps because of the fact that since 2008 victims have had both legal representation and access to victim support. Consequently the law has been amended so that the appeals no longer go to a bench of three judges but instead to a single judge of the lower court.

If the court does decide to act on the appeal, it can direct the prosecutor to undertake further investigations or to review the case, but in the final analysis it cannot direct the prosecutor to lay charges.

The victim is not entitled to appeal against a prosecution decision to divert the offender. However, in practice the victim will have been involved in the decision to divert in any case - that is, the victim will have been consulted about it in advance.

Acting as a subsidiary prosecutor

In the event that the prosecutor does not proceed with a prosecution, whether or not there has been an appeal, the victim has the right to continue with the case as a "subsidiary prosecutor". The victim may have access to the prosecution file for that purpose and lay charges in court with the accompanying witness statements and other relevant information. If the victim chooses to act as a subsidiary prosecutor, he or she has to pay not only his or her own costs and court costs, but also defence costs in the event that the proceedings are unsuccessful.

Representation at the trial

If the victim has suffered loss or damage as a result of the offence, he or she is entitled to join in the proceedings as a participant in order to make a compensation claim and is entitled to have legal representation at the trial of the offender for that purpose. In that event, the victim or the victim's representative may participate in the proceedings and set out the basis for the reparation claim. He or she may ask for additional evidence to be heard for the purposes of proving that claim and ask questions of witnesses. The court is then obliged to make a finding as to the claim as part of the overall verdict.

If the offence is a homicide, a sexual offence, an offence involving violence or threats or an offence against a spouse, the victim is also entitled to legal representation both before and during the trial that is funded by the state at the rate of EU78 per hour. The

majority of women and children have lawyers in sexual and violence cases. It is much less common for a male adult victim to obtain a lawyer, even though it is possible in any personal injury case.

Victims are also entitled to "psycho-social" support.

The contradictory interrogation procedure

In addition to this general right to appear in the criminal proceedings in support of a property claim, there is a procedure, rather oddly in translation termed the "contradictory interrogation" procedure, that is designed to mitigate the trauma and stress suffered by victims giving evidence at trial. Under this procedure, some victims are able to provide their evidence, and be questioned by the parties, in advance of the trial. When that occurs, they are generally not required to appear at the trial itself. The evidence is recorded by way of videotape and played at the trial in lieu of oral testimony. The evidence is taken after the prosecutor has laid charges, which is usually 2-3 months after the initial report to the police. It is additional to, rather than a substitute for, questioning of the victim by the police (and sometimes by the prosecutor) before charges are laid.

The procedure is mandatory when the offence is a sexual offence and the victim is under the age of 14 years. In relation to other offences, either the victim or the prosecutor can request that the procedure be made available to the victim or the judge can order it ex officio. The victim may also be examined by a psychiatrist or psychologist to see whether he or she is fit to give evidence at trial as a witness. Ultimately it is a matter for the judge to determine whether the contradictory interrogation procedure ought to be used in such cases, and he or she will usually be guided by what the victim wants. About 95% of the cases in which the procedure is used are sexual cases.

Under the procedure, the victim's evidence is always taken by the judge, who is generally in one room with the victim and his or her legal representative (victim's advocate) and/or support person while the defendant, prosecutor and defence counsel are in another room linked by CCTV. (This may be contrasted with the trial, where no support person is permitted.) The victim is shown on the screen from the front and side, but the defendant cannot see the Judge or the support person. The use of two rooms is mandatory when the offence is a sexual offence and the victim is under the age of 14 years, but otherwise the victim or the prosecutor can ask for it. The use of two rooms is almost always the procedure adopted. The victim gives his or her evidence as a narrative, and the judge then poses questions. The judge must be in the same room as the victim, as he or she needs to be able to show the victim documents etc. When the judge has finished his or her questioning, the judge goes to the other room, asks the parties what additional questions they wish to put, and then returns to the room in which the victim is located and puts those questions. One party can object to a question which the other party wants put and the judge will then determine whether the question is appropriate. The judge on his or her own initiative can also refuse to put a question suggested by the parties if the Judge considers the question to be unnecessary or inappropriate (or is an irrelevant question about the victim's private life). There is in practice no ability to challenge a judge's refusal to put a question. The defence can only then mention at trial that they wanted to ask a question. The judges undertaking a contradictory interrogation are pre-trial judges – they are not trial judges, so there will

never be the same judge who has done the contradictory interrogation hearing the case at trial.

The judge, of course, is able to take the lead role in questioning the witness because he or she has fully prepared for the case by reading through the case dossier and receiving all witness statements in advance (including those favourable to the defence). In other words, the procedure is workable because the judge is the person in overall control of the case and with responsibility for determining what evidence should be called. Without that preparation, it is difficult to see how the judge would be in a position to undertake the questioning.

In cases involving child victims, the Code contemplates that the questions will be asked by an expert psychologist rather than by the judge. We are told that generally it is up to the judge to decide if it is preferable to use an expert. In the jurisdiction of the Innsbruck Regional Court it is mostly the judges who carry out the questioning, while in Vienna it is mostly done by experts and hardly ever by the judge.

The Code requires the judge to allow the parties to participate in the contradictory interrogation procedure, but permits it to be used even in the absence of the prosecutor, defence counsel and/or the defendant. Defence counsel has a right to be there but does not have to be there, an aspect of the procedure that is criticised by many. Indeed, there is one case before the appellate court where the defendant had absconded and the contradictory interrogation went ahead in the presence of defence counsel, who had not received instructions from the defendant. All of those to whom we talked thought that the prosecutor, the defence counsel and the defendant needed to be present, as it is essentially part of the trial taking place pre-trial.

Both the prosecutor and defence counsel to whom we talked suggested that difficulties could arise from the fact that they were in a different room from the judge when questions were being put to the victim. The defence counsel noted that he could not communicate with the judge in order to object to the way in which a question had been put. Similarly, the prosecutor was unable to intervene to ask for further clarification of something arising out of the victim's answer; she had to wait until the judge sought additional questions. Initially communication between the judge and counsel was permitted by way of wireless microphone, but this practice stopped because it was found that the communication could be listened to. For these reasons, the defence counsel thought that the use of two rooms during the contradictory interrogation procedure was used excessively.

Both the prosecutor and the defence counsel thought that a major advantage of the contradictory interrogation procedure is that it enables a better assessment to be made of whether the trial should proceed. In fact, around 60% of investigations are closed by the prosecutor after the contradictory interrogation, because that discloses that there is insufficient evidence or evidence that is not sufficiently convincing.

The judge who conducts the interview at the contradictory interrogation is required to be different from the trial judge as the hearing is taking place in the investigative phase and a trial judge is never allowed to participate in the pre-trial process. This stems from what the Austrians regard as their "accusatorial model", which constitutionally requires the investigation process and the trial process to be separated. A trial judge that participated in the investigative phase is always considered biased.

The evidence is videotaped, and is then played as the victim's evidence at trial. If the victim has given evidence in this way, it is uncommon for him or her to be called to give evidence again at the main trial. The victim can choose to give evidence again at trial or can refuse to and say the contradictory interrogation is all there will be (which may lead to the prosecutor not proceeding to trial). However, it is possible for the victim to be called again at trial and agree to give evidence. If this does occur, the same procedure is followed: the victim is separated from the defendant, prosecutor and defence counsel in another room and gives evidence linked by way of CCTV. This time the questioning is done by the trial judge. But this re-examination hardly ever happens.

VICTIM OFFENDER MEDIATION

This is not used, even for minor sexual or other cases, and there has been no discussion or debate about extending it to serious sexual cases. It is viewed as a soft approach and would not be a politically acceptable policy.

APPENDIX 5: DANISH CRIMINAL PROCEDURE

This description was drafted based on observation and interviews during a visit to the jurisdiction in 2010, as well as a review of the relevant English-speaking literature. It will not reflect any legislative or procedural changes since that time.

INTRODUCTION

Danish criminal procedure has both adversarial and inquisitorial features. The parties are more in control of the conduct of the trial than in other European jurisdictions. However, there are many similarities in the pre-trial process and in the rules governing the presentation of evidence.

Like the substantive law, procedural law is codified and described in a fair amount of detail.

INDEPENDENT PROSECUTION SERVICE

There is a prosecution service that is separate from the police and the judiciary.

The prosecution office is hierarchically structured. There are three levels. The first level is represented by the Director of Public Prosecutions (the general prosecutor). The second level comprises six units called regional public prosecutors. The third level is the local level, comprising 12 commissioners who head both the local prosecution service and the local police service. The fact that commissioners head both the police and the prosecution at the local level means that there is a close working relationship between the two.

The jurisdiction of the local prosecutors, which was originally confined to petty cases, was progressively extended between 1972 and 1992, and since then has applied to almost all offences. The role of regional prosecutors is confined to deciding whether or not to prosecute in very serious cases and other selected cases (such as when the victim is a police officer), conducting trials and appeals before the High Court, and exercising overall supervision of the handling of criminal cases by prosecutors at the local level.

The highest authority in the prosecution service is in practice the Director of Public Prosecutions, a non-political position. He or she, and therefore the prosecution service as a whole, is ultimately accountable in theory to the Minister of Justice, who not only supervises the service but also appoints the prosecutors, issues general instructions and has the power to intervene in individual cases. However, in practice the Minister almost always delegates his or her authority to the Director of Public Prosecutions.

Because the prosecutor is regarded as quasi-judicial rather than a party to adversary proceedings, he or she is regarded as neutral and objective, and is trusted to call witnesses for both the prosecution and the defence (see further below). He or she is also expected to present to the Court not only inculpatory evidence but also any evidence that might exonerate the accused.

THE INVESTIGATIVE STAGE

The role of the police and the relationship between the prosecution and the police

The police, when investigating an offence, are theoretically under the general supervision and oversight of the prosecution service. However, in practice the police conduct the vast majority of investigations independently of the prosecutor and present him or her with the completed file only at the conclusion of the investigation.

However, there are two main exceptions to this:

- The police will advise the prosecution of the commencement of an investigation in serious cases and cases involving complex economic crimes. In some of these cases the prosecution will merely have a watching brief. In others, such as very serious crimes like homicide, they may be more actively involved throughout the investigation.

- In any case where the police wish to exercise coercive powers that require a judicial warrant (eg, a search or surveillance warrant) or are seeking pre-trial detention, they must advise the prosecutor, who is responsible for seeking the warrant or detention.

