A looking Glass on summary sentencing in New Zealand

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"Let the jury consider their verdicts," the king said for about the twentieth time that day
"No, no!" said the Queen. "Sentence first – verdict afterwards."

Lewis Carroll
Alice's Adventures in Wonderland

Sentencing Practice in New Zealand

[1] It is very hard in New Zealand to have a public discussion about crime, punishment and sentencing. It has been like this for at least ten years and in this election year there is potential for it to reach new heights. A conference such as this which is attended by legal professionals and by other members of the public would receive scant public attention because of its considered analytical nature. On the other hand the latest youth knifing will get pages of attention nation-wide.

[2] This is only worth commenting on because of the impact it has on legislation and practice. Public outrage and strong displays of concern from victims are understandable, but tend to force any public discussion into a comparison of the need for a tough, zero tolerance approach in place of what is perceived as soft sentencing by the judiciary. Lurking behind it all is the often asserted public belief that toughness solved crime in New York City

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(although crime rates there have certainly decreased, they, as with the rest of the United States, are still roughly four times higher than those in New Zealand[2]).

[3] At the general election in 1999 a citizens' initiated referendum asked the question:

> *"Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum hard labour for all serious violent offences?"*

[4] The "yes" vote was overwhelming, receiving more than 91% of votes. The question as framed has been widely criticised, and in my view, rightly so. Who would not want to support the needs of victims, but how could you vote in favour of that without also voting in favour of minimum sentencing regimes and hard labour?

[5] The clearest result of that referendum was the enactment of new bail legislation in 2000 and new sentencing legislation in 2002. The consequences of the legislation have made it necessary to again substantially reform both areas, as will be shortly discussed.

[6] What were the consequences?

[7] In the last census New Zealand had a population of 4.1 million persons. At 1 November 2007 the prison muster was 8,056, making a rate of 190 per 100,000 of the population.[3] While the United States incarcerates people at the highest rate in the western world, being

[2] Tanya Segessenmann, *International comparisons of recorded violent crime rates for 2000*, Ministry of Justice, 2002

[3] Mel Smith, Ombudsman, *Report following a reference by the Prime Minister under s13(5) of the Ombudsman Act 1975 for an investigation into issues involving the Criminal Justice Sector*, (Decemeber 2007), at 26

760 per 100,000 in mid 2006,[4] New Zealand's prison muster per 100,000 compared unfavourably with all other countries which we are usually associated with[5].

England and Wales	148	(2007)
Australia	129	(2006)
Canada	107	(2004)
Germany	93	(2006)
France	85	(2006)
Sweden	79	(2006)

[8] The consequences for the Mäori population of New Zealand have been astounding. In 2006, 568 persons of every 100,000 of the Mäori population were in prison,[6] indeed Mäori constitute over half the total prison muster[7] but only about 15% of the overall population of New Zealand. Mäori have become grossly over-represented, being about 3.5 times over-represented.[8]

[9] The increase in the prison muster has been substantial in the last ten years. In 1997 it passed 5,000. The figure in 2003 was 6,000, and 7,000 in 2005, and 8,000 in 2007.[9] The number of prisoners is forecast to grow. Of the total muster the sentenced prisoners increased in numbers by 35% in the last ten years, but during the same period the remand muster increased by a massive 214%.[10]

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[4] *Ibid*, at 27
[5] *Ibid*, at 27
[6] Figure taken from Governments "Effective Interventions" policy webpage, accessible at http://www.justice.govt.nz/effective_interventions/cabinet_papers/maori-pacific.asp (last accessed on 31/1/08)
[7] *Supra* n3, at 67
[8] Department of Corrections, *About Time: Turning people away from a life of crime and reducing re-offending*, (May 2001), at
[9] *Supra* n3, at 27
[10] *Supra* n3, at 29

[10] It is difficult to know what influence popular clamour for more stringent bail decisions, and heavier prison sentences, have had on working Judges. Notwithstanding the intention to be doggedly independent, one intuitively feels that Judges have been influenced. One can be much more certain that legislative changes have played a big part. It is a matter for some dismay among those who search for better sentencing results that the underlying basis for any discussion about sentence reform centres on cost as a major driver. The Bail Act 2000 which came into force at the beginning of 2001 made bail conditions tougher and an onus was placed on many categories of defendant to prove that bail was safe; indeed there was a presumption against bail in some categories of serious offenders. It has to be seen as a consequence of that Act that a larger proportion of offenders were remanded in custody, by 2006 becoming 20% of the overall muster.[11]

[11] We can also see as a consequence that more defendants are remanded in custody than are sentenced to a custodial sentence. In 2004, 41.9% of custodial remands resulted in a custodial sentence, in 2005 the figure was 43.8% and in 2006, 44.3%.[12] For whatever of the various reasons that this might have arisen, it is plain that a large number of them will have "done their time" on remand because of court delays in getting to sentencing.

[12] The Bail Act 2000 may not be responsible for another change in the way bail is regarded which has occurred over the last decade, but it certainly appears to support it. That is that from a point where bail had been a way in which the court would ensure attendance at trial, to becoming a means of empowering the Police to control the conduct of the defendant while awaiting the outcome of the court processes. And so conditions for curfew and other intrusive controls are common and enable Police to track and control a

[11] Greg Newbold, *The Problem of Prisons*, (Dunmore Press, Wellington 2007), at 157

defendant's behaviour. This has its own impact on remand numbers, compliance with stringent bail conditions becoming an end in itself often resulting in the consequence of a remand in custody on failure.

