DISCUSSION PAPER
REVIEW OF CASE MANAGEMENT AND LISTING PROCEDURES IN THE ACT SUPREME COURT

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EXECUTIVE SUMMARY

I. Introduction and Background

1.1 The review of case management and listing practices in the ACT Supreme Court inquired into successful reforms in other jurisdictions’ court systems. The Attorney-General and Acting Chief Justice Malcolm Gray commissioned the review. Justice Hilary Penfold of the ACT Supreme Court and Kathy Leigh, Director-General of the ACT Justice & Community Safety Directorate, conducted the review. Justice Penfold and Ms Leigh consulted current and retired Judges from other jurisdictions, including experts who undertook reviews of case management elsewhere in Australia.

   Case management is active judicial intervention in matters before the Court, intended to decrease resolution times and ensure the efficient use of Court resources.

   Listing procedures are the methods by which matters are allocated to judicial officers, and allotted time before the Court.

1.2 This paper seeks input on options for improved case management and listing systems.

1.3 Case management and listing procedure options are considered here with a view to:

   - promoting early, fair settlement of civil cases, and early pleas of guilty in criminal cases where appropriate;
   - narrowing the issues to those genuinely in dispute where early settlement or an early plea is inappropriate; and
   - listing matters before the Court so that trial dates are always met, and the Court’s schedule ensures maximum use of available judicial resources.

1.4 Early settlement, narrowing of the issues, and sound listing practices will help to reduce the time taken to finalise matters. Reducing finalisation times improves the experiences of criminal defendants, victims of crime, and civil litigants. The Court also benefits from improved case management because its resources will be focused on steps that drive resolution of cases, as opposed to appearances and hearings that do not ultimately lead to finalisation.

1.5 Options for delivering these outcomes through case management and listing reform are discussed in this paper. In an ideal case management scheme, every appearance before the Court will result in the parties being closer to resolution of their disputes, and a minimal number of appearances will be required between commencement and finalisation.
1.6 Parts II to IV discuss measures to promote earlier discussion between parties about the issues in dispute, the importance of judicial involvement in listing events, including whether an individual docket system should be adopted, and the importance of ensuring not only that trials and hearings are listed only when the parties are ready to proceed but also that the listing of trials and hearings itself plays a role in encouraging early resolution of matters.

II. Models of case management and practices in other jurisdictions

2.1 A minimum of required appearances before the Court, and ensuring that parties are prepared to resolve disputes at all appearances, contribute to efficient and timely resolution of disputes. Currently in the ACT Supreme Court, in the criminal jurisdiction, the first appearance by a defendant is generally shortly after committal. Standard directions are given, and preparation by the parties begins following those directions. Delaying a first appearance and relying instead on practice directions to ensure preparation may permit a more productive use of the Court’s time. First appearance dates might be later for trial matters than for sentence matters, to allow for different preparation requirements. Parties would be expected to be ready to discuss the issues, and to resolve preliminary disputes, by the first appearance date.

2.2 The Supreme Court operates a separate arraignments list, with a specified arraignment day throughout the year. It may be more efficient for the arraignment to happen at the first appearance.

III. Criminal procedures and sentencing practices

3.2 Criminal procedures and sentencing practices have been reformed in other jurisdictions with a view to providing incentives for efficient resolution of a case, and giving Judges powers to manage the conduct of criminal cases.

3.3 Sentencing incentives are provided in all jurisdictions in Australia. A sentencing discount is available for those who plead guilty, sparing the community and victims of crime the burdens of a trial. Recently, New South Wales and South Australia in particular have experimented with legislating different discounts for guilty pleas depending on their timing. For example, the Criminal Case Conferencing Trial Act 2008 (NSW) provides for a 25% discount for a plea before committal, dropping to 12.5% for a plea after committal. The theory is that a clear, identifiable discount will give defendants an incentive not to leave pleas of guilty until late in the process. Sentencing indication schemes complement sentencing discounts. They involve a Judge giving a binding statement of the sentence that will be given if a defendant pleads guilty, giving the defendant certainty about the result of a guilty plea.
3.4 Some Australian jurisdictions have created statutory criminal case management powers for criminal matters that proceed to trial. These include the power to order pre-trial conferencing as a means of settling disputes, and the requirement for pre-trial disclosure, by both prosecution and defence, of issues to be raised at trial. As in civil matters, conferencing and pre-trial disclosure in criminal matters reduce the element of surprise at trial and allow the parties to honestly evaluate their respective cases. The NSW *Criminal Procedure Act 1986*, Part 3, Division 3, gives Judges the authority to order varying levels of disclosure by prosecution and defence, and to sanction parties for non-compliance with criminal case management directions.

3.5 Mutual disclosure may produce frank discussions between prosecutors and defence counsel that in turn promote settlement before trial, either through guilty pleas, or through abandonment of a weak prosecution case. Disclosure prior to a sentencing hearing may also reduce court time.

3.6 A review of the processes for committing cases to the Supreme Court may identify possible improvements. For example, an expanded statutory power for the Supreme Court to hear summary matters with related indictable matters might provide efficiencies by avoiding repeated litigation of the same issues. The legislative approach to the transfer of indictable matters that may be heard summarily may benefit from reconsideration.

**IV. Judicial Control**

4.1 The powers of Judges to enforce case management directions, and the policies surrounding enforcement, are central to ensuring consistent adherence to a case management program. Effective sanctions promote compliance by litigants with the Court’s measures to improve resolution times and efficient use of Court resources.

4.2 Sanctions available in civil matters, depending on the degree of non-compliance, include costs orders, refusing leave to make an application, and dismissing a case. In criminal matters, sanctions available in other jurisdictions include granting adjournments in favour of a party if the opposing party contravenes a direction, costs awards, and (although rarely used in practice) adverse comment on a party’s failure to disclose evidence or an argument before trial. An appropriate policy on sanctions would impose proportionate consequences on all parties, in civil and criminal matters, for failure to comply with case management directions.

4.3 Active judicial involvement in case management is also supported by policies that give Judges greater control over a matter. Directing parties to prepare disputes, and to undertake alternative dispute resolution where appropriate, can promote efficient and timely resolution of cases. An increased focus on ADR in civil matters may reduce
the overall burden on the Court by resolving cases that would otherwise proceed to trial, or only settle at a late stage having consumed significant Court resources.

4.4 The Court’s policies for allocating and listing cases have an impact on case management. A docket system, where one Judge is assigned a matter on commencement and makes all decisions in relation to the matter until disposition, may support the Court in applying case management practices. The docket Judge has a clear picture of all decisions and steps in a case, and the parties are unable to engage in Judge-shopping or delaying tactics through adjournments or other methods. A docket system also gives a Judge greater direct involvement in listing decisions, allowing flexibility in scheduling when and for what purposes the parties will appear before the Court.

V. Information technology and performance measures

5.1 Expanded and improved information technology would allow for more efficient monitoring of case-flow, and of the outcomes of case management reforms. Any new case management system should readily deliver detailed information about the progress of cases, from commencement to disposition, with all interlocutory steps. The system should also be capable of delivering status updates on pending cases that allow easy monitoring of the progress of cases, including compliance with court deadlines and expected resolution times.

VI. Case management reforms in context

6.1 Case management reforms and reviews have tended to coincide with broader examinations of both criminal and civil process. Case management and listing reform should be considered only one aspect of a complete approach to reducing delays and improving court efficiency.

6.2 Particularly in the criminal jurisdiction, case management techniques have been included in dedicated criminal procedures statutes which consolidate and clarify existing rules. A broader examination of criminal and civil procedures is outside the scope of this review, but the impact of any reforms to be adopted could be analysed in the context of existing criminal and civil legislation and the scope for using that legislation to support case management techniques.
The paper sets out 23 questions on which the review team seeks views and input on the options for case management reform. Each discussion question relates to a case management reform measure that has been implemented in another jurisdiction, and that may prove beneficial if adopted in the Territory.

**Information about making a submission to the review**
Generally, submissions will be made public. In the absence of a clear indication that a submission is intended to be confidential, the submission will be treated as non-confidential.

*Non-confidential submissions* may be made available to any person or organisation upon request during or following the completion of the review.

*Confidential submissions* may include personal or sensitive information where privacy is required. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1989*, which has provisions designed to protect sensitive information given in confidence.

*Anonymous submissions* may be accepted, but the review team reserves the right not to publish or refer to a submission whose author is not reliably identified.

**Submissions should be directed to:**

Case Management Review  
c/o  
ACT Justice & Community Safety Directorate  
GPO Box 158  
CANBERRA ACT 2601
DISCUSSION QUESTIONS - SUMMARY

II. Models of case management and practices in other jurisdictions

Question 1
Is there any practical need for the separate arraignments list in the Supreme Court (as distinct from the current legal needs)?

Question 2
a) Should the first appearance in matters committed for trial be listed separately, and on a different basis, from matters committed for sentence?

b) Should the standard criminal directions be issued by practice direction, or by the rules, rather than at an initial appearance?

Question 3
Is there any reason why the point at which the Supreme Court obtains jurisdiction over a criminal matter should not be an earlier, or different, event than arraignment?

III. Criminal procedures and sentencing practices

Question 4
Should the ACT legislate for the amount of discount available for early pleas of guilty?

Question 5
At what points in the process should a plea be considered early, and under what circumstances?

Question 6
What statutory limits, if any, should be imposed on the availability of discounts, and at which points in the pre-trial process should they be imposed?

Question 7
Should there be provision for binding sentencing indications to be given by the ACT Supreme Court?

Question 8
Should pre-trial criminal conferencing be required in the Magistrates Court, Supreme Court, or both, and if so, by legislation or by practice direction?
Question 9
If so, what matters would need to be addressed in the legislation?

Question 10
Should the ACT require defendants/accused persons to disclose issues in dispute, likely applications, and a list of witnesses, before trial?

Question 11
Should defendants/accused persons be required to disclose expert reports before trial?

Question 12
Should there be restrictions on the ability of defendants who plead guilty in the Magistrates Court to change their pleas following committal for sentencing in the Supreme Court?

Question 13
Should the *Magistrates Court Act 1930* and the *Supreme Court Act 1933* be amended to allow the Supreme Court greater scope to hear summary charges against an accused person that have similar elements to indictable matters being heard in the Supreme Court, or that arise from the same facts and circumstances?

Question 14
What information and materials related to a sentencing matter should have to be disclosed between the parties, and filed with the court, before the sentencing hearing?

IV. *Judicial control: enforcing compliance, improving civil case management, adhering to timetables, and pre-trial attempts at resolution*

Question 15
What sanctions should be available for failure to comply with procedural legislation or directions of a court?

Question 16
How should sanctions differ between criminal and civil matters?

Question 17
Under what circumstances should sanctions be imposed?
Question 18
Should the ACT adopt a policy (to be implemented by legislation or practice direction) of referring most civil cases to mediation or arbitration?

Question 19
What should be the criteria for requiring alternative dispute resolution?

Question 20
What timeframes for filings and completion of pre-trial events in civil cases should be required by the Supreme Court?

Question 21
What criteria should be included in a policy on refusing adjournments in the civil jurisdiction? Should the policy in criminal cases be different?

Question 22
Should the Supreme Court introduce a docket system, for civil matters, criminal matters, or both, under which a Judge is assigned a matter and hears all applications in relation to it from commencement to disposition?

Question 23
What additional costs are imposed by over-listing in civil matters, and in criminal matters? What information can be provided to assist in minimising the risks of over-listing?
I. Introduction and Background

Terms of reference
1. On 17 November 2010, the Attorney General, Simon Corbell MLA, and the Acting Chief Justice of the Supreme Court, the Hon Malcolm Gray, requested a review of case management and listing procedures in the ACT Supreme Court.

Case management is active judicial intervention in matters before the Court, intended to decrease resolution times and ensure the efficient use of Court resources.

Listing procedures are the methods by which matters are allocated to judicial officers, and are allotted time before the Court.

2. The terms of reference\(^1\) called for a review of practices in other jurisdictions, the challenges faced by small jurisdictions, and any other relevant matters. The Hon Justice Hilary Penfold of the Supreme Court and the Director-General of Justice & Community Safety, Kathy Leigh, conducted the review and liaised with a reference group of court stakeholders. The reference group comprised representatives of the Bar Association, the Law Society, the Director of Public Prosecutions, and Legal Aid ACT.

3. In conducting the review, Justice Penfold and Ms Leigh sought the views of experienced judicial officers in other jurisdictions that have successfully implemented case management and listing reforms. New South Wales, Queensland, Western Australia and New Zealand have all explored significant case management and procedural reforms that informed this review. Consultation with other judicial officers was extensive. The Hon Chief Justice Wayne Martin of Western Australia, Senior Judge Administrator the Hon Justice John Byrne RFD and the Hon Justice Debra Mullins of Queensland, the Hon Justice Peter McClellan AM QC, Chief Judge at Common Law of the New South Wales Supreme Court, and the Hon Justice Reginald Blanch AM, Chief Judge of the New South Wales District Court all provided input on effective case management measures. Former Judge of the Supreme Court of Queensland Martin Moynihan QC and former Judge of the Supreme Court of New South Wales Prof Andrew Rogers QC also shared their knowledge of case management and listing reform with Justice Penfold and Ms Leigh. Of note, Mr Moynihan conducted detailed reviews of procedures and case management in both the Queensland and Northern Territory Courts in addition to his term as a Judge. In addition, Justice Penfold met with Chief High Court Judge Winkelmann of the New Zealand High Court and discussed the experiences of the New Zealand Courts in improving case management.

