NEW SOUTH WALES
LAW REFORM COMMISSION

CRIMINAL PROCEDURE

PROCEDURE FROM CHARGE TO TRIAL: SPECIFIC PROBLEMS AND PROPOSALS

VOLUME 1

A DISCUSSION PAPER
FOR COMMUNITY CONSULTATION

DP 14/1
1987

NEW SOUTH WALES

LAW REFORM COMMISSION

CRIMINAL PROCEDURE

PROCEDURE FROM CHARGE TO TRIAL: SPECIFIC PROBLEMS AND PROPOSALS

DISCUSSION PAPER

VOLUME 1

DP 14

February 1987

Sydney 1987
ISSN 0818-7924

National Library of Australia
Cataloguing-in-Publication entry

New South Wales. Law Reform Commission.
Criminal procedure: procedure from charge to trial: specific problems and proposals.

Bibliography.
ISBN 0 7305 3133 3.

1. Criminal procedure - New South Wales. 2. Pre-trial procedure - New South Wales. 3. Criminal justice, Administration of - New South Wales. I. Title. (Series: Discussion paper (New South Wales. Law Reform Commission); no 14).

345.944'072

Participants

For the purpose of the Criminal Procedure Reference the Chairman, in accordance with section 12A of the Law Reform Commission Act 1967, created a Division comprising the following members of the Commission:

Paul Byrne (in charge of this reference)
Greg James QC
Mr Keith Mason QC (Chairman of the Commission)
Her Honour Judge Jane Mathews
Ronald Sackville
(The Honourable Adrian Roden, a Justice of the Supreme Court of New South Wales, was a member of this Division until his resignation from the Commission on 7 October 1986.)

Research Director:

Mark Richardson (to 21 June 1985)
William J Tearle (from 18 November 1985)

Research:

Ms Maxine Cuttler
Ms Alexis Hailstones
Ms Anne Healey
Ms Gail Morgan
Ms Jill O'Meara
Mr Gordon Renouf
Mr Mark Richardson
Ms Clare Sneddon
Mr Kimber Swan
Ms Meredith Wilkie

Secretary:

Mr John McMillan

Word Processing:

Ms Lorna Clarke
Mrs Margaret Edenborough
Mrs Nozveen Khan

Librarian:

Ms Beverley Caska

Administrative Assistance:

Ms Zoya Howes
Ms Diane Wood

Preface

The Commission's work on the topics covered by this Discussion Paper was commenced in 1985. Since then, it has been something of an on-again off-again affair while the Commission has concentrated its efforts on other aspects of the law and practice of criminal procedure. The vast range of people who have given the Commission the benefit of their knowledge, experience and sound common sense during the time this material was being prepared are acknowledged on the pages surrounding this note. Initially Maxine Cuttler and Gordon Renouf, more recently Anne Healey and Kimber Swan have been of considerable help in the production of this Discussion Paper.

There are two people who should be singled out for special thanks for the contribution which they made to this work. Firstly, the cheerful assistance and enthusiastic encouragement provided by the former Chairman of the Commission, Mr Keith Mason QC, Solicitor-General of New South Wales, was of inestimable value. His inspiring leadership of the Commission was chiefly responsible for maintaining the pleasant environment in which this work was completed. Secondly, the laborious and so frequently unrecognized task of getting this material into a presentable form was handled with remarkable tolerance and patience by Margaret Edenborough. The high quality of her skill and the professional manner in which she approached this project are sincerely appreciated.

Paul Byrne

February 1987

Acknowledgments

The Commission would like to thank the following people for the valuable assistance, suggestions and comments they provided in the course of preparing this Discussion Paper:

Mr R O Blanch QC
Mr R Bonnici
Mr Kevin Borick (South Australia)
The Honourable Sir Nigel Bowen
Mr B R Brown
Ms J Bujold (Canada)
The Honourable Mr Justice W Carter (Queensland)
Mr J Casey QC (Canada)
Professor M Chesterman
Mr J G Cusack
Ms Beverley Dalley
Mr T S Davidson QC
Mr E J Davison (Queensland)
Mr P G Dingwall (Australian Capital Territory)
Mr M Findlay
Professor Brent Fisse
His Honour Judge Richard Fitzgerald (United States)
Mr S A Flood
Ms Rosemary Friend
Mr P Garling
The Honourable Justice M G Gaudron
Mr J L Glissan QC
Mr M A Green
The Honourable Mr Justice G Hampel (Victoria)
Mr G Harris (South Australia)
Mr N Harrison
His Honour Judge J Hassett (Victoria)
His Honour Judge B J Herron QC
Mr P J Hidden QC
Mr R Hocking (Northern Territory)
Mr W D Hosking QC
Ms J Houghton
Mr R N Howie QC
Mr H P W Johnston QC
The Honourable Mr Justice J J A Kelly (Australian Capital Territory)
Mr T J Kelly
The Honourable Justice Michael Kirby CMG
His Honour Judge E P Knoblanche QC
His Honour Judge R F Loveday QC
Mr C A Luland QC
Ms C J Lyons
Mr M A McL MacGregor
Mr T J Martin QC
The Honourable Mr Justice A V Maxwell
Mr D Melham

His Honour Judge J A Moore
Mr K R Murray AO OBE ED QC
Mr C R Newham
Mr Richard Nicastro (United States)
Mr J C Nicholson
Mr S R Norrish
Mr T Nyman
The Honourable Mr Justice J O'Brien
The Honourable Mr Justice J H Phillips (Victoria)
Mr H F Purnell AM QC
Mr R Read (Victoria)
Mr M Richardson
Mr B L Roach
Mr W J Robinson
Mr P A Sallmann (Victoria)
Mr E J Shields QC
Mr M L Sides
His Honour Judge Staunton CBE
The Honourable Sir Laurence Street KCMG
His Honour Judge B R Thorley
Mr M A Viney
The Honourable Mr Justice R S Watson
Dr D Weatherburn
Mr D Weisbrot
Mr M J Williams
Mr J Willis (Victoria)
Dr G D Woods QC
The Honourable Mr Justice D A Yeldham
Mr G Zdenkowski

