The District Courts Amendment Act 1980 - sentencing and guilty pleas

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This article examines the sentencing provisions governing the District Courts in their new criminal jury trial jurisdiction. In particular, it examines both the evolution of these provisions and their effect as an inducement to accused persons to plead guilty.

I. INTRODUCTION

On the next to last day of its 1980 session, the House of Representatives passed the District Courts Amendment Act 1980 and five companion measures,[1] all designed to institute criminal jury trials in the District Courts as of 1 May, 1981. Although these Acts, which were introduced together as the Courts Amendment Bill 1980, could be subjected to a variety of criticisms,[2] this article concentrates on a critical evaluation of the sentencing provisions contained in the District Courts Amendment Act 1980. The basic sentencing provisions were inserted by section 9 of the amendment Act as sections 28F and 28G of the principal Act, the District Courts Act 1947.[3] Section 28F provides that a person found guilty after a jury trial in a District Court may be sentenced up to the maximum term of imprisonment prescribed for the offence involved, which for some offences is as high as ten years.[4] The same sentencing power is provided in the case of a

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1 These were the Summary Proceedings Amendment Act 1980, the Crimes Amendment Act (No. 2) 1980, the Criminal Justice Amendment Act (No. 3) 1980, the Children and Young Persons Amendment Act 1980, and the Judicature Amendment Act 1980 — N.Z. Parliamentary debates Vol. 436, 1980: 5891.

2 Most of these criticisms can be found in the submissions made on the Bill by lecturers at Victoria University cp. infra n.19.

3 In this paper ss.28A to 28J of the District Courts Act 1947, as inserted by s.9 of the District Courts Amendment Act 1980, will be referred to solely by their numbering in the principal Act e.g. s.28A.

4 Among the offences given over to the District Courts' new jurisdiction are those listed in the First Schedule to the Summary Proceedings Act 1957 cp. section 28A. That Schedule was amended by s.25 of the Summary Proceedings Amendment Act 1980, to remove those offences attracting a maximum penalty of over ten years. There still remain in the Schedule, however, several offences punishable by up to ten years' imprisonment, such as ss.133, 189(1), and 295 of the Crimes Act 1961.

person who, after having been committed for a jury trial in a District Court, decides to plead guilty either before or during his trial. On the other hand, the section provides that in the case of a person who pleads guilty before or during his preliminary hearing or who pleads guilty after his preliminary hearing but before his committal for trial in a District Court, the sentence may not exceed a maximum term of imprisonment of three years.[5] Section 28G then creates an exception to section 28F by providing for a power in District Court Judges to decline to sentence under section 28F in any case and to commit the person to the High Court for sentence instead.[6]

II. EVOLUTION OF THE THREE YEAR SENTENCING LIMIT

The idea of making a judge's statutory sentencing power dependent on how and when an accused pleads is a revolutionary one.[7] Before examining the implications of this innovation, it would be useful to trace its evolution. Prior to the institution of criminal jury trials in the District Courts jurisdiction upon indictment[8] rested exclusively in the High Court, and that court's sentencing power was the same, up to the maximum term of imprisonment prescribed for the offence involved, regardless of how or when the accused pleaded to the charge.[9] When the Courts Amendment Bill 1980 was introduced, its purpose was to take away some of the High Court's jurisdiction upon indictment and give it to the

5 Section 28F(2) provides that a court may sentence such a person to imprisonment "not exceeding the maximum term . . . prescribed by section 7 of the Summary Proceedings Act 1957." Section 7, in turn, provides that a court may sentence an offender to a term of imprisonment not exceeding three years "[p]rovided that no person shall be sentenced in respect of an indictable offence" to a term of imprisonment exceeding the maximum term prescribed for the offence involved. In other words, the section provides for a maximum sentence of three years unless a lower maximum is prescribed for the particular offence. Section 28F(2) obviously meant to incorporate all of s.7, including its proviso. Unfortunately, as s.7 is concerned only with indictable offences triable summarily, its proviso is limited to indictable offences. On the other hand, s.28F(2) is concerned with not only those offences, but also offences for which a jury trial may be elected by an accused — See also s.28A. A look at the provision governing the election of jury trials, s.66 of the Summary Proceedings Act 1957, shows that it is concerned with summary offences as well as indictable ones. It is questionable if the s.7 proviso could be read to apply when a sentence is being imposed under s.28F(2) for a summary offence. As a result, it would be possible, in theory at least, for someone to be sentenced to three years' imprisonment for an offence carrying a prescribed maximum of six months. On a more practical level, this example is just one of many instances of poor draftsmanship to be found in the various acts implementing District Court jury trials.

6 The High Court would not be bound then by the three year sentencing limit. See s.28G and s.170 of the Summary Proceedings Act 1957 referred to there.

7 Although a complete search has been hindered by a lack of primary source materials, it appears that no other Common Law jurisdiction has enacted such a statutory limit on sentencing.

8 Jurisdiction upon indictment, as opposed to summary jurisdiction, is the jurisdiction in which jury trials take place.

9 See ss.44, 153A, 168, and 170 of the Summary Proceedings Act 1957 (s.153A was inserted by the Summary Proceedings Amendment Act 1976, s.15) and ss.321, 356, and 371 of the Crimes Act 1961, as they existed prior to the enactment of the 1980 amendment Acts.