\(^1\) Attached at Appendix I.
Objectives of reform – overview

4. The objective of case management reforms in the ACT Supreme Court will be to ensure that, as far as practicable, the Court’s resources and the resources of parties before the Court are focused on the timely, efficient, and fair resolution of disputes. All appearances before the Court should move the parties closer towards resolution, either by agreement between the parties, or by a focused and efficient hearing of the dispute.

5. Enhanced pre-trial disclosure requirements and case management powers in the criminal jurisdiction (discussed in parts II and III below) have the potential to promote earlier resolution of criminal matters, and to avoid last-minute delays and vacation of trial dates.

6. An individual docket system, where matters are assigned to a single Judge for steps from commencement to finalisation (discussed in part IV below) offers several potential benefits. These benefits include increased familiarity by the docket Judge with the status of each case before the Court, and individual control over future events. Assigning matters through a docket system could support Judges’ efforts to manage cases effectively.

7. Improvements to case management process would give Registry staff and Judges more information about each case, which could then be used to enhance the listing process. Greater pre-trial disclosure by the parties, and the improvements in familiarity with a case from a docket system would help the Court to avoid listing matters for trial until the parties are fully prepared to litigate their disputes. Having the ability to list a matter for appearance before a Judge only when it is certain that the parties understand the issues in dispute, and are prepared to litigate, would help to minimise unexpected delays and adjournments. At the same time, the Judge’s capacity to list an early hearing so as to encourage parties to focus on resolving the matter may bring forward settlements and pleas of guilty that would otherwise have happened much later.

Impacts of increasing finalisation times in the Supreme Court

8. The impetus for the review is the length of time between the commencement of proceedings and finalisation in the ACT Supreme Court. In criminal matters, delays affect defendants, the community, and victims by prolonging the emotionally traumatic and exhausting experience of participating in criminal proceedings. Defendants remain on bail or remand, subject to restrictive conditions for the duration of the pre-trial period. Victims of crime must deal with the lack of finality that comes with delay. The ACT Human Rights Act 2004 recognises a right to be tried without unreasonable delay. In R v Kara Lesley Mills, Higgins C J of the ACT Supreme

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2 Human Rights Act 2004 (ACT), s.22(2)(c).
Court granted an application for a permanent stay of criminal proceedings following, more than 12 months delay which, in the words of Higgins CJ, was ”egregiously unreasonable, for whatever reason it might happen”. Delays in criminal proceedings can have serious consequences for both the community and defendants.

9. In the civil jurisdiction, the Court Procedures Rules 2006 state that the purpose of the rules is to “facilitate the just resolution of real issues with minimum delay and expense.” In civil proceedings, delays often frustrate the parties and increase costs by requiring the engagement of legal practitioners over a number of years. The economic and emotional consequences of the original dispute may continue to fester in the interim.

Current reform measures
10. There are multiple approaches currently underway to reform Supreme Court procedures in the Territory. Amendments to the Bail Act 1992 aim to reduce the number of applications for bail in the Supreme Court. A bill has been passed by the Legislative Assembly that will increase the number of jury trials for specific, serious offences to ensure community involvement in those sorts of matters. It will correspondingly reduce the number of judge-alone trials, which could have the incidental benefit of reducing the number of reserved judgments. Also, the Legislative Assembly has enacted legislation to increase the civil and criminal jurisdiction of the Magistrates Court. The increase in the Magistrates Court jurisdiction is designed to ensure that some matters which are more appropriately heard in the Magistrates Court, rather than the Supreme Court, are in fact allocated to the Magistrates Court. This should reduce delays in the Supreme Court.

Other methods of reducing delays
11. The reforms in other jurisdictions explored below are being examined with a view to enabling the Supreme Court to meet basic performance criteria, without compromising on the fairness of outcomes. The three primary methods of reducing delays are:

- promoting early settlement of civil cases, and early pleas of guilty in criminal cases;
- in cases where early settlement is impossible, narrowing the issues to those genuinely in dispute; and

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4 Court Procedures Rules 2006, rule 21.
5 Bail Amendment Act 2011 (ACT).
7 Courts Legislation Amendment Act 2011 (ACT).
8 The Courts Legislation Amendment Act 2011 was passed by the Legislative Assembly on 11 May 2011 and has yet to commence.
listing matters before the Court so that trial dates are always met, and the Court’s schedule ensures maximum use of available judicial resources.

12. Each of the questions below seeks comment on methods that have the potential to increase the efficiency of criminal and civil process in the Territory. Stakeholder responses should provide information about the needs of the profession in relation to each suggestion, and potential challenges in adopting new measures in the Territory.

13. The aim of this paper is to gather information that will allow for the implementation of practices that satisfy the needs of the parties, the community, and the Supreme Court.

Performance measures and challenges of the small jurisdiction

14. The Productivity Commission’s Report on Government Services (ROGS) provides a basis for comparison between jurisdictions, and a consistent measurement of events within the Supreme Court from year to year. The ROGS target for case resolution in matters before superior courts is 90% of cases within 12 months, and 100% within 24 months. In the Supreme Court, these measures count the time from when a matter is first committed for trial or sentence in the criminal jurisdiction, and the time from lodgement in the civil jurisdiction.

15. The last year for which complete data are available, 2009/10, ended with the ACT Supreme Court’s non-appeal criminal matters backlog at 38.4% of cases over 12 months old, and 9.5% of cases over 24 months old. The latest figures follow a trend of increases since 2004/05, when just 12.7% of cases were over 12 months, and 1.3% of cases were over 24 months of age.

16. Similar increases in backlog appear in the ACT Supreme Court’s non-appellate civil matters. (The data show 51.4% of non-appeal matters over 12 months, and 23.6% over 24 months in 2009/10, compared to 47.8% and 21.7% for 2004/05.) The ROGS backlog indicator in the ACT for 2009/10 indicated a growing backlog compared to 2008/09. Complete figures for 2010/11, however, are expected to show clearance rates well above 100% in the criminal jurisdiction, due to a recent drop in the number of criminal matters lodged. The drop in lodgements has permitted the Court to clear a number of pending cases, but so far this clearance rate has not resulted in a high number of long wait cases (over 12 months old) being cleared.

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10 Report on Government Services 2011, Part 7A, Court administration, Table 7A.17.
12 ROGS 2011, Part 7A, Court administration, Table 7A.18.
13 The ROGS 2011 report lists the Supreme Court’s 2009/10 clearance rate at 81.6%; current data for 2011 indicate a figure well over 100% may be reached by the end of 2010/11.
Causes of increasing finalisation times

17. The Territory faces special challenges in managing the flow of cases. Because of the small scale of the ACT Courts, any interruption, delay, or increase in lodgements can cause the backlog of cases to build up very quickly as a percentage of the total. For example, between 2006/07 and 2007/08, the number of non-appellate criminal cases pending for over 12 months jumped 67%, from 48 to 71.14 This increase corresponded to a 68% increase in lodgements in the same timeframe, from 217 to 319.15 In the years since then the number of lodgements has been steadier, and recently, criminal lodgements have fallen.16

18. Late adjournments contribute to delays and lost Court time in the criminal jurisdiction. Of criminal matters committed to the Supreme Court, substantial numbers do not go to trial.17 While most of the committals are committals for trial, rather than sentence, not guilty pleas frequently become guilty pleas as the matter works its way through the Supreme Court pre-trial processes or immediately before the trial is to start. For example, in 2009/10, there were 312 committals from the Magistrates Court. Of those, 114 were committed for sentencing, and 198 for trial.18 Statistics over the past five years have shown between 41% and 71% of listed trials being vacated.19 124 matters were listed for trial in 2010, and the outcomes followed previous years’ trends – changed pleas and prosecution decisions not to proceed resulted in 50% of trials being vacated, most on or close to the listed trial date.20 Of the 50% of trials vacated in 2010, 52% were vacated because of a changed plea, 17% because the prosecution declined to proceed, 9.5% because a witness was unavailable, and 14% for other reasons.21 58% of the time, the trial was vacated on the date listed for trial to begin.22 Only 20% were vacated with more than 20 days notice to the Court.

19. Since 2006, the factor behind most vacated trials is a change of plea.23 Changes of plea routinely occur on the day of trial, or close to trial. Reasons for changed pleas vary. A witness’s appearance, an unfavourable decision in a pre-trial application, a final round of negotiations with the prosecutor, or simply the imminence of trial may all result in changes of plea.

14 Report on Government Services 2011, Part 7A, Court administration, Table 7A.17.
15 Report on Government Services 2011, Part 7A, Court administration, Table 7A.1.
16 In the six months to January 2011, there were 68 fewer lodgements in the criminal jurisdiction than in the six months to January 2010.
17 Figures provided by the Supreme Court listing clerk are as follows: 2006: 48.75%; 2007: 28.26%; 2008: 37.04%; 2009: 47.46%; 2010: 25.80%.
18 Ibid.
19 Ibid.
20 Matters committed in a year are not necessarily listed in that year; this is why the number of trials listed does not match the number of trials committed.
21 These figures are drawn from a list of matters maintained by the Supreme Court listing clerk.
22 Ibid.
23 Also based on information provided by the Supreme Court listing clerk.
20. Stakeholders have reported a lack of early engagement with the issues as a common cause of delay. Scheduling trials far in advance, multiple adjournments of proceedings before trial, and a high proportion of late changes of plea all contribute to this effect, because time spent preparing for a hearing might eventually be wasted if for some reason the matter does not proceed. Certainty of the trial date has been emphasised in consultation with judicial officers in other jurisdictions, and in reviews of trial management, as an essential feature of effective case management.24

Previous case management reforms and reviews

21. The Supreme Court’s listing and case management practices have featured prominently in multiple reports and discussions in recent years. Most recently, they were considered in the Supreme Court Working Group’s report of April 2010.25 Prior to that, listing and case management were considered in the context of the Magistrates Court in the Auditor General’s Report No. 4 of 2005 on Courts Administration (the Audit Report), with some supplementary discussion of the Supreme Court’s practice in a November 2010 follow-up audit.26

22. The Audit Report and follow-up suggested, among many recommendations for reform of courts administration, reviewing case management procedures and improving information technology to measure performance. Then Director of Public Prosecutions, Richard Refshauge, submitted to the Auditor-General that consensus between the Courts and the profession could affect the level of compliance with any new case management procedures.27 The ACT Law Society and ACT Bar Association also submitted that, in any project to reform listing practices, consultation with the profession is absolutely essential.28

23. The current practice directions and court rules regarding Supreme Court procedure reflect the outcome of some of these past discussions. The Pre-Arraignment Conference (PAC) and attendant forms were introduced in an attempt to improve management of criminal cases. The PAC was designed to give the Registrar information that could affect the number and length of pre-trial events, in addition to identifying the issues that may arise at trial. A questionnaire was also introduced to seek information from the parties about likely points of contention.29 The scheme was designed to assist the parties to confer before arraignment and settle any outstanding issues.

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25 “Report for presentation to the Courts Governance Committee on issues affecting the ACT Supreme Court’s ability to complete in a timely way cases currently coming before it,” ACT Supreme Court Working Group (April 2010).
26 Follow-up Audit – Courts Administration, ACT Auditor-General’s Office, November 2010.
27 ACT Director of Public Prosecutions, submission on the Auditor-General’s Report No. 4 of 2005.
Court Procedures Rules 2006, Form 4.10.
24. The implementation of the PAC underscores the importance of monitoring case management practices. After a review of its impact on pre-trial preparation, the PAC was discarded from March 2011.\textsuperscript{30} While a PAC was sometimes a useful step in promoting settlement, there were high rates of non-attendance at the PAC, which in turn led to delays in listing matters for trial.\textsuperscript{31} While in theory the PAC should have led to reduced resolution times and earlier guilty pleas, monitoring of its implementation showed that the additional cost and time generated by the PAC was not warranted by the results.