The role of the prosecutor

Unless the police decide to terminate an investigation for want of evidence before the prosecutor is consulted, the file is handed to the prosecutor when the investigation is completed. The prosecutor must then decide whether or not to prosecute. Unlike many other European jurisdictions, there is no formal "principle of legality" that requires prosecution. However, the Code specifies the circumstances in which the case can be dismissed without prosecution, and also lists the circumstances under which a discretion to waive prosecution may be exercised. Arguably, therefore, the prosecution framework is in substance the same as the German "principle of legality" that is tempered by the "principle of expediency".

Section 721 of the Danish Penal Code lists the criteria for dismissing a case without prosecution as follows:

- where the complaint is manifestly ill-founded, in which case not only the prosecution but also the police can dismiss the case;

- where prosecution is not expected to result in a conviction;

- where the costs, expected length of proceedings or amount of work involved in preparing the case for trial are out of proportion to the importance of the case or the expected penalty.

The last criterion may be applied not only to dismiss an entire case, but also to curtail the scope of the trial by dismissing single counts, leaving out potential co-defendants etc.

Section 722 of the Code sets out a large number of circumstances in which the prosecutor may exercise discretion to waive the prosecution. These include cases where

the prosecution is not seeking a penalty higher than a fine, in which case the case can be settled by the accused by the payment of the nominated amount without the involvement of the court; cases where "social proceedings" (a form of diversion) are to be applied; and more generally cases where there are exceptional mitigating circumstances or other special circumstances that make prosecution contrary to the public interest.

Once a charge has been laid, the prosecution is unable to withdraw it on their own initiative. However, they can amend the charge, and can seek an acquittal.

There are a very small number of so-called private penal cases (involving offences such as criminal libel) which victims themselves prosecute in the civil courts. Apart from this, the prosecution service is the sole prosecutor; there is no right of private prosecution. If the prosecutor dismisses a case without prosecution or waives prosecution, victims or others representing them can lodge an objection with the next level of the prosecution hierarchy (i.e with the regional prosecutor if a decision has been taken by a local prosecutor). However, they do not have a right of appeal to the court.

Victim-offender mediation may also be used in all kinds of cases as an adjunct rather than alternative to prosecution. It typically takes place before the charge is filed in court and the outcome is included in the case dossier. Cases that are suitable for victim-offender mediation are generally identified by the police.

The arrest, detention and questioning of the suspect

If the police arrest a suspect, they can detain him or her for up to 24 hours without a judicial order. After that, they can seek a court order, through the prosecutor, for pre-trial detention on the basis of a reasonable suspicion that a particular offence has been committed. A preliminary "charge" is filed in court and the request for pre-trial detention is heard by a judge in open court (unlike other European jurisdictions). If pre-trial detention is not ordered, the preliminary "charge" has no further significance; the charge against the defendant will be determined by the charge, if any, that is subsequently brought by the prosecutor at the completion of the investigation.

The suspect has the right to a lawyer at any time during the investigation, including the initial 24 hour detention. If the defendant does not have a lawyer, then one will be obtained for him or her. If the defendant cannot afford a lawyer, then legal representation will be state funded, but recompense will subsequently be sought from the defendant if he or she is convicted. Defendants regularly obtain the services of a lawyer during the investigation and lawyers are always present in court to deal with pre-trial detention cases anyway.

If the suspect is subject to a pre-trial detention order, he or she may be released at any time without any order of the court on the direction of the prosecutor, sometimes after discussion with the defence.

Time limits

If the suspect is remanded in custody, he or she must be brought before a judge every four weeks for a review of the detention order and progress in the investigation. Moreover, the maximum period of pre-trial detention of an adult offender is six months if the maximum penalty for the offence is six years or less and one year if the maximum

penalty is more than six years. If the offender is under the age of 18 years, these maximum periods are reduced to four months and eight months respectively. The court can extend the period in special circumstances. But generally cases come to trial within these maximum periods.

There is also a rule that pre-trial detention cannot be for longer than the expected prison sentence. If it is, compensation is payable.

There is no statutory time limit on the period of the investigation. However, whether or not a defendant is held on pre-trial detention, he or she can petition the court to review progress or to set a timetable for trial if a charge has not been filed in court by the prosecutor within a reasonable period.

THE PRE-TRIAL STAGE

If the prosecutor decides to bring charges following the completion of the investigation, he or she files those charges in court, together with a supporting case dossier. This dossier contains the statements of all of the witnesses regarded by the prosecution as relevant to the case (including those that might provide exculpatory evidence). It is thus similar to, but potentially more extensive than, the formal written statements filed by the prosecution in relation to cases proceeding by way of indictment in New Zealand.

The preparation of the case for trial is party-driven. The judge uses the case dossier to prepare for the trial, but it is the responsibility of the parties to determine which witnesses should be called.

Generally the prosecution is in control of witnesses and the witness list and calls all the witnesses who have relevant evidence to give. Thus, if the defence wishes to call witnesses, it is expected to advise the prosecution, so that the prosecution can then summon them to appear. Nevertheless, this does not invariably apply. There is an obligation on the court to consider all the evidence available at trial, so that if the defence calls its own witnesses and advises the prosecution of that fact very late, the court will take the evidence into account. If the defence indulged in this practice too frequently, it would be seen as a breach of ethics. However, the defence may well do this from time to time where there is seen to be some strategic advantage in keeping the existence of particular evidence from the prosecution until a late stage. Even then, however, there is an obligation to advise the prosecution by the time of trial that witnesses are to be called and the nature of the proposed evidence.

THE TRIAL STAGE

The fact-finder

Until 2007, Denmark had a system of lay juries similar to that in New Zealand, where jurors deliberated alone. From that time, system was replaced with something more akin to the model operating elsewhere in Europe.

Where the prosecution is seeking a sentence of four years imprisonment or more, the defence has a right to have a "jury trial" before three judges and six jurors in the District Court or (on appeal) three judges and nine jurors in the High Court. However,

the defence may waive this right. In practice, the number of trials of this sort is very low.

If the prosecution is not seeking a sentence of four years imprisonment or more, or the defence waives the right to a jury trial, the trial is held before a judge and two lay assessors if the prosecution is seeking a prison sentence, and otherwise before a judge alone.

Lay jurors and assessors are drawn from a list of citizens who have expressed an interest in the role. In practice, many are nominated from lists of political party members, excluding those who are politically active. Efforts are being made to broaden the representation on the list because of concerns about lack of representativeness. Particular efforts are being made to try and recruit more members from minority backgrounds. There has also been a concern that public servants have been dominating the lists because they can get paid time off more easily.

Lay jurors and assessors are appointed for four-year terms to either the District Court or the High Court. They may be called upon from time to time to act as either a juror or an assessor. There is a presumption that they will be called to preside over about four trials per year. They are paid a relatively low rate (about 1100 Danish krone per day, which is about $275). They may be reappointed. Judges give them a brief orientation at the beginning of their four-year term, but involvement in this is not mandatory and it does not constitute extensive education about the law or their decision-making role.

It is possible to challenge a juror for cause, but this is rare. In theory there was also a peremptory challenge system, with each side then allowed one challenge, although again this is rare. To the extent that it happens, it is done on the papers before the trial, so that the person involved is not summoned.

During a jury trial, the judges and jurors are separated as a group and come together only during deliberations. In contrast, judges and lay assessors associate with each other during the trial and have morning tea etc together. There is no logical reason for the distinction between these two forms of trial, but the separation of judges and jurors in the more serious cases is an attempt to avoid the criticism that judges will dominate the jurors.

The judges and jurors/lay assessors deliberate together about both conviction and sentence. A majority of both judges and jurors have to each be independently in favour of the preferred verdict. In relation to sentence, the overall result must be agreed by a majority of votes. However, Judges get two votes and jurors only one.

According to those to whom we talked, both judges and jurors/lay assessors find the system superior to its predecessor. In particular, the lay participants appear to be more satisfied with the role they play. Although defence lawyers have criticised the new system because of the risk that judges will dominate the process, lay participants do not report that judges play too great a role.

Reasons for verdict have to be given. However, when the trial is before a mix of professional judges and lay jurors or assessors, it is not clear how agreement as to the reasons for the verdict is reached. One of the judges is responsible for writing the

decision. It is therefore presumably the case that the reasoning of the professional judges generally prevails, although there can be a statement of dissenting views.

Guilty pleas

Unlike other European systems, the Danish system accepts guilty pleas and in that event the defendant appears before a judge alone. Before entering a conviction the judge must still be satisfied of the accused's guilt by reference to some corroborating evidence; conviction cannot be entered on the basis of the accused's admission alone. However, this is a very truncated and perfunctory procedure.

Because there is no sentencing discount given for a full guilty plea, they are not very common.

The conduct of the trial and presentation of evidence

The prosecutor may make an opening address and more generally do so in jury trials and in bigger economic cases. However, his or her introduction in ordinary cases will generally be very brief.

As in New Zealand, evidence is generally presented by way of oral testimony at the trial. There are three main exceptions to this.

First, in sexual offence cases involving child victims, the evidence is video-recorded in advance of the trial and played at the trial. (There is no current discussion/proposal to extend this process to adult victims.) The defendant and the defence counsel are in a separate room and not able to be seen by the witness. Questioning is undertaken by a specialist police officer not involved in the case. Neither prosecution nor defence can ask questions directly; they can only write down questions and submit them to the police officer who is doing the questioning. The evidence is sometimes taken before the arrest of the suspect. In that event, a defence counsel is appointed to represent the interests of the putative suspect (who at that stage may be unknown and who they have never met).

Secondly, written evidence that is regarded as objective may be presented. This includes the contents of the initial victim complaint to the police before the commencement of the investigation (which is read to the court). It also includes medical reports that may be summarised orally by the prosecutor unless (in rare cases) the defence requires the witness to be called.

Finally, written evidence from a witness may be presented if he or she is not available at trial (for example, because he or she has died or left the country or cannot otherwise be located). Where it is known in advance that the witness will not be available, the evidence may be entered into the court records as oral testimony in a separate court session before the trial – again, sometimes even before a suspect has been identified or arrested. In the latter event, a defence counsel is again appointed to represent the interests of the putative suspect.

As noted above, the case dossier that is filed with the charge is used by judges only for the purposes of preparation for trial. Indeed, it was regarded by judges we spoke to as

essential in preparing for the trial. However, the verdict must be based on the evidence given at the trial; the file may be referred to only if there is an inconsistency between it and the evidence at trial. Even then, the judge cannot ask questions about it unless one of the parties does.

The previous convictions and other background information about the accused (including in some cases a probation report) are on the case dossier and are therefore known to the judge or judges. This information is also disclosed to jurors and lay assessors from the outset and may be taken into account during deliberations (although jurors in particular are not permitted to remove the case dossier from the court room). Although jurors have access to the case dossier at the beginning of the trial, they theoretically do not see the previous convictions and related background information until after a conviction has been entered, because in jury trial cases the conviction and sentencing stages of the case are separated (see further below).