District Courts.[10] It was a measure derived from recommendations contained in the *Report of the Royal Commission on the Courts 1978,*[10a] recommendations designed to relieve the High Court of some of its original jurisdiction so that it could more effectively perform its appellate functions.[11] Section 28G in the Bill[11a] upon introduction was the same as the section 28G contained in the Act as passed, but section 28F of the Bill differed in that it set a three year sentencing limit anytime an accused pleaded guilty.[12] Like section 28F in the Act, section 28F in the Bill provided that when the three year sentencing limit was in effect any District Court Judge could pass sentence. Otherwise, only a District Court Judge warranted to conduct jury trials could pass sentence.[13] Similarly, section 28H in the Bill, as well as section 28H in the Act, provided that an appeal from a sentence imposed under the three year sentencing limit would lie to the High Court. Otherwise, it would lie to the Court of Appeal.[14]

The Minister of Justice said, when introducing the Bill, that sections 28F and 28H gave effect to specific recommendations of the Royal Commission.[15] Indeed, he then, in effect, quoted from those recommendations:[16]

> . . . first, District Court Judges, sitting with a jury, should be empowered to impose the sentence prescribed by law, and in such cases appeals should be direct to the Court of Appeal; secondly, District Court Judges, sitting without a jury, should be restricted to imposing a sentence of no greater than 3 years' imprisonment; and, thirdly, in all other respects, appeal procedures should remain unaltered.

It is clear, however, that the Minister misunderstood what the Royal Commission meant by those recommendations. He seemed to have read them quite literally to

10 The jurisdiction to be transferred by the Bill, and which was then transferred by the Act, was in respect of indictable offences triable summarily and offences for which a jury trial has been elected — see s.28A.

10a Government Printer, Wellington, 1978.

11 N.Z. Parliamentary debates Vol. 434, 1980: 4171.

11a In this paper provisions of Bills concerned with the District Courts Act 1947 will be referred to by their proposed section numbers in that Act rather than by their clause numbers.

12 Actually, because s.28F(2)(a) in the Bill referred to an accused person who "pleads guilty on the presentment of the indictment . . . ", the Bill's sentencing provisions did not seem to cover an accused person pleading guilty under the Crimes Act 1961, s.356(3), the provision allowing a plea made on the presentment of the indictment under s.356(1) to be altered during trial. This omission was corrected in the Act by changing the wording to refer to an accused who " . . . pleads guilty under . . . section 356 of the Crimes Act 1961" — See s.28F(1)(b).

13 It was conceded by all concerned that not all District Court Judges would be suited to conducting jury trials. See *Report of the Royal Commission on the Courts 1978,* op. cit. n.10a, 111, 133. The warranting of suitable judges is provided for in s.28B.

14 Section 28D of the Bill provided that trials upon indictment in the District Courts were to take place before a judge and a jury and that the Crimes Act 1961 would apply accordingly. Because of the section's emphasis on the trial stage, it was unclear whether the appeal provisions of the Crimes Act 1961 were to be made applicable too. This problem was corrected in the Act by a clear direction that Part XIII of the Crimes Act 1961 (the appeal provisions) would be applicable whenever a person is committed for trial in a District Court "until the matter is finally disposed of" — See s.28D(3).

15 N.Z. Parliamentary debates Vol. 434, 1980: 4171.

16 Idem. Cp. *Report of the Royal Commission on the Courts 1978,* op.cit. n.10a, 113.

mean that a District Court Judge's sentencing power should depend on whether or not the accused has in fact been before a jury. Thus, whether he has not been before a jury because he has been subjected to a District Court's summary jurisdiction, or, because he has pleaded guilty before his jury trial was to begin, effect.[17] What the Royal Commission actually meant, however, was that a District Court Judge's sentencing power should depend on whether or not the type of jurisdiction the accused has been subject to could have involved the accused appearing before a jury. Thus a three year sentencing limit should be in effect only when a conviction has been entered in a District Court exercising its summary jurisdiction and not when the accused has pleaded guilty and thus foregone a jury trial he would have had if the proceedings had carried on. That this is the correct interpretation is apparent from the Royal Commission's discussion of the recommendations in question, a discussion in which it links summary jurisdiction and the three year sentencing limit.[18] It is also apparent from the total lack of explicit mention by the Royal Commission of a link between guilty pleas and the three year sentencing limit, a lack which would be virtually unbelievable if this unprecedented link were really being proposed.

17 This equating of summary jurisdiction with guilty pleas in the District Courts' jurisdiction upon indictment also explains why, in the latter case, the Bill provided that any judge, warranted or not, could pass sentence and appeal would lie to the High Court. Indeed, this equating is evidenced further by the way cl.45 of the Bill proposed to amend the Crimes Act 1961, s.3 so that when an accused pleaded guilty to an offence to be proceeded against by indictment in a District Court, he would not be deemed to have been convicted on indictment. For some reason, this would be so even if the accused were to be committed to the High Court for sentence under s.28G. Under the Act as passed as well, whenever the three year sentencing limit is to be in effect, these other characteristics of summary jurisdiction are also to be in effect — See ss.28F and 28H. See also the Crimes Amendment Act (No. 2) 1980, s. 3.