[13] The Bail Amendment Act 2007 sought to soften the threshold from a risk of offending or non-attendance to a "serious and significant risk".[13] Whether this will have the hoped for effect is moot. In addition, it removed the ability to withdraw bail for non-compliance.

[14] The Sentencing Act 2002 sought to provide greater clarity, consistency and transparency in sentencing legislation. Various purposes for which the sentences may be imposed (punishment, deterrence, denunciation, rehabilitation),[14] as well as the principles of sentencing[15] a court must take into account, were included. And so a court is required to:

- take into account the gravity and seriousness of the offending, the culpability of the offender;
- impose the maximum penalty, or near to the maximum penalty available if the offending is within or near to the most serious cases for which the penalty is available;
- consider the desirability of having consistency in terms of similar offenders and offences;
- take into account information on the effects on victims;
- impose the least restrictive outcome appropriate in the circumstances;

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[12] *Supra* n3, at 44
[13] Section 8, Bail Act 2000
[14] Section 7, Sentencing Act 2002
[15] Section 8, Sentencing Act 2002

- take into account restorative justices processes.

[15] The Act also specified aggravating and mitigating factors to be taken into account;[16] created a greater emphasis on fines and reparation;[17] provided new sentencing structure for murder;[18] and extended the sentence of preventive detention.[19]

[16] The Act was intended to have the consequence that serious and violent offenders would receive lengthier sentences, but it appears that instead there has been an increase in the length of sentences across the board. In fact data suggests that the increased rate of incarcerations for less serious offenders has contributed most to the increase in the prison population. Between 2000 and 2004 there was a drop in the imposition of community based sentences from around 31% to 25% and the use of imprisonment rose from 8.3% to 9.4%.[20]

[17] The five year lifetime of the Sentencing Act 2002 was a period of growing disappointment for District Court Judges generally. The Act reduced the number of discretions retained by a Judge in sentencing, largely by the disappearance of variety in the available sentences. Most missed was periodic detention, a form of weekly work under the supervision of warders, often recruited from the armed forces, as an alternative to imprisonment. In place was greater discretion on the part of Probation Officers to decide what kind of sentence an offender received when awarded community work. This could range from barely supervised light work to the type of thing experienced on periodic

[16] Section 9, Sentencing Act 2002
[17] Part 2, Subpart 1, Sentencing Act 2002
[18] Part 2, Subpart 4, Sentencing Act 2002
[19] Section 87, Sentencing Act 2002

detention. The difficulty was that Judges had no idea what the offender would be likely to end up with, and anecdotal information led to a loss of confidence in the integrity of the community work sentence and a feeling of being straight-jacketed between their choices of fine, community work or imprisonment. The upshot has been a rapid increase in the number of short terms of imprisonment being imposed, I apprehend, in lieu of sentences which in another regime might otherwise have been within the community. It is hard to say that this is a reaction to public pressure or that it has anything to do with getting tough on violent criminals, but more probably has a lot to do with legislative design. The result, I think, mostly of the burgeoning prison population has been the enactment of the Criminal Justice Reform Bill in 2007. The series of Acts it spawned established a Sentencing Council, which will come into effect at about the end of this year to administer guidelines for sentencing, and by amending the Sentencing Act 2002 created a new hierarchy of sentences incorporating some new community based sentences, which have been in effect since October 2007.

Sentencing Council Act 2007

[18] Sentencing Council guidelines will take the place of what are currently known as "guideline judgments" of the Court of Appeal. The aim is said to promote consistency in sentencing practice while still allowing for judicial discretion.[21] Sentencing Judges will be required to adhere to the guidelines unless satisfied that to do so would be contrary to the interests of justice.[22] When a sentencing Judge deviates from the guidelines, he or she must give reasons for doing so. The composition of the Sentencing Council will include

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[20] Figures taken from a speech by the former Minister of Justice, available at http://www.beehive.govt.nz/speech/building+safer+communities+through+effective+interventions+criminal+justice (last accessed on 31/1/08)
[21] Section 8, Sentencing Guidelines Council Act 2007
[22] Section 21A, Sentencing Act 2002

two District Court Judges, a Judge from the Court of Appeal, one from the High Court, the Chair of the Parole Board and five non-judicial members.[23]

Sentencing Amendment Act 2007

[19] This Act introduces new non-custodial sentences of intensive supervision and community detention.[24] It also changes home detention from a disposition which could be ordered by the Parole Board to a sentence in its own right.[25] A new hierarchy of sentences has been introduced.[26] The hierarchy (from least restrictive to most restrictive) is:

- discharge or order to come up for sentence if called upon
- sentences of a fine and reparations
- community based sentences, community work and supervision
- community based sentences with intensive supervision and community detention
- home detention
- imprisonment

[20] The Act allows these sentences to be combined and gives guidance on how that should occur.[27] The court may also impose judicial monitoring as a condition of a sentence of intensive supervision or home detention.[28]

[21] It remains to be seen how these sentences will affect sentencing and in particular impact on the prison muster. Experience so far allows cautious optimism that the muster may be reduced but it is too early to tell. So far as sentencing practice is concerned it has certainly slowed procedures down and made for more complicated and longer hearings. In

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[23] Section 10, Sentencing Guidelines Council Act 2007
[24] Sections 54B and 69B, Sentencing Act 2002
[25] Section 80A, Sentencing Act 2002
[26] Section 10A, Sentencing Act 2002
[27] Sections 19 and 20, Sentencing Act 2002

part this has to do with the reports which are required for intensive supervision, community detention or home detention are imposed, but Judges appear to be enjoying the ability to mix and match sentences for the first time.