Regardless of whether a witness is put forward by the prosecution or the defence, there is no formal distinction between prosecution and defence witnesses. Nor is there any distinction between examination-in-chief and cross-examination. There is a prohibition on leading questions, but this is interpreted liberally, and it is still possible to challenge a witness by posing closed questions.

The parties take the initiative to call and question witnesses. The prosecution always begins the questioning. However, if the defence calls a witness whom the prosecution thinks has nothing to add, the defence commonly asks questions first. Judges may ask questions for clarification but their role is more like an umpire and they will not dominate – appeals can be based on an over-active judge.

As in other European jurisdictions, it is the practice that the accused gives evidence first. The accused cannot take the oath and is not required to tell the truth. He or she also has the right to remain silent. However, this right is rarely exercised. We were told that defendants do not give evidence in less than 1% of cases. There are perhaps at least four reasons for that. First, there is a cultural expectation that defendants will participate in the trial. Secondly, if they do not do so, a reasonable inference as to guilt may be drawn. Thirdly, the accused is always asked questions personally rather than through their counsel, so that they have to exercise their right to silence on a question by question basis.

We were told that both Norway and Denmark have been considering changing their systems so that the victim is called first, followed by the accused and then other witnesses.

At the conclusion of the trial both the prosecutor and the defence counsel will make closing addresses, and the accused personally will then have the last word. In jury trials, where the conviction and sentencing stages are separated, the prosecutor and defence counsel will also make submissions on the sentence to be imposed after a conviction has been entered.

The nature of the trial process (and the more informal layout and seating arrangement of the courtroom) means that the defendant and arguably the complainant are much more involved in the trial than would generally be the case in New Zealand. Indeed, in the trial that we observed in Copenhagen, both the complainant and the defendant

actively interacted with the judges in a relatively informal and conversational way and gave the appearance of more meaningful involvement than would typically be the case in a New Zealand trial. Moreover, as in other European jurisdictions the defendant personally is always given the last word in the trial – that is, the defendant is asked by the presiding judge whether there is anything else that he or she wishes to say.

The conviction and sentencing stages

As noted above, in trials involving a single judge or a judge and lay assessors, no distinction is drawn between the conviction and sentencing stages of the process. As a result, as in other European jurisdictions information that, from a New Zealand perspective, is relevant only to sentence is both placed on the case dossier that is prepared before trial and elicited from witnesses (including the accused) during the trial itself. This includes the defendant's previous convictions. The result, of course, is that a large amount of information is presented during the trial that, in the event of an acquittal, is of marginal relevance to the outcome. Some of those we interviewed saw some advantages in drawing a more formal distinction in all cases between the trial and sentencing stages.

In cases involving judges and/or lay assessors, prosecution and defence state what they believe the sentence should be before the court retires to consider the verdict. However, the conflation of the conviction and sentencing stages means that, at least in cases where the accused is denying responsibility for the offence altogether, there is little or no opportunity for defence counsel to make the sort of plea in mitigation that occurs prior to sentence in New Zealand.

APPEALS

If there are serious procedural errors at the trial, there may be an application for a retrial before second-tier appeal rights are exercised.

Otherwise both the prosecution and the defence have a right of appeal. If the penalty that has been imposed is less than 3000 kroner, leave to appeal must be granted. Otherwise the right to appeal is more or less unqualified and, if exercised, results in another hearing. Although the evidence heard at the first trial may be referred to, witnesses are recalled and re-present their evidence. Effectively, therefore, it is close to being considered a basic right to have two trials.

Notwithstanding the fact that appeals effectively result in a new trial, they are not as common as might be expected. Although appeals are brought in approximately 40-50% of jury trial cases, they are probably brought in only about 10-15% of cases overall.

An appeal from a decision of a judge alone is heard by three judges. An appeal from a decision of a judge and two lay assessors is heard by three judges and three lay assessors. An appeal from a jury trial is heard by three judges and nine jurors.

THE ROLE OF VICTIMS

Various provisions of the Code provide some protection for victims. There are the protections for child victims in sexual cases set out above. Victim support persons may also accompany the victims to court and sit next to them when they are giving evidence.

Apart from that, victims are entitled to be legally represented in cases involving sexual offences, murder, violence or robbery, or in other special circumstances following a request to the court. Victims take up this opportunity frequently, and in serious cases it is routine.

The victim's lawyer (paid for by the State) is entitled to have access to the case dossier from the point at which the charge is filed in court. However, he or she is not entitled to show the victim the file (although we were told that this rule is often broken). The victim's lawyer can also talk to the police or the prosecutor before the trial, but this is not formalised in any way and is fairly uncommon. The victim's lawyer can request that the accused leaves the court when the victim gives their evidence (in which case the evidence can be read aloud to him when he returns or he may watch or hear it live via audio or audiovisual link). The victim's lawyer may also object to questions being asked about the victim's sexual behaviour on other occasions. Victim lawyers are drawn from the same pool as defence lawyers.

The victim may lodge a civil claim as part of the criminal proceedings and be represented for that purpose. The victim's lawyer will then have the opportunity to ask questions. Apart from that, the victim is not a party to the trial and cannot directly participate. (In 2006 Denmark rejected the adoption of the German model of the Nebenkläger.) Moreover, if the defence disputes the nature or quantum of the civil claim, then the claim is sometimes referred to the Public Victim Compensation Board, which pays out the victim and then attempts to recover the money from the offender. If the compensation claim is during the criminal proceedings, the victim's lawyer can appeal. At that point the claim becomes a civil proceeding, even though it began as a criminal proceeding, and the appeal is heard only by professional judges.

The Danish Ministry of Justice recently conducted a review of the position of victims within the criminal justice system, and concluded that nothing further could be done to assist them, at least without substantial expenditure.

APPENDIX 6: CRIMINAL PROCEDURE IN THE NETHERLANDS

This description was drafted based on observation and interviews during a visit to the jurisdiction in 2010, as well as a review of the relevant English-speaking literature. It will not reflect any legislative or procedural changes since that time.

INTRODUCTION

Criminal procedure is more classically inquisitorial than the German, Austrian, Danish or Swedish systems as we observed them. In more serious cases, it still relies heavily upon investigative judges to collect formal written evidence; and it largely relies upon that evidence at trial rather than requiring oral testimony. The pre-trial stage therefore has far greater importance than the trial stage, and problems with the Dutch system are accordingly being addressed by improvements to the pre-trial stage rather than changes to the trial process itself.

Like the substantive law, procedural law is codified and described in detail. However, it dates from 1926. Although there have been important alterations to and extensions of it since 1990, it has not been fundamentally overhauled. As a result, many aspects of the law of criminal procedure can now be found in the case law of the Supreme Court. This means that in some respects the Code is outdated or incomplete.

The criminal justice process involves the police, public prosecutors and the judiciary (both investigative and trial judges). These are organised on a territorial basis. There are 25 police forces, 19 prosecution districts, one national prosecution office responsible for investigating serious organised crime and four functional prosecution offices with responsibility for prosecuting criminal offences in a particular category that require special expertise. Police officers will generally deal with a relatively small number of prosecutors in a district. For example, in a prosecution subdistrict in Nijmegen police officers are likely to deal with only about three prosecutors.

Prosecutors and judges have a close relationship. They share the same training and career path, as in Germany and Austria. At the district level they usually occupy the same building and eat in the same canteen etc, although (unlike in Germany) they no longer informally discuss cases together before the trial.

However, judges are independent, have life tenure and are entirely separate from the Ministry of Justice. In contrast, public prosecutors are civil servants and are directly accountable to the Ministry of Justice. They are organised hierarchically, with a Board of Prosecutors-General at the top of the hierarchy. The Board sets general policy for the prosecution services. The Minister can give directions to the Board (although not to individual prosecutors). It is generally accepted that the Minister cannot direct the Board that a prosecutor ask for an acquittal or other particular outcome in a case that is going to trial. However, the Minister can direct that a prosecution be undertaken or not undertaken. It is very exceptional for this to occur, and if that is done Parliament and the court has to be informed. More generally, the Board and the Minister meet on a regular basis and there is frequent informal contact between the Chair of the Board and the Minister. As a result, the Minister can be questioned in Parliament both about

general prosecution policy and about individual prosecutorial decisions. The Dutch regard this as one of the core elements of the rule of law in the Netherlands.[74]

THE INVESTIGATIVE STAGE

The role of the police

When an offender is detected in the commission of an offence or an offence is reported to the police, the police are responsible for conducting the investigations into those offences. Although they are notionally under the supervision of the prosecutor when they do so, they generally conduct investigations without prior consultation with the prosecutor. Thus, for example, even in a "regular" rape case, the prosecutor is unlikely to be informed of the investigation until the police decide that it is necessary to do so. There are no fixed rules about this. Much depends upon local expectations and conventions. However there are instructions from the prosecutors' office to the police giving guidelines for investigating categories of criminal offences and the use of certain investigative methods.[75]

Most criminal offences that come to trial are prosecuted using only information collected by investigating police officers,[76] especially in the case of less serious types of offending.[77]

Complaints of sexual offences will go to a specialised police sex offences unit, or at least to trained police personnel. There will be a forensic examination of the victim immediately. The investigation will usually be in two stages. First, the victim will tell his or her story briefly at the time of the initial complaint. This is followed subsequently by a more formal interview where the victim makes a statement and says that he or she wishes to press charges. The two steps can be compressed into a single process in some cases. In more serious cases, victims will later be interviewed by the prosecutor and/or the investigating judge.

The police always refer the case to the prosecutor in three situations:

- when the case is a particularly serious or high profile case that is likely to attract public attention or criticism;
- when the police need to employ coercive or covert investigative strategies (see below);
- when the police wish to hold a suspect in their own custody after the expiry of the period allowed for the initial police arrest (see below).

If the police wish to search premises, they can enter the premises and secure the search scene. In some specific cases where there is urgency (for example, where the police have grounds to suspect that there are firearms in the house) they are able to undertake the

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74 Peter JP Tak *The Dutch Criminal Justice System* (Wolf Legal Publishers, Nijmegen, 2008) at 51-52.

75 Marc Groenhuijsen and Joep Simmelink "Criminal Procedure in the Netherlands" in Richard Vogler and Barbara Huber (eds) *Criminal Procedure in Europe* (Duncker & Humblot, Berlin, 2008) 373 at 415.