18 The Royal Commission derived its recommendations as to the sentencing jurisdiction of District Court Judges from the proposal put forward by the Department of Justice. First the Commission said, "the Department of Justice, on the other hand, placed no limit on sentencing for a District Court judge sitting with a jury other than the sentence prescribed for the offence. It did propose that the District Court judge sitting without a jury should exercise the current criminal jurisdiction of the Magistrates' Courts." (The "current criminal jurisdiction" was summary jurisdiction.) Then the Commission said, " . . . we think the best solution is to propose that the sentencing jurisdiction of District Court judges sitting with a jury should be that provided by statute for the crime . . . . On the other hand, we have decided to recommend that when District Court judges sit without a jury, the maximum sentence should remain at three years' imprisonment . . . ". *Report of the Royal Commission on the Courts 1978,* op.cit. n.10a, 111. It is obvious that the Commission was equating sitting without a jury with summary jurisdiction, not only from the similarity of wording found between its proposal and that of the Justice Department, but also from its use of the word "remain". The only three year sentencing limit around to "remain" was that for summary jurisdiction. Later in its discussion, the Commission suggested that in three years the Judicial Commission should review the limit put on the sentencing jurisdiction of District Court Judges sitting without a jury. Still later, it referred back to a recommendation that "meantime (for say, three years) the District Courts should exercise the summary jurisdiction currently exercised by the Magistrates' Courts". Ibid. 134. The recommendation referred back to must have been the one for a review of the sentencing limit. Again, it seems clear that the Royal Commission meant the three year sentencing limit to apply only within summary jurisdiction.

Corrections - (1981) 11 V.U.W.L.R.

Page 262 - Between the 4th and 5th lines insert:

"would be irrelevant. In either case, a three year sentencing limit should be in "

Page 266 - Delete line 10, and insert:

"... which will not only enable a trial judge to sentence according to law after a "

Although this misunderstanding of the Royal Commission's recommendations apparently was never pointed out to the House, the sentencing provisions of the Bill did come in for some sharp criticism in the two submissions made on the Bill to the Statutes Revision Committee by lecturers at Victoria University.[19] Both these submissions criticised the three year sentencing limit as constituting an inducement to accused persons to plead guilty.[20] Having accepted the submissions that such an inducement was improper, the Committee recommended that section 28F be deleted from the Bill.[21] The Committee clearly thought that such a deletion would result in an across-the-board limit on the sentencing power of District Court Judges, allowing them to sentence accused persons to a maximum of only three years' imprisonment, regardless of whether those accused persons pleaded guilty or went to trial and regardless of whether they were subject to a court's summary jurisdiction or its jurisdiction upon indictment.[22] To take care of the infrequent case of an accused requiring more than a three year sentence, section 28G was to be retained.[23] It seems clear, however, that the Committee misunderstood the effect of its proposed deletion of section 28F. Given that the original Bill's three year sentencing limit had been effected by a reference in section 28F to section 7 of the Summary Proceedings Act 1957,[24] a reference deleted along with section 28F, and given that section 7 read on its own terms could have an effect only on a sentence passed on an accused person subject to a court's summary jurisdiction,[25] the deletion of section 28F would eliminate completely the three year sentencing limit for accused persons subject to a District Court's jurisdiction upon indictment. As a matter of fact, the only sensible reference to a District Court's sentencing power over such persons would be found then in section 28D, which would allow sentencing up to the maximum term of imprisonment prescribed for the offence involved.[26] Even this provision, however, would not govern sentences to be passed upon accused persons pleading guilty before their committal for trial in a District Court.[27]

19 One of these submissions was made by Neil Cameron of the Faculty of Law and Dr. Warren Young of the Institute of Criminology. The other was made by the author of this paper. The only other submission on the Bill was made by the New Zealand Law Society and it did not address itself to the propriety of the sentencing provisions.

20 Cameron and Young, op.cit. n.19, 3-4. Sleek, op.cit. n.19, 4-5.

21 N.Z. Parliamentary debates Vol. 436, 1980: 5585-86.

22 Ibid. 5585-87.

23 Ibid. 5587. Despite the deletion of section 28F, the section 28G contained in the Courts Amendment Bill 1980 as reported from the Statutes Revision Committee was phrased as an exception to section 28F!

24 In that respect, the Bill's wording was the same as that in the Act as passed. Supra n.5.

25 Section 7 begins: "Where any person is summarily convicted of an offence . . . ".

26 Section 28D contained in the Bill as reported from the Committee provided that Part XII of the Crimes Act 1961 (in which can be found its sentencing provisions) would apply whenever a person is committed for trial in a District Court. Those provisions allow sentencing up to the maximum set for the particular offence. See the Crimes Act 1961, ss.321, 356, and 371.

27 By its own terms, the section's reference to the Crimes Act 1961 made it applicable "[w]here any person is committed to a District Court for trial . . . ". Elsewhere in the Bill as reported from the Committee, however, cl.27 and 28 amended the Summary Proceedings Act 1957, ss.153A and 168 to deal with the sentencing of persons pleading guilty before their committal for trial in a District Court. Unfortunately, these sections provided for sentence to be passed under the previously deleted section 28F!