Redressing Inefficiencies

[22] The District Court is a hybrid court which almost 30 years ago grew out of the Magistrates Court. It has all of the summary jurisdiction and most of the indictable jurisdiction, undertaking 98% of all sentencing in New Zealand. Other divisions of the District Court deal with its civil jurisdiction, the Family Court jurisdiction and some Tribunal jurisdictions.

[23] The summary jurisdiction is regulated by the Summary Proceedings Act 1957. The Act has served us well, but as we begin its 51st year of operation it is staggering under the need for amendment to enable adequate case management in the summary jurisdiction.

[24] The Act has nothing to say about disclosure processes which the prosecution have been obliged to make under the Bill of Rights Act 1990, nor various decisions in 1989 by the Court of Appeal under the Official Information Act 1982. While the New Zealand Bill of Rights Act requires speedy trial,[29] the Summary Proceedings Act contains no provisions which give teeth to support the nervous energy which Judges must expend trying to get people to the point of hearing. The upshot is that while in most parts of New Zealand, Bench, Bar and Prosecutors are happily co-operative in reasonably efficient disposal of the work, in the busiest centres the summary jurisdiction suffers from churn, delay and

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[28] Part 2, Subpart 2B, Sentencing Act 2002
[29] Section 25(b), New Zealand Bill of Rights Act 1990

various dynamic inefficiencies, sometimes contributed to by the way the legal aid system operates.

[25] Possibly because of increases in numbers of the Police Force the Government has been systematically undertaking in the last three years, although the reported crime rate has remained fairly static for the past decade, the caseload of the criminal courts has grown. In the list court this is partly because of the higher rate of arrest by Police but also attributable to a decline in the use of Police diversion, partly I think because of the community aversion to soft sentencing, but probably in fairness, mostly because of other reasons. In the last two years the District Courts' volume of new summary cases has increased by 10% and new jury trial cases by 12%.[30] Unfortunately not guilty pleas have increased by 20% and elections of trial requiring preliminary hearings by 19%.[31]

[26] To counter procedural deficiencies in reaching efficient disposals the Judges have, on their own initiative, developed some alternative processes which have been inserted into the current model without statutory authorisation.

<u>Status hearings</u>

[27] The process called "status hearings" has been in operation in 39 out of 66 New Zealand District Courts for the last 12 years. These courthouses account for 82% of the entire summary caseload. Adapted from observations of Victorian practices, they were intended to overcome the problem of cracked trials clogging the courts' schedules by offering sentence indications.

[30] *Supra* n3, at 115
[31] *Supra* n3, at 115

[28] A study in 1995 revealed that almost 77% of cases set down for a defended hearing did not proceed to that stage, mainly due to last minute guilty pleas.[32] This waste of court time led many District Court Judges in 1995 to adopt status hearings. The broad aims this process sought to achieve were:

- to resolve cases earlier rather than wait for a defended hearing
- to ensure better use of court resources
- for cases that can be satisfactorily disposed of at an earlier stage, to stop them being set down for defended hearings
- for cases that can only be resolved by a defended hearing, to contribute to the defended hearing stage going more smoothly (fewer adjournments and cancellations)
- to ensure an appropriate plea is entered at the first opportunity
- to reduce the time taken to hear each case by limiting the evidence to the facts in issue

[29] There is no statutory basis for status hearings, neither is there a national practice note to govern them. They are authorised by the District Courts' inherent power to regulate its own proceedings.

[30] In all summary matters (that is where jury trial is not elected or mandated), if the defendant pleads not guilty then a status hearing will be the next appearance before the court. The time between a list court appearance and status hearing varies between

[32] Ministry of Justice and Law Commission, Status Hearings Evaluation: *A New Zealand Study of Pre-trial Hearings in Criminal Cases* (2004), at 2

districts although ideally a status hearing occurs around six weeks before the substantive trial.

[31] Fundamental to the early disposition of status hearings is the provision of a disclosure package by the prosecutor containing all the material on the Police file to assist the defendant in making an informed plea and to encourage informed discussion between the parties. Status hearings are dependant on defence and prosecution clarifying the issues in dispute and engaging in charge negotiations prior to the hearing, but obviously the Judge's facilitation can increase the effectiveness of both.

[32] Status hearing courts are very much like a list court, with each case called seriatum. The Judge can expect to deal with around 40 such status hearings in a full day but more in number have been not infrequent. Apart from the defendant, others present include the Judge, defence counsel (if there is one), the prosecutor, victim advisors and community probation officers. The court is open to media who may attend as well as the general public and any interested parties such as a victim. Other witnesses would not ordinarily be present.