76 Ibid, at 44.

77 Ibid, at 47.

search on their own so long as they have obtained a warrant in advance from the prosecutor. Generally, however, either a prosecutor or an investigating judge needs to be present when the search is undertaken. Generally the presence of an investigating judge is required, but if there is a pressing need to undertake the search before an investigating judge arrives, it can be done under the personal supervision of either a prosecutor or a deputy prosecutor, on the approval of an investigating judge.[78] It follows that, whenever the police wish to undertake a search, the case needs to be drawn to the attention of the prosecutor, and the investigation from then on will be under the prosecutor's supervision.

Where the prosecutor is actively involved in the investigation, he or she should keep the victim informed of progress in the investigation.

Unlike Germany, the police are not under a legal obligation to investigate every recorded offence. They have a discretion not to investigate. However, as a result of European case law that requires serious crimes to be investigated and prosecuted, this discretion has reduced in the last 10 years. Its exercise is subject to instructions (as to the general policy on investigations) by the Board of Prosecutors General. Those instructions require that an investigation should generally take place where the offender is known, except where the case is trivial and did not cause danger, injury or damage. However, in practice investigations may not be undertaken in specific cases like family violence if a resolution and the provision of voluntary assistance is seen to be a better response.

Moreover, even if the police do investigate, they can resolve the case themselves without reference to the prosecutor by way of informal resolution – for example, an oral or written caution, a negotiated financial settlement or other victim-offender mediation. These are informal and not regulated. Even in sexual cases, the police will sometimes try to mediate and resolve the case themselves without reference to the prosecutor if the offence is regarded as not too serious or there is insufficient evidence to prosecute.

Police informal resolutions made after an investigation has been launched are not binding. In theory, the prosecutor can still intervene and take over the file with a view to prosecution.

The police may arrest a suspect for any offence where the offender is caught red-handed, or otherwise for crimes which are punishable by four years imprisonment or more. However, unless there is urgency (in which case the police officer may make the decision to arrest on his or her own initiative) the arrest must be sanctioned by a prosecutor, or by a senior police officer where obtaining an order from the prosecutor would cause undue delay.

Unlike in New Zealand, the purpose of an arrest is not to enable the offender to be charged and brought before the court. (The charge is laid at a later stage after the investigation is completed and the offender does not appear in court until the trial itself.) Rather, the initial purpose is to enable the interrogation of the suspect for the purposes of the investigation of the alleged offence. The initial interrogation is called the "verification interrogation" and is designed to ensure that the right person has been arrested, and that continuation of the arrest is justified. It is during this interrogation

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78 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 427.

that the arrested person will be informed of the reasons for his or her arrest (that is, the offence that he or she is suspected of having committed). The person is entitled to be represented by defence counsel during the verification interrogation, but in practice counsel is hardly ever present.[79]

The period of "police arrest" (which commences at the time when the arrested person arrives at the place of questioning) is six hours, not including midnight to 9am (i.e. up to 15 hours in all). During this period, the suspect may continue to be questioned. However, until very recently he or she was not entitled to be represented by counsel after the initial verification interrogation. This was changed by way of a legislative amendment as a result of the decision of the European Court of Human Rights in *Salduz v Turkey*,[80] which held that the lack of a right to legal representation was inconsistent with the rights of suspects under article 6 of the European Convention on Human Rights.

After the expiry of the period of police arrest, the suspect must either be released or taken into "police custody". Police custody can only be ordered by a public prosecutor or a senior police officer, and must contain a description of the suspected offence and the reasons why the order is necessary (e.g. the need for further investigations, including further interrogation of the suspect or interviews with witnesses). A police custody order may last for three days, with provision for this to be extended by a prosecutor for not more than an additional three days.

Questioning of suspects during the police arrest and police custody stages is controversial and the subject of many complaints from defence lawyers. Although suspects have the right to silence, they rarely exercise this right. Moreover, although the statement is not videotaped or audiotaped, and is generally a police construction of what they have said orally, it is often a crucial part of the evidence relied upon at the trial itself. The recent legislative amendment entitling suspects to legal representation may have the potential to change this, but it is not known how often this right is being or will be exercised.

The role of the prosecutor and the investigating judge in the investigation

As noted above, prosecutors may have the case referred to them by the police at the outset of the investigation, at any stage during the course of the investigation, or at its conclusion. When they are apprised of the case, they may take any of the following actions:

- They may do no more than exercise periodic (and perhaps minimal) oversight over the police investigation, including giving approval or making applications in relation to the use of coercive investigative measures, police custody or pre-trial detention.
- They may decide to prosecute on the basis of witness statements already provided to the police (see below).
- They may resolve the case by way of a "transaction" or "penal order" (see below).

They may conduct further investigations and/or take witness statements themselves.

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79 Tak *The Dutch Criminal Justice System*, above n 74, at 92.

80 *Salduz v Turkey* (36391/02) ECHR 27 November 2008.

They may refer the case to an investigating judge for the purpose of further investigation. This is called a "judicial inquiry", and may occur where the case is a high profile, complicated or serious one; where there are uncooperative witnesses who are refusing to attend police or prosecution interviews or answer questions; where interviews with witnesses in the presence of counsel are desirable so that any challenges to the nature of the evidence can be resolved before trial rather than at trial; or where the suspect has requested a "mini-investigation" (see below). Initiating the judicial inquiry does not end the criminal investigation, and the prosecutor may continue further investigation.[81]

The primary role of investigating judges is to prepare the case for trial. They are precluded from being a trial judge in the case. They may direct the police or the prosecutor to undertake further investigations. They may also take statements directly from the suspect or witnesses so that they do not need to be heard at the trial itself, although this is generally done only in more serious cases. They can require witnesses to attend for an interview. To this end, they summons witnesses, including complainants and suspects, to attend for an interview at a specified date and time. Generally this occurs within three months of the event or the commencement of the investigation, although in some cases a much longer period may have elapsed. Witnesses other than suspects must answer questions put to them. Suspects have the right to silence and may refuse to answer questions, although in practice they rarely do so.

Representatives of victim support groups with whom we spoke were critical of the way in which victims in sex offence cases were summoned to appear before investigating judges. They reported that victims are not consulted about the time that would be convenient for them to appear and receive a summons in the same way as a suspect, requiring them to appear at a particular time and place and telling them that they will be liable to imprisonment for failure to do so.

When victims and witnesses are being examined by an investigating judge, defence counsel are generally entitled to be present and to put questions to witnesses themselves after the judge has finished his or her questioning. However, they may be prohibited from being present if this may risk prejudicing the investigation. In this event, they may put in writing suggested questions that the investigating judge should ask, and have a right to be informed afterwards of the substance of the evidence that was taken and to request within a reasonable time that additional evidence be taken, or that additional witnesses or experts be called.

Defence counsel have an active role in the judicial investigation including putting questions to witnesses, putting forward alternative scenarios, putting statements to witnesses that conflict with their evidence, and asking for additional investigations or experts.[82] There is much more scope for involvement by defence counsel in a judicial investigation than in a pre-trial police investigation.[83]

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81 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 385.

82 Peter JP Tak "The Defence Lawyer's Role in Pre-trial Investigations" in Thomas Weigend, Susanne Walther and Barbara Grunewald (eds) *Strafverteidigung vor neuen Herausforderungen* (Duncker & Humblot, Berlin, 2008) 61 at 69-71.

83 Ibid, at 71.

The defendant does not have a right to be personally present when evidence from other witnesses is taken.

Questioning is undertaken in essentially the same manner as in other European jurisdictions. The judge begins by asking all of the questions that he or she wishes to put to the witness. Those questions cover both the prosecution and the defence cases. The prosecutor and the defence counsel then ask any additional questions that they think need to be put. There is no distinction between examination-in-chief and cross-examination in this respect. There are few rules of evidence, and the same rules apply to questions by prosecution and the defence.

The judges and the academic lawyer to whom we spoke argued that a major advantage of the Dutch system, by comparison with adversarial systems, is that both the investigating judge and the trial judge are required to look at the case proactively from both the prosecution and the defence perspective. As a result, although defence counsel are often lacking in competence, this does not matter as much as it does in an adversarial system. (A similar comment has been made to us in relation to the German system; some believe that if judges are doing their jobs well, defence counsel are more or less redundant.)

However, representatives of victim support groups to whom we spoke were critical of the way in which questioning by investigating judges is conducted. Adult victims are questioned in the same manner as other witnesses. No special training is given to investigating judges on the way in which victims in sex offence cases should be questioned. Questioning by defence counsel is sometimes hostile and aggressive, and there are no guidelines as to the way in which this ought to be controlled. While some judges intervene (for example, to prevent unduly repetitive questioning), others do not. Sometimes victims will have support people with them when they are questions, but there is no uniformity of practice; it depends upon the trial judge.

There are special procedures for child witnesses and other vulnerable witnesses such as those who are mentally disordered.

Child witnesses are questioned by a police officer who has been trained in child interviewing, and the interview recorded on CCTV. The investigative judge, prosecutor and defence counsel (but not defendant) watch the interview from another studio. The investigating judge takes suggested questions in advance from the prosecutor and defence lawyer. These are discussed with, and may be changed at the suggestion of, the police interviewer to ensure they are appropriate given the age and level of comprehension of the witness. After the police interviewer has gone through the agreed questions, the investigating judge will discuss with the prosecutor and the defence lawyer whether further questions are needed; if so, these are given to the police investigator to put. A full transcript is taken from the video interview and put into the case file. That record is then evidence at trial. The video record can be used in the trial and on appeal if necessary.

Many interviews with child victims take place before a suspect is identified and so no defence lawyer will be present. In those cases the Netherlands Supreme Court case law holds that, as an exception to the general rule that the defence must always have the opportunity to question a witness, the child witness is not to be re-interviewed later because of expected stress on the witness. This may clash with European Court of

Human Rights jurisprudence requiring there to be an opportunity for a defence challenge to the witness if the evidence of that witness is relied on as critical. However, some believe that it is sufficient for the defence to be able to counterbalance the impact of not being able to question the witness by playing the video interview and making points about demeanour etc from that.

Apart from these special procedures, the examination by an investigating judge is not audiotaped or videotaped. Rather, the judge's clerk takes a record of the questions and answers, and at the conclusion of the examination the judge then dictates a synthesised statement that he or she believes represents the substance of the evidence provided by the witness. The prosecutor and defence counsel may suggest additions or amendments. Since the statement is likely to comprise the evidence at trial, both the prosecutor and defence counsel need to be careful to ensure that the parts of the evidence relevant to their case are included. When that process is complete, the statement is given to the witness to read through and, if it is correct, to sign it.