Be that as it may, the Statutes Revision Committee's proposal as regards section 28F was not accepted by the Minister of Justice, nor did he accept the proposal, put forward in the submissions of the Victoria University lecturers, to allow only District Court Judges warranted to conduct jury trials to sentence accused persons subject to a District Court's jurisdiction upon indictment and without any three year sentencing limit at all.[28] Instead, he proposed that section 28F be retained but with an amendment that put it into the form in which it was finally passed.[29] The Minister gave several reasons for rejecting the Committee's proposal, which he also perceived as setting an across-the-board sentencing limit.[30] One was that it would prevent the District Courts from achieving an enhanced status through an extended criminal jurisdiction.[31] Another was that it would encourage too many accused to opt for a jury trial (presumably as opposed to a summary trial).[32] Finally, it would not decrease the High Court's workload as much as needed because more cases would have to be committed to the High Court in order that sentences over three years might be passed when needed.[33] These reasons, however, militate even more strongly in favour of the proposal to eliminate the three year sentencing limit completely than they do in favour of the Minister's proposal for a three year sentencing limit in certain instances of guilty pleas.[34] Yet, he gave no reasons for rejecting that proposal as well.[35]

Nor did he give any reason for wishing to amend the original version of section 28F so that instead of applying whenever an accused pleaded guilty, the three year sentencing limit would apply only when an accused pleaded guilty before his committal for trial.[36] It seems, however, that he might have noted the point made in one of the submissions on the Bill, that, in fact, the only time an accused person might be making a guilty plea before a District Court Judge not warranted to

28 N.Z. Parliamentary debates Vol. 436, 1980: 5799. See Cameron and Young, op. cit. n.19, 3-8; Sleek, op. cit. n.19, 4-6.

29 N.Z. Parliamentary debates Vol. 436, 1980: 5799.

30 Idem.

31 Idem. The Minister seemed to be worried that, among other things, this would hinder the recruitment of suitable persons to become warranted judges.

32 Idem. Presumably, the Minister felt that with jury trials and summary trials both attracting a maximum three year sentence, there would be no incentive for accused persons to opt for summary trials.

33 Idem. The Minister also was concerned that the Crown would apply for more transfers of trial to the High Court under s.28J, again so that sentences of over three years could be passed.
It should be noted, however, that less than 5% of offenders receive sentences of more than three years' imprisonment, and that some of those would be for offences still triable only in the High Court. N.Z. Parliamentary debates Vol. 436, 1980: 5586-87

34 See the discussion infra Part IIIB.

35 Nor did he ever acknowledge that his proposal might induce guilty pleas. See N.Z. Parliamentary debates Vol. 436, 1980: 4171-74, 5585-87, 5799-5801, 5848, 5856, 5891.

36 Idem. Note that along with changing the circumstances in which the three year sentencing limit would apply, the Minister's proposal made further amendments to the Bill in order that other characteristics of summary jurisdiction, including passing of sentence by any judge of the District Courts, would apply in those same circumstances. See supra n.17.

conduct trials upon indictment would be before his committal for trial.[37] In any other case, the accused would have been committed to trial before and could only plead guilty before a warranted judge. Perhaps the Minister then noted the further point made in the submission that it is not logical to say a warranted judge can be trusted to exercise his sentencing discretion fully after a jury verdict but not after a guilty plea.[38] While that may explain the elimination of the three year sentencing limit for guilty pleas made after committal for trial, it does not explain the retention of the limit for other guilty plea situations.

The following chart provides a comparative summary of the proposals outlined above.

Offences within District Court Jurisdiction under the New Law and the Three Year Sentencing Limit

	Summary jurisdiction	Jurisdiction upon indictment — guilty plea before committal for trial	Jurisdiction upon indictment — guilty plea after committal for trial	Jurisdiction upon indictment — conviction after trial
*Old law	✓	X	X	X
Bill as introduced	✓	✓	✓	X
Lecturers' proposal	✓	X	X	X
Statutes Revision Committee's proposal (as it was intended)	✓	✓	✓	✓
Statutes Revision Committee's proposal (as it was actually)	✓	?	X	X
Minister's proposal (new law)	✓	✓	X	X

✓ = the existence of a three year sentencing limit
X = no three year sentencing limit.
? = no provision made for sentencing at all
* Note that under the old law jurisdiction upon indictment for these offences was in the High Court

III. AN EVALUATION OF THE MINISTER'S PROPOSAL

A. *As a Reflection of the Royal Commission's Recommendation*

The reasons behind the retention of the limit can be the subject only of speculation. Perhaps they can be traced to what seemed to be the Minister's new understanding, as stated by him when he put forward his proposal for an amended

37 Sleek, op. cit. n.19, 4.
38 Ibid. 5.

section 28F, of the sentencing recommendations of the Royal Commission. He seemed to be concerned with the statement by the Commission that they[39]

> . . . consider that as with their counterparts in District Courts overseas, our District Court judges who sit with a jury should have jurisdiction to impose the full sentence prescribed for the particular offence, that is, the same jurisdiction a judge of the High Court would have if he were dealing with the same offence.

When discussing his proposed amendment to section 28F, however, the Minister paraphrased that statement in an interesting way. He said that his amendment to section 28F was one[40]

> which state that the district court judges in this respect should have, as have similar trial by a jury, but also when the accused pleads guilty after committal for trial. That brings it essentially to the recommendations of the Royal Commission on the Courts, which state that the District court judges in this respect should have, as have similar judges overseas, the same sentencing powers as a High Court judge in those circumstances.