[33] The process generally involves the defence counsel explaining the current stage of the case to the Judge which may at that time include a change of plea. Counsel may request a sentence indication at which point the prosecutor will be asked to give their view of the case and the Judge may ask questions. In as many cases as possible it is hoped this interchange will result in resolution of the case.

[34] The New Zealand Law Commission[33] has said that the predominant purpose of status hearings is to allow the defendant to request a sentence indication, the intention being that the carrot dangled in front of the defendant will be sufficient to deter him proceeding to a defended hearing which has little chance of success. Sentencing indications can be given at any time prior to the court finding guilt or innocence; they are not limited to status hearings. The District Court Bench Book provides "structured guidelines" for giving a sentence indication at a status hearing:

- A sentence indication will be given only if asked for by the Defendant.
- An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Statement, along with any other information necessary to enable the Judge to assess the proper sentence, having regard to the provisions of the Sentencing Act 2002.
- The Defence cannot be compelled to disclose anything, but can give the Judge such material as it wishes.
- The Judge is bound by the indication unless, after it is given, fresh evidence shows that the indication is inappropriate. However, should that arise, the Judge must inform the Defendant of the now intended type of sentence. He or she must allow the Defendant to reconsider his or her plea and, if he or she wishes, vacate it, plead not guilty and proceed to a defended hearing.

[33] New Zealand Law Commission, Report 89: *Criminal Pre-trial Processes: Justice Through Efficiency*, June 2005, at 88

- A Judge who considers he or she lacks sufficient information should decline to give a sentence indication.

- Any sentence indicated must accord with the principles and aims of the Sentencing Act 2002.

- The indication will be limited to the type of sentence that the Judge thinks appropriate, that is, imprisonment or a community-based sentence.

- When a sentence indication is accepted but sentencing is delayed and comes before another Judge, that Judge must follow the indication already given or indicate the sentence he or she intends to impose and afford the defendant an opportunity to reconsider his or her position and withdraw or confirm the guilty plea. See *R v Gemmell* [2000] 1 NZLR 695; *R v Edwards* (2000) 17 CRNZ 604; *Deighton v Police*, unreported, HC Whangarei, 20 May 2005, per Baragwanath J.

- When the indication is not accepted, no record of it will be put on the file. If the defendant is later convicted of that offence, any indication given at status hearing shall have no bearing on the sentence. Sentencing Judges will not be told by counsel of the Judge's indication and, if told, will ignore the indication.

- Consultation with all parties, Police, victims and the defendant is essential.

[35] These standards have been approved by the Court of Appeal in *R v Edwards.*[34] In accordance with the *sentencing discount principle* (enshrined in s 9(2)(b) of the Sentencing Act 2002), the defendant who pleads guilty at an early stage will receive a lesser penalty than one who pleads guilty only on the morning of the defended hearing (or

[34] (2005) 22 CRNZ 309

at some stage closer to trial). Thus a sentence indication at a status hearing, because it will incorporate a reduction in sentence, seeks to draw out a guilty plea where appropriate. While a sentence should not be increased merely because a defendant has exercised the right to put the prosecution to proof by pleading not guilty, it is generally appropriate to make a reduction in sentence where the defendant has pleaded guilty. An early guilty plea earns a reduction in sentence because it denotes remorse, spares witnesses the stress and time and avoids the cost of trial.

[36] Overall status hearings have more of a consultative as opposed to adversarial nature, which some may perceive as fair, although fairness will often depend on competent counsel being available for the defendant.

[37] Status hearings began as a form of case management in the summary processes. In the mid '90s case management in New Zealand courts was a brand new topic which everyone enthusiastically engaged. I can only speak from impression of how status hearings succeeded in those days because there were no formal evaluations. It was recognised at that time that some Judges could do it very well and other Judges could not. In other words some Judges were quite persuasive when it came to talking about conceding guilt and being sentenced and others frightened the horses. So when status hearings were first extended tentatively through the country only certain Judges were authorised to undertake them. That was fine because many Judges were yet to be persuaded that case management or judicial intervention was acceptable. The earliest results (and this has to be taken as anecdote) were that a good operator could achieve a result where about 25% of cases went on from status hearing to a defended hearing and the other 75% were resolved, either by withdrawal or plea or some of each. As time went by and more and more Judges became involved and, I think, as the novelty of the process

wore off, and also, I believe, because the legal aid system started to make payments for the purpose of going to a status hearing, the dynamic changed and anything about 50% disposal rate at status hearings was regarded as successful. Sad to say, my intuitive impression is that there is less and less inclination to play ball with the process amongst defendants and counsel.

[38] In recent years several reports and studies have been conducted with status hearings as the focus. These studies have presented the opportunity to draw some conclusions about their current impact on summary justice in New Zealand and whether status hearings have attained the goals they were sought to achieve.