25. The Supreme Court Working Group’s report considered the efficacy of existing procedures, and suggested a review of case management procedures, sentencing discounts, and the jurisdictional limits of the Supreme Court. Many of the topics of concern in the Supreme Court Working Group report were previously mentioned in the ACT’s contributions to the Australian Institute of Judicial Administration’s Case Management Conference 2005.\textsuperscript{32} At that time, the Pre-Arraignment Conference and attendant pre-trial questionnaire had recently been introduced in the criminal jurisdiction. Since that time, New South Wales, Victoria, Queensland, and Tasmania have enacted significant reforms to the criminal process in order to reduce delays.\textsuperscript{33}

II. Models of case management and practices in other jurisdictions

Approaches to case management

26. Case management is active judicial intervention in matters before the Court, with the aim of improving resolution times and efficiency in the use of Court resources.\textsuperscript{34} Adopting case management practices represents a shift away from the traditional adversarial model, where the parties drive all key events in a case. Originating with a desire to improve the speed and efficiency of the Courts, a policy of at least some judicial intervention to narrow the issues and direct the parties towards resolution has been adopted in all Australian jurisdictions.\textsuperscript{35} While case management has generally been regarded as effective in speeding resolution times, it is not without controversy. Case management practices can increase costs to the parties even when they reduce finalisation times, by requiring extensive preparation and more scrutinised appearances before the Courts.\textsuperscript{36} It is also the case that case management reforms, if

\textsuperscript{30} ACT Supreme Court Registrar’s Notice to Practitioners, 25 February 2011.
\textsuperscript{31} Ibid.
\textsuperscript{32} AIJA Case Management Seminar Proceedings, February 2005.
\textsuperscript{33} Criminal Case Conferencing Trial Act 2008 (NSW); Criminal Procedure Act 2009 (Vic); Civil and Criminal Jurisdiction Reform and Modernisation Act 2010 (Qld); Justices Amendment Act 2007 (Tas).
\textsuperscript{34} Review of the Criminal and Civil Justice System, Final Report, Western Australia, 1999, Ch.12.
\textsuperscript{35} Ibid.
\textsuperscript{36} Changes in the Trial Process, the Hon Peter McClellan, presentation to Civil Justice Reform – What has it achieved? April 2010,
not carefully tailored to the jurisdiction, present the risk of actually increasing resolution times by requiring unnecessary work before trial. These risks can be minimised by ensuring that case management rules are applied with appropriate flexibility, to account for the wide range of circumstances that may arise before the Court. Flexibility in case management is particularly important in the ACT Supreme Court as compared to other jurisdictions, many of which have a more narrow Supreme Court jurisdiction. A docket Judge’s capacity to assess the appropriate level of case management matter by matter would increase the scope for a flexible application of the case management rules.

27. Most jurisdictions have adopted, and most reviewers have recommended, a mixed approach to case management. In the mixed approach, only those cases that require early intervention and scrutiny are subject to the full range of case management measures. Implementation of differential management depends in part on the ability to identify early on what degrees of management will be necessary (for example, judicial or registry intervention).

28. A key principle of case management reform projects has been to minimise the number of court events necessary to finalise a matter. Higher numbers of required appearances in the pre-trial stage result in higher costs to the parties, and potentially longer delays before finalisation. To the greatest extent possible, court events should be limited to only those necessary to drive a case towards conclusion.

Existing criminal management systems: Arraignment and criminal directions in the ACT Supreme Court

29. The 2010 Supreme Court Working Group report suggested reviewing pre-trial events, including the practice of maintaining a separate arraignments list. One of the pre-trial events, the Pre-Arraignment Conference, was evaluated and discarded in March 2011 (discussed above at 23-25). The arraignment date triggers two important consequences in the ACT Supreme Court: it gives the Court jurisdiction over the committed matter, and it ends the period during which a person may withdraw an election for a Judge-alone trial.

30. The Supreme Court introduced a separate arraignments list, published at the beginning of each term, to provide some certainty about the deadlines in relation to


38 Changes in the Trial Process, the Hon Peter McClellan, presentation to Civil Justice Reform – What has it achieved? April 2010.
39 Report to the Chief Justice of the Northern Territory on Calendar and Listing Arrangements, Justice Moynihan, Senior Judge Administrator, Supreme Court of Queensland (August 2001), p.7.
40 See Court Procedures Act 2004 (ACT), s 76(1), and W v The Queen (2001) 115 FCR 41
41 Supreme Court Act 1933, s.68B.
elections for judge-alone trials. The separate arraignments list does provide some certainty about the timing for elections for judge-alone trials and for withdrawing such elections, but certainty about judge-alone elections has not yielded clear benefits in terms of efficiency.

31. The recent Tasmanian reforms differentiate between listing matters committed for sentence and those committed for trial.42 The latter are scheduled for a first appearance in the Supreme Court 7 weeks from committal, while the former are listed for appearance in 7 days. The reason is that, where there has been a plea of not guilty, the seven weeks are seen as necessary to allow the parties to prepare for a meaningful first appearance before the Court. The more complicated issues relating to the indictment and other pre-trial matters can be identified, discussed and prepared in advance of the first hearing during the 7 weeks. In relation to a sentencing matter, less time is necessary because there are fewer complicated issues to be addressed by the Court.

32. A similar model could prove useful in the ACT Supreme Court. Combining the arraignment with one of the two existing directions hearings (first directions or pre-trial directions) would be one method of listing fewer events before trial. Conducting the arraignment along with an initial directions hearing should have a minimal impact on the scheduling of those hearings, as the time devoted strictly to arraignment will be relatively short.

33. Delaying the first appearance in matters committed for trial, and relying on a practice direction to require the parties to complete the necessary pre-arraignment filings, could lead to more productive first appearances in criminal matters. Following the Tasmanian model, a new practice direction could require a more detailed version of the pre-trial questionnaire, sufficiently in advance of a first listed appearance to allow the Registrar to identify parties who are behind in their filings, to identify any issues that might arise which would require a longer or more complicated hearing, and to contact the parties and order any further steps necessary. Changes to the listing of arraignments may require changes to the point at which the Supreme Court obtains jurisdiction under the Court Procedures Act 2004. An earlier or different trigger for jurisdiction could support the new process by avoiding disputes about when the Court is seized of the matter.

Question 1

Is there any practical need for the separate arraignments list in the Supreme Court (as distinct from the current legal needs)?

Question 2

a) Should the first appearance in matters committed for trial be listed separately, and on a different basis, from matters committed for sentence?
b) Should the standard criminal directions be issued by practice direction, or by the rules, rather than at an initial appearance?

Question 3

Is there any reason why the point at which the Supreme Court obtains jurisdiction over a criminal matter should not be an earlier, or different, event than arraignment?

III. Criminal procedures and sentencing practices

Focus of criminal procedures reforms

34. Criminal procedure reform in relation to indictable matters in Australia has focused on streamlining pre-trial events, promoting early pleas of guilty in appropriate cases, increasing the certainty of trial dates, and narrowing the issues before trial. Some of the more common reasons identified for trial delays include:
   - failure by the parties to engage in the issues until trial is imminent,
   - failure to appreciate the relative strengths and weaknesses of each case, and
   - defendants’ unwillingness to instruct until trial or sentencing is imminent.

35. Late engagement in the issues by the prosecution can lead to last minute amendments to indictments, last minute agreement to pleas on lesser charges, or a decision not to proceed. Late engagement by the defence can lead to late changes of plea. The result is that trial listing becomes difficult and unpredictable; late trial vacations have the potential to leave unused time which could otherwise have been allocated to resolve a different matter. Judicial time is used in preparation when that time could have been allocated to other matters. Public resources are also used in the preparation undertaken by the Office of the Director of Public Prosecutions and by defence counsel funded by Legal Aid. The aim of criminal case management and sentencing reform is to provide mechanisms and incentives for encouraging early resolution of matters in cases where a plea or decision not to proceed is appropriate, to ensure as far

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43 Payne, Jason, Criminal Trial Delays in Australia: trial listing outcomes, AIC Research and Public Policy Series No. 74, 2007.
44 These causes were discussed by the ACT Reference Group, and have been identified in reports issued by other jurisdictions, see e.g. Payne, Jason, Criminal Trial Delays in Australia: trial listing outcomes; Report of the Trial Efficiency Working Group, March 2009 (NSW), http://www.lawlink.nsw.gov.au/lawlink/crld/ll_elrd.nsf/vwFiles/TEWG_ReportMarch2009.pdf/$file/TEWG_ReportMarch2009.pdf
as possible that where early resolution is possible, it comes early enough to allow the scheduled trial date to be re-allocated. Encouraging an early plea of guilty is particularly important, as the majority of matters committed end in a plea. For example, in 2009/10, 67% of the total criminal matters lodged in the Supreme Court ended in a plea of guilty.\textsuperscript{45}

\textbf{Sentencing discounts}

36. All jurisdictions in Australia offer discounts for early pleas of guilty.\textsuperscript{46} For example, under the \textit{Crimes (Sentencing Procedure) Act 1999} (NSW), courts must take into account a plea of guilty, and the time at which the plea was entered, in determining a sentence. The NSW Supreme Court set guidelines of between 10 and 25\% for discounts under this provision in \textit{R v Thomson & Houlton} (2000) 49 NSWLR 383. Discounts provide an incentive to plead guilty early in the process, which saves victims the trauma of ongoing proceedings, and also conserves public resources.

37. A similar provision exists in section 35 of the \textit{Crimes (Sentencing) Act 2005} (ACT). The ACT legislation does not specify the amount of a discount, but was explicitly written to offer greater discounts for earlier pleas of guilty.\textsuperscript{47} In addition, the ACT legislation accords with other jurisdictions’ sentencing discount regimes by requiring that the presiding Judge state what the sentence would have been but for the reduction under section 35.\textsuperscript{48}

38. Two matters are frequently the subject of consideration in sentencing discount schemes:

\begin{itemize}
  \item the point at which a plea may reasonably be considered “early”; and
  \item scepticism about the actual difference between sentences handed down on a plea compared with after a trial.
\end{itemize}

39. A core principle in implementing a sentencing discount regime, and in encouraging guilty pleas generally, is that the accused should not be unduly influenced or coerced into a guilty plea. Discounts and any other case management reform aimed at securing an early guilty plea should only do so to the extent that a plea is fair and reasonable under the circumstances. Discounts for early pleas, or penalties for late pleas, cannot be so great that they result in pleas of guilty simply to avoid the risks of a trial.

40. Discounts and other incentives for a plea must also take account of the circumstances of each case. In complex cases, or in cases where the prosecution’s case evolves past the committal date with further evidence, it may be unreasonable to expect a

\textsuperscript{45} Australian Bureau of Statistics, Criminal Courts, Australia 2009-10 (4513.0).
\textsuperscript{46} Ibid.
\textsuperscript{47} Explanatory Statement, Crimes (Sentencing) Bill 2005.
\textsuperscript{48} Crimes (Sentencing) Act 2005, s37.
defendant to plead guilty at a fixed point in time for a discount. At a minimum, defendants must have a full picture of the prosecution case, and a meaningful opportunity to seek advice, before they should be reasonably expected to enter a plea of guilty; comparisons between the original charge and the charge to which the prosecution ultimately accepts a plea may also be relevant to an assessment of an early plea.

41. The issue of when a plea is early underscores the challenge of promoting early pleas through sentencing discounts without producing unfair outcomes. If the incentive is very high, and the risk associated with a conviction is great, defendants might feel coerced to plead to facts that overstate the actual crime. Similarly, the discounts should not be so great that defendants who plead early avoid appropriate sentences entirely, an outcome that has the potential to offend victims and the community conscience.

42. There has been a recent trend towards placing the amount of discount available, and the points at which a discount is available, into statute. These measures are designed to increase the transparency and consistency of sentencing discounts, which in turn may give defendants a clearer picture of the benefits of pleading guilty early in the process. In the New South Wales trial model (which also includes case conferencing, discussed below at 49-52), a plea before committal yields 25% off the usual sentence. A plea after committal must not yield any more than 12.5%. The South Australian model would institute discounts ranging between 20% and 40%, depending on the stage at which the defendant pleads guilty.

43. One issue identified in preliminary consultations for adopting statutory sentencing discounts in the ACT is the importance of demonstrating the discount to defendants. Without having sentences that are defined by statute (as in the standard minimum non-parole period in New South Wales), or clear ranges that have been defined by numerous appeals and guideline judgments (to deal with the range of different facts available for each type of offence), it may be difficult to demonstrate to defendants the extent of a discount. When the penalty for an offence is tailored to the specific facts, and there is no clear appellate or statutory guidance for what the standard sentence would be, the concept of a discount can be unclear. The relative lack of

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50 Ibid.
52 Criminal Case Conferencing Trial Act 2008 (NSW); exposure draft Criminal Law (Sentencing) (Sentencing Considerations) Bill 2010 (SA).
53 Criminal Case Conferencing Trial Act 2008 (NSW), s.17.
54 Criminal Law (Sentencing) (Sentencing Considerations) Bill 2010 (SA), clause 6.
55 NSW Sentencing Council statistics, for example, provide information about sentencing trends that is not presently available in the ACT. NSW Sentencing Council Annual Report, 2008/09.
baselines in ACT sentencing (a problem which will not easily be overcome given the small numbers of most kinds of offences dealt with in the ACT) may make statutory discounts less effective in promoting an early plea of guilty than in other jurisdictions.56

| Question 4 |
| Should the ACT legislate for the amount of discount available for early pleas of guilty? |

| Question 5 |
| At what points in the process should a plea be considered early, and under what circumstances? |

| Question 6 |
| What statutory limits, if any, should be imposed on the availability of discounts, and at which points in the pre-trial process should they be imposed? |

Sentencing indications
44. One measure designed to complement sentence discounts is the sentence indication process. A sentence indication scheme permits a Judge to state explicitly, before a final plea is entered, what the sentence would be as a result of a guilty plea, and what it would be if the matter goes to trial and produces a guilty verdict. If the defendant pleads guilty as a result of the indication, the indicated sentence is handed down. Certainty of the sentence to be imposed is arguably one way to promote early pleas of guilty in appropriate cases.