Nowhere did the Royal Commission confine its recommendation that warranted District Court Judges have the same sentencing power as High Court Judges to "those circumstances" of after a jury trial and when there is a post-committal guilty plea. Rather, the Commission must have meant that whenever a warranted District Court Judge is exercising a sentencing jurisdiction previously given over to the High Court, he should have the same full sentencing power as a High Court Judge would have had. This would include the situation of such a judge sentencing an accused who pleaded guilty prior to being committed for trial.[41] Moreover, to enact a statute that would deny a warranted judge full sentencing power in such a situation would again lead to the illogical conclusion mentioned earlier: that a judge specially selected for his ability to exercise the District Courts' new criminal jurisdiction can be trusted to exercise his sentencing discretion fully after a jury verdict and after a guilty plea if it is entered after committal for trial but not after a guilty plea that is entered before committal for trial.

To give effect to the Royal Commission's recommendation that warranted judges have a full sentencing power whenever they are performing sentencing tasks previously given to the High Court would, of course, require that such tasks be given only to warranted judges. It would be absurd if accused persons who happened to plead guilty before warranted judges could be sentenced up to ten years' imprisonment, while those who happened to plead guilty before unwarranted judges could only be sentenced up to three years' imprisonment. It would be almost as illogical to give the latter judges full sentencing power over those who plead guilty before them, as they would not be gaining the other experience in the use of a full sentencing power that warranted judges would be gaining by sentencing those committed for trial. Moreover, the Royal Commission, while concerned that warranted judges should have a full sentencing power, said nothing about other District Court Judges having such a power. Nor, for that matter, did it say anything about such judges being given any of the sentencing tasks previously

39 *Report of the Royal Commission on the Courts 1978,* op.cit. n.10a, 111
40 N.Z. Parliamentary debates Vol. 436, 1980: 5799.
41 See supra n.9.

performed by the High Court. Clearly, then, a proper implementation of the Royal Commission's recommendations would require both a total elimination of the three year sentencing limit proposed by the Minister and an amendment of the provisions governing committal for sentence at the preliminary hearing stage so that whenever an accused pleaded guilty before a judge not warranted to conduct jury trials, he would be committed for sentence to a warranted judge, provided the offence involved was within District Court jurisdiction upon indictment.[42]

B. *In Light of the Minister's Reasons for Rejecting the Committee's Proposal*

Despite the Minister's proposal for section 28F not being an accurate reflection of the Royal Commission's recommendations nor a logical restriction on the sentencing power of warranted District Court Judges, it was passed into law. In addition to the section's other defects, it fares badly against the reasons given by the Minister for rejecting the Statutes Revision Committee's proposal for an across-the-board three year sentencing limit when it is compared to the proposal[42a] put forward by the Victoria University lecturers. One of the Minister's misgivings about the Committee's proposal was its effect on the status of District Courts. Yet, the goal of enhancing the status of District Courts by extending their criminal jurisdiction must surely suffer as the result of any restriction on the sentencing power of warranted judges. As a result of the Minister's proposal, warranted judges will be able to sentence only a proportion of those accused pleading guilty at the preliminary hearing stage and then only to sentences not exceeding three years. This not only shows a lack of trust in the sentencing ability of warranted judges, but also it deprives them of the chance to gain experience in the use of their full sentencing power as quickly as possible. On the other hand, the lecturers' proposal would have given warranted judges the fullest possible sentencing jurisdiction.

Also, the Minister's proposal will act as a special inducement to accused persons to opt for the jury trial process, another of the Minister's criticisms of the Committee's proposal. Under the section as passed, accused persons can at least start the jury trial process without foregoing any sentencing advantage vis-à-vis the summary trial process. Thus, an accused could ask for a jury trial in order to get information on the prosecution's case during the preliminary hearing. Then, if it were a strong case, he could plead guilty and be in the same position as to sentence as if he had been dealt with in summary jurisdiction.[43] If it were not a

42 The provisions involved, ss.153A and 168 of the Summary Proceedings Act 1957, could be amended to require this quite easily. See Sleek, op.cit. n.19 at 5-6. Such an amendment would provide as well that if a guilty plea to such an offence were entered before a warranted judge, then the proceedings would continue as if there had been a committal for sentence. For offences not within District Court jurisdiction upon indictment (that is, purely indictable offences), any committal for sentence would be to the High Court, just as before.

42a That proposal is in line with what is described above as being necessary to implement the Royal Commission's sentencing recommendations.

43 While it is true that even prior to the institution of jury trials in District Courts, an accused could do this by withdrawing his election of a jury trial, a withdrawal allowed anytime prior to committal for trial or sentence, such a withdrawal cannot be done without the leave of the Court. See the Summary Proceedings Act 1957, s.66(6).

strong case, he could then take advantage of all the benefits of the jury trial process. The lecturers' proposal would have offered no such advance look before an accused had to decide whether to forego the advantage of a limited sentence.