The Commission invites submission on the issues raised in this Discussion Paper. There is a Comment Sheet inserted at the back of Volume 2 and we would be pleased to receive replies in this form. Submissions and comments should reach us by 30 June 1987 when it is intended that the Commission will begin the preparation of the final Report to the Attorney General on the issues raised in this Discussion Paper. All inquiries and comments should be directed to:

Mr John McMillan
Secretary
NSW Law Reform Commission
PO Box 6 GPO
SYDNEY NSW 2001

Table of Contents

Chapter 1

Introduction

I. BACKGROUND

A. Terms of Reference

1.1 On 17 January 1982, the Attorney General of New South Wales, the Hon F J Walker, QC, MP, made the following reference to the Commission:

> To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing to consider -
>
> (a) the means of instituting criminal proceedings;
>
> (b) the role and conduct of committal proceedings;
>
> (c) pre-trial procedures in criminal proceedings;
>
> (d) trial procedures in matters dealt with summarily or on indictment;
>
> (e) practices and procedures relating to juries in criminal proceedings;
>
> (f) procedures followed in the sentencing of convicted persons;
>
> (g) appeals in criminal proceedings;
>
> (h) the classification of criminal offences;
>
> (i) the desirability and feasibility of codifying the law relating to criminal procedure.

1.2 Pursuant to this reference, the Commission published in December 1982 an Issues Paper (the First Issues Paper) which was principally concerned with criminal proceedings in Courts of Petty Sessions (now renamed Local Courts). Subsequently work on the reference was suspended when the Commission's resources were concentrated upon the Accident Compensation

reference. Work on criminal procedure was resumed in the second half of 1984 when the relevant Division of the Commission was reconstituted following the appointment of a new Commissioner to take charge of the reference.

B. The First Issues Paper on Criminal Procedure

1.3 In the First Issues Paper, the Commission examined a number of matters which provide a general background to the Criminal Procedure reference. Whilst we do not intend to reproduce that material here, we consider that it is important to give a general summary of the ground that has already been covered and of the more important issues raised. The First Issues Paper drew attention to the close relationship between substantive and procedural law. It acknowledged that there is increasing public criticism of undue delay, inefficiency and exorbitant cost, all of which are seen to be features of the criminal justice system. It went on to examine some general complaints about criminal procedure. A number of specific questions which had given rise to the need for this reference were identified, in particular:

* Is the criminal courts system coping adequately with its workload of serious criminal cases?

* Can the existing procedures cope with "white collar" and computer crime?

* Is the law relating to criminal procedure readily accessible?

* Are juries adequately assisted?

The Issues Paper then presented three general outlines to assist in the understanding of its work, not only for the benefit of those unfamiliar with criminal procedure, but also to clarify the background against which the rest of that Paper

should be considered. The subjects covered by these outlines were the language of criminal procedure, the structure of the criminal courts system, and the initiation and conduct of criminal proceedings. We intend to rely on this background material in this Paper and in future publications under this reference. It should be regarded as forming an integral part of our work on criminal procedure.

C. Reform Since the First Issues Paper

1.4 Since the First Issues Paper was published at the end of 1982, some of the matters which were dealt with have been covered in various items of legislation. Not all of this legislation is a direct result of the Commission's work, nor does it necessarily follow the course suggested by the Commission's tentative proposals. The following issues raised in the First Issues Paper have been the subject of legislation:

* A system of "paper committals" has been introduced.[1]

* The property value in s476 of the Crimes Act 1900, under which certain indictable offences can be dealt with summarily with the consent of the accused person, has been increased from $2,000 to $10,000.[2]

* The range of offences to which s476 of the Crimes Act applies has been significantly increased.[3]

* The property value in s501 of the Crimes Act, under which certain indictable offences can be dealt with summarily without the consent of the accused person, has been increased from $500 to $2,000.[4]

* Committal proceedings may continue in the absence of a defendant who absconds.[5]

* Section 51A of the Justices Act 1902 has been amended so that the procedure enabling a plea of guilty to be made at committal proceedings is available in respect of all indictable offences.[6]

* Section 51A of the Justices Act has been amended to give a judge the power to commit for trial where an accused person has pleaded guilty at the committal proceedings but later wishes to change his or her plea to not guilty.[7]

* Major amendments have been made regarding the powers of criminal courts to deal with persons who are mentally ill, including those unfit to plead for that reason.[8]

* The criteria for committal have been changed.[9]

D. The Work Program for the Criminal Procedure Reference

1.5 The Commission's terms of reference are very wide. They cover all criminal proceedings in all State courts as well as administrative practices which do not take place in court but which have an important role in the process of criminal justice. The Commission has planned a program of research by dividing the reference into the following areas:

* the classification of criminal offences;

* procedure before trial;

* trial procedure;

* the jury in criminal trials;

* penalties and sentencing;

* appeal procedure; and

* criminal investigation.

The program set out above differs in certain minor respects from that set out in the First Issues Paper. This reflects the Commission's decision to examine the subject matter which falls within its terms of reference in a slightly different way from that originally contemplated. The Commission's intention is to publish a series of Discussion Papers, each describing the current law and practice in the relevant area and, where

appropriate, making tentative proposals for change. These papers will be distributed widely to interested groups and individuals for consideration and comment. Following public consultation, the Commission will proceed to report to the Government. A Report, Unsworn Statements of Accused Persons (LRC 45), was completed in October 1985. A Discussion Paper, The Jury in a Criminal Trial (DP 12), was prepared and distributed for public comment in September 1985. The Commission published its Report (LRC 48) on that subject in March 1986 and completed a Research Report, The Jury in a Criminal Trial: Empirical Studies (RR 1) in June 1986.