[39] A collaborative effort between the Ministry of Justice and the New Zealand Law Commission saw the publication in 2004 of a paper entitled "Status Hearings Evaluations: a New Zealand Study of Pre-Trial Hearings and Criminal Cases".[35] It was found that 94% of status hearings lasted ten minutes or less.[36] 19% of cases had all or some of the charges withdrawn (most commonly because of guilty pleas in respect of other charges).[37]Sentence indications were sought in 17% of cases and 86% of these cases were resolved at the status hearings.[38] However, overall 60% of the cases were not resolved at the status hearings.[39] As is common through the criminal justice system in New Zealand, the figures show an over-representation of Mäori defendants in the summary crime lists. While 41% of defendants were "European", 39% were classified as Mäori, with the Mäori population, as already mentioned, standing at around 15% of total.

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[35] Ministry of Justice and Law Commission, Status Hearings Evaluation: *A New Zealand Study of Pre-trial Hearings in Criminal Cases* (2004),
[36] *Ibid*, at 27
[37] *Ibid*, at 29/30

[40] Following this in 2005 the Law Commission published a report entitled "Criminal Pre-Trial Processes: Justice Through Efficiency",[40] which took a much broader approach than the original terms of reference had envisaged.

[41] The later report identified that lack of communication between prosecution and defence prior to status hearings so as to prepare for the hearings was a major stumbling block.[41]

[42] Although in a preliminary report the Commission had indicated that it favoured removing Judges from the role of "facilitator" (seen as inappropriate for an adversarial adjudicator), in the face of universal opposition the value and impartial, experienced and authoritative Judge offered that status hearings was accepted.[42]

[43] The Commission identified four common criticisms of sentence indications:[43]

- The pressure on defendants to plead guilty when confronted with a sentence indication;
- The lack of information available in the summary jurisdiction to Judges giving indications;
- The problem of subsequent inconsistent sentences; and
- The status of a sentence indication on a Crown appeal against sentence.

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[38] *Ibid*, at 36
[39] *Ibid*, at 34
[40] New Zealand Law Commission, Report 89: *Criminal Pre-trial Processes: Justice Through Efficiency*, June 2005
[41] *Ibid*, at 88
[42] *Ibid*, at 90
[43] *Ibid*, at 93

[44] The Commission indicated that in its view, where possible an indication should specify not only the type of sentence but the likely quantum of sentence. It emphasised, however, that absent a pre-sentence and victim impact report only the type or sometimes no indication at all should be given. The Commission recommended that rules should be promulgated for the giving of sentence indications.[44]

[45] More significant than what the Law Commission recommended is how the Government responded. The Government's response recognised the utility such rules might have, but also a number of risks associated with them.[45] In light of that it directed the Ministry of Justice to investigate options for formalising sentence indications. This work is currently underway.

[46] Last year I asked the Ministry of Justice to further investigate the effectiveness of status hearings in New Zealand District Courts, to provide me with some statistical data which would assist Judges in making a decision as to whether we continue with status hearings in the summary jurisdiction or not, either across the board or in individual courthouses. There is a good deal of judicial ambivalence about whether status hearings are effective and a great deal of judicial frustration over the way in which various players in the system are failing to engage with its purposes. Because there are no legislative rules to support status hearings Judges are expending a great deal of nervous energy on a process where we have been, in recent years, in two minds about whether it is worth it.

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[44] *Ibid*, at 102

[45] *Government Response to Law Commission Report on Criminal Pre-Trial Processes-Justice Through Efficiency*, accessible at http://courts.govt.nz/pubs/reports/2006/govt-response-law-commission-criminal-pre-trial-processes (last accessed on 31/1/08)

[47] The national statistics compiled by this team show that status hearings actually appear to adversely affect a court's overall efficiency (that is, compared to courts that do not use status hearings).

[48] While status hearings reduce the number of cases directed to be set down for a defended hearing (nationally only by a mere 2%), their net impact is negative for the following reasons:

- status hearings increase the number of events it takes to dispose of cases;
- status hearings lengthen the average time it takes to dispose of cases;
- overall, status hearings do not reduce the amount of judicial time the courts need and indeed the reverse may be true.

[49] Variations between different courts' performance cannot be explained by differences in the types of cases that come to these courts and/or by the level of resources they have, alone. The dynamics within specific "court communities" (judiciary, Police, Crown, Legal Services Authority, defence counsel, registry staff and others) is the key differentiating factor; and everything else being equal, status hearings are more effective for some categories of cases than for others.

[50] Closer examination shows that there are shortcomings in relying solely on national averages. When certain individual courts are considered in isolation, they can be seen as out-performing other courts which do not use status hearings. There are certain courts in both categories (status hearing and non-status hearing courts) which perform so well that no intervention seems necessary or warranted. As the team suggested, tailoring solutions

to specific issues in individual courts may yield greater improvements in efficiency than making changes at a national level, which national averages suggest is necessary. A number of factors will influence a given court's performance and the research suggests that status hearings, or their absence from a court procedure alone, cannot explain these variations.

[51] Very important to the process is the degree of preparation and collaboration between counsel the parties are prepared to enter into. While this runs counter to the strong adversarial current in our jurisdiction, status hearings require it. Often the efficiency failure of the status hearing is because the prosecution has failed to provide disclosure in a timely manner or is generally reluctant to enter into charge negotiations, or defence counsel have been dilatory, difficult, or for some other reason have not prepared. There also appear to be perverse financial incentives to do with legal aid. The research suggests that legal aid beneficiaries, who make up the majority of defendants, have no financial interest in ensuring that cases are not unduly prolonged and in several respects a delay will often be an advantage.