The judge formulating the synthesised statement will be as factual as possible. He or she does not make any finding as to credibility. However, the record will indicate where the investigating judge has felt it necessary to give a warning to the witness about the risk of perjury, and may indicate aspects of the witness's demeanour - for example, that he or she was crying or was silent for a long period in response to a question. If the judge believes that the witness is lying, he or she will require him or her to take the oath; that signals to the trial court that there are concerns about the witness's credibility.

Generally not much time is allowed for each witness to be examined. As a result, neither the witness, nor the prosecutor and defence counsel, may have time properly to scrutinise the statement formulated by the judge before a witness is required to sign it. It may therefore be questionable whether the statement that forms the evidence at trial is always an accurate verbatim account of the information that the witness provides. Nevertheless, most of those to whom we spoke argued that, because the evidence of the witness is heard much nearer to the time of the alleged offence than is the case in a New Zealand trial, it is better quality evidence with a higher degree of accuracy.

Normally the prosecutor and investigating judge determine who is to be called to give evidence before the investigating judge. However, the defence may request that the prosecution call particular witnesses. Moreover, since February 2000 a suspect who is the subject of a pre-trial investigation by the police or prosecutor, or his or her defence counsel, has had the right to ask an investigating judge to carry out a specific investigation (called a "mini-investigation"). The scope of a mini-investigation is limited and is much narrower than a full judicial inquiry.[84] The suspect has to spell out the concrete investigations to be carried out (for example, the interrogation of a particular witness) and to specify why this should be done. The investigating judge can refuse all or part of the request. Further investigations can be requested after completion of the judicial inquiry up to and even during the trial, as well as during an appeal.[85]

The defendant is permitted by the prosecutor to inspect the case file on request. If there is a judicial inquiry, the investigating judge must give permission. Some documents can

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84 Tak "The Defence Lawyer's Role in Pre-trial Investigations", above n 82, at 71.

85 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 412.

be excluded in the interests of the investigation, but certain documents must always be made available. These include the report of the defendant's questioning, acts of investigation where the defendant was allowed to be present, and witness examinations, the content of which was already made known to the defendant verbally.[86]

Remands in custody

After the periods of police arrest and police custody have expired (15 hours and 6 days), or at any time during those periods, the prosecutor may bring the suspect before an investigating judge who can order a remand in custody for 14 days. Such a remand can be ordered if the alleged offence is of a designated type (notably an offence punishable by four years imprisonment or more) and the suspect is at risk of absconding or poses a serious danger to public safety.

If at the end of 14 days the prosecutor believes that continuing detention is required, he or she may request an order to that effect from a full bench of the court. As in other European jurisdictions, this application is not heard in open court. The suspect has an opportunity to be heard during the application. No formal charges are laid at this stage of the proceedings, although obviously the court is advised of the nature of the alleged offence. If the court orders continuing detention pending trial, that detention may not exceed 90 days. Moreover, it has to end if it is likely that the actual term of imprisonment (taking into consideration the provisions on early release) will be shorter than the period spent in pre-trial detention. In the majority of cases, the offender is released before the full term of pre-trial detention has expired.

Upon the expiry of 104 days (the initial 14 days' remand in custody plus a further 90 days), the prosecutor must either release the suspect or present the case to the court. Unless the case is ready for trial, it will be adjourned and the remand detention order will remain in force. Nevertheless, the order will be under continuing scrutiny by the court, and the fact that the duration of pre-trial detention for the presentation of the case to the court for trial is limited means that cases against detained suspects are prioritised for trial.[87]

THE DECISION TO PROSECUTE

Unless the police at the conclusion of the investigation decide to deal with the matter themselves by way of informal resolution (see above), they will refer the case file to the prosecutor for a decision whether or not to prosecute. The prosecutor may make the decision solely on the basis of witness statements provided to the police, or may first undertake further investigations themselves or refer the case to an investigating judge. The prosecutor will make the prosecution decision even if an investigating judge is involved.

In making the prosecution decision, the prosecutor is governed by a principle of expediency rather than (as in other European jurisdictions) a principle of legality. Under the principle of expediency, a prosecution should only be undertaken when that will be in the public interest. About 10 per cent of cases referred to the prosecutor are not prosecuted: 50 per cent of these for evidential reasons and 50 per cent for other reasons.

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86 Ibid, at 408.

87 Tak *The Dutch Criminal Justice System*, above n 74, at 95.

If the prosecutor does not lay a charge, he or she has three options:

- dismiss the charge altogether for evidential or other public interest reasons and take no action;
- impose a "transaction": a form of diversion that depends upon the consent of the accused and may have a number of conditions attached, including the possibility of payment of a fine to the State;
- impose a "penal order" in respect of offences carrying a maximum penalty of six years imprisonment or less: an order without intervention of the court, which signifies guilt, is regarded as a sentence and may be imposed without the offender's specific consent unless he or she objects.

The penal order is a recent innovation that may include the payment of money to the state or into a public fund to support victims; community work; suspension of a driving licence for up to 6 months; compulsory participation in a training course lasting not more than 180 hours; or individually designed rehabilitative conditions with which the offender must comply. It therefore parallels the more longstanding "transaction" procedure. The key difference between the two is that if the offender does not comply with an agreed "transaction", the case must be prosecuted; in contrast, a penal order may be enforced in the same way as a sentence of the court. Until 2012 the transaction and penal order will co-exist. After that the transaction procedure will be phased out so that only the option of the penal order will remain.

The prosecutor has the sole power to prosecute; there is no right of private prosecution. The defendant can note an objection in writing about the decision to prosecute to the district court. This process allows them to challenge the decision in a non-public setting. Judicial review of the decision to prosecute is fairly limited and in most cases it results in a decision by the judge that the case should proceed. [88] However the objection procedure is seldom used in practice.[89] Whether or not the defendant has lodged an objection to the district court, both he or she and the victim can appeal to the Court of Appeal against a decision to prosecute or not to prosecute.

The appeal by the victim may be on the grounds that the prosecutor has incorrectly applied the principle of expediency or that the decision is not in line with general prosecution policy. The Court of Appeal hears the complainant, prosecutor and alleged offender. It may dismiss the appeal, allow it and direct that the prosecution proceeds, or, more commonly, remit the case for further investigation. There are about 1200 victim appeals per annum but only about 10 to 15 per cent of these are successful.

If victims cannot afford a lawyer for this purpose, they can probably get legal aid. Victims in this context are defined quite broadly to mean "interested persons". In the case of hate speech, for example, a group of citizens has brought an appeal against a refusal to prosecute. However, it is unlikely that a victim support group would have standing to appeal against a refusal to prosecute in a sex offence case.

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88 Tak *The Dutch Criminal Justice System*, above n 79, at 48.

89 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 463.

Over the last five years, there have been prosecutors with an audit function in serious cases to check that the right decisions are being made.

Once a decision to prosecute is made, charges are laid in court, together with a case dossier. The case dossier is smaller than the investigating file, since it includes only evidence that the prosecutor regards as relevant to the case either for or against the accused. However, the case dossier may still be substantial in some cases, particularly if intercept material is included.

THE TRIAL STAGE

The trial court

All offences at first instance are dealt with by district courts. There are 19 such courts, with 61 subdistricts called the cantonal sector.

Minor offences (generally those where the police or the prosecutor has offered an informal diversion or settlement that has not been accepted by the offender) are dealt with by a single cantonal judge. The judge imposes sentence orally immediately at the conclusion of the trial.

More serious offences (where the prosecutor is requesting a sentence of more than one year's imprisonment) are dealt with by a bench of three judges. Other offences that are more serious than those that can be tried by a single cantonal judge (for example, where a sentence of less than 12 months' imprisonment is being sought) are dealt with by a single judge of the district court. There are also specialist courts to deal with economic and environmental crimes and offences by juveniles.

There is no jury system and no participation by laypersons in the trial process. However, not all judges are professional judges. Lawyers, academics and others with a law degree and with knowledge and experience of the criminal justice system may be appointed as substitute judges either at first instance or at the appellate level. They sit on a part-time basis, for which they receive a small remuneration.[90]

In principle, criminal trials are public and any member of the public can attend. The trial can be closed to the public for certain special reasons. Criminal trials involving minors are conducted in a closed court.[91]

The charges

The court cannot modify the charges that the prosecutor has laid before the court, but during the trial the prosecutor may seek to have the charges changed, including increasing them if aggravating circumstances are discovered. Before making the change, the court must hear from the defendant and the defence lawyer on the proposed change. Any changes cannot relate to different criminal conduct.

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90 Tak *The Dutch Criminal Justice System*, above n 79, at 56.

91 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 398.

The plea

As in other European jurisdictions, there is no provision for a defendant to enter a guilty plea. All cases must proceed to trial. Conviction may not rest solely upon the evidence of a single witness or the defendant's confession.

The conduct of the trial

In more complex criminal trials (those that might take more than one day or in which several witnesses have to be heard, or other investigative tasks have to be performed), there may be a so-called scheduling hearing, or hearing in advance (regiezitting). This is an informal, preliminary procedure, not codified, in which the judge, prosecutor and defence exchange intentions about the organisation of the trial, and the prosecutor and defence identify which issues they would like to focus on in the proceedings. They can also state any further investigation that is still necessary and which witnesses they would like to appear. The procedure reduces adjournments and makes better use of the hearing time available.[92] Such hearings are usually public (other than in certain specific circumstances).

The court hearing proper commences with the identification of the accused by the presiding judge and the reading of the charge by the prosecutor. The accused is reminded of his or her right to remain silent.

However, although the accused has the right to be present at trial, he or she is not obliged to appear unless the court directs this. The case may therefore be tried in the absence of the accused, so long as he or she was properly summoned to appear. If an absent defendant is represented by counsel who is explicitly authorised by the accused to act on his or her behalf, the trial is considered to take place in the presence of the accused.

As in other European jurisdictions, an accused who is present at the trial goes first in giving evidence. He or she is asked questions by the judge, but may refuse to answer on a question-by-question basis. The defendant cannot give evidence on oath and is not required to tell the truth. It is uncommon for the defendant to remain silent and refuse to answer all questions.

After the accused has given evidence, any other witnesses who are to give oral evidence are called. There is no formal distinction between prosecution and defence witnesses in this respect.

Witnesses give evidence on oath. Their examination is usually combined with the reading by the presiding judge of the statements they made to the police, the prosecutor or the investigating judge. The presiding judge begins by putting questions that cover both prosecution and defence cases, and the prosecutor and the defence counsel then put any additional questions. There is no distinction between examination-in-chief and cross-examination; and (apart from an overriding requirement of relevance) no formal rules of evidence.