1.6 The present Discussion Paper is designed to provoke responses from the community and any proposals advanced in it are merely tentative and do not represent firm recommendations made by the Commission. It is published in conjunction with another Discussion Paper Procedure From Charge to Trial: A General Proposal for Reform (DP 13), which is essentially an outline of the principal features of the Commission's preferred options for reform of criminal procedure between the time an accused person is charged and the time of trial.

E. The Significance of the Criminal Procedure Reference

1.7 The Commission regards this reference as one of the most important it has undertaken. In examining the criminal justice system and ultimately making recommendations for its reform, the Commission is conscious of the fact that the criminal law, and the manner in which it is enforced, have a significant

impact on the lives of individual citizens and, in contemporary terms, the "quality of life" enjoyed in this community. Every person is always a potential participant in the criminal justice system whether as an accused person, a victim, a witness or a juror. Whilst the "quality of life" of every citizen in New South Wales is at least indirectly affected by the criminal justice system, it is equally important to recognise that the standing of this community within the community of nations can be based upon the standard to which it aspires in the administration of justice.

F. Fundamental Principles

1.8 The issues raised in this Discussion Paper have been examined against a background of certain principles which we regard as fundamental. We have referred to them when assessing the current law and practice, in deciding whether there is a need for change and in evaluating the merit of various proposals for reform that we have considered. As these principles have played a crucial role in our work, we think it important for us to articulate them so that the views we express in this Discussion Paper, and the nature of the proposals for reform that we make, may be better understood.

1. Fairness and Justice

1.9 The essential feature of any system of criminal justice is that it be fair. Fairness has a number of aspects. It requires certainty and consistency in the law and procedure, although there must be flexibility in order to cope with the variations between cases and different and changing

circumstances. The occasions on which flexibility is warranted are properly determined by reference to contemporary community standards. In achieving the goal of fairness, the principle that justice should not only be done but be seen to be done is important. The appearance of justice is part of the substance of justice. The objective of fairness must be seen from the perspective of each of the parties in a criminal case. Every litigant should perceive the trial to be a fair one if the decision of the court is to be generally acceptable.

2. Accountability

1.10 Decisions affecting the rights of individuals, particularly those which place their liberty in jeopardy, should be subject to public scrutiny and to review by establishing procedures in which accountability is a prominent feature. The prospect of exposing error or wrongdoing will at once encourage compliance with procedural rules and enable injustices to be remedied. In the context of procedures before trial, the trial proceedings themselves should be recognised as a form of public review of the correctness of decisions made at an earlier stage in the criminal process. However, it is dangerous to take the attitude that the availability of procedures for review will remedy an injustice. It is more efficient to develop procedures which reduce the likelihood of injustice occurring. Putting this another way, it may not be enough to say that a criminal justice system is efficient if it concentrates on minimising the risk of innocent people being convicted at trial. A higher goal is to ensure that innocent people are not put on trial in the first place.

3. Efficiency

1.11 It is trite to observe that the administration of criminal justice should be efficient. The criteria for the assessment of efficiency are more controversial. Efficiency should be measured primarily by reference to the standard and quality of justice and, secondly, by reference to the cost and duration of criminal proceedings.[10] The efficient use of available resources involves those resources being applied to obtain a fair result in an acceptable manner for the least possible cost and in the shortest possible time. Error, duplication, waste, unfairness, delay and uncertainty are all indicators of inefficiency. The goal of eliminating practices involving such elements is designed to serve the greater goal of efficiency in the administration of criminal justice.

4. Consistency and Uniformity

1.12 The procedures followed in the criminal courts should be consistent in order to serve the goal that like cases should be treated alike. Amongst criminal courts of different jurisdiction, the procedures should at least be uniform on questions of basic principle. The goal of consistency and uniformity will be easier to achieve if the course to be followed in criminal proceedings is clear and uncomplicated. Consistency of procedure will promote consistency in the results of criminal cases and will help to make both the participants in the system and the general community familiar with the procedure of the criminal courts.

5. The Desirability of Expeditious Justice

1.13 The need to avoid unnecessary delay is part of the substance of justice itself. As has often been said, justice delayed is justice denied. At the same time, criminal cases should not be disposed of with such haste that there is insufficient time available for adequate consideration of the best means of ensuring that justice is done in the particular case. Whilst some cases may not appear to need extensive preparation, and many litigants may be anxious to avoid having a case considered at length, there is a risk that undue haste in disputes of criminal cases can be as much a cause of injustice as protracted delay. The injustice caused by avoidable and unnecessary delay is an injustice to the accused person, to any victim of the offence and to the general community.

6. Avoiding Miscarriages of Justice

1.14 One of the primary objectives of the criminal process, beginning with the investigation of a suspected offence and concluding with a determination as to guilt in a court, should be to establish the truth regarding the events which are the subject of the inquiry. The importance of this principle and, in particular, the strength of the desire to avoid wrongful convictions is reflected in the standard of proof in criminal cases being established as proof beyond reasonable doubt. The law and practice of criminal procedure should be designed to further the likelihood that evidence presented in the course of criminal proceedings is both honest and accurate.

7. Public Confidence

1.15 Public confidence in the criminal law and its administration is a prerequisite to the acceptability and the ultimate effectiveness of the system of criminal justice. The criminal law and criminal procedure must be capable of adapting to the changing standards of the community so that the process of determining guilt remains consistent with contemporary standards within the general community.

8. Impartiality and Competence of the Tribunal

1.16 It is a fundamental principle that those who are called upon to make decisions in the criminal justice process should be impartial and competent. The features of impartiality and competence must be evaluated from the point of view of the various participants in the criminal process in order that justice should not only be done, it should be seen to be done.