Finally, section 28F's three year sentencing limit must give rise to cases in which the accused deserves more than a three year sentence and can only get it if he is committed to the High Court for sentence under section 28G. These cases will, of course, increase the High Court's workload beyond what it would have been if the greater sentence could have been imposed at District Court level. That workload was another of the Minister's concerns. It should be of even more concern, however, that it is inevitable that, after a period of time, the High Court will become less able than the District Courts at sentencing accused who commit offences which are in the District Courts' new jurisdiction. Under the new scheme, if such an accused is dealt with summarily, it is a District Court which is to sentence him,[44] unless he is committed to the High Court for sentence under section 44(2)(a) of the Summary Proceedings Act 1957. If he is not dealt with summarily, again it is a District Court which is to sentence him,[45] unless he is committed to the High Court for trial under section 44(2)(b) of the Summary Proceedings Act, 1957, or his trial is transferred to the High Court under section 28J of the District Courts Act 1947, or he is committed to the High Court for sentence under section 28G. These exceptions seem bound to arise quite infrequently.[46] As a result, the High Court will not be able to keep in contact with changes in offending or sentencing patterns. Nor will the High Court be gaining such contact by hearing sentence appeals arising out of the District Courts' new jurisdiction, as all such appeals, except those concerned with sentences imposed for guilty pleas entered before committal for trial, are to go to the Court of Appeal.[47] Adopting the lecturers' proposal would solve this problem, restricting all such sentencing to warranted District Court judges, so that an inexperienced High Court is not asked to sentence in some of the most difficult cases arising out of the District Courts' jurisdiction.[48]

44 See the Summary Proceedings Act 1957, ss.6,7, and 9.

45 See ss.28A and 28F.

46 The prime reason for these exceptions is so that a sentence of more than three years can be imposed on an accused. (Section 28J transfers may be motivated by other reasons, including administrative convenience. See *Report of the Royal Commission on the Courts 1978,* op.cit. n.10a,112-13). However, very few offenders are deemed to deserve such a sentence. See n.33 supra.

47 See ss.28D(3) and 28H. Of course, the High Court's workload will be increased, by its having to hear these sentence appeals, beyond what it would have been if all appeals were to go to the Court of Appeal, that being another part of both the lecturers' proposal and the recommendations of the Royal Commission. See Cameron and Young, op.cit. n.19, 5-6; Sleek, op.cit. n.19, 5; *Report of the Royal Commission on the Courts 1978,* op.cit., 111. Sentence appeals arising out of summary jurisdiction would still go to the High Court.

48 As part of their proposal to eliminate the three year sentencing limit, the lecturers also proposed the deletion of section 28G. See Cameron and Young, op.cit. n. 19, 4-6; Sleek, op.cit.n.19, 5. In addition, they proposed that the Summary Proceedings Act 1957, s.44 be amended so that all committals made under it, whether for trial or sentence, would be to a District Court presided over by a warranted judge. They pointed out the illogicality

C. *As an Improper Inducement to Plead Guilty*

The most telling point that can be made against the Minister's proposal, however, is, ironically, the one point the Minister never addressed. That point was made in the submissions of the Victoria University lecturers on the original Bill, when they contended that a three year sentencing limit for conviction after guilty plea would be an improper inducement to accused persons to plead guilty, considering that a conviction after trial could bring a sentence as high as ten years.[49] That point's validity is not affected by the Minister's amendment to section 28F. Under it, the inducement is not only to plead guilty but also to do so quickly, for only before there has been a committal for trial is there a sentencing advantage to be gained by pleading guilty.

Until the District Court jury trial system has been in operation for several years there can be no direct way to evaluate the proposition that the three year sentencing limit will act as an improper inducement to plead guilty. The best that can be done is to evaluate it by way of analogy to the effect of current sentencing practice on guilty pleas. It is well-known that many judges in Common Law jurisdictions make it a practice to give to an accused person who pleads guilty a lighter sentence than the circumstances of the offence and the characteristics of the accused would otherwise warrant.[50] Indeed, such a practice has twice been endorsed in New Zealand.[51] The traditional reason that has been given to justify this practice is that a guilty plea is a sign of remorse, the existence of which causes rehabilitation to be accomplished in a shorter time.[52] In contrast, a few judges recognize that a guilty plea is only rarely motivated by remorse and refuse to follow a semi-automatic practice of discounting sentences for guilty pleas, preferring instead to determine on an individual basis whether there is genuine

of nominating District Courts to try and sentence accused persons to be dealt with upon indictment when they are charged on indictment by the prosecution or elect a trial on indicement themselves, but not when a District Court declines to deal with them summarily. See Cameron and Young op.cit., 6-7; Sleek op.cit., 6. At least under s.28J, if the High Court is to do any sentencing, it will also have tried the case and thus be in a better position to pass sentence than under s.28G. But the existence of s.28J is still objectionable for giving jurisdiction to an inexperienced High Court and for evidencing a mistrust of the abilities of the warranted judges of the District Courts.