45. Sentence indication schemes have been implemented in other jurisdictions. Such schemes have been reviewed in the past in New South Wales, and recently in New Zealand and Victoria, with mixed results. In both NSW57 and Victoria,58 take-up of the sentence indication option was low, particularly in Victoria, where less than 1% of matters involved a sentencing indication. The low take-up and lack of any perceptible benefit resulted in the NSW pilot scheme being abandoned. Following a recent report


56 The ACT is currently exploring options to improve information collection to meet the 2008 ACT Labor Justice and Law Reform policy platform proposal to establish a means of collecting, analysing and publishing statistical data on sentencing. Investigating options to better use ACT sentencing information to facilitate a greater consistency in criminal court sentencing was identified as a priority in the 2011/2012 Budget.


that indicated stakeholder satisfaction in Victoria, however, the sentence indication scheme was incorporated into the *Criminal Procedure Act 2009 (Vic).*\(^59\)

46. A sentence indication is effectively a binding offer made by the court. The Victorian rules specify that an indication may only be given in indictable matters on the application of the accused, with the consent of the prosecutor.\(^60\) If the court indicates a sentence and the accused pleads guilty at the first available opportunity as a result, the final sentence given must not be more severe than the indication.\(^61\) If the accused does not plead guilty, the trial must be under a different judge from the one who gave the indication.\(^62\)

47. While the evidence from Australian jurisdictions has not, to date, demonstrated a significant impact on late guilty pleas or trials, the New Zealand District Court has reported greater success with similar procedures. Sentence indications have been in place administratively since a 1995 pilot program in the Auckland District Court.\(^63\) During a trial period, 13% of indictable matters in the Auckland District Court involved a request for a sentence indication. When combined with the completion of a case management memorandum (a document that requires pre-trial conferral and agreement on the issues in contention), guilty pleas following a sentence indication were as high as 76% in one test site.\(^64\) The findings were the basis for including sentence indications in the *Criminal Procedure (Reform and Modernisation) Bill 2010 (NZ).*\(^65\) If enacted, the Bill would completely overhaul criminal procedures in New Zealand, and would include sentence indications alongside a series of pre-trial measures intended to streamline the flow of criminal matters in the New Zealand courts.

48. In the ACT, while defendants and the prosecution can agree on a recommended sentencing range (for example, non-custodial versus custodial), such an agreement does not bind the Court, and at present there is no formal mechanism for requesting a guaranteed sentence in advance of the actual sentencing hearing. One serious consideration in relation to sentence indications in the ACT is that, if the Judge giving the indication is thereby precluded from hearing a subsequent trial, then a high

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\(^{59}\) Criminal Procedure Act 2009 (Vic), s.207.

\(^{60}\) Criminal Procedure Act 2009 (Vic), s.208.

\(^{61}\) Criminal Procedure Act 2009 (Vic), s.209.

\(^{62}\) Ibid.


number of requests for sentence indications that do not produce guilty pleas may cause the Supreme Court’s lists to become difficult to manage.

**Question 7**

Should there be provision for binding sentencing indications to be given by the ACT Supreme Court?

**Criminal case conferencing**

49. A system of criminal mediation was introduced in Western Australia as a result of the 1999 report on civil and criminal justice. In the WA system, Judges have the power to order defence and prosecution to meet and confer on the appropriate charges and the issues in contention, and to order expert witnesses to confer and discuss issues in contention as well.\(^\text{66}\) Voluntary mediation is available on a non-prejudicial basis under a protocol adopted by the WA Supreme Court.\(^\text{67}\) The Court makes retired judges or other sufficiently independent mediators available to assist. The aim of the program is to promote early settlement of criminal matters or, in the alternative, to narrow the issues before trial, so that the length and conduct of the trial is predictable. The system essentially seeks to apply the successful elements of civil mediation and alternative dispute resolution to criminal cases.

50. New South Wales recently introduced a similar model, with the *Criminal Case Conferencing Trial Act 2008* (NSW). The Act introduced a system of mandatory referrals for case conferencing in some NSW Local Courts, to be undertaken prior to committal hearings. Indictable matters in the Downing Centre or Central Local Courts must, with few exceptions, undergo a case conference before committal. At the conference, the prosecution and defence must discuss the charges which will be heard at committal, and any alternative charges about which the defendant might concede guilt.

51. The NSW Criminal Case Conferencing system incorporates both pre-trial identification of issues, and sentencing incentives for early pleas. If the defendant agrees to plead guilty, and does so before the committal proceedings, a discount of 25% must be given under the statute.\(^\text{68}\) The legislation further specifies that if a plea is entered after committal, the Court may allow up to 12.5% discount, but any discount needs to be proportionate to the benefit of the plea.\(^\text{69}\) Preliminary evidence indicates that the trial has not resulted in a significantly greater proportion of guilty

\(^{66}\) Criminal Procedure Act 2004 (WA), s.137.


\(^{68}\) Criminal Case Conferencing Trial Act 2008 (NSW), s.17.

\(^{69}\) Ibid.
pleas, or in earlier guilty pleas.\textsuperscript{70} (The reasons for this were not clearly identified in the study, but it is possible that the similarity between the statutory discounts and prior discounts accorded under the New South Wales guidelines meant very little de facto change in incentives as a result of the legislation.) Stakeholder satisfaction with conferences remains high, however.\textsuperscript{71} A similar system of presumptively mandatory conferencing combined with sentence indications is in place in the Tasmanian Magistrates Court, in the form of contest-mention hearings.\textsuperscript{72}

52. The combination of sentencing incentives and criminal case conferencing is intended to encourage a complete evaluation of the case by both sides, and, on the basis of that evaluation, an incentive for an early plea. These conferences should be broad ranging enough to include discussions about the evidentiary basis of the case – the prospects for a plea should include a discussion of the merits of any applications that are likely to be made. Ideally the case management and conferencing powers would be broad enough to allow the Court to order discussion after major evidentiary disputes have been resolved through pre-trial applications.

Current ACT practice – Case Management Hearings

53. In the ACT, the Case Management Hearing (CMH) in the Magistrates Court is intended to fulfil a similar role to the various pre-trial negotiation mechanisms in other jurisdictions. The CMH is held in the Magistrates Court before committal or summary hearings. The Magistrates Court Practice Directions (No. 1 of 2009) require the prosecution and defence to identify issues in contention before a CMH. In practice, the introduction of the CMH process in 2004 has not resulted in demonstrable increases in early guilty pleas in cases that ultimately proceed to the Supreme Court.\textsuperscript{73} Rates of vacated trials, delays, and late guilty pleas remained similar. A complete review of the CMH and its effects in the Magistrates Court is underway following the Auditor-General’s 2010 update to the 2005 report on Courts Administration.\textsuperscript{74}

54. Adopting the Western Australian model would require making skilled mediators (retired Judges are often made available in that jurisdiction) available to the parties. One issue identified in preliminary consultation with the reference group was that criminal mediation may increase the costs of preparing for a case. This is because the parties would be required to fully identify the issues for mediation, and then again for a later trial if the mediation (in whatever form) failed. There will, however, be some

\textsuperscript{71} Ibid.
\textsuperscript{72} Guidelines for contest-mention hearings are available online at: \url{http://www.magistratescourt.tas.gov.au/divisions/criminal and general/contest_mention}
\textsuperscript{73} ROGS data and statistics provided by the Supreme Court registry show no overall changes in the indictable jurisdiction after the CMH was introduced.
\textsuperscript{74} Auditor-General’s Follow-up Report of November 2010, Recommendation 3.
efficiencies in preparing for trial, given that much of the preparation will have occurred at an earlier stage.

**ACT Director of Public Prosecutions initiative**

55. In March 2011, Jon White, the ACT Director of Public Prosecutions announced a new rotating Practice Manager position for Supreme Court matters. The role of the Practice Manager will be to review matters that have been committed, and to consider plea negotiations. The intention is to support efforts to identify the likely issues as soon as possible in Supreme Court matters. This new role should assist in achieving some of the benefits of pre-trial conferencing in criminal matters described above at 49-52.

56. Facilitating early communication between the Office of the Director of Public Prosecution and defence practitioners, notably Legal Aid, is instrumental to improving trial efficiency. Criminal procedure reforms in other jurisdictions have been enacted to support and encourage the process of early engagement. These reforms ultimately depend on the involvement of practitioners with sufficient experience and authority to negotiate an agreement as to the outcome, or at least the issues.

57. Without any changes to the existing procedures, the Practice Manager scheme should provide an opportunity for prepared defence counsel to initiate early discussions when the matter reaches the Supreme Court. Additionally, matters that might otherwise have resulted in a late filing of nolle prosequi may be resolved at an earlier stage. In recent discussions with the Office of the Director of Public Prosecutions, Legal Aid ACT has expressed interest in initiating contact with the Practice Manager earlier in the process, before committal for trial. The success of any new criminal procedures will be greatly enhanced by efforts such as these from the DPP and defence practitioners to facilitate early review of criminal matters in the Supreme Court.

**Question 8**

Should pre-trial criminal conferencing be required in the Magistrates Court, Supreme Court, or both, and if so, by legislation or practice direction?

**Question 9**

If so, what matters would need to be addressed in the legislation?
Pre-trial disclosure obligations in criminal proceedings

58. Broad disclosure obligations are already a feature of civil practice. Parties are generally required to exchange information on witnesses, issues in contention, and other evidence prior to trial. Reciprocal disclosure reduces the element of surprise, and encourages the parties to honestly evaluate their respective positions prior to trial. Identifying the contested issues in advance improves trial efficiency by allowing the court and the parties to focus on disputes that need to be resolved, and that are relevant to the case.

59. The Standing Committee of Attorneys General Report\textsuperscript{75}, the Western Australian Report on Criminal and Civil Justice\textsuperscript{76}, the Queensland Review of Civil and Criminal Justice\textsuperscript{77}, and the Trial Efficiency Working Group report in New South Wales\textsuperscript{78} all considered a statutory basis for pre-trial disclosure to be an important feature of criminal case management. Complete disclosure of the prosecution’s case has long been required, and recognised as essential to providing a fair trial.\textsuperscript{79} In contrast to civil matters, however, defendants in criminal matters have traditionally not been required to disclose the details of any planned defence. Jurisdictions with dedicated criminal procedure legislation, however, have reversed this position by adopting reforms that compel varying degrees of defence disclosure.\textsuperscript{80} The statutory reforms that introduced defence disclosure make criminal pre-trial procedures more like civil proceedings, where an open exchange by both parties is considered essential to narrowing the issues in contention and promoting early settlement.\textsuperscript{81}

60. In the ACT, on committal for trial in the Supreme Court, the prosecution must file:
- a draft indictment;
- the case statement;
- a list of proposed witnesses; and
- a pre-trial questionnaire.\textsuperscript{82}

61. Defendants, in turn, must give notice of an alibi within 14 days after committal for trial.\textsuperscript{83} Prior to committal, the prosecution is required to hand over witness statements and exhibits.\textsuperscript{84}

\textsuperscript{75} Standing Committee of Attorneys General Working Group on Criminal Trial Procedure, 1999.
\textsuperscript{76} Review of the Criminal and Civil Justice System, Final Report, Western Australia, 1999.
\textsuperscript{77} Moynihan QC, Review of the Civil and Criminal Justice System in Queensland, 2008.
\textsuperscript{78} Report of the Trial Efficiency Working Group, March 2009 (NSW).
\textsuperscript{80} A selection of defence disclosure statutes from around Australia and New Zealand is at Appendix2.
\textsuperscript{81} The explanatory note to the Criminal Procedure Amendment Bill 2000 (NSW), which introduced pre-trial defence disclosure in NSW, summarises the reasons commonly cited for the requirement.
\textsuperscript{82} Court Procedures Rules 2006, Rules 4733 and 4734.
\textsuperscript{83} Crimes Act 1900, section 288.
\textsuperscript{84} Magistrates Court Act 1930, s.90.
62. In contrast, the New South Wales Criminal Procedure Act 1986 provides broad case
management powers to the court over criminal matters. Included in these powers is
a tiered system of disclosure requirements, where all matters require some basic level
of reciprocal disclosure. A recent examination of trial efficiency and delay found that
increasing the ability of the courts to order disclosure would improve trial efficiency. Prior to 2009, the most extensive criminal disclosure orders were available when a Judge found the matter to be particularly complex. Under the new test in the Criminal Procedure Act 1986 (NSW) a Judge has wide discretion to order disclosure on a case by case basis. Depending on the information about the case before a Judge, different levels of prosecution and defence disclosure, including disclosure of expert witness reports and summaries of other evidence, can be ordered. Disclosure allows the Court to more thoroughly assess the likely progress of a trial. The information sharing also reduces the possibility of surprise developments that might require adjournment of a trial to hear and settle unanticipated disputes.