9. The Presumption of Innocence

1.17 The rule which presumes that an accused or suspected person is innocent until proven guilty is one which the law has established to guard against the risk of innocent people being wrongly convicted. Its practical significance may be found in the rule in criminal cases that it is for the prosecution to prove the guilt of the accused person. The privilege against self-incrimination and the right of the accused person to remain silent are further practical consequences of the presumption of innocence.

10. The Participation of the Accused Person

1.18 An accused or suspected person should have the right to participate in the criminal process. This basic right is reflected in subsidiary rights which are safeguards against the accused person being excluded from the trial proceedings or playing an ineffectual role. Various procedural rules such as the right to legal representation, the right to be informed of the prosecution case, the right to make full answer and defence, the right to confrontation of witnesses, the right to be heard and the right to review, have been established to give effect and substance to the right of the accused person to participate in the proceedings.

11. The Grounds on which the Law and Practice should be Changed

1.19 Any alteration to the law and practice of criminal procedure which adversely affects any of the foregoing principles should not be made unless there is a clearly demonstrated need for reform. Accordingly, those who propose reforms likely to have this effect carry the burden of showing the need for them and the utility and desirability of the new laws or practices which they propose.

II. PROCEDURE BEFORE TRIAL

A. Introduction

1.20 The terms of reference specifically refer to "pre-trial procedures in criminal cases". The Commission decided to focus its attention on this area at an early stage of its work on the reference because of the relevance of pre-trial procedure to the problem of delays in the conduct of criminal cases. In New South Wales, the problem of delay in the criminal process has

become a matter of concern for those responsible for the administration of justice. In our view, complaints about unnecessary delay and inefficiency in procedure before trial are a legitimate criticism of the current state of the criminal justice system in New South Wales. From our preliminary research, it appears to us that the reorganisation of that procedure offers the best prospect of limiting avoidable delay. Whilst largely concerned with the problem of delay, our discussion is also designed to address the issue of whether pre-trial procedure is operating in a fair and efficient manner.

1.21 Serious and apparently avoidable delay in the hearing of criminal cases has also been experienced in other jurisdictions.[11] In England,[12] Canada[13] and the United States,[14] various measures have been implemented with the intention of reducing delays in criminal proceedings. Those measures have tended to concentrate on the period between the time when an accused person is charged with an offence and the time of the commencement of the trial. The belief has clearly been that the most significant causes of delay occur in that part of the criminal process.

B. Scope of this Paper

1.22 This Discussion Paper will cover the following topics:

* current procedure from charge to trial in New South Wales;
* time limits on the prosecution of criminal offences;
* disclosure by the prosecution;

* disclosure by the defence;
* the determination of mode of trial;
* the process of committal for trial or sentence;
* listing for trial;
* pre-trial conferences and hearings;
* the "no bill" procedure;
* plea bargaining;
* the function of the prosecuting authority; and
* pre-trial publicity in criminal cases.

In the Commission's view, these topics represent those areas which will require attention in any rational attempt to improve efficiency in the disposition of criminal cases. If the primary purpose of this Paper can be summarised, it is to identify the sources or potential sources of inefficiency in the criminal process and to make tentative proposals to remedy those problems whilst keeping firmly in mind the goal of maintaining fairness and a high standard in the administration of justice.

1.23 Certain aspects of the terms of reference which involve events occurring before trial are not covered in this Paper. They include the investigation of crime and the initiation of criminal proceedings. These topics will be dealt with in other Discussion Papers and Reports under this reference.

C. Federal Issues

1.24 It should be appreciated that the Commission is confined to making recommendations about the administration of justice within New South Wales. However, federal prosecutions are a significant part of the workload of the New South Wales

criminal courts. Serious drug trafficking offences and taxation offences are, for example, usually prosecuted by the Commonwealth Director of Public Prosecutions. The increasing role played by federal prosecuting agencies in the criminal law has underlined the desirability of achieving uniformity in criminal procedure throughout Australia. Whilst the Commission agrees with the views of some very prominent lawyers that uniformity is desirable,[15] we emphasise that it should not be seen as an end sufficiently important in itself to override other policy considerations.

D. Consultation

1.25 The Commission maintains close contact with other law reform agencies whose work is relevant to criminal procedure. These include the Criminal Law Review Division of the New South Wales Attorney General's Department; Mr Justice Watson, who is conducting an inquiry into the criminal law of the Commonwealth with a view to preparing a draft code;[16] and the respective Law Reform Commissions of the individual States. The Commission is also in contact with the Australian Law Reform Commission, whose references on Contempt,[17] Evidence,[18] Sentencing of Federal Offenders[19] and Access to the Courts[20] cover areas which are relevant to this reference. In addition, we have had the invaluable assistance of many eminent practitioners in several States. These people, who have given us the benefit of their knowledge and experience, are acknowledged in the preface to this Paper.

E. The Problems of Delay and Long Criminal Cases

1.26 There are two major problem areas which cause particular concern to the government, to the community and to those people involved in the administration of the criminal justice system. Firstly, there is the problem of unnecessary delay in the system. Secondly, there are the problems caused by the length of both criminal trials and committal proceedings.[21] These two problem areas are related.

1. Delay

1.27 Delay is an inevitable aspect of the criminal justice system since the effective and just disposition of criminal cases is dependent upon their proper preparation. Concern is expressed, however, about delays which are inordinate or the result of inefficiency. These delays are generally seen to be avoidable. The problem of delay is more significant in indictable criminal cases than it is in summary cases. In cases to be tried on indictment, unnecessary delays occur between the initiation of proceedings and the commencement of the trial more often than during the trial. This time span is accordingly the focus of this Discussion Paper.