49 Supra nn.4 and 20.

50 As to the existence of such a practice in England, see *R.* v. *Haan* [1968] 2 Q.B. 108, 111; J. Baldwin and M. McConville "Plea Bargaining and the Court of Appeal" (1979) 6 Brit. J. of Law and Soc. 200, 212-15; D.A. Thomas *Principles of Sentencing* (2nd ed., Heinemann, London, 1979) 50-52; R. Cross *The English Sentencing System* (2nd ed., Butterworths, London, 1975) 105. As to the existence of such a practice in the United States, see: R.O. Dawson *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* (Little, Brown and Co., Boston, 1969) 1973; H.S. Miller, W.F. McDonald, and J.A. Cramer *Plea Bargaining in the United States* (National Institute of Law Enforcement and Criminal Justice, Washington, D.C., 1978) 217-27. As to the existence of such a practice in Victoria, see *R.* v. *Gray* [1977] V.R. 225, 232-33.

51 See *R. v. Taylor* [1968] N.Z.L.R. 981, 987. See also the case discussed in J. Pope "Rewarding Pleas of Guilty" [1974] N.Z.L.J. 317.

52 Baldwin and McConville, op. cit. n.50, 212-13; Thomas, op. cit. n.50, 50-51; Cross, op. cit. n. 50, 105; Dawson, op. cit. n.50, 175.

remorse.[53] Indeed, many judges and researchers recognize the spurious nature of the traditional reasoning.[54] Nevertheless, some judges go along with the practice of discounting sentences for another reason, the need to encourage the obviously guilty to so plead in order that the limited resources of the criminal justice system can be saved for the cases in which guilt is in genuine doubt.[55] Some go so far as to claim the system would break down if the great mass of cases were not resolved by guilty pleas.[56] Other, less common, reasons have been put forward to justify this sentencing practice,[57] but remorse and resource-saving are the major ones.

The practice of rewarding guilty pleas with lighter sentences has not gone unchallenged. Judges and others have attacked this implicit form of plea-bargaining as a practice that actually prevents rehabilitation. Those who plead guilty often feel bitter about the pressure this practice puts on them to so plead, especially if, as sometimes happens, the promise that has been held out to them of a lighter sentence does not eventuate.[58] Moreover, it is said, a sentence discounting practice reduces the deterrent effect of sentences, especially in the case of experienced offenders, who are both more likely to know about and more willing to take advantage of this practice.[59] A variety of other arguments have been made in opposition to this sentencing practice, including the argument that it effectively imposes a penalty on those who assert their fundamental right to a trial.[60]

There is, however, one argument that even proponents of the sentencing discount for guilty plea practice take heed of: that the practice induces guilty pleas from the innocent, or at least from those accused whose guilt is arguable.[61] Some proponents might argue that inducing a small number of such guilty pleas is an

53 See *Harris* v. *The Queen* [1967] S.A.S.R. 316, 328. See also Miller, McDonald, and Cramer, op. cit. n.50, 218; Dawson, op. cit. n.50, 174-75. Cp. *R.* v. *Harper* [1968] 2 Q.B. 108, 110.

54 See Cross, op. cit. n.50, 170; Miller, McDonald, and Cramer, op. cit. n.50, 219; *Harris* v. *The Queen* [1967] S.A.S.R. 316, 328.

55 See Baldwin and McConville, op. cit. n.50, 213; Cross, op. cit. n.50, 105; Dawson, op. cit. n.50, 175; Miller, McDonald, and Cramer, op.cit. n.50, 217-18. An interesting variation on this reasoning was expressed in *R.* v. *Gray* [1977] V.R. 225, 232-33, in which the emphasis was on rewardig guilty pleas that not only do save the system's resources but also are made for the purpose of saving those resources. See also *R.* v. *deHaan* [1968] 2 Q.B. 108, 111 and *R.* v. *Taylor* [1968] N.Z.L.R. 981, 987, both of which refer generally to guilty pleas as being in the public interest.

56 See, e.g., Cross, op. cit. n.50, 105. There is, however, the experience of one American city, which has streamlined its criminal justice system so successssfully that it is reducing the backlog of cases despite having only 32% of cases resolved by guilty plea. See L. Orland and H.R. Tyler Jr. (eds) *Justice in Sentencing* (Foundation Press, New York, 1974) 266.

57 For example, that guilty pleas can save witnesses the ordeal of testifying, especially in sexual cases. See Pope, op. cit. n.51, 317.

58 Orland and Tyler, op. cit. n.56, 261-63. See also the case histories recounted in J. Baldwin and M.McConville *Negotiated Justice* (Martin Robertson, London, 1977) 39-56.

59 Orland and Tyler, op. cit. n.56, 261-63.

60 See, e g., Dawson, op. cit. n.50, 175.

61 Some of those who put forward this argument speak of the innocent being induced to plead guilty. Others, recognizing that innocence or guilt can never be empirically proven, prefer to speak of those whose guilt is contestable, assuming that at least some of those are also innocent. Moreover, it is only those whose guilt is arguable on the evidence that

acceptable price to pay for the smooth functioning of the criminal justice system.[62] Unfortunately, there is no way to accurately determine just how many innocents or people whose guilt is contestable, if any, have been induced to plead guilty by the promise of a lighter sentence held out by current sentencing practice. Research carried out in England, however, showed that in the sample of accused persons studied 37% of those who pleaded guilty seemed to have believed strongly in their own innocence.[63] Also, perhaps as many as 21% of those who so pleaded might have contested their cases before a jury with success.[64] Among the major factors inducing these accused whose guilt was arguable to plead guilty was the prospect of a lighter sentence if they so pleaded.[65] If this study can be generalized validly, it would seem that current sentencing practice is exacting too high a price in untrustworthy guilty pleas to be justified.