63. Pre-trial defence disclosure has been controversial when adopted in other
jurisdictions. Disclosure requirements must be balanced to reflect the resource
advantage of the Crown over defendants. The basic principles applicable to civil
cases also apply in criminal matters, in that disclosure allows both the prosecution and
the defence to honestly evaluate their positions before trial. In cases where agreement
on the facts or outcome cannot be reached, disclosure should promote identification of
the issues in contention. That information can in turn allow the Court to manage pre-
trial applications and the trial so that attention is given only to those issues genuinely
in dispute, and relevant to the outcome of the case.

Question 10
Should the ACT require defendants/accused persons to disclose issues in dispute,
likely applications, and a list of witnesses, before trial?

Question 11
Should defendants/accused persons be required to disclose expert
reports before trial?

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85 Criminal Procedure Act 1986 (NSW), Pt 3, Division 3.
86 Criminal Procedure Act 1986 (NSW), sections 137 to 146.
87 Trial Efficiency Working Group Report, March 2009 (NSW).
88 Criminal Procedure Act 1986 (NSW), s.136.
89 The most common arguments are reviewed in The Right to Silence, Report 95 of 2000 of the New South Wales Law
Improving the flow of matters between Magistrates Court and Supreme Court

64. The Director of Public Prosecutions (DPP) identified aspects of the relationship between the Magistrates and Supreme Courts that may lead to inefficient handling of cases. There are two situations in particular where changes of plea or of counsel following committal to the Supreme Court can result in administrative difficulties: first, where a defendant pleads guilty at committal and then is committed for sentencing, and second, where a matter is committed and a related summary charge remains in the Magistrates Court.

65. In the first situation, the effect of section 90A of the *Magistrates Court Act 1930*[^91] is that a plea of guilty in the Magistrates Court may be reversed in the Supreme Court after the matter has been committed to that Court. If the defendant then asks for the matter to be returned to the Magistrates Court, the matter will proceed as if the defendant had not plead guilty.[^92] This structure allows in theory for a loop, whereby a defendant can reverse a plea of guilty in the Supreme Court, then plead guilty again in the Magistrates Court, only to be committed for sentencing a second time. The DPP noted that delays between committal for sentencing and the Supreme Court becoming seized of the matter increased the chances of delays resulting from the operation of section 90A.

66. The second difficulty the DPP identified in managing committed matters was in the handling of related summary offences. The Supreme Court’s power to deal with summary matters is limited by section 68D of the *Supreme Court Act 1933*. As a result, in many cases, a lesser included summary offence or a summary offence arising from the same incident will be dealt with in the Magistrates Court only after the indictable matter is completed in the Supreme Court. Apart from the inefficiency of litigating the same facts in both Courts, jury verdicts can lead to serious double jeopardy issues. Where the same facts are at issue in both the summary and indictable offences, a jury acquittal will not necessarily be an acquittal on the summary charge, but in some cases, a jury verdict of not guilty may imply findings of fact that would make conviction on the summary charges unavailable.

67. A carefully designed provision allowing the Supreme Court to hear summary matters that are related to indictable matters could avoid these problems. This would help to prevent appeals based on the apparent inconsistency between indictable and summary outcomes in the Supreme Court and Magistrates Court. There are significant questions as to the burdens that might be imposed on defendants. These would have to be accounted for carefully in changing the current legislation. The defendant’s right to

[^91]: Section 90A.
[^92]: Magistrates Court Act 1930, section 90A(10)(b); 90A(13)(a).
elect summary jurisdiction will be at issue in some of these matters, and the increased costs of dealing with a matter in the Supreme Court may be an issue as well.

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<td>Should there be restrictions on the ability of defendants who plead guilty in the Magistrates Court to change their pleas following committal for sentencing in the Supreme Court?</td>
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<td>Should the <em>Magistrates Court Act 1930</em> and the <em>Supreme Court Act 1933</em> be amended to allow the Supreme Court greater scope to hear summary charges against an accused person that have similar elements to indictable matters being heard in the Supreme Court, or that arise from the same facts and circumstances?</td>
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**Sentencing hearings**

68. In the ACT, sentencing hearings are sometimes delayed by last minute events that require adjournment. The causes of these last minute adjournments are similar to the causes of adjournments of trials. These causes include: late identification of the issues, leading to the need to adjourn and further consider the facts that will underlie the sentence; last minute disputes over pre-sentence reports; and late notice of witnesses who may need to be called (including victims to give an impact statement) or of extra reports (e.g., psychiatric reports) that may need to be obtained.\(^{93}\) Ensuring that information is exchanged prior to sentencing hearings, that issues in dispute are identified, and that the Judge receives the information necessary to complete the hearing in a timely fashion should help to reduce adjournments and unexpected delays in completing sentencing hearings.

69. The costs of adjourned sentencing hearings are also significant. Defendants experience delay on top of any delays leading to trial and judgment. Court time is required to hear the matter again, and all involved parties are subjected to greater inconvenience and expense. Improved sentencing procedures have the potential to shorten resolution times, and allow the Court to complete more sentencing matters in any given timeframe.

70. Consultation with officers in other jurisdictions showed that submissions, statements of fact, and reports are generally required to be with the Court well in advance of a sentencing date. In the actual sentencing proceedings, rather than reading reports and

\(^{93}\) Recently the standard directions in sentencing matters have been changed to include a direction that, at least 2 days before the sentencing hearing, the accused file and serve a copy of any documents on which he or she proposes to rely.
statements of facts on to the record, summaries are given. These procedures allow judicial officers to familiarise themselves with the matter before the hearing, and to use time efficiently during the actual proceedings.

71. A change in the custom of reading pre-sentence reports and statements could be achieved without any change to legislation or the rules, and would potentially save significant Court time. It is arguable that reading reports in open Court contributes to open access to justice, by allowing all those present in the courtroom to hear all of the submissions before the Court. However, these documents would be on the record for any interested members of the community to review. Ensuring that these documents are filed well in advance would help the parties to identify any contentious issues, and allow the sentencing Judge to prepare draft sentencing remarks, in advance of the hearing. One option is to require parties to file a summary of the agreed facts for inclusion in sentencing remarks, and to identify the portions of the pre-sentence report that they will rely on in the sentencing hearing.

72. Procedural reforms to sentencing hearings should be designed, as with case management measures for trials, to reduce adjournments and ensure that surprise delays are minimised. Pre-sentence disclosure requirements might also extend as far as requiring both parties to disclose any disputed facts, witnesses they seek to call, and any other submissions that will be made at sentencing, to each other and to the court in advance of the sentencing date. While the requirements are similar to those reviewed above at 58-63 in relation to trials, disclosure in anticipation of a sentence should attract less controversy because it does not have implications for the trial process.

Question 14

What information and materials related to a sentencing matter should have to be disclosed between the parties, and filed with the court, before the sentencing hearing?
IV. Judicial control: enforcing compliance, improving civil case management, adhering to timetables, and pre-trial attempts at resolution

73. Consultation with other jurisdictions affirmed the view that judicial control over case management functions, including listing, is essential to court efficiency. The importance that judicial leadership plays in an effective case management system cannot be overstated. In Queensland, judicial control has been formalised in the role of the Senior Judge Administrator. The Senior Judge Administrator oversees the allocation of the caseload and the management of all lists in the Queensland Supreme Court. While this model may be more suitable to a large court than a smaller one like the ACT’s, it highlights the importance that judicial leadership plays in managing the case-flow of the Courts. The discussion of the docket system (discussed below), where each case is assigned to one Judge for management from commencement to finalisation, is another method of improving Judges’ ability to manage the progress of cases before the Court. Judicial independence requires Judges to actively participate in programs to manage the resources of the Court effectively.

74. Implementation of new case management and other pre-trial procedures would require agreement between the local profession and the Court on the importance of participating in the new scheme. Developing a culture of participation in new schemes helps to ensure that new pre-trial requirements, and the attendant timelines, will be effective in achieving the Court’s goals. Measures that implement the Court’s expectations with respect to timeframes, adherence to scheduled dates, and adjournments should be introduced in a way that encourages all parties to understand that compliance will be taken seriously by the Court. At the same time, any new rules and procedures must be the result of consultation and consideration of the needs of all stakeholders.

75. Implementing new case management and listing practices would impose new responsibilities on judicial officers, and require them to apply different skills. There are various ways for the judicial officers to equip themselves for their roles. Increased interaction with courts across Australia, and participation in judicial education, can serve to enhance the Court’s capabilities in designing and implementing new case management initiatives. Professional development can increase the ability of each Judge on a Court to participate effectively in a wider variety of matters, and also helps to distribute experience and lessons across

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94 Supreme Court of Queensland Act 1991, s.59.
As discussed above in Part I, extensive consultation with practitioners is likely to help in achieving high rates of compliance from the beginning of any new program of case management, but an effective program of sanctions is also necessary to support the design and implementation of a case management program.

Sanctions in civil matters

The available sanctions in civil matters in the ACT are comparable to those in other jurisdictions. Applications can be denied, costs imposed, and in extreme cases, a matter can be struck off in response to breaches of the case management directions and rules. A judicially-implemented policy on adjournments, taking into account judicial guidance on how case management principles may guide adjournment decisions, is likely to be more relevant to enforcing compliance with schedules than a change to the available sanctions. (Adjournments are discussed below.)

Sanctions in criminal matters

Sanctions for non-compliance are a necessary component of case management regimes. An effective and uniform set of consequences for failing to meet deadlines or failure to comply with the Court’s rules serves two purposes:

it discourages non-compliance that could otherwise cause delays, and
it protects responsible parties from being disadvantaged by scrupulous obedience to the rules.

As discussed above in Part I, extensive consultation with practitioners is likely to help in achieving high rates of compliance from the beginning of any new program of case management, but an effective program of sanctions is also necessary to support the design and implementation of a case management program.

Sanctions in civil matters

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Sanctions in criminal matters

Sanctions for failure to observe pre-trial rules in criminal matters are reviewed in detail in the New South Wales Trial Efficiency Working Group Report. The range of sanctions available in a criminal matter include:

adverse comment on a party’s failure to disclose;

exclusion of evidence not disclosed; or

an adjournment in favour of the opposing party.

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97 ACT Director of Public Prosecutions, submission on the Auditor-General’s Report No. 4 of 2005.


99 E.g., Criminal Procedure Act 2004 (WA), s.97(4).
80. In Queensland, costs are also available, and non-compliant parties may be required to provide an affidavit explaining the reasons for failure to comply with pre-trial procedures.\textsuperscript{101} The affidavit may form the basis of further sanctions if it is untrue, or it may serve to promote compliance so that embarrassing disclosures about time management by the practitioner are avoided.

81. As the NSW Trial Efficiency Working Group noted, adverse comment is in some ways the most severe and difficult sanction to apply. In reviewing the Victorian provision, the Group noted that adverse comment had rarely been used. The difficulty lies in formulating an adverse comment that addresses the lack of disclosure and directs the fact finder to consider the weight of that individual piece of evidence, but that does not imply guilt.\textsuperscript{102} This would be a severe sanction where, for example, having a jury believe some piece of evidence and accord it great weight is important to the defence; even if the comment on the evidence itself does not imply guilt, the comment potentially deprives the party of credibility about that piece of evidence. Exclusion of evidence on case management grounds is a relatively new feature of the New South Wales system, and the circumstances under which a trial might proceed after evidence is excluded on case management grounds are not well defined. A corresponding sanction is a refusal by the Court to accept applications at a late stage. Again New South Wales legislation provides an example by prohibiting challenges to an indictment, and certain evidentiary applications, being raised at trial (except with leave of the Court) if they are not raised at the appropriate pre-trial stages.\textsuperscript{103}

82. The importance of sanctions to case management is that, in addition to promoting efficiency, they ensure that no party benefits from tactical or negligent non-compliance. Sanctions should be applied uniformly to ensure that no party is disadvantaged by its adherence to the rules, for example, by early disclosure of evidence, which is not reciprocated in accordance with legislation or court-ordered requirements.\textsuperscript{104}

Question 15

What sanctions should be available for failure to comply with procedural legislation or directions of a court?