Questioning by defence counsel can be hostile and aggressive, and some judges are reluctant to intervene to prevent this. However, if lawyers become too hostile, judges

92 Ibid, at 438.

can require that their questions be reduced to writing first and if necessary put through the judge. Moreover, there are two reasons why cross-examination such as occurs in the New Zealand system is uncommon. First, because the judge begins with the questioning and has overall control of the case, a defence counsel who then asks a large number of questions and who challenges the reliability of the witness is implicitly suggesting that the judge has not done an adequate job. Secondly, because there are no formal rules of evidence, questions do not need to be asked in the roundabout way that sometimes occurs in an adversarial system, and evidence can be given in a more narrative fashion.

The defendant can be excluded from the courtroom while a witness is examined (for reasons such as intimidation). On such occasions defence counsel remain present and are still permitted to question the witness. The defendant is allowed back immediately after the witness has given evidence, and is given a transcript of the content of the examination and an opportunity to challenge the evidence.[93]

As in Germany, the trial operates on the basis of the principle of immediacy (onmiddellijkheid, Unmittelbarkeit), which denotes a preference for live testimony over written statements, but in practice this ideal has been restricted.[94] Although the Code of Criminal Procedure, as in other European jurisdictions, requires that the decision at trial be based upon evidence directly presented to the court by witnesses, this principle has been substantially diluted by Supreme Court decisions that have allowed hearsay evidence to be used instead. As a result, the reality now is that there is a presumption against the hearing of oral evidence. With the exception of evidence from the accused, the trial will normally involve only consideration of the documentary record including records of interviews by police, prosecutors and investigating judges and the videotaped statements of child witnesses or victims, plus video recordings of surveillance etc. Most unsworn witness statements can be used, "provided that they are disclosed during the trial and the court gives the parties the opportunity to comment and discuss the contents and the way in which the examination was conducted".[95]

It is the initial responsibility of the prosecutor to determine whether any witnesses should be called to give oral evidence. If the defence thinks that it is in the interests of the defendant for a particular witness to give oral evidence, it can ask the prosecutor to summon that witness. If the prosecutor refuses, the defence can ask the judge to direct that the witness be called. However, the judge will give such a direction only if he or she believes that it is *necessary* to do so in the interests of justice.

There are three particular situations in which the oral evidence of a witness may be required:

- If the witness has been interviewed by the police, the prosecutor or an investigating judge without any ability for the defence to challenge that evidence (for example, because the defendant had not been identified as a suspect at the time of the interview), the defence has the right to put questions to the witness (unless the witness is a child – see above).

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93 Ibid.

94 Johannes F Nijboer "Current Issues in Evidence and Procedure – Comparative Comments from a Continental Perspective" (2009) 6(2) International Commentary on Evidence Art 7 at 8-9. Technical devices such as closed circuit television do not contravene the principle of immediacy.

95 Ibid, at 9.

- If there is an inconsistency between the police statement and the evidence presented to the investigating judge that is adverse to the accused, the police statement cannot be used unless the witness gives oral evidence at trial or the matter is sent back to the investigating judge for the inconsistency to be resolved. Thus, if the inconsistency is identified from the case dossier before the trial, the presiding judge may direct that the witness be called to give oral evidence.

- If there is a witness who has not given testimony earlier, the trial court may hear the witness or may suspend the trial and require the investigating judge to interview the witness.

More generally, it has become more common for both judges and defence counsel to seek to have a witness – most commonly the victim - who has given critical evidence before the trial called at the trial. European Court of Human Rights jurisprudence encourages judges to see and hear the witnesses themselves. Some victims also prefer to give evidence at the trial so that the testimony is in their own words rather than by way of the investigating judge's summary. However, the prosecutor is influential in the decision; we were told that in sex offence cases the judge will generally grant a defence request that the victim be heard orally unless the prosecutor objects, and the prosecutor does not always take the victim's interests into account in deciding whether to object.

Notwithstanding the increase in the number of witnesses being heard orally, there is still an overwhelming reliance upon documentary evidence. Indeed, if the trial court determines that more than a couple of witnesses need to be heard orally, it generally prefers instead to adjourn the trial and refer the matter back to the investigating judge. This is regarded as more efficient and effective: only one judge rather than three needs to listen to the evidence; the defendant is not present so that there is less pressure on the witness; and there is no unexpected pressure on the time of the trial court. When this occurs, it is possible for one of the trial judges to be appointed as the investigating judge for the purpose of taking the evidence that the trial court requires.

The result is that trials are generally very short. Most last for only an hour or two, and it is rare for a case to last for more than a couple of days. The trial court is largely concerned not with receiving evidence, but rather with assessing the evidence already presented to it in the case dossier and determining the legality of the way in which it was collected.

The reliance upon documentary evidence can cause difficulties for trial judges. The sheer size of the case dossier may mean that trial judges lack the time to read it all before or at trial. In the lower court, they get significant guidance from their law clerk, who reads the dossier and selects for them the evidence that the clerk regards as relevant to the issues. However, most judges will conscientiously try and read the whole case dossier, and even in the case of large dossiers will generally read about 80% of it (unless there is a huge volume of intercept material).

A weakness of the paper-based nature of the trial is that it contains insufficient checks and balances. Two examples will suffice to demonstrate this.

First, in more minor cases where an investigating judge has not taken witness statements, the documentary evidence will primarily comprise statements made to the police. Those statements are often the subject of critical comment by defence counsel (see above, in relation to statements made by defendants). It is not always clear how

they were collected and constructed. There is no control over the way in which questions are asked. Statements to the police are neither audiotaped nor videotaped, and there is no way of checking the accuracy of the record. There is a proposal that every statement will be audiotaped, but that has not yet been accepted or implemented. Defence do not get access to police material early enough. In fact, they are entitled to the whole case dossier only 10 days before the trial, although they will see most of it well before then. In any case, it is often difficult for them to identify questions that need to be asked simply from an examination of the paper record, as a result of which it will be difficult for them to make a case for the evidence of a witness to be heard orally.

Secondly, what the law clerk selects as the relevant evidence to be considered by the judge at trial is not recorded, and is not shown to the prosecution and defence, so that there is great difficulty in lodging an appeal on the basis that the judge has not looked at all of the relevant material.

After the evidence has been presented, the prosecutor makes a closing address summarising the evidence, indicating what offence should be found proved and requesting the imposition of a particular sentence (based on extensive sentencing guidelines set by the Board of Prosecutors General). The defence counsel then makes a closing address, and the accused personally has the last word.

As in other European jurisdictions, there is no distinction between the trial and sentencing stages. Thus all information relevant to sentence is presented during the trial itself. That is why the closing addresses by counsel focus on sentence as well as verdict. However, the result is that, if the accused is denying guilt, he or she cannot effectively put forward a plea in mitigation of sentence; this can only be done on appeal.

The verdict

A guilty verdict must be based on admissible evidence which is corroborated in some way. Conviction may not rest solely upon the evidence of a single witness. However, this is interpreted very flexibly. For example, an accused's denial of guilt may be used as corroborating evidence if his or her statement admits to anything that implicates him or her - for example, presence at the scene.

Contested issues of fact, including issues of credibility, have to be resolved by the trial judge. In most cases the judge is reliant entirely on the papers and will not have seen the witnesses. Conflicts between witnesses have to be resolved by weighing what the witness has said against other evidence. The demeanour of the witness may be mentioned in the investigating judge's synthesis of the witness's statement, but generally demeanour carries less weight than it does in the New Zealand system (and indeed in adversarial systems generally).

The court in considering both verdict and sentence may take into account the prior criminal record and other background information relating to the accused, since this will be included in the case dossier.

The trial judge must provide a written judgment within 14 days. Most of this is in standard form. The judgement typically does not go through all of the evidence; it simply outlines the evidence relied upon and addresses how conflicting evidence relied upon by

the defence, or disputed evidence, has been assessed. The verdict must be presented in open court.[96]

Where there is a multiple-judge panel the decision is made by a simple majority. However, no minority judgments are given and the judgment must not indicate whether the verdict is unanimous or by a majority decision.

APPEALS

Both prosecution and defence may appeal against the decision of the trial court. Typically, the Court of Appeal may decline to deal with an appeal if no grounds for the appeal are specified. Moreover, they always ask at the beginning of an appeal hearing what the appeal is about. However, regardless of the ground for an appeal, the court will almost always examine the whole case. Even if the appeal is specified to be only against the sentence imposed, the court will deal with the whole facts (although on a much briefer basis than would be the case if the appeal were against conviction).

The Court of Appeal may acquit, convict or just vary the sentence. It may conduct a re-trial, including requiring further evidence from witnesses or remitting the matter to an investigating judge. In a re-trial the Court of Appeal will usually hear evidence from the defendant.

VICTIM ISSUES

General

Guidelines on the treatment of victims were introduced including the 'instruction on victim support' of 1999, which charged the police and judiciary with three main duties towards the victim:[97]

a) Giving the victim fair and personal treatment;

b) Providing clear and relevant information as quickly as possible;

c) Making best use of the options for compensation for damages in criminal cases.

Access to information

Since the Criminal Injuries Compensation Act 1993, which gave victims the right to join proceedings in order to claim financial compensation from the offender, victims have been able to access the investigative file and the case dossier for the purposes of properly preparing the claim. As a result of a recent change, however, victims are notionally regarded as parties in the case, and have such access, whether or not they are claiming compensation, unless this is regarded as inappropriate (for example, because it might prejudice the investigation or the trial).

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96 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 398.

97 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75, at 450.

The victim has a right to be present during the trial, even when he or she is being examined as a witness.[98]

Compensation claims

Although there is a State-funded Criminal Injuries Compensation Fund to which victims of a violent crime can apply for compensation, under the Criminal Injuries Compensation Act 1993 victims can also join criminal proceedings as a party for the sole purpose of claiming financial compensation from the offender. They are not assisted by the prosecution in bringing this claim. However, they may be assisted by a lawyer or by some other person acting on their behalf. Since 2007, they have also been entitled to means-tested legal aid for this purpose in serious cases.

Victim impact statements

The investigating judge does not explore victim impact matters unless they are relevant to the definition or proof of the offence. However, since 2005 the victim has had a restricted right to present a victim impact statement at the trial itself. The victim may speak about the effects of the offence on them, but is not permitted to make normative comments, for example about suitable punishment for the accused.[99] The presentation of the statement is dependent upon the preference of the court: sometimes it is written, sometimes it is oral and sometimes it is written and read out loud. It does not include details of the emotional impact on the victim. It is not generally referred to when reasons for the sentence are given.