[52] The upshot of this is that after a very successful five or six years run, approximately, with status hearings, the efficiency and benefits to be gained from them have waned to the point now where statistically their benefit is to be questioned. In large measure, the absence of pre-trial rules in the summary jurisdiction may be contributing to the ability to sustain parties interest in status hearings and it may be time for that foreign expression "plea bargaining" to enter our system in a formal, recognised and regulated way. In the meantime I and my Judges are sitting on our hands trying to decide whether to continue

with status hearings or not, pending an exhausting courthouse by courthouse review of efficiency of processes which I intend to begin this year.

Family Violence Courts

[53] The Family Violence Courts are also a product of judicial initiative in the face of a perceived need to make up for the procedural short-comings of the Summary Proceedings Act 1957. There are six courthouses participating in this form of specialised summary court throughout the country. Two more will join those ranks this year.

[54] After a decade of experimenting with fast-track lists for Family Violence Courts in West Auckland, together with co-ordination of Victim Support Services there, the prototype of the Family Violence Court as we know it was started at Waitakere in West Auckland in 2001.

[55] I do not recite the figures relating to family violence in New Zealand - they can be found elsewhere and they make unedifying reading. Needless to say the burgeoning volume of family violence cases being reported has put the court system under pressure to ensure that the processes are fairly dealt with in court rather than outside of it by neglect or failure of an ability to deal with it in a timely way.

[56] The Waitakere Family Violence Court aims to overcome systemic delays in court processes; to minimise damage to families by delays; to concentrate specialist services within the court process; to protect the victims of family violence consistent with the rights

of defendants; to promote a holistic approach in the court's response to family violence; and to hold offenders responsible for their actions.

[57] The Court deals exclusively with charges relating to family violence. The Domestic Violence Act 1995 (Family Court legislation dealing largely with protection orders and the consequences) defines domestic violence as "violence against that person by any other person with whom that person is, or has been, in a domestic relationship".[46] Violence includes physical, sexual and psychological abuse. That largely defines the type of charges which the summary Family Violence Court will deal with. The Family Violence Court deals with pleas, sentence indications, sentencing and if time allows, defended hearings. Other defended hearings are to be allocated early trials on ordinary court defended days, or hearing days rostered specifically for that purpose.

[58] The key mechanism in the Family Violence Court is an enquiry at the second appearance some two weeks after first appearance in court, in the nature of a status hearing. The defendant will not have entered a guilty plea at that time and that has been a practice insisted on to discourage a belief that such pleas are necessary to get discovery and to prevent knee-jerk pleas of not guilty prior to receiving proper legal advice which may set an unfortunate track for the proceedings.

[59] The status hearing however differs from those normally used for other work. There is a pretty rigid discipline imposed on the process which has been possible because frankly only certain Judges have the will, resilience and energy to sustain this kind of work. It is

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[46] Section 3, Domestic Violence Act 1995

energy sapping in the extreme but Judges who volunteer become enthusiastic with the results they seem to be able to achieve.

[60] The hearing discusses the facts, the impact on family and seeks a disposition on a problem solving basis. Notwithstanding all of that no one will be deprived of a day in court if they want to go to a full hearing, but the secret of the system is that defended hearings will follow quickly upon a determination that it cannot be resolved at a Family Violence Court day. To achieve this concessions have to be made by other parts of the courthouse's work to ensure that early return days for defended hearings can be given. The cases are often resolved by programmes relating to drugs, alcohol, anger management and the like. All of the sentences available to the court are available in the Family Violence Court, but the preponderance of them tend to be non-custodial community based sentences which are intended to provide remedies for the problems of the defendant and his family. The assistance of programme providers, victim advisors is encouraged.

[61] This court too is a variation on the adversarial theme, based on inducements to see healing of the family as of paramount consideration, with the idea that it is damaging to proceed to a not guilty hearing except in cases where there is a clear denial.

Restorative Justice[47]

[47] I would like to express my gratitude to Allison Hill at the New Zealand Ministry of Justice for her valuable contribution to this section of the paper

[62] Courts in the New Zealand criminal justice system (for adult offenders) have considered outcomes from restorative justice processes on an ad hoc basis since the mid 1990s. Formal statutory recognition of restorative justice processes came about with the passage of the Sentencing, Parole and Victims' Rights Acts 2002. The three Acts give greater recognition and legitimacy to restorative justice processes and encourage the use of restorative justice processes wherever appropriate. The Acts also allow and require restorative justice processes to be taken into account in the sentencing and parole of offenders, where these processes have occurred.

[63] Restorative justice processes are used at various stages in the criminal justice system, including pre-conviction, pre-sentence and post-sentence. Offenders are required to admit responsibility for the offence before entering the restorative justice process. Participation is voluntary for both victims and offenders. The Ministry of Justice contracts 29 community-based programmes to provide restorative justice processes pre-conviction (as part of a diversion process) and pre-sentencing.

[64] Two main forms of restorative justice processes are used in New Zealand:

- victim-offender conference
- community panel process.