By analogy to that practice, it can be argued that the three year sentencing limit will also exact too high a price, for the limit, like the practice, will put pressure, by way of a sentencing differential, on those whose guilt is doubtful to, nevertheless, plead guilty. Moreover, the statutory limit will do more harm than merely to codify, and thus entrench, the current sentencing practice. It must inevitably add to the inducement effected by that practice. From now on, all District Court Judges must engage in the practice of giving lighter sentences in exchange for guilty pleas, entered before committal for trial, even if they are not so inclined. Even judges who are so inclined will be encouraged to engage in that practice more often than they would otherwise. After all, by enshrining a sentencing discount for pre-committal guilty pleas in a statute, the legislature has made it clear that such a discount is to be the rule rather than just a general tendency. As a result, the promise of a reward for pleading guilty becomes more likely to be fulfilled and thus more of an inducement than ever before.

The sentencing limit is likely to add to the inducement to plead guilty in yet another way. It is only logical that the greater the perceived difference between the sentences received by those who plead guilty and those who go to trial, the greater is the inducement to plead guilty.[66] In England, it appears that sentences are, on average, discounted by one-quarter to one-third for guilty pleas.[67] The only hint

could be said to be foregoing something (the chance of acquittal) by pleading guilty. See Baldwin and McConville, op. cit. n.50, 214; Dawson, op. cit. n.50, 175; Miller, McDonald, and Cramer, op. cit. n.50, 218; Orland and Tyler, op. cit. n.56, 261-63, 266; Baldwin and McConville op. cit. n. 58, 59-80. Perhaps it should be noted here that some of the references given are to books and articles that are concerned with all forms of plea-bargaining. All of these authors, however, consider judicial sentencing practice as a form of plea-bargaining and the arguments made by them apply equally to that practice.

62 Others would not be willing to pay that price. Contrast Cross, op. cit. n.50, 105 and *R. v. Gray* [1977] V.R. 225, 233 with the discussion to be found in T. R. McCoy and M. J. Mirra "Plea Bargaining as Due Process in Determining Guilt" (1980) 32 Stan. L. Rev. 887.

63 Baldwin and McConville, op.cit. n.58, 61-63.

64 Ibid. 72-77.

65 Ibid. 46, 65-67.

66 See McCoy and Mirra, op. cit. n.62, 922-32.

67 Thomas, op. cit. n.50, 51-52. The discount given in the United States can be as high as 95%. See Miller, McDonald, and Cramer, op. cit. n.50, 224-25.

that can be gained as to the usual discount given in New Zealand is to be found in *R.* v. *Taylor*,[68] where a sentence of four years was reduced to one of three years by virtue of a guilty plea, a discount of one-quarter. On the other hand, the three year sentencing limit could result in a pattern of discounts much higher than that, with, for example, six year sentences being reduced to two years, a discount of two-thirds, and a powerful inducement to plead guilty. Moreover, because the greatness of the possible sentencing discount is clearly set out in a statute, accused persons will have no trouble perceiving it and will, therefore, become even more likely to act on it.

It is true that only a small percentage of persons within the District Courts' new jurisdiction would have been likely to receive sentences of over three years' imprisonment without the sentencing limit.[69] That does not mean, however, that only that small percentage could possibly gain by the limit and thus be induced by it to plead guilty. Even those accused who would have received less than a three year sentence anyway should gain a reduction in sentence because of the limit, for the limit is, in essence, a direction to judges to work out sentences with a lower maximum in mind for those who plead guilty than for those who go to trial. To give a crude example, an accused who is of average culpability in comparison to others who commit an offence with a maximum penalty of five years' imprisonment attached might if he goes to trial receive a sentence of two years and six months (that is, halfway between the maximum of five years saved for the worst offenders and the non-imprisonment saved for the best). But if he pleads guilty before committal for trial, he might receive a sentence of only one year and six months (that it, halfway between the maximum of three years saved for the worst offenders and the non-imprisonment saved for the best).

Besides the great harm likely to result from the three year sentencing limit, it would seem there is little to be gained from it. As the vast majority of accused plead guilty anyway,[70] there is just not that great a contribution that can be made to the efficiency of the system by reducing the number of indictable proceedings. What little reduction in that number that is gained can only be largely at the expense of persons whose guilt is contestable but who plead guilty as a result of the extra inducement offered by the sentencing limit. It is even possible, as pointed out in one of the submissions made on the Bill, that the existence of the limit, combined with the retention of police discretion for most offences as to whether to start proceedings summarily or indictably, could lead to more charges being proceeded with indictably in order to pressure accused into pleading guilty.[71]

One must also wonder why, if the sentencing limit is a good idea, it has been confined to the District Courts' new jurisdiction. The whole purpose of instituting jury trials in District Courts was to reduce the workload of the High Court. Yet there is no sentencing limit to induce guilty pleas for offences within High Court

68 [1968] N.Z.L.R. 981, 987.

69 See Supra n.33.

70 Almost all those accused who could have a jury trial opt instead to plead guilty. See Dept. of Justice *Submissions to the Royal Commission on the Courts, Part I* (Government Printer, Wellington, 1977) 51.

71 See Cameron and Young, op. cit. n.19, 1-4.