\textsuperscript{100} E.g., Criminal Procedure Act 1986 (NSW), s.146.
\textsuperscript{101} Criminal Code Act 1899 (Qld), s.590AAA.
\textsuperscript{102} Trial Efficiency Working Group Report (NSW), 2009, p.87.
\textsuperscript{103} Criminal Procedure Act 1986 (NSW), s.139.
\textsuperscript{104} Recently, criminal proceedings in the Supreme Court were stayed until the DPP paid certain costs incurred by the accused person as a result of the DPP’s failure to disclose relevant evidence. Previously an order had been made prohibiting, without the leave of the court, reliance at the trial on evidence not disclosed to the accused before a specified future date. R v Trong Ruyen Bui [2011] ACTSC 102.
Improving civil case management

83. Created in 2006, the ACT’s civil procedure rules incorporate many of the reforms identified by the Woolf report, and closely align with the equivalent New South Wales provisions. Many of the examples of best practice, for example, broad ranging powers to direct how evidence is presented to the Court, are included. The civil rules provide for judges to order a conference before a referee. Mediation can also be ordered by the Court. The basic architecture of the ACT’s civil procedure rules is consistent with leading jurisdictions. Improving case management in the civil jurisdiction would likely benefit most from a focus on judicial control, practice directions, and increased use of alternative dispute resolution to clear outstanding matters.

Pre-trial attempts at resolution: arbitration and mediation

84. In the civil jurisdiction particularly, Chief Justice Martin of the Supreme Court of Western Australia has commented that trials are now the alternative method of dispute resolution. The primary method of resolution in most jurisdictions is mediation. In some jurisdictions, “court-annexed” dispute resolution, where alternative methods are offered the support of the Courts, has been adopted to increase effectiveness. Court-annexed mediation is part of a move to view the Courts as able to direct parties to the most appropriate resolution method, which in some cases will be mediation or another alternative to the trial.

Clearing backlogs – civil matters

85. The number of outstanding civil matters in the ACT is high, and cases listed for trial rarely proceed. Of 212 matters listed for trial in the civil jurisdiction in 2009/10, 159 (75%) settled. The ROGS Backlog indicator shows that the Court is clearing some of its backlog; however, parties still report incidents of being unable to obtain even
one day hearings for up to six months. The crowded civil list means that even when parties are ready to have a hearing, they are unable to obtain a listing near in time. In a submission recommending the appointment of an Acting Judge, the Supreme Court noted that in 2005, it was normal to obtain a hearing date within three months. As of late 2009, 8 months of delay was more realistic. The backlog of cases must be cleared before any new civil management procedures will reduce delays.

86. The experience of the New South Wales District Court in clearing civil backlog is instructive in this regard. In addition to acting judges, the District Court adopted a system of Court-supported arbitration. The “Philadelphia Arbitration” system was adopted, where the Court Registry listed matters on a rolling basis, and provided rooms for arbitrators to sit and hear matters. As one matter settled, the next was called on. Parties paid a set fee regardless of whether they settled before the arbitration, which funded the system. The number of arbitrations in the District Court has fallen drastically since 2005, but not because of disappointment with the system. Tort reforms reduced lodgement of matters that were previously arbitrated, such as motor vehicle injury cases. An evaluation of the arbitration program found it to be successful when dealing with a large number of matters.

87. Though the Federal Court’s mediation practice has been suggested as a possible model for the ACT, the differences in case type and resources between the ACT and Federal Court systems make it unlikely that any of the benefits measured in the Federal Court system would be achieved in the ACT. In the Federal Court system, mediation can be conducted by either a Registrar or a Judge, but most commonly by a Registrar. The Federal Court uses a docket system, where a case is allocated from start to finish to a single Judge, who hears all applications and makes all decisions in relation to the matter. The docket Judge has the power to refer the case to mediation. Of the kinds of matters that are commonly suitable for mediation, 24% were referred by the docket Judge, and in 2009/10, 52% of matters referred to mediation were settled in the Federal Court system. At the State level, the WA Supreme Court has

111 The ACT Supreme Court was clearing matters at 115.9% in 2009/10.
113 Ibid.
115 Ibid.
118 Ibid; the Federal Court of Australia Annual Report calculates mediation statistics on the basis of only some of its cases, namely, those types of cases that would be generally suitable for mediation. The statistics on mediation do not therefore reflect a total picture of the Federal Court caseload.
119 Federal Court of Australia Annual Report, 2009-10, table 3.12, p.38; this compares to a settlement rate of approximately 50%in 2009 for the NSW District Court (District Court NSW Annual Review 2009, p.11).
relied heavily on mediation as a dispute resolution tool. Ordering mediation early, or promoting its use through pre-action protocols, may give the parties a chance to resolve their disputes before sunk costs make a costs award a necessary component of resolution. Pre-action protocols have recently been introduced into the Commonwealth system, which gives additional incentives to mediate or seek other ADR options before lodging a matter. In the WA Supreme Court, mediators are generally Registrars with appropriate training and qualifications, called “Mediation Registrars”. The WA Supreme Court’s practice directions specify that attendees must have sufficient familiarity with a matter, and authority from the client, to compromise. The WA Supreme Court has reported significant savings in trial time as a result of its mediation policy.

88. Arbitration in line with the New South Wales model may be effective, but providing rooms and registry support for arbitrators would have potentially significant resource implications to consider for the Court. If an increased reliance on alternative methods is adopted, the kind of method (mediation versus arbitration) and the criteria for each must be carefully detailed to ensure that only cases with good prospects for resolution are referred.

| Question 18 |
| Should the ACT adopt a policy (to be implemented by legislation or practice direction) of referring most civil cases to mediation or arbitration? |

| Question 19 |
| What should be the criteria for requiring alternative dispute resolution? |

89. Case management practice directions in other jurisdictions are used to set standard timetables for the progress of matters, and to put parties on notice that adjournments

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123 Supreme Court of Western Australia Consolidated Practice Directions 2009, Part 4.2.

124 Supreme Court of Western Australia Consolidated Practice Directions 2009, Part 4.2.1, par 24.

125 The WA Supreme Court’s annual review lists approximately 1000 trial days saved in 2007/08 as a result of mediation; see Supreme Court of Western Australia Annual Review 07-08 at p.22, http://www.supremecourt.wa.gov.au/publications/pdf/annual_review_07-08.pdf
The NSW District Court uses advance preparation and mediation to manage general civil matters. Once filed, a case is expected to be resolved within 12 months. Reasons must be given for any matters that will take longer. A pre-trial conference is scheduled for 2 months from commencement. At the pre-trial conference, a status conference is scheduled and directions are given, and if appropriate, a hearing date or mediation date will be allocated. A status conference requires the parties to identify the issues, select a trial date that is between 8 and 11 months from commencement, and to generally show preparation for a hearing. Cases will be referred for mediation at this point, unless the parties show that it is not appropriate. If mediation is unsuccessful, they will be expected to proceed to a hearing.

Adjournments can be refused by Judges on grounds of case management, and practice directions have been used in other jurisdictions to deter unnecessary applications for adjournment. In Aon Risk Services Aust Ltd v ANU (2009) 239 CLR175, the High Court ruled among other things that in considering whether to permit amendment of a statement of claim, courts should consider waste of public resources and delays caused by permitting the amendment.

Introducing a docket system, where a Judge is assigned a case and hears all matters in relation to it until disposition, may contribute to reducing adjournments of preliminary matters and trials. Having to seek adjournments before the same Judge, and to appear before the same Judge following any adjournment, may discourage repeated applications to delay a matter and create a greater sense of accountability for representations made in support of an adjournment.

A draft policy on listing practices was attached to the Supreme Court Working Group’s report. Among other things, the draft policy specifies that judgment writing time in Judge-alone trials and civil matters will be scheduled immediately following hearings, at the rate of a day for each week of hearing (this does not apply to jury trials). Also, preparation time of a half day to a day is to be scheduled in advance of certain hearings.

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126 NSW District Court Civil Practice Note 1 (attached at Appendix 3).
127 NSW District Court Civil Practice Note 1; Supreme Court of Queensland Practice Direction 9 of 2010.
94. The listing policy does not identify criteria for cases that are suitable for over-listing. Over-listing operates on the assumption that many cases will settle, and only a few of the multiple cases listed on the same day will proceed. Over-listing minimises the impact of late settlements on the Court by ensuring that if one trial vacates, other parties will be ready to use the scheduled Court time. The risk is that if more matters are ready to proceed in a day than there are judicial resources available, some matters will be “not reached” and parties will be denied their expected trial dates, possibly at considerable cost and inconvenience. Public resources in terms of judicial time spent on the matter that is not reached, prosecution time spent preparing, and legal aid time and money, are lost in these circumstances because they are spent preparing for a matter that does not proceed as scheduled. Particularly in the criminal jurisdiction, a mechanism of rating cases that are over-listed in order of priority could assist in minimising any adverse consequences of over-listing. Information that alerts the Registry staff as to the urgency of each matter, the status of the parties, and delays that might follow an unexpected adjournment are examples of the kind of information that might assist in more effective over-listing practices.

**Question 20**

What timeframes for filings and completion of pre-trial events in civil cases should be required by the Supreme Court?

**Question 21**

What criteria should be included in a policy on refusing adjournments in the civil jurisdiction? Should the policy in criminal cases be different?

**Question 22**

Should the Supreme Court introduce a docket system, for civil matters, criminal matters, or both, under which a Judge is assigned a matter and hears all applications in relation to it from commencement to disposition?

**Question 23**

What additional costs are imposed by over-listing in civil matters, and in criminal matters? What information can be provided to assist in minimising the risks of over-listing?
Trial plans and time estimates

95. In addition to requiring preparation and adherence to listed dates, judicial control over the conduct of hearings helps to ensure the efficient use of the Court’s time. Trial management has been an element in other jurisdictions’ approaches to reducing delays in both civil and criminal cases. For example, in the criminal jurisdiction of NSW, a Judge can dispense with formal proof and direct that some witness statements be tendered in summary form.129 In the civil jurisdiction, using existing powers to reduce the complexity of matters and better inform the presiding Judge has resulted in a range of creative trial formats.130

96. Setting timetables for opening and closing statements, and for witness testimony, is one method of limiting trial time. Based on pre-trial filings that provide information about the content of a witness’s testimony, the likelihood of extended testimony, and estimates by each party of the length of time needed to present evidence, a Judge can assess how much time will be needed for each step at trial, and then assign to each party strict time limits. The New South Wales Supreme Court’s Common Law Division regularly applies this method to complex cases.131 Another iteration of this method is the “stopwatch trial”, where the parties estimate the total time required, and then divide up the allotted minutes between themselves as they see appropriate.132 Timetables can be used with great flexibility by the Court to ensure that proceedings at trial meet expected timeframes.

97. Judicial control over proceedings can also facilitate a clearer presentation of the dispute. An example is “hot-tubbing”, where in cases with more than one expert, the evidence is given in the form of a panel before the presiding Judge. The Judge is then able to hear a discussion about the different points of view, to ask questions of the panel, and to receive information concurrently. The Victorian Law Reform Commission reviewed much of the evidence on dealing with experts in this format and concluded, as have earlier reviewers, that it reduces the total amount of time needed for the Court to receive expert testimony.133 The ACT’s civil procedure rules are already aligned with the New South Wales provisions that enable these techniques to be employed. Greater reliance on these techniques could be promoted through judicial education (discussed above at 75), and through new case management practice directions (also discussed above, at 89-91).

129 Criminal Procedure Act 1986 (NSW), s.145.
130 Changes in the Trial Process, the Hon Peter McClellan, presentation to Civil Justice Reform – What has it achieved? April 2010
131 Ibid.
132 Ibid.
V. Information technology and performance measures

98. Consultation with other jurisdictions, reviews of case management in other jurisdictions, and the Auditor-General’s reports of 2005 and 2010 all emphasised the need for reliable and routine statistics on Court performance in order to implement and maintain an effective case management system. The current practice in the Supreme Court Registry is to manually collect and analyse information on cases. The electronic database, MAX, contains information about cases in the Court, but that information is not readily accessible. A programmer is needed to write a special program for any special request, for example, an analysis of wait time in cases of a certain type. Changes in the statute book also require a programmer to custom-alter MAX to record the basic data associated with those changes.

99. The Supreme Court Registry’s reliance on manual statistics makes obtaining information about the success or failure of case management measures, and monitoring the workflow of the Court generally, extremely difficult. The recent moves towards a combined Registry, serving both the Magistrates and Supreme Courts, may involve consolidation of information technology resources into a new case management system. Any investment in new technology for the Courts should be dedicated to a system that provides, in addition to the ROGS statistics, at minimum:

- automated reports on the status of active cases, both civil and criminal, including date since initiation and number/type of previous events;
- in the criminal jurisdiction, a history of the charges laid, including any changes;
- in the civil and criminal jurisdictions, a list of applications heard in relation to the matter; and
- the number of adjournments (if possible, with a reference to cause).

100. Providing information about the caseload to the Court enables the Court to monitor and respond to changes in its workload. At present, routine reports on are available to the Chief Justice that provide information about the existing backlog, and the average time to resolution of cases on a quarterly basis. In contrast, the Chief Judge of the New South Wales District Court receives monthly reports on case-flow, including the identification of any individual matters that are nearing 12 months or more in duration. More frequent and detailed information will allow for more effective management of the caseload, and will be necessary for an evaluation of any changes to the case management system.