1.28 Delays in the criminal justice system can cause many serious problems. Some of the adverse consequences of delay are:

* unnecessary expense and the waste of resources;
* the loss of or deterioration in the reliability of evidence;
* prolonged anxiety for the victims of crimes;

* additional delays in restitution and the payment of compensation to victims of crime;

* increased inconvenience to witnesses;

* prolonged anxiety for accused people;

* gaol overcrowding caused by increased numbers of people being held in custody for long periods pending trial, and, conversely, people accused of serious offences being granted bail to avoid gaol overcrowding;

* while time spent in custody pending trial is usually "credited" to those who are convicted, for those acquitted there is usually no compensation;

* a higher incidence of absconding on bail;

* a greater reliance on disposition of cases by plea and charge bargaining;

* increased difficulties in sentencing convicted people;

* a diminished likelihood of offender rehabilitation and a diminution in the deterrent effect of the criminal justice system; and

* a reduction in public confidence in the criminal justice system.

1.29 The Commission is satisfied that the extent of delay currently being experienced in criminal cases is so serious as to demand urgent attention. We cite four cases to illustrate the problem of delay and its adverse effects.

Case One: Nine months in custody followed by acquittal

At 2.40 pm on 19 February 1981 a boy employed by a store was carrying the day's takings of $11,500 for deposit in a nearby bank. He was accompanied by another employee. The boy was assaulted and robbed of the money by a man who ran a short distance and jumped into the rear seat of a car which drove off at high speed. The offence was reported to the police who were given a description of the car and the thief. The thief was described as wearing black shorts, sandshoes

and a yellow spray jacket and as having a moustache and a "new Australian" accent. The police searched the nearby streets and at 2.58 pm found a car parked in front of the flat occupied by the accused person which matched the description of the car used following the theft. The accused person was subsequently questioned and denied all knowledge of the offence. The police then requested him to return to his flat with them. They searched the flat with his consent but found nothing indicating the his involvement in the offence. Later that evening in a formal interview the accused person denied all knowledge of the crime, said that he had been watching television all afternoon and related the plots of the television shows he had watched. He was charged with the offence on 19 February 1981 and denied bail. He was 37 years old with a record of a juvenile offence committed when he was 17. He was later granted bail but was unable to raise it and was held in custody until 2 October 1981 when bail was raised. The case was listed for hearing on 27 September 1982 but withdrawn because of congestion of the court lists. The accused person filed a "no bill" application on the basis that there was no evidence upon which a reasonable jury properly instructed could convict him. This application was unsuccessful. A new hearing date was set for 23 February 1983, more than two years after the accused person had been arrested. On 25 February 1983, the accused person was acquitted.

Case Two: Over twelve months in custody followed by abandonment of the prosecution

On 17 March 1982 in Sydney, a customer in a bank reached over an unattended counter and stole a box of travellers cheques valued at approximately $55,000. According to witnesses the thief was wearing a pink short-sleeved shirt and had light wavy hair, a tattoo on one arm and a small scar near the right eyebrow. The accused person, a man with a record of convictions for cheque-related offences, was arrested in Perth on 20 May 1982 in relation to other matters. He was questioned about the offence in question and denied any knowledge of it. He claimed that he was at all material times in Perth. He did not have light wavy hair, a tattoo or a small scar near the eyebrow. He was extradited from Perth on 22 March 1983. Committal proceedings were commenced on 9 June 1983. A "no bill" application was filed by the accused person on the basis that there was no evidence on which a reasonable jury properly instructed could convict

the accused person. The "no bill" application was granted in March 1984, 12 months after arrest and more than eight months after committal for trial. Throughout this period the accused person had been held in custody.

Case Three: Two years, three months spent in custody awaiting the determination of a charge carrying a maximum penalty of six months

In 1968 the accused person was convicted of murder and sentenced to life imprisonment. He was released on licence on 4 November 1982.

On 24 February 1983 he was arrested and charged with the indictable offence of sexual assault and a summary offence of common assault under s493 of the Crimes Act. Each of these offences was alleged to have been committed on 23 February 1983 and arose out of the same incident.

On 1 March 1983, three working days after his arrest, the accused person's licence was revoked because of the charges laid against him. On 29 April 1983 he was committed for trial on the indictable offence.

On 6 December 1983 he was informed in writing that the sexual assault charge against him had been "no billed". In March 1984 he was taken before a Court of Petty Sessions on the charge of common assault. In May 1984 he was convicted on this charge and sentenced to six months imprisonment, the maximum available for the offence. Since he had been arrested on 24 February 1983, he had been in custody for approximately 15 months awaiting the determination of this charge. The sentence of six months was back-dated for a period of three months.

The next event in this saga occurred later in May 1984 when the accused person appealed to the District Court against his conviction. The transcript of the trial proceedings did not become available until Christmas 1984. The appeal was listed for hearing in the District Court on 1 March 1985 when it was heard for one day and then adjourned until 7 June. On that day the appeal was upheld and the charge dismissed.

The accused person spent more than two years and three months in custody which is almost five times the maximum sentence of six months imprisonment prescribed by the legislature for the offence. He had been cleared of both of the charges which led to his incarceration.

Case Four: Still awaiting trial after almost five years; case postponed four times

The accused person, a 55 year old man with no record of criminal convictions, was charged with the offence of receiving. The offence was alleged to have occurred between July 1979 and August 1981. He was arrested and charged on 7 October 1981.

On 5 April 1982 he was committed for trial in the District Court. The case was listed for trial on 22 November 1984 but was stood over until 7 March 1985. On that day the matter was not reached because other matters in the list had priority. The case was stood over until 17 April 1985 but once again did not proceed because a police officer who was to testify was ill and the Crown was not ready to proceed. The case was then listed for 15 July 1985 but did not proceed on that day. On that occasion the judge directed that the case be given priority at its next listing and that it should proceed. There followed a further series of adjournments, none of which could be attributed to the fault of the accused person.

When the matter came before the District Court for trial on 25 June 1986 an application was made to the trial judge by the accused person's lawyer for an indefinite stay of proceedings. This application was granted. The case was brought to an end without the accused person ever having been tried on any of the charges. The order which put an end to the proceedings was made four years and eight months after he was first arrested and charged.