Victim support centres

There are local victim support centres that are funded by the Ministry of Justice through the National Victim Support Organisation. These centres provide financial and material help and direct victims towards the compensation fund. They give particular attention to victims of sexual offending and other violent offending. Police usually refer the victim to the victim support centres. The centres also provide information about the criminal case and the offender.[100]

98 Nijboer "Current Issues in Evidence and Procedure – Comparative Comments from a Continental Perspective", above n 94, at 12.

99 Groenhuijsen and Simmelink "Criminal Procedure in the Netherlands", above n 75 at 437.

100 Tak *The Dutch Criminal Justice System*, above n 79, at 109-110.

APPENDIX 7: FRENCH CRIMINAL PROCEDURE

This description was drafted based on translated primary and secondary sources and has been peer reviewed by a French lawyer and an academic. It is current to mid-2011.

INTRODUCTION

The French describe their system as a mix of the inquisitorial and adversarial models. To the extent that professional judges (either the prosecutor (*procureur*) or the investigating judge (*juge d'instruction*)) will exercise some degree of oversight/control over the activities of the police, participate in the investigation, and take the decision to prosecute, then the system can be described as falling squarely within the inquisitorial tradition. Similarly, the fact that the case revolves around a written case dossier which is built up in the pre-trial phase and is used by the trial and appellate courts is consistent with the inquisitorial model.

However, the practice sometimes strays from the model. For example, there are many cases where, largely for resourcing reasons, the police exercise significant autonomy in the investigation and preparation of a case for trial. In a similar vein, the degree of judicial control over the investigative stage is variable due to the police not always notifying the *procureur's* office of all offences or failing to notify in a timely fashion.

THE INVESTIGATIVE STAGE

Investigations usually commence with the police making enquiries to identify the suspect (the *enquête*). A police officer may detain a person (placing them in *garde à vue*) where there is a reasonable suspicion that he or she has committed or attempted to commit an offence punishable by at least one year of imprisonment and the officer considers the detention necessary to the investigation.

Upon becoming aware of an offence, the police are required to notify the *procureur*, although in practice they do not always do so. The victim might, however, take the matter to a *juge d'instruction* in the event of the police or the *procureur* not proceeding to investigate.

Garde à vue may last up to 24 hours and the *procureur* may authorize extension of the period of detention by up to another 24 hours. The oversight of the *procureur* is the primary guarantee of proper treatment for the suspect. In some more serious cases (organized crime, drug trafficking and terrorism), the *garde à vue* may be extended for two additional 24 hour periods. The is done by the *juge des libertés et de la detention* or the *juge d'instruction* at the request of the *procureur*. The suspect must be examined by a doctor who will advise whether or not the individual can be held in custody for another 48 hours. In such cases, the right to see a lawyer (discussed below) may be delayed for up to 72 hours (depending on the nature of the offence).

Once in *garde à vue* the suspect must be informed, in language that he or she understands, of the nature and date of the offence for which he or she is being held, his or her rights to inform someone of the detention, to be examined by a doctor, to see a lawyer, and the right to make a statement, to answer questions, or to remain silent. He or she must also be told of the permitted length of the detention and be given the

assistance of an interpreter or sign language interpreter if necessary. It was previously the case that the suspect was allowed to see a lawyer for 30 minutes from the start of the detention, but under recent amendments to the law which came into force on 1 June 2011, the lawyer may be present during the entire *garde à vue*, including during interrogation of the suspect. The lawyer must see a copy of the paperwork placing the suspect in *garde à vue* and any statements made by the suspect. In most instances there will only be a written record of the interview. Only with the most serious cases is there any requirement for videotaping of interviews.

Once the *procureur* is notified of an offence, he or she is responsible for directing the activities of the police, overseeing any police detention and interrogation of suspects held in *garde à vue*, deciding whether the investigation should proceed, or whether an alternative to prosecution (such as mediation) is appropriate. In a minority of cases (just 4%) the *procureur* refers the case to the *juge d'instruction*, who possesses wider powers of investigation.

Different powers of investigation and procedures will apply depending on the classification of the offence in question. Offences are classified according their gravity as a *crime* or a *délit* or a *contravention*. The latter are minor offences.

For both *délits* and *contraventions* alternative procedures may be available for minor offending. *Médiation pénale* is a procedure in which the offender and the victim negotiate a solution with the assistance of a legal mediator. With *mesures de classement sous conditions* the offender will be reminded of the law or required to make reparation in some way. Where the offence is not serious enough to justify the appearance of the offender in court but is considered too serious for the individual to benefit from the *médiation pénale* or the *mesures de classement sous conditions*, the *composition pénale* procedure might be followed whereby the prosecution will be discontinued if the offender pays a fine, completes community work, or loses his or her licence for a period.

In the case of a *crime* the involvement of a *juge d'instruction* is mandatory, whereas they are only involved in the investigation of a *délit* at the request of the *procureur*, or if it is a *flagrant délit.* An offence will be *flagrant* where the police become aware of it in the course of it being committed, where it has very recently been committed or the suspect is being freshly pursued, or where a person is found in possession of objects or indicia leading to suspicion that he or she took part in a *crime* or *délit*.

While there is a requirement for the *juge d'instruction* to be involved in the investigation of certain types of offences, there is no particular time that that must occur. The matter might not be handed to the *juge d'instruction* until the preliminary investigation is complete, or he or she may play a more substantial role in consultation with the police (and sometimes the office of the prosecutor) in determining the direction of the investigation. The *juge d'instruction* is obliged to assume responsibility for the case upon being requested to do so. However, if he or she is unable or unwilling to carry out certain acts the police may be authorised to do so by way of a *commission rogatoire*.

There is some tension between the theory of a system which conforms to the inquisitorial model of "supervised investigations" with a judge in control of the investigative stage and the way in which most investigations are carried out. In practice, the police tend to enjoy considerable autonomy in investigations, even where a

procureur or *juge d'instruction* is seized of the matter. This is particularly so in larger centres where the judicial workloads tend to be very heavy.

Except in the most important or serious cases, the *procureur* or *juge d'instruction* will tend to delegate investigative functions to the police. During the *instruction* this must be done formally by the *juge d'instruction* by *commission rogatoire* which may be cast in specific terms or (more usually) in very general terms. Searches of dwellings and interception of communications must be authorised by the *juge d'instruction* (except in the case of *flagrant* offences where the police have wider powers, although subject to the control of the *procureur*). In practice, these powers will usually be carried out by the police. A few things may not be delegated, including the issuing of arrest warrants and formal questioning of witnesses.

In matters that will go to the *tribunal correctionnel*, the *procureur* will tend to rely on the witness statements taken by the police. He or she will, however, check that the dossier is complete and may order the police to investigate further if necessary.

While the *procureur* tends to oversee what is essentially a police investigation, the *juge d'instruction* is personally responsible for the *instruction* inquiry. Accordingly, the system can be said to move somewhat closer to the model of a "supervised investigation" once a *juge d'instruction* is involved. Once the *juge d'instruction* becomes involved the *procureur* ceases to have any oversight responsibilities in relation to the case until such time as the file is returned by the *juge d'instruction* (although he or she may suggest lines of investigation etc in the same way as the defence and the victim). The *juge d'instruction* is obliged to inquire into both guilt and innocence. The *juge d'instruction's* role is defined by the "*requisition*" from the *procureur*, meaning that if offending other than that referred by the *procureur* is suspected, there will need to be fresh instructions.

The crucial point in the pre-trial phase is the *mise en examen* – the point at which a person formally becomes a suspect at law. At this point the suspect's rights become stronger, particularly the rights to legal representation and to silence. However, the decision to formally investigate a person does not necessarily lead to prosecution. In 2004, approximately one third of the cases handled by *juges d'instruction* did not result in a prosecution.

In addition to the ability of the police to detain a suspect for limited periods of time, pre-trial detention may also be ordered after the *mise en examen*. Historically, such pre-trial detention was ordered by the *juge d'instruction* but this role was recently passed to the *juge des libertés et de la détention*. A suspect may only be remanded in custody after a contested hearing. While pre-trial detention is at law permitted only for certain reasons, France's pre-trial detention rates are some of the highest in Western Europe (the source of much litigation before the European Court of Human Rights).

While the police can obtain a forensic report, such a report commissioned by the *juge d'instruction* has greater evidential value. If the *juge d'instruction* commissions a report, the accused may take it to his or her own expert and if there is any doubt about the original report, he or she can ask the *juge d'instruction* to order a further expert report. The accused has a right of appeal against a refusal by the *juge d'instruction* to do so.

During an investigation by the *juge d'instruction* lawyers for all parties (including the victim) have the right to attend or at least see the results of any questioning of witnesses. They may also suggest questions to be put to witnesses.

The *juge d'instruction* can require the defendant to attend at his or her office for questioning. This may happen many times during an investigation as new evidence is obtained and the defendant's response is sought. The defendant is required to be notified on his or her first (formal) appearance before the *juge d'instruction* that questioning can only then proceed with the defendant's consent, which consent is required to be given in the presence of the defendant's lawyer. Since 2000 the *juge d'instruction* is also now required to notify the defendant that he or she may make any statements, be questioned or remain silent. The *juge d'instruction* is not required to caution the defendant on subsequent appearances before him or her.

The material produced from each session of questioning before the *juge d'instruction* is written up and signed by the witness. Comments may then be submitted by any party on what has been said or on any questions not asked, which forms part of the case dossier.

The defence can also ask the *juge d'instruction* to interview witnesses. There is no right of appeal from a refusal to interview a particular witness but apparently, in practice, *juges d'instruction* will always do so in cases involving doubt. The defence will usually identify any witnesses helpful to their case or raise any issues they have with the evidence at this stage, as any attempt to raise new evidence at trial is likely to attract judicial criticism and result in an adjournment so that the witness can be interviewed.

Interviews of witnesses may be conducted by the *juge d'instruction* personally or they may ask the police to do it (not necessarily an officer who was involved in the investigation). When the *juge d'instruction* questions the suspect, he or she is entitled to have a lawyer present (unlike the earlier stage of questioning by the police).

Where a *juge d'instruction* has investigated a case, he or she will produce a report with a view of what should happen to the case and instruct the *procureur*.

At the end of the instruction phase the lawyers for the accused and the victim will be given an opportunity to examine the case dossier. Having had an opportunity to examine the case dossier, it is open to the accused's counsel to make representations before the decision as to whether the case should proceed.

THE DECISION TO PROSECUTE

The *procureur* generally makes the decision to prosecute even in cases where the *juge d'instruction* has been involved, although the *juge d'instruction* may send the case to trial against the wishes of the *procureur*. The decision of the *juge d'instruction* in such cases may be appealed.