[65] Victim-offender conferences are facilitated meetings between the offender and the victim. A conference only takes place if the victim is willing to participate. Conferences are private and relatively informal. The victim and the offender are able to talk honestly about what happened, to describe the consequences of the offending, and to consider ways in which the harm can be repaired. Some conferences produce an agreed plan to be

followed by the offender, which generally includes an apology, and often other reparative measures such as voluntary payments to the victim, and community work. A report from the conference, including any agreed plan, is provided to the court at sentencing. In some cases the court adjourns to allow the offender to complete all or part of the plan before sentencing. Restorative Justice Conferences have also been used with great success in serious offending, one of the results often being a reduction in any prison term.

[66] Community panel restorative justice processes are often used in cases of less serious offending. Offenders meet with a panel of community members and negotiate sanctions aimed at providing reparation to the victim(s) and the wider community and reducing the amount and seriousness of future offending. The panel process usually results in a plan for the offender to address the harm caused by the offending. Where restorative justice is used as part of the Police Adult Diversion process, completion of the plan leads to the charges being withdrawn. Victims may (and frequently do) attend community-panel processes, but the process can take place without their presence.

Restorative Justice as part of Police Diversion

[67] Restorative justice has recently been formally incorporated into Police diversion policy. There is considerable Police support for extended availability of restorative justice as part of diversion, especially for Mäori and Pacific offenders who are currently not well represented in diversion statistics. Police have recently undertaken an assessment of a small number of diversions with associated restorative justice processes. The results of

these processes indicate a significant reduction in crime impact for victims. Offenders were satisfactorily held to account through the processes.

Restorative Justice Pre-Sentence

[68] Restorative justice processes most usually take place before sentencing where they provide the judge with assessments in respect of the victim and the offender to take into account at sentencing.

[69] The process and report address the impact on the needs of the victim, including possible reparation. They also consider the extent to which the offender accepts responsibility and his/her willingness to demonstrate that accountability. The process leads in most cases to reduced frequency and length of sentences, better compliance with sanctions and reduced re-offending.

The Future

[70] The Ministry of Justice's focus for restorative justice is on increasing access to restorative justice nationally and ensuring services are consistently of high quality.

[71] The Ministry of Justice is implementing a new Performance Framework for restorative justice services which supports provision by local providers, helping them to develop robust governance and management structures, good links to local support services and the ability to deliver flexible and responsive high quality services.

[72] This includes a better reporting tool (so that we will have better information about what has been done and its impacts in the future) and case management systems, a coherent set of quality standards, and consistent, assessed training for practitioners.

Reducing Mäori imprisonment rates

[73] Over half of the New Zealand prison population is of Mäori ethnicity.[48] Figures for 2006 showed that 568 in every 100,000 Mäori are prisoners.[49] Correspondingly 98 out of every 100,000 non-Mäori are prisoners. This is especially shocking given that only around 15% of the overall population are Mäori. In addition to being over-represented in prison numbers, Mäori are also over-represented among those who are at risk of re-offending more frequently and seriously.[50] They are grossly over-represented throughout the New Zealand criminal justice system, and providing for the unmet needs of Mäori is a matter of urgency. There needs to be a targeting system or mechanism in place which will deliver a share of the available resources for reducing imprisonment rates commensurable with the degree of Mäori over-representation, which is 3.5 times.

[74] A Government report published in 2001[51] states:

> "Like colonised minorities in other countries, some Mäori have become socially, culturally and economically marginalised in New Zealand, resulting in a higher incidence of social difficulties, including offending … The general solution to this situation is to assist Mäori to develop their social, cultural and economic resources and to use tikanga Mäori and whakapapa as positive forces for the rehabilitation of

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[48] *Supra* n3, at 67
[49] Figure taken from Governments "Effective Interventions" policy webpage, accessible at http://www.justice.govt.nz/effective_interventions/cabinet_papers/maori-pacific.asp (last accessed on 31/1/08)
[50] *Ibid*
[51] Department of Corrections, *About Time: Turning people away from a life of crime and reducing re-offending*, (May 2001), at 55

> Mäori offenders … The development and evaluation of the programmes for Mäori should draw from a knowledge pool that includes western theories and practices, and tikanga Mäori theories and practices. Tikanga based approaches can meet the specific cultural needs of Mäori offenders, and thereby assist in the construction of positive family relationships …"

[75] The number of Police prosecutions of Päkehä or European New Zealanders is 2,000 for every 100,000, against the equivalent figure for Mäori of 9,700 per 100,000.[52] This is perhaps not surprising as it is considered that the Police apprehend five times more Mäori than they do Europeans.[53] The number of convictions for New Zealanders at large is 2,400 per 100,000 but this is made up of convictions for Europeans at 1,400; Mäori 6,300; and Pacific Islanders 2,700.[54]

[76] Redressing the socio-economic causes of such high rates of imprisonment is not directly a task for the judiciary. In addition to the changes to the criminal justice system mentioned above, the Government has announced a strategy to intervene at several stages of each "high risk" individual's life with a view to reducing the chances of offending and to address socio-economic factors contributing to the high rate of Mäori imprisonment and offending.[55] If this work is undertaken that is a good thing. The judiciary does have an important role in sentencing those who do not find protection by these expanding support networks. The very high rates of re-offending amongst Mäori who are sent to prison show the dangers of institutionalising such offenders and creating national "lifers".