134 Recommendation 4 of the ACT Auditor-General’s 2010 Follow-up report – Courts Administration.
135 Based on information provided by the Courts Administrator.
VI. Case management and listing reforms in context

101. Case management reforms and reviews in other jurisdictions have tended to coincide with broader examinations of both criminal and civil process. Particularly in the criminal jurisdiction, case management techniques have been included in dedicated criminal procedures statutes, the purpose of which is to consolidate and clarify existing rules. In New South Wales, for example, one criminal procedure statute contains the basic procedural rules for both summary and indictable offences. A broader examination of criminal and civil procedures is outside the scope of this review, however, the impact of any reforms to be adopted could be analysed in the context of existing criminal and civil legislation and the scope for using that legislation to support case management techniques.

102. Because case management reforms generally occur in the context of multifaceted approaches to delays, the statistical impact of any one reform is difficult to measure. For example, among Australian jurisdictions, the New South Wales District Court consistently leads in both civil and criminal resolution times according to the Productivity Commission’s data. The District Court also consistently receives the highest number of lodgements, with 8,273 civil and 11,627 criminal lodgements in 2009/10. The administration of the Office of the Director of Public Prosecutions, Legal Aid NSW, the criminal pre-trial disclosure rules, and active judicial leadership of the Court have all been cited as reasons for its ability to handle the large volume of cases. Case management and listing reform should be considered only one aspect of a complete approach to reducing delays and improving court efficiency.

103. The procedures considered in this paper were selected for direct applicability to problems identified by the Supreme Court and the reference group in causing delays. Further input from stakeholders on these and any other case management practices that could be helpful will be necessary for designing pre-trial improvements, sentencing regimes, and practice directions that meet the needs of the legal profession, the community, and the Courts together.

136 Criminal Procedure Act 1986 (NSW); Criminal Procedure Act 2004 (WA); Criminal Procedure Act 2009 (Vic); Criminal Procedure (Reform and Modernisation) Bill 2010 (NZ).
Submissions should be directed to:

Case Management Review  
c/o  
ACT Justice & Community Safety Directorate  
GPO Box 158  
CANBERRA ACT 2601

Information about making a submission
Generally submissions will be made public. In the absence of a clear indication that a submission is intended to be confidential, the submission will be treated as non-confidential.

Non-confidential submissions may be made available to any person or organisation upon request during or following the completion of the review.

Confidential submissions may include personal or sensitive information where privacy is required. Any request for access to a confidential submission is determined in accordance with the Freedom of Information Act 1989, which has provisions designed to protect sensitive information given in confidence.

Anonymous submissions may be accepted, but the review team reserves the right not to publish or refer to a submission whose author is not reliably identified.
APPENDIX 1

TERMS OF REFERENCE

ACT Supreme Court Case Management Practices

TO EXAMINE case management practices in the ACT Supreme Court

HAVING REGARD TO

Case management practices in other jurisdictions;
The specific circumstances and demands affecting case management in a small jurisdiction;
Any other matters that appear to be relevant;

AND TO REPORT ON desirable changes to practice, procedure, and the law to achieve more efficient use of the time of the Supreme Court, with specific reference to:

Desirable changes in listing practices (eg, the desirability or otherwise of overlisting matters or establishing a reserve list to minimise the impact of trials not proceeding);
The scope for adopting pre-trial practices or procedures or legislative change that might increase certainty about whether hearings will proceed on days and within allocated time frames (eg, the desirability of otherwise of active judicial control of pre-trial processes, the proceedings, the responsibility of a court in finalising the matter, the formalisation of discounts in sentence to lend certainty to defendants and counsel);
Other measures which might reduce the time to finalise proceedings within the Supreme Court or to reduce inconvenience and cost to parties (including the publicly funded office of the Director of Public Prosecutions and ACT Legal Aid Commission), counsel and witnesses (eg judicial education, improvements to assist pre-trial management or judgment writing, video appearances, improved ICST support for case management practices).

ESTABLISH AND CONSULT a Reference Group consisting of senior members of the ACT Bar, the ACT Law Society, the ACT Legal Aid Commission and the office of the Director of Public Prosecutions and

REPORT by 30 March 2011
APPENDIX 2

Selected Criminal Procedure Provisions

NEW SOUTH WALES

Criminal Procedure Act 1986 (New South Wales)

143 Defence response—court-ordered pre-trial disclosure

For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:

(a) the matters required to be included in a notice under section 138,

(b) a statement, in relation to each fact set out in the statement of facts provided by the prosecutor, as to whether the accused person considers the fact is an agreed fact (within the meaning of section 191 of the Evidence Act 1995) or the accused person disputes the fact,

(c) a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the accused person takes issue with the matter or circumstance as set out,

(d) notice as to whether the accused person proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection,

(e) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

(f) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,

(g) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(h) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(i) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
(j) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(k) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,

(l) notice of any consent the accused person proposes to give under section 184 of the Evidence Act 1995.

146 Sanctions for non-compliance with pre-trial disclosure requirements

(1) Exclusion of evidence not disclosed
   The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(2) Exclusion of expert evidence where report not provided
   The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(3) Adjournment
   The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.

(4) Application of sanctions
   Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division.

(5) Regulations
   The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).

Criminal Case Conferencing Trial Act 2008 (New South Wales)

17 Discount for guilty plea

(1) If an offender pleaded guilty to an offence at any time before being committed for sentence, the sentencing court must allow a discount for the guilty plea calculated as follows:
   (a) if the court imposes a sentence of imprisonment for a term—a term that is 25% less than the term the court would otherwise have imposed,
   (b) if the court imposes a fine—a fine that is 25% less than the fine the court would otherwise have imposed,
(c) if the court makes a community service order directing the performance of community service work for a specified number of hours—work for 25% less than the number of hours the court would otherwise have ordered to be performed,

(d) if the court imposes a good behaviour bond for a term—a bond for 25% less than the term the court would otherwise have imposed.

(2) If an offender pleaded guilty to an offence at any time after being committed for trial, the sentencing court may allow a discount for the guilty plea of up to 12.5% less than the term, fine, work or bond that it would otherwise have imposed.

...  

(7) The sentencing court may, for the purpose only of resolving any issue concerning the matters agreed to by parties at, or after, any compulsory conference held in respect of the offence to which the offender has pleaded guilty, or of making a determination in relation to any matter referred to in subsection (5), take into account the compulsory conference certificate relating to the conference.

VICTORIA

Criminal Procedure Act 2009 (Victoria)

PART 5.6—SENTENCE INDICATION

207 Court may give sentence indication

At any time after the indictment is filed, the court may indicate that, if the accused pleads guilty to the charge on the indictment at that time or another charge, the court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately.

Note

Section 18 of the Supreme Court Act 1986 and section 80 of the County Court Act 1958 enable the court to close a proceeding to the public.

208 Application for sentence indication

(1) A sentence indication under section 207—

(a) may be given only on the application of the accused; and

(b) may be given only once during the proceeding, unless the prosecutor otherwise consents.

(2) An application under subsection (1)(a) may be made only with the consent of the prosecutor.

(3) If an application under subsection (1)(a) is made in respect of a charge that is not on the indictment, the accused must specify the charge in the application.

(4) The court may refuse to give a sentence indication under section 207.

209 Effect of sentence indication
(1) If—
   (a) the court indicates that it would not be likely to impose on the accused a sentence of imprisonment that commences immediately; and
   (b) the accused pleads guilty to the charge for the offence at the first available opportunity—

   the court, when sentencing the accused for the offence, must not impose a sentence of imprisonment that commences immediately.

(2) If—
   (a) the court gives a sentence indication under section 207; and
   (b) the accused does not plead guilty to the charge for the offence at the first available opportunity—

   at trial the court must be constituted by a different judge, unless all the parties otherwise agree.

(3) A sentence indication does not bind the court on any hearing before the court constituted by a different judge.

(4) A decision to give or not to give a sentence indication is final and conclusive.

(5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.

(6) This section does not affect any right to appeal against sentence.

WESTERN AUSTRALIA

Criminal Procedure Act 2004 (Western Australia)

96. Disclosure by accused of certain matters

(1) In this section, unless the contrary intention appears —

   alibi evidence has the meaning given by section 62(1);
   expert evidence material has the meaning given by section 62(1);
   lodge means to lodge with the superior court concerned;
   serve has the meaning given by section 62(1).

(2) The operation of this section, other than subsection (3)(a), is subject to any order made under section 138.

(3) Within the prescribed period before the trial date for a charge in an indictment, the accused must lodge and serve the following —

   (a) if the accused intends to give or adduce any alibi evidence, written notice of—

      (i) the accused’s intention to do so;
      (ii) the details of the nature of the evidence; and
(iii) the name of each person who the accused intends to call to give any such evidence and the person’s address or other information sufficient to enable the person to be located;

(b) any expert evidence material that relates to the charge;

(c) written notice of the factual elements of the offence that the accused may contend cannot be proved;

(d) written notice of any objection by the accused to —

(i) any document that the prosecutor intends to adduce at the trial; or

(ii) any evidence to be given by a witness whom the prosecutor intends to call at the trial,

and the grounds for the objection.

(4) If, after complying with subsection (3), an accused receives or obtains evidence, information or material referred to in subsection (3), the accused must lodge and serve it as soon as practicable.

97. Non-disclosure, consequences of

(1) In this section, unless the contrary intention appears —

*disclosure requirement* means a requirement imposed on a party by section 95 or 96 and any order made under section 138.

(2) If before or at a trial on indictment the court is satisfied that a party has not obeyed a disclosure requirement, the court, on the application of a party affected by the breach, may adjourn the trial for a period that allows enough time —

(a) if necessary, for the party in breach of the requirement to obey it; and

(b) for a party affected by the breach to investigate properly any evidence or other matter disclosed in accordance with the requirement and to obtain any evidence that may be necessary as a result of the disclosure,

or, if the trial is a trial by jury, may discontinue the trial, discharge the jury from giving its verdict and adjourn the prosecution.

(3) On any resumption of a trial adjourned under subsection (2) a party affected by the breach —

(a) may require a person who has given evidence in the trial, including the accused, to be recalled as a witness;

(b) may cross-examine or further cross-examine the person about the evidence or other matter disclosed in accordance with the disclosure requirement; and

(c) may adduce evidence in rebuttal of the evidence or other matter disclosed in accordance with the disclosure requirement.

(4) The failure by a party to obey a disclosure requirement may be the subject of adverse comment to the jury by the judge, the accused or the prosecutor.

137. Case management powers

(1) This section does not limit a superior court’s inherent powers.
(2) A power in this section to make an order includes a power to amend or cancel the order.

(3) Unless this Act or the rules of court or another written law provides otherwise, a court may do any or all of the following for the purposes of controlling and managing cases before it —

(a) order the parties to a case —

(i) to confer on a “without prejudice” basis or to take other measures before trial to try to identify those facts and issues in the case that are agreed between them and those that will be in issue at the trial of the case;

(ii) to attend before the court before trial for the purpose of dealing with case management and pre-trial issues;

(iii) to do anything that in the court’s opinion will or may facilitate the case being conducted and concluded efficiently, economically and expeditiously;

(b) order 2 or more witnesses who are to give expert opinion evidence, whether for the prosecutor or the accused, and whose evidence has been disclosed —

(i) to confer on a “without prejudice” basis before trial in order to identify the differences between them and to resolve as many of them as possible;

(ii) to each provide a report to the court that explains which aspects of the evidence to be given by the other are disputed and why.

(4) Despite section 171(2) but without affecting the operation of the rest of section 171, the courtroom where proceedings ordered under subsection (3)(a) are conducted before a court is not to be regarded as an open court.

(5) If a person publishes outside a court anything said orally or in writing, any admission made, anything done, or any document prepared, in or for the purpose of proceedings ordered under, or pursuant to an order made under, subsection (3)(a), the person commits an offence.

Penalty:

(a) for an individual, a fine of $12 000 or imprisonment for 12 months;

(b) for a corporation, a fine of $60 000.

(6) A court of summary jurisdiction may make rules of court for the purposes of this section.
APPENDIX
3

NSW DISTRICT COURT CIVIL PRACTICE NOTE

PRACTICE NOTE DC (CIVIL) NO. 1

CASE MANAGEMENT IN THE
GENERAL LIST

This practice note is issued under sections 56 and 57 of the Civil Procedure Act 2005 and is intended to facilitate the just, quick and cheap resolution of the real issues in all proceedings before the Court. It applies to all matters in the general list in the Sydney, Gosford and Newcastle registries commencing 7 September, 2009. This practice note supersedes and replaces the previous practice note referrable to case management in the general list. As this practice note incorporates the provisions of Practice Notes DC (Civil) No. 3, No. 4, No. 9 and No. 13 those practice notes are hereby revoked.