1.30 Whilst we acknowledge with emphasis that these cases may represent extremes, they illustrate that there is unfairness and inefficiency in the system of prosecution in the higher criminal courts. It should also be emphasised that the situation which gives rise to cases of this kind occurring has not been neglected in recent years. In the course of our research we have noted a general concern on the part of judges, prosecuting authorities, lawyers and court administrators about

the difficulties currently being experienced. Several important remedial measures have been taken to relieve the extent of congestion in the criminal justice system, such as as the short matters list,[22] the establishment of a screening unit in the office of the Solicitor for Public Prosecutions, streamlined procedures for the work of the senior Crown Law Officers,[23] the use of a computer by the Solicitor for Public Prosecutions to "track" the progress of prosecutions in the higher courts, and the implementation of a new listing system in June 1986.[24] We are at present unable to point to the precise reasons for the increased strain upon the administration of criminal justice, notwithstanding the implementation of such an array of improvements. It may simply be the result of a massive increase in the workload of the higher courts, measured not so much by reference to the number of cases which they hear but by the increasing complexity and difficulty of many cases.

2. Long Criminal Cases

1.31 In recent years there have been a number of well publicised criminal cases which have run for an exceptionally long time, a trend which is not confined to New South Wales. The so-called "Croatian Conspiracy" trial before the Supreme Court in 1981 took over 10 months to complete. The case which has become known as the "Social Security Conspiracy Case", a Commonwealth prosecution involving large numbers of members of the Greek community, ran for a period of almost four years before all the charges were either dropped by the prosecuting agency or discontinued in consequence of orders made by various

courts.[25] The committal proceedings involving some 300 counts against more than 40 accused people arising out of the shootings at Milperra in 1984, took more than a year to complete. At the time of writing, the trial proceedings are continuing with many of the accused men involved having been in continuous custody for over two years.

1.32 Long trials and committal proceedings are becoming more frequent. They are a relatively new development in a criminal justice system that has not yet established procedures to cope with them adequately. The "cost" of long cases cannot be measured merely by calculating the accumulated expenses of the various agencies which expend time and effort in dealing with them. Such cases clearly place heavy demands, for example, on the resources of legal aid. One must also consider the enormous stress which these cases place upon the criminal justice system generally. They tie up courtrooms and judges for long periods of time and place considerable strains on all involved, particularly the accused person, the prosecution, members of the judiciary and the jurors. Other matters awaiting hearing are delayed because there are not enough courts available. Delays in bringing cases on for hearing compound the problems in other parts of the system and inevitably create injustice. As Dicey has said,

> ... the dilatoriness of legal proceedings and their exorbitant cost, or the want of an easily accessible court, work greater and far more frequent injustice than the formal denial of a man's due rights.[26]

The Chief Justice of New South Wales, Sir Laurence Street, KCMG, said on the occasion of his appointment to that office:

> Delay is anathema to justice, and we must be prepared for changes in our system to accommodate the demands of the future. This may well involve a complete reappraisal of our mechanisms for resolving disputes between citizen and citizen or between citizen and State.[27]

1.33 If procedures before trial are streamlined, the time which criminal cases take to be heard by the trial courts will decrease. Shorter trials should also cause less strain to the participants in those trials and result in better decisions being made. It is not unreasonable to suggest that, where the participants in the trial are under great stress, the kind of errors which might lead to a need for retrials or create injustice are more likely to occur. The reform of pre-trial procedures may be successful not only in reducing the incidence of delay but also in improving the overall standard of the criminal justice system.

F. Our Objectives for Procedure Before Trial

1.34 In the course of this Paper, the Commission pursues two major objectives. One is to make proposals which will increase efficiency in the administration of criminal justice. Although we place emphasis on the benefits of speedy disposition of criminal cases, we also have in mind fostering clarity and certainty in criminal law. Our second and more important objective is to advance proposals which will contribute to improving the standard of the administration of criminal justice. Quite apart from increasing efficiency, there are

things which can be done to improve the quality of decisions made in this phase of the criminal process. We believe that both these objectives can and should be achieved by measures which do not interfere with those traditional rights of the accused person designed as a safeguard against the risk of convicting the innocent. The point has been well made by an English commentator:

> On June 15, 1215, in a meadow at Runnymede, King John, in Magna Carta proclaimed "To no one will We deny or delay, right or justice." He did not add "Provided this is cost-effective".[28]

G. Empirical Studies and Research Papers

1.35 In the course of this Discussion Paper, reference is made to certain empirical studies. The Commission has undertaken three such studies. Firstly, the Commission has engaged the services of a consultant, Ms Concetta Rizzo, who has collected available statistical information in relation to the criminal justice system in New South Wales. Secondly, the Commission has conducted a survey of Crown Prosecutors to ascertain their practices and attitudes in relation to various pre-trial procedures. Thirdly, the Commission has conducted a random survey of Public Defenders to determine the extent of delay in criminal cases which are currently before the courts. Before work on this Discussion Paper was begun, the following background research papers were prepared:

* R L Misner Legislatively Mandated Speedy Trials (Unpublished Commission document, 1982). An amended version was later published in (1984) 8 Criminal Law Journal 17.

* C Rizzo A Collection of Statistical Information on the Administration of Criminal Justice in New South Wales (Unpublished Commission document, 1984).

* Mark Richardson Disclosure by the Prosecution in Indictable Criminal Proceedings (Unpublished Commission document, 1985).

* Paul Byrne Long Criminal Cases (Unpublished Commission document, 1985).

Footnotes

1. Justices Act 1902 ss48-48I, inserted by Justices (Procedure) Further Amendment Act 1983 s4. See also Justices Act (Use of Written Statements) Regulation 1984.