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[52] *Supra* n3, at 65
[53] *Supra* n3, at 65
[54] *Supra* n3, at 65
[55] Effective Interventions Policy, for details see http://www.justice.govt.nz/effective_interventions/home.asp (last accessed on 31/1/08)

[77] Recent research indicates that Mäori have higher mental health and addiction needs than the rest of the population. Te Rau Hinengaro – The New Zealand Mental Health Survey indicated that Mäori have a higher rate of life time mental disorders compared with other ethnic groups, and particularly suffer from mood disorders, substance abuse disorders, and suicidal behaviour. Where such problems manifest themselves in an offender before the court, appropriate measures would be for the court, one would think, to require the offender to complete a form of remedial programme.

[78] Some suggest that Mäori offenders be removed from the criminal justice system altogether and instead apply "marae justice". The heart of this system, which is based on Mäori tradition or custom, is the recognition that everybody has a responsibility to the wider community. The offender and family take responsibility for the crime and work to find a point of reconciliation to restore the mana or prestige of the victim and their family.

[79] I am very impressed by Canadian approaches, where the level of punitiveness in the criminal justice system seems to have been affected by what has been called a "deep scepticism" about the use of imprisonment as a response to crime and where restraint seems to be part of the culture of criminal justice policy.[56] Notwithstanding that Canada has its share of racial intolerance and that Aboriginal Canadians are over-represented in prisons, the law appears to refer to them as a group that should not be imprisoned if other facilities are available.[57]

[80] Whether the new Sentencing Guideline Council will enable Judges to actively seek alternatives to prison sentences for members of the Mäori population remains to be seen.

Certainly the hierarchy of sentences under the new sentencing legislation provides opportunities. For instance the available special conditions under intense supervision, coupled with say community detention or home detention, could enable the empowerment of Mäori marae, tribes or family, to administer programmes for individuals within a Mäori context. Whether sufficient Mäori infrastructure will be available to do this at a meaningful level is currently in some doubt. Whether there will be community tolerance for differential sentencing for Mäori offenders is also a matter for considerable doubt. The principles of natural justice will be an aid and we are intrigued by the circle sentencing process which we think is probably a form of restorative justice as we know it, gifted to the world by a decision of the Supreme Court of Ukon in Canada in *R. v. Moses* (1992), 71 CCC (3d) 347 (Yukon Territorial Court) and followed, I understand, in New South Wales in recent times.

Restorative Justice and Mäori

[81] Restorative justice can offer a culturally-appropriate response to offending by and against Mäori.

[82] The results of a court-referred restorative justice pilot, completed in 2005, indicated that where an offender had participated in a restorative justice process, victims were likely to be highly satisfied with the process, and offenders were likely to receive fewer, and shorter, prison sentences. It also suggested a small but positive impact on re-offending (though the sample size was too small to assure statistical significance). International

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[56] *Supra* n3, at 132
[57] *Supra* n3, at 132

research also suggests that restorative justice can be particularly useful when delivered by indigenous providers.

[83] Seven of the 29 restorative justice providers contracted by the Ministry of Justice to offer restorative justice services in the adult criminal justice system are Mäori and operate out of a tikanga base. They are located in Whangarei, South and West Auckland, Rotorua, Tokoroa, Taupö and Gisborne.

[84] For a number of these, restorative justice is one of a range of culturally-appropriate services offered. For instance the Ngati Hine Health Trust, the restorative justice provider in Whangarei, offers a range of social and health services, as does Te Runanga o Ngati Porou, the restorative justice provider in Gisborne.

[85] Two of the longer established groups are:

- Mana Social Services in Rotorua, which deals with a very wide range of criminal cases referred from the District Court. This provider operates voluntary victim-offender restorative justice conferencing process, providing a report back to the court which is taken into account in sentencing. Mana provides a range of social services primarily to Mäori.

- Hoani Waititi Marae in Waitakere, which deals with a very large number of referrals from the District Court. Offenders are able to access tikanga-based programmes offered by the marae as part of the restorative justice process. A current focus for this programme is on improving its service to victims.

[86] The Police are supportive of these providers, and Iwi Liaison Police Officers are members of some of the restorative justice providers' local stakeholder consultation groups.

[87] The national body for restorative justice providers, Restorative Justice Aotearoa, has a Maori caucus specifically to support and provide advice to Mäori service providers.

[88] The Police diversion policy was revised in 2007 and now incorporates, for the first time, specific reference to restorative justice as part of the diversion process for adult offenders. This also offers opportunities for a culturally-appropriate response to lower level offending.

Conclusion

[89] We have much to do to modernise our summary process in New Zealand Courts to cope with the volume, and to incorporate workable procedures to ensure compliance with modern standards in a timely way. We need to find ways to drive proceedings to a timely conclusion. We need to have a serious national debate about crime and punishment.

[90] One way of addressing the burgeoning volume of work has been to introduce quasi judicial intervention as an overlay to the adversarial system, in the form of status hearings, family violence courts, and to seek better recognition of the community in the process by emphasising the victims participation in restorative justice. But we have imbalances in our criminal justice system, for which we are yet to find satisfactory answers. That is one of our great challenges.