1. TIME STANDARD

1.1 The Court aims to have cases completed within 12 months of commencement.

1.2 Parties should expect to be allocated a trial date within 12 months of the commencement of proceedings and plan to meet this time standard.

2. COMMENCING PROCEEDINGS

2.1 Plaintiffs must not commence proceedings until they are ready to comply with the requirements of the Uniform Civil Procedure Rules (UCPR) and the Court’s practice notes for preparation and trial. This means that, except in special circumstances, the plaintiff’s preparation for trial must be well advanced before filing the statement of claim.

2.2 In cases under the Motor Accidents Compensation Act 1999 or Part 2A of the Civil Liability Act 2002, the plaintiff should obtain evidence that the relevant impairment threshold for damages for non-economic loss has been reached before commencing proceedings.

2.3 Rules 15.12 and 15.13 provide that in personal injury cases and claims under the
Compensation to Relatives Act 1897 the plaintiff must file and serve particulars and serve the supporting documentation on the defendant or the defendant’s insurer or
solicitor either with the statement of claim or as soon as practicable after the service of
the statement of claim. In order to protect the plaintiff’s privacy, the Court does not
require the particulars to be served personally on the defendant.

2.4 If it has not already done so, the defendant must commence its preparation on receipt of
the statement of claim. In a personal injury case, the defendant must start preparing for
trial based on the matters alleged in the statement of claim and rule
15.12 or 15.13 particulars. The defendant’s solicitor must arrange medical
examinations on receipt of these documents.

2.5 Before commencing proceedings or filing a defence, legal practitioners must give their
clients notice in writing about the requirements of this practice note and of the
Court’s insistence on compliance with its orders. That notice must state that the Court
may dismiss actions or cross claims or strike out defences if orders are not complied
with and that the Court may make costs orders against parties who fail to comply with its
orders.

2.6 This practice note does not apply to a statement of claim in which a liquidated amount is
claimed until a defence is filed. When a defence is filed, the Court will list the case for a
pre-trial conference.

3. PROPOSED CONSENT ORDERS

3.1 The plaintiff must serve proposed consent orders for the preparation of the case on
the defendant with the statement of claim. The orders must be drafted specifically for
each case. They must include all steps necessary to ensure that the case will be ready to
be referred to mediation and/or arbitration or listed for trial at the status conference.

3.2 If the defendant does not agree with the proposed orders, or wants to add additional
steps, it must serve amended consent orders on the plaintiff’s solicitor at least 7 days
before the pre-trial conference.

3.3 The Court expects that, in most cases, the defendant will have requested particulars of
the statement of claim, which the plaintiff will have supplied before the pre-trial
conference. The defendant should also have filed and served a defence and any cross
claims.

3.4 In a personal injury case, the Court expects that the plaintiff will have served complete
rule 15.12 or 15.13 particulars and primary medical reports and have qualified the
experts who will prepare reports, including any liability or economic loss expert. The
Court expects that the defendant will have arranged medical examinations and issued
subpoenas.
4. REPRESENTATION

4.1 The Court requires proper representation at all appearances. If a party is legally represented, a legal practitioner with adequate knowledge of the case must represent that party whenever the case is listed before the Court. That legal practitioner must have sufficient instructions to answer the Court’s questions and to enable the Court to make all appropriate orders and directions.

4.2 Cases should not be mentioned by consent unless they are settled or ready for a hearing date.

4.3 It is generally inappropriate for parties to be represented by agents or clerks. If a party is represented by an agent, that agent should have adequate instructions to deal with any questions asked by the Court.

4.4 If there is no proper representation, the case will either be stood down or stood over to another day to allow proper representation. The adjournment will be at the cost of the party not properly represented and usually such costs will be payable by that party’s legal representative.

5. PRE-TRIAL CONFERENCE

5.1 In all cases in the case managed list, (except defamation cases, child care appeals and Family Provision cases in Newcastle) the Court will allocate a pre-trial conference date when the statement of claim is filed. The plaintiff must notify the defendant of the date and time of the pre-trial conference when the statement of claim is served.

5.2 The pre-trial conference will be held two months after commencement of proceedings.

5.3 No case may be entered into the Commercial, Construction or Professional Negligence lists before the pre-trial conference.

5.4 An application may be made at the pre-trial conference for a case to be placed in one of the specialist lists. Any application must be supported by an affidavit setting out the reasons for entering a case in the list. The Court will carefully consider each application, even if both parties consent.

5.5 Cases will generally not be put into specialist lists for case management unless they are of a significant value and/or complexity so as to require detailed management. Cases concerning a claim for less than $150,000 and cases which do not require special case management will not usually be listed in the specialist lists. The majority of cases will be managed in the General List.
5.6 At the pre-trial conference, the Court will examine the orders proposed by the parties and make all appropriate directions and orders to ensure that the case is ready to be listed for hearing at the status conference. Disputes between the parties will be resolved or a hearing date fixed for a motion. The orders of the Court must be strictly complied with. Failure to comply with those orders will be treated seriously and may lead to costs orders.

5.7 The Court will give directions for the service of expert reports under rule 31.19 UCPR at the pre-trial conference. The parties must be able to tell the Court the precise nature of any expert evidence to be relied on and the names of all experts so that appropriate directions can be made. All reports must be served at least 28 days before the status conference.

5.8 In cases under the Motor Accidents Compensation Act 1999 or Part 2A of the Civil Liability Act 2002, the defendant should tell the plaintiff whether or not it agrees that the relevant threshold has been reached at or before the pre-trial conference. In a motor accident case, the proposed orders must provide for any referral to the Medical Assessment Service if the matter has not yet been referred.

5.9 In an appropriate case, the Court will allocate a trial or arbitration date at the pre-trial conference or refer the parties to mediation.

6. SUBPOENAS

6.1 Parties must issue subpoenas as early as possible so that documents can be produced and inspected and are available for the proper preparation of the case, including submission to experts.

6.2 A return date will be fixed at the pre-trial conference if the parties have not already issued subpoenas.

6.3 Parties should inspect all documents produced under subpoena and serve any documents on which they rely before the status conference. Parties must ensure that they follow up any non-production of documents and file any necessary notices of motion before the status conference.

7. MOTIONS and SUMMONSES

7.1 Interlocutory disputes between the parties should generally be resolved by filing a notice of motion. Parties must file any motions as soon as practicable. The parties should not wait until the next occasion when the case is before the Court to consider seeking orders or filing a motion.
7.2 A motion will be allocated a hearing date in the general motions list on the first available Friday and the parties should be ready to argue the motion on the first return date.

7.3 An Assistant Registrar will be available in court between 9.00 a.m. and 9.30 a.m. on Friday to deal with any consent orders and applications for adjournments of motions. At 9.30 a.m. the Assistant Registrar will call through the list and refer the notices of motion requiring hearing to the Judicial Registrar or Motions Judge.

7.4 The Judicial Registrar will allocate a hearing date to any notice of motion which the parties anticipate will require more than two hours hearing time.

7.5 Long motions will generally be case managed with the substantive case and will be allocated a hearing date as soon as they are ready for hearing.

7.6 All summonses (other than costs appeals or child care appeals) will be listed before the Judicial Registrar for case management.

7.7 Where there are more than two parties to the proceedings and the dispute to be resolved by way of notice of motion does not affect a party the appearance of that party may be mentioned by consent.

7.8 Counsel are not required to robe for the hearing of motions and summonses.

7.9 Affidavits in support of motions will be returned to the parties at the conclusion of the hearing of the motion.

8. STATUS CONFERENCE

8.1 All cases, except for those which for good reason cannot be heard within 12 months of commencement, will be required to take a hearing date within a period between 8 and 11 months from commencement.

8.2 Cases in the General List will be required to take a hearing date at the status conference even though there are still some matters to be completed before the hearing. Appropriate orders will be made.

8.3 Matters allocated a hearing date will generally be referred to mediation unless the parties can satisfy the Court that mediation is not appropriate.

8.4 When parties attend a status conference they must have instructions about mediation, details of the availability of their client, witnesses and counsel together with an estimate of the length of the case to allow a hearing or arbitration date to be fixed.
8.5 Any cases, except those which have a genuine need for an additional time for preparation, will be subject to an enquiry as to why they have not been prepared for hearing, orders will be made for their further preparation and costs orders will be made. In cases not ready to proceed to a hearing, the party responsible may have to show cause why the case or cross claim should not be dismissed or the defence struck out.

8.6 Unless orders are made at the status conference, the Court will usually not allow parties to rely on medical reports and experts’ reports served later than 28 days before the status conference. Reports which are not served in accordance with the Court’s orders are usually inadmissible (see rule 31.28).

8.7 If a case requires a conference between expert witnesses or the parties seek that expert witnesses give evidence concurrently, the parties should seek directions from the Court at the status conference.

8.8 The Court will generally order that final particulars under rule 15.12 or 15.13 be filed and served before the status conference.

9. LONG TRIAL DATES

9.1 In cases estimated to take 5 days or more, the Court will allocate long trial dates at the status conference or any subsequent directions hearing.

9.2 Long cases will be referred to mediation unless the parties can satisfy the Court that the case is unsuitable for mediation. The parties must have instructions about mediation when they seek to have a long trial date allocated.

9.3 When a long case is fixed for trial, the Court will make every effort to ensure that it proceeds. For that reason, the Court will not adjourn long cases unless there are exceptional circumstances.

9.4 Cases with an estimated trial time of 2 weeks or more will be listed before the Court for case management directions. Each party should be represented on that date by counsel briefed on the trial or the solicitor with conduct of the case to enable all proper directions to be made.

10. ALTERNATE DISPUTE RESOLUTION

10.1 The Court will refer all appropriate cases for alternate dispute resolution under Part 4 of the Civil Procedure Act. The parties must have instructions about suitability for mediation, arbitration or other alternate dispute resolution when they ask for a hearing date. Parties should note that the Court’s power to order mediation does not depend on the consent of the parties.
10.2 If a case has not been the subject of alternate dispute resolution, the Court may order that the parties arrange and hold a settlement conference before the hearing date. The parties and their legal representatives must attend that settlement conference. In the case of an insured party, an officer with authority to resolve the case must attend.

11. DIRECTIONS HEARINGS and SHOW CAUSE HEARINGS

11.1 At any stage, the Court may refer a case to a directions hearing before the Civil List Judge or the Judicial Registrar. If a case is not ready for hearing at the status conference it will be referred for directions. Any order to provide statements or file affidavits must be strictly complied with. Generally, the Court will not accept statements, affidavits or submissions which have not been provided in accordance with an order.

11.2 Cases in which parties have failed to comply with Court orders will be referred to the Civil List Judge at an early time.

11.3 Where there has been non-compliance with Court orders, the Court may list a case for

(a) the plaintiff to show cause why the case should not be dismissed for want of prosecution

(b) the defendant to show cause why the defence should not be struck out and/or any cross claim dismissed for want of prosecution

The party ordered to show cause should expect to pay the costs of the show cause hearing.

11.4 At least 5 days before the show cause hearing, the legal practitioner for the party in default (or the party, if self-represented) must file and serve an affidavit setting out the reasons why he or she has not complied with the Court’s orders and/or this practice note. In addition, any other party who wishes the Court to consider any submissions must put those submissions in writing, file and serve them at least 5 days before the show cause hearing.

12. ADJOURNMENTS

12.1 If a hearing date is in jeopardy as a result of non-compliance with orders or intervening events, either party must immediately approach the Court by filing an affidavit in the registry. The registry will allocate a directions hearing before the Civil List Judge. The affidavit and details of the listing date and time must be served on all other parties forthwith. If adjournment of the hearing date is later sought, the Court will take any failure to approach the Court under this clause into account when considering the adjournment application.
12.2 The Court will only grant adjournment applications where there are very good reasons. The failure to comply with orders will normally not be a reason for adjournment. Parties who breach orders may be restricted in the evidence which they can rely on at the hearing.

12.3 An application for adjournment of a trial or arbitration is made by notice of motion and supporting affidavit and must be made at the earliest possible opportunity.

12.4 Where appropriate, the Court will make costs orders in a fixed sum payable at a nominated time. The Court will, almost invariably, make an order for costs against a party whose legal representative has failed to ascertain the availability of the parties and their witnesses before taking a date for trial or arbitration. The Court may call on legal practitioners to show cause why they should not pay the costs of an adjournment personally or reimburse their client for those costs.

13. SETTLED MATTERS

13.1 Practitioners are requested to advise the list office immediately on 9377 5833 when cases with hearing dates are settled.

13.2 Until terms of settlement, consent orders or a notice of discontinuance is filed, the parties must attend when the case is listed before the Court. Parties should aim to file settlement documents in court on that day. If settlement documents are not available when the case is listed for hearing, the case will be listed for directions.

13.3 Settlement documents must be filed promptly and, if they have not been filed, parties must attend on the directions date. The Court may dismiss cases for want of prosecution if settlement documents are not filed or if the parties do not appear.

The Hon. Justice R.O. Blanch A.M.

Chief Judge

28 August, 2009