2. Crimes Act 1900 s476(6)(a) and (f), amended by Crimes (Amendment) Act 1983 s5.

3. Crimes Act 1900 s476(6)(d) and (aa), amended and inserted respectively by Crimes (Amendment) Act 1983 s5.

4. Crimes Act 1900 s501, amended by Crimes (Amendment) Act 1983 s5.

5. Justices Act 1902 s41, amended by Justices (Procedure) Amendment Act 1983 s5.

6. Justices Act 1902 s51A(1), amended by Justices (Amendment) Act 1985 s3.

7. Justices Act 1902 s51A(1)(e), inserted by Justices (Procedure) Further Amendment Act 1983 s4.

8. Mental Health Act 1983, Crimes Act 1900 s428A-428ZB.

9. Justices Act 1902 s41, amended by Justices (Amendment) Act 1985 s3.

10. As W D Hosking QC has said, in "Problems of Delay in Criminal Proceedings" (1980) 42 Proceedings of the Institute of Criminology, University of Sydney at 30:

> We are not talking of a company with shareholders which just show a profit and be efficient in that sense; in the ultimate its efficiency is measured by the fact that true justice is done.

See also E Greenspan QC "The Role of the Defence Lawyer", reported in National, Journal of the Bar Association of Canada, October, 1986 at 15.

11. Parliament of Victoria Legal and Constitutional Committee "Report on Overseas Court Delays and Remedies" November 1984. See also J A Osborne "Delay in the Administration of Justice: Commonwealth Developments and Experience" Commonwealth Secretariat November 1980. Delay is not limited to criminal cases: see Berger & Co Inc v Gill & Duffus SA [1984] AC 382.

12. See eg Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (Cmnd 8092) HMSO London 1981; Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and the Magistrates Courts (Chairman: Lord Justice James) Report (Cmnd 6323) HMSO London 1975.

13. See generally Catherine J Mathews and Dorothy E Chunn "Congestion and Delay in the Criminal Courts: A Selected Bibliography" Centre of Criminology, University of Toronto 1979.

14. National Institute of Law Enforcement and Criminal Justice Washington DC USA "Reducing Court Delay" papers presented at a symposium conducted by the Institute of Criminal Justice and Criminology, University of Maryland, May 1972.

15. The Chief Justice of New South Wales, Sir Laurence Street, has publicly acknowledged the desirability of uniform criminal procedure.

16. The Honourable Mr Justice R S Watson "Review of the Criminal Law of the Commonwealth" unpublished report to the Commonwealth Attorney-General, July 1986.

17. Australian Law Reform Commission Contempt and the Media Discussion Paper No 26 (AGPS Canberra March 1986).

18. Australian Law Reform Commission Evidence ALRC 26 "Interim" (AGPS Canberra 1985).

19. Australian Law Reform Commission Sentencing of Federal Offenders ALRC 15 (AGPS Canberra 1980).

20. Australian Law Reform Commission Standing in Public Interest Litigation ALRC 27 (AGPS Canberra 1985).

21. Paul Byrne Long Criminal Cases, Background Paper, New South Wales Law Reform Commission, January 1985.

22. Letter to the editor, The Sydney Morning Herald, from the Attorney General, the Hon Terry Sheahan, published 17 December 1986.

23. See generally Chapter 10.

24. This system is explained in greater detail in Chapter 8. The Commission is grateful to the Solicitor for Public Prosecutions, Mr Brian Roach, for his assistance in providing us with this information.

25. The length of this prosecution is well illustrated by the following cases dealing with it: Moss v Brown [1979] 1 NSWLR 114; Lamb v Moss (1983) 49 ALR 533; Tahmindjis v Brown (1985) 60 ALR 120.

26. A V Dicey Law and Opinion in England at 205-6.

27. [1974] 2 NSWLR xxi, 28 June 1974.

28. J Timmons "The Crown Prosecution Service in Practice" [1986] Criminal Law Review 28.

Chapter 2

Procedure from Charge to Trial: The Current Law and Practice

I. INTRODUCTION

2.1 This chapter describes the criminal process in New South Wales from the time that a suspected person is charged with an offence until the commencement of trial. The law and procedure of arrest and investigation are dealt with only to the extent required for understanding this process.

2.2 Both indictable offences and summary offences are considered, but no attention is paid to those offences which are dealt with by an "infringement notice" system, such as that used for the less serious driving offences, since there is no "procedure before trial" in cases dealt with in this way. It should be noted that the practices described are those generally followed in the normal course of prosecuting criminal offences. We do not always cite particular exceptions which may be found, for example, in prosecutions by the Corporate Affairs Commission or in relation to offences committed by juveniles. The scope of this chapter nevertheless covers the overwhelming majority of criminal prosecutions in New South Wales.

II. INVESTIGATION, ARREST AND CHARGE

2.3 In practice, most criminal proceedings are initiated by police officers. Some are commenced by other public officials (for example, officers of the Corporate Affairs Commission or local councils) or, in unusual circumstances, by private citizens or by the Attorney General or Solicitor-General. Police officers and other law enforcement officials have a discretion whether or not to lay a charge against a person suspected of having committed an offence. The discretion not to charge may be, and is, exercised in many circumstances, for example, where a caution is thought sufficient, where it is thought that there is not enough evidence to convict, or where the suspected person is willing to help the police with information that would be useful in some other investigation.

A. Investigation

2.4 The extent of investigation involved in a particular case will vary considerably according to the nature of the case. The majority of offences tried before the courts, especially the Local Courts, require little or no investigation. Examples include cases where the charges are based on behaviour that the police have observed, where a store security guard has apprehended a suspected shoplifter, or where failure to pay a train fare is alleged. The traditional notion of police investigation is usually only to be found in relation to serious crimes such as murder or armed robbery. In other cases, there may be an exhaustive examination of documentary evidence, for example, where the charge relates to a commercial fraud.

B. Arrest and Summons

2.5 Once the police have decided that a person should be charged with a criminal offence, they may proceed by one of three methods: arrest without warrant, arrest under warrant, or summons.