In theory, the *procureur* enjoys a complete discretion as to whether or not to initiate criminal proceedings, which contrasts strongly with the position in other European civil law jurisdictions (with the exception of Belgium) where prosecution is, at least in theory, mandatory and there is no such discretion. However, in practice, prosecutorial discretion is limited by reviews of individual *procureur*'s decisions by hierarchical

superiors. It is, in theory at least, further limited by the ability of the victim to constitute him or herself *partie civile* and attempt to provoke a prosecution.

If the *procureur* decides that the case is to proceed, he or she will commit the defendant for trial directly, either at a future date or immediately under the rapid trial procedure *comparution immediate*. In potentially serious cases, the *procureur* may treat the offence as a *délit* rather than a *crime* and send the case for hearing in the *Tribunal correctionnel* (a process known as "*correctionnalisation*") in order to avoid the lengthy *instruction* process and trial at the *Cour d'assises*. The *procureur* may also decide not to proceed further with the case.

There are also a range of alternatives to prosecution available to the *procureur*, including a caution, dropping the case on condition (e.g. of treatment), requiring an offender to regularise his or her situation (e.g. by getting a driving licence), reparation or mediation.

There are also some more formal alternative options which are known as "penal composition". For example, a penal fine might be imposed, an offender might be asked to surrender his or her licence or undertake unpaid community work for a specified period. If an order for penal composition is made, it must be in writing and signed by the prosecutor. The unambiguous consent of the offender is required and the decision must be validated by a judge. If the offender completes the obligation he or she has undertaken, the *dossier* will be archived.

In all cases of diversion, the *procureur* is required to refer the victim to a victim support agency for advice and help.

Even where the *procureur* decides not to initiate proceedings and no diversionary measures are taken, the *dossier* must be archived.

THE TRIAL PROCESS

Depending on the seriousness of the offence, the trial will take place before differently constituted courts. The *Tribunal de police* comprises just one judge, the *Tribunal correctionnel* a bench of three judges (although in certain situations listed in the code of procedure the court will be comprised of just one judge), and the *Cour d'assises* is a jury of nine sitting with three judges.

In cases before the *Cour d'assises* the judges will have studied the case dossier prior to trial and the presiding judge will have the dossier on the bench throughout the trial. The jurors have no access to the dossier.

There are no guilty pleas as we know them. The court must be satisfied of the accused's guilt. However, since 2004 there has been a procedure of plea bargaining whereby the defendant will appear in court following a prior admission of guilt that may only be made with the assistance of a lawyer. The presiding judge reviews the genuineness of the facts and their legal classification before registering the declaration of guilt made by the defendant and the penalty suggested by the *procureur*. The judge cannot alter the suggested sentence but must accept or reject it. The procedure is only available in respect of cases with a maximum sentence of five years imprisonment.

The presiding judge conducts questioning based on the case dossier. Only key witnesses are heard orally in most cases. The accused is questioned first and has no choice about whether to be questioned, although he or she may remain silent. Questions may cover matters that would be inadmissible under our laws of evidence and are usually directed to having witnesses confirm for the court what the witness said to the police and to the *juge d'instruction*.

Any experts are usually appointed by the *procureur* or the *juge d'investigation*. However, the presiding judge has the power to require that further investigations be undertaken (including the obtaining of (further) expert evidence) before or during the trial.

The *procureur* and lawyers for the defence and victim may seek to question witnesses with leave of the presiding judge. In the *Cour d'assises* the other two judges and the jurors may also ask questions, but in fact this rarely occurs.

After oral evidence has been heard, the *procureur* will address the court elaborating upon the evidence and usually requesting a particular punishment. The defendant's lawyer will be heard next, usually on issues of criminal liability and sentence. Any lawyer for the victim may also give a closing address.

A majority of two-thirds is necessary for conviction in the *Cour d'assises;* that is, eight of the 12 judges and jurors.

The trial court imposes the sentence at the conclusion of the trial. The *Juge de l'application des peines* will deal with the implementation and rectification of any sentence that is imposed.

After the presiding judge has delivered the court's decision, the court will deal with any issue of compensation to the victim.

A conviction in the *Cour d'assises* may be appealed to a second *Cour d'assises* (the *Cour d'assises d'appel*) where the appeal will be heard by way of a retrial. There is a right of appeal to the *Cour d'appel* from the *Tribunal de police* and the *Tribunal correctionnel*. An appeal takes the form of a retrial based on the case dossier and issues of conviction and sentence based on points of law or fact may found an appeal. Actions for review of decisions made by the trial court on a point of law may be taken in the *Cour de cassation*. There are also some rights of appeal for the *partie civile* where a verdict has affected their civil interests.

There is a process to deal with potential miscarriages of justice whereby the *Cour de cassation* may in certain circumstances order a "*revision*" by ordering an *instruction* with a *commission rogatoire* given to the police to investigate the new facts and produce a report.

ROLE OF THE VICTIM

The victim enjoys a more formal status and role within the investigation and trial phases than in New Zealand.

The preamble to Criminal Procedural Code contains a reference to the duty of the judiciary to guarantee the rights of the victim throughout the criminal process, together with specific requirements in the code to offer guidance and assistance to victims.

The victim may constitute him or herself as a party to the case (*partie civile*). The *partie civile* usually becomes involved at the investigative stage of the case. The object of this "civil party procedure" is compensation, restitution, and legal costs. However, it does provide the victim with the ability to take an active role throughout the proceedings.

There is the further advantage for victims in the relative simplicity, speed and cheapness of using the criminal process to obtain compensation as compared to a civil action. Legal aid is available to victims who chose to constitute themselves a *partie civile*. Discovery and the obtaining of evidence is easier than in a civil action and the victim is relieved of the burden of leading the conduct of proceedings while still being able to play a meaningful role.

The right to be included in the proceedings as a *partie civile* exists only for those victims who have suffered injuries arising from the commission of serious or middle-range offences. The concept of "injury" is a broad one and includes material, physical and moral damage.

Where the *procureur* decides not to take proceedings, the victim may have the matter investigated by a *juge d'instruction*, although he or she may be required to deposit a sum of money to cover the costs of the proceedings and may be exposed to a claim for damages if the accused is not convicted.

The *partie civile* may claim compensation (*dommages-intérêts* or *dommages et intérêts*) in the criminal proceedings for loss and damage caused by the accused in the commission of the offence, relying on the evidence collected pre-trial and on any further evidence adduced at the trial. Indeed, the *partie civile* may seek to have the *juge d'instruction* gather evidence directed to the claim for compensation and include it in the case dossier. The level of compensation is the same as would be awarded in independent civil proceedings. Any compensation awarded is payable by the state which then can seek reimbursement from the accused.

French law has no concept of a private prosecution. It is the State alone, acting through the prosecutor that has the exclusive right to initiate criminal proceedings. However, where no prosecution has been instituted, the victim may activate proceedings directly by instructing the *juge d'instruction* and thereby requiring an investigation. Also, the victim may institute civil proceedings for damages in the relevant criminal court, which has the effect of automatically triggering a parallel criminal prosecution thereby obliging the *procureur* to act.

A *partie civile* has the same rights as the defence in relation to requesting the *juge d'instruction* to investigate certain matters and put particular questions to witnesses.

At trial, the *partie civile* may seek to elicit evidence and make submissions relevant to liability and to sentence.

In French law, the families of primary victims, those claiming interests through victims (eg, insurers, trade unions, employers) and various special interest groups (eg, returned servicemen, conservationists, anti-discrimination groups, associations concerned with sexual violence or violence against children) may be constituted as a *partie civile*.

ISSUES AND RECENT DEVELOPMENTS

The lack of clear distinctions between the roles of the police, *procureur*, and the *juge d'instruction* is a common cause of complaint. While many see the integrity of the investigative stage depending heavily on the impartiality of the *juge d'instruction*, the numbers of cases that are overseen by the *juge d'instruction* has been declining steadily (from 20% in the 1960s to 8% in the 1980s to a current level of less than 4%).

A reform Commission in 2009 recommended the abolition altogether of the office of the *juge d'instruction* with the *procureur* taking responsibility for all investigations, even the most serious and sensitive. Due to controversy, the proposal was postponed for further consideration in 2011. It is still unclear what course the French Government will take.

Despite some reforms in the past 10 years granting greater rights to suspects, the lack of due process rights also remains an issue. It has led to a relatively high rate of condemnation by the European Court of Human Rights, about half of which cases relate to criminal procedure. These condemnations have tended not to relate to one-off cases but rather to issues that are endemic in the French system, including police brutality, failure to afford rights to suspects in police custody, and excessive use of pre-trial detention.

Based on European human rights jurisprudence, the *Conseil Constitutionnel* ruled in July 2010 that the *garde á vue* (the legal regime for the detention and interrogation of suspects by the police) is contrary to the Constitution. Lawyers had in recent times enjoyed some limited success in challenging aspects of the *garde á vue* before the ordinary criminal courts on the basis that provisions of Criminal Code governing access to legal advice were inconsistent with European case law. Several aspects of the *garde á vue* process were considered by the *Conseil Constitutionnel.* It concluded that the combination of these factors, especially the increasing and different circumstances in which suspects are being detained and interrogated, meant that procedure did not contain appropriate safeguards. As a result of this decision a number of changes to the code of procedure were made, which came into force on 1 June 2011.

France has tended to justify its minimalist approach to due process rights on the basis that the defendant's interests will be protected through criminal investigations being supervised by judicial officers (either the *procureur* or the *juge d'instruction*).

However, there are questions about the extent to which this happens or is possible with the *procureur*. For example, while the *procureur* is responsible for oversight of any police detention, he or she will almost never attend the police station to check on a suspect or whether his or her rights are being adequately respected. Any extension of detention will usually be done by way of a telephone call. Another key limitation is that the defence will not have any formal opportunities to participate in an investigation overseen by the *procureur*, unlike one overseen by the *juge d'instruction*, in which the defence is entitled to seek to have certain witnesses interviewed and suggest lines of investigation or questioning, has access to the case dossier, and may respond to material being gathered.

A recent decision of the European Court has also called into question, as a matter of law, the protection that prosecutorial supervision provides. The Court did not need to address the status of the *procureur* in order to support its findings. However, in

underlining the qualities that make the *juge d'instruction* a judicial authority for the purposes of the European Convention, the Court essentially calls into question whether the *procureur* can really be considered an independent judicial authority. (It should be noted that this decision runs counter to French domestic case law which has held the *procureur* to be an independent judicial authority.)