



Recent & Proposed Reforms

This article relates to the following legislation:

1. **The Summary Proceedings Act (The SPA) - changes to depositions process;**
2. **The Criminal Disclosure Act (The CDA) - which codifies the disclosure regime in New Zealand;**

SPA - The Standard Committal Procedure

The changes to the previous depositions process have been well publicised. The driving forces were a desire to achieve greater efficiency and lower costs. It will be interesting to see if these aims are achieved, however. Broadly:

- If a defendant is charged indictably, or elects trial by jury, then:
 - The prosecution must file briefs of evidence within 42 days of the charge or the election; and
 - The parties have a further 14 days in which to apply for an "oral hearing".
- If no application for an oral hearing is made then:
 - The standard committal procedure bites; and
 - The Registrar must commit the defendant for trial.

However, if an application for an oral hearing is made then a District Court Judge must consider whether an oral hearing is appropriate. Before making such a determination, a District Court Judge must be satisfied that either:

- (a) It is necessary to hear a witness before determining whether there is sufficient evidence to commit to trial; or
- (b) It is in the interests of justice to hear a witness.

It will be interesting to see how the Courts enforce the tests outlined in (a) and (b) above. The application for an oral hearing is, in itself, likely to be time consuming. The process of determining whether or not an oral hearing is necessary, now involves judicial time. In the past, the vast majority of depositions were dealt with by JPs or Community Magistrates. Even when full depositions hearings were held, as opposed to "hand ups", District Court Judges were hardly ever involved (unless the charges were of a particular sexual nature).

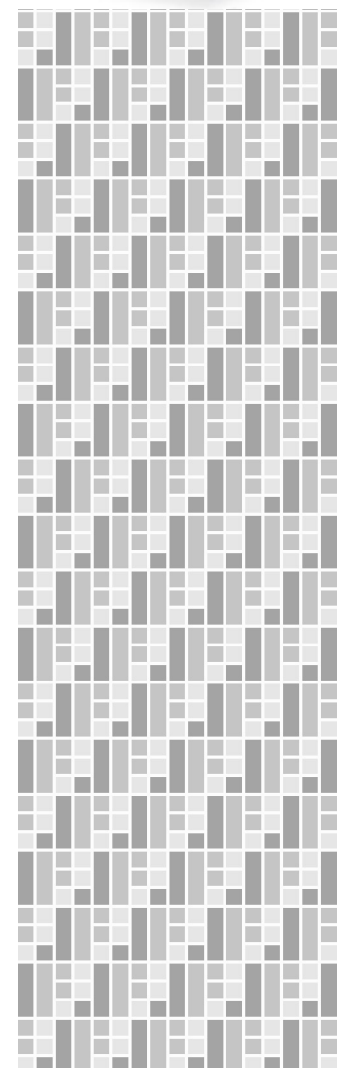
We understand that in the Wellington Registry, the District Court has already set aside a Court for every second Monday to deal with applications for oral hearings. This is obviously a procedure that District Court Judges have not had to accommodate before. Busy Registries will have to "crib" judicial time and resources from elsewhere. It is not immediately apparent where this time or resourcing will come from.

In dealing with applications for oral hearings, we suggest Courts may require:

- Filing of written submissions pursuant to a timetable; and
- Oral submissions.

It is also possible that Judges will reserve decisions in complex or important cases. Also, if the application relates to more than one witness, the Judge will need to consider each witness separately to determine if it is necessary to hear him or her. In other words an entire 'subset' of hearings has now been created just to determine whether a full depositions hearing is appropriate. Applications for oral hearings mean more work for Judges and Counsel before a deposition hearing is even held.

While there is no doubt that the new standard committal process is even quicker than the previous "hand up" process it remains to be seen whether the changes overall will result in greater efficiency.



INSIGHT



Especially in light of:

- (a) The fact that judicial time is now required to police the depositions process (whereas before it was not); and
- (b) It is likely that defence counsel (and in some cases even the prosecution) will feel obligated to apply for an oral hearing. Just determining whether an oral hearing is appropriate will involve:
 - Preparation of submissions (written and oral);
 - A hearing in itself.

The Criminal Disclosure Act

It is certainly desirable to have a codified system of disclosure in New Zealand. The old system was a mishmash of common law, the Privacy Act and the Official Information Act. Under the previous regime there were no time obligations and there were regional variances. While there was some judicial sanction for a prosecuting agency failing to disclose appropriately (see *Police v Allen*), strictly speaking the District Court lacked much jurisdiction to make “disclosure orders” or set any form of timetable. In addition, third party disclosure applications were cumbersome.

With those comments in mind it is pleasing to see, in our view, a codified system of disclosure. As well as codifying disclosure in general, there is now a clear set of provisions for dealing with third party disclosure and the Act codifies the obligations of the defence in terms of providing expert briefs within a certain time before trial (i.e. 14 days). The basic outline is as follows:

- After a defendant is charged he or she is to receive initial disclosure within 21 days.
- After a plea of not guilty or election, a defendant is entitled to fuller disclosure.
- If the defendant takes the view that further disclosure is required then the defendant can write to the prosecuting agency seeking further disclosure.

- The prosecution is obliged to respond to that request as soon as reasonably practicable.¹

Here the governing feature is that the prosecution is only obliged to disclose what the prosecution regards as relevant. It is easy to imagine the defence and prosecution having different views about what is relevant. If there is a dispute between the parties about disclosure obligations then, again, judicial time is involved. If the English experience is anything to go by, “disclosure hearings” will become common and time consuming. There will, it is suggested, be a tension between the opposing parties views on relevance and this may prompt prosecuting agencies to turn to a “warehousing” approach to disclosure. No doubt, if a “warehousing” style is adopted this in itself will be met with objection.

In summary, while many of the changes are pleasing to note, in a desire to achieve greater efficiency the legislature has created a new “subset” of pre trial hearings involving judicial time. Again, we predict that in complex cases written and oral submissions will be required with the possibility of reserved judgment. It is also noteworthy that previously in the summary jurisdiction there was no ability to challenge any evidential matters pre-hearing, let alone the adequacy of disclosure. Suddenly, however, disclosure has been elevated in significance. Much like the changes to the depositions process, we wait to see whether the stated desire to achieve a greater efficiency and lower cost will eventuate.

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¹ It should be remembered that the Act codifies that the obligation to disclose is a continuing one (s13(6)).