1. Arrest Without Warrant

2.6 Arrest without warrant is the most common means of proceeding, especially in serious cases. Section 352 of the Crimes Act 1900 provides that a constable or any other person may, without warrant, arrest a person in the act of committing an offence or immediately after committing an offence. The section also provides that a constable (but not another person) may, without warrant, arrest a person whom he or she, with reasonable cause, suspects of having committed an offence. These provisions recognise and extend the powers of arrest established by the common law.

2.7 Unless the investigation is unusually complicated, an arrest without warrant is carried out at the first reasonable opportunity. A person who has been arrested must be taken before a magistrate without delay.[1] In practice, an arrested person is first taken to a police station and may be detained for some time before being charged. It is often during this time that formal interrogation takes place. It should be noted, however, that despite frequent references in the media to people being "wanted for questioning", the police are not permitted to arrest a person purely for the purpose of

questioning.[2] Often the legality of an arrest is challenged, with a view to excluding evidence subsequently obtained, on the basis that it was made for the purpose of questioning. Since arrest is usually followed by questioning and then charge, the distinction between lawful and unlawful arrest and interrogation is sometimes difficult to determine and a great deal of court time may be spent on this issue. After questioning, the charge is read to the accused person who may be fingerprinted or photographed or both.

2. Arrest Under Warrant

2.8 A justice may issue a warrant for the arrest of a person where an "information" has been sworn before a justice. An information may be laid where a person has committed, or is suspected of having committed, an offence in New South Wales. The information will usually be laid by a police officer. Warrants are commonly issued for the arrest of people who are the subject of an information charging a relatively serious offence or who fail to appear in response to a summons or to comply with the conditions of a bail undertaking.

3. Summons

2.9 Whenever an information is laid in respect of an indictable or summary offence, a justice may issue a summons requiring the appearance in court of the person named in the information if the person is not already in custody. The issue of a summons is an alternative to issuing a warrant for the arrest of the person. A summons is not usually issued for an

indictable offence, unless the proceedings are commenced by the Customs Department or the Corporate Affairs Commission. However, a summons is frequently issued in respect of summary offences.

2.10 A summons is an official document which sets out the offence that a particular person is alleged to have committed, and the date on which the person named is required to attend court to answer the allegation. The summons is normally "served" by a police officer by giving it to the person named or by leaving it at his or her usual place of residence. In certain cases the summons can be mailed.[3]

2.11 The summons is expressed in archaic and confusing language and, once deciphered, provides misleading information about the procedure to be followed. An accused person is not advised that the case will probably be adjourned if he or she intends to dispute the allegation nor that witnesses will almost certainly not be required on the appointed day. An accused person who intends to plead guilty is not advised to bring any witnesses or evidence supporting an argument as to the appropriate penalty. No information about legal representation or the availability of legal aid is included.

2.12 If a person does not attend court in response to a summons, the court may, if there is proof that the summons was served, proceed to hear the matter in the absence of the accused person. Such hearings are called ex parte hearings. Alternatively, the court may decide to adjourn the hearing and

issue a warrant for the arrest of the accused person.[4] Certain cases, particularly summonses relating to traffic matters and fare evasion, are frequently dealt with in the absence of the accused person. The court therefore has the power to impose a penalty in respect of the offence without hearing the case against the accused person.[5] However, it has been held that a penalty imposed in this way does not amount to a conviction.[6]

C. Police Questioning of Suspects

2.13 The questioning of the suspected person is usually the most important part of the investigation of a serious offence. The evidence obtained as a result of such questioning is, in most cases, of critical impact on the decision as to plea and the subsequent disposition of the case. A study of 147 people charged with indictable offences in the New South Wales District Court revealed that confessional evidence was obtained from police interrogation in 96% of cases where a verdict of guilty was recorded.[7] As noted in the study, the sample was too small to draw precise conclusions, and the figure here reported is higher than that found in any equivalent overseas study.[8] Nevertheless, the crucial importance of confessional evidence resulting from police interrogation is clear. Undoubtedly, confessional evidence is also significant in many cases dealt with summarily. However, at present, statistical information is not available for such cases.

2.14 In most cases a suspected person has no legal obligation to answer any questions at all[9] nor to accompany police to a police station when asked to do so. Nevertheless, the probability is that many people are unaware of their rights in this regard. The police are free to interview a suspected person without giving any formal caution or affording an opportunity to obtain legal advice.[10] If the police form the intention to lay a charge, they must at that time warn the person being interviewed that he or she need not answer any questions and that anything said may be used as evidence.[11] Once a person has been charged with an offence, it is unusual for further formal questioning to take place in respect of that offence. However, questioning about some other offence may take place.

2.15 In the normal course of events, a comprehensive interrogation is followed by the police informing the suspected person that he or she will be charged with a particular offence. In many cases, of course, the evidence against a person is so strong that the decision to charge is immediate. In such a case, questioning almost invariably precedes the formal laying of a charge.

2.16 In the context of police interrogation of suspects, the Commission considers it appropriate to comment upon various proposals recommending the use of electronic equipment to record interviews between police and suspected people.[12] In the Commission's view, electronic recording of police

interviews would be a valuable measure in reducing delay in the criminal justice system. Video recordings of interviews would decrease the number of contested criminal cases and reduce the range and complexity of disputes in contested cases. It can be expected that congestion in the criminal courts would be relieved as a result.

D. Charge and Information

2.17 Before a person is brought before a court after being arrested, he or she is charged with an offence. This is a formal procedure which usually takes place in a police station and which involves the informant, usually the police officer in charge of the case, advising the accused person of the nature of the charge laid in the information. Part of the function of the information is to inform the accused person and the court of the case which is alleged by the informant who has initiated the prosecution. A conviction is not valid unless it is either based on an information or complaint which accurately states the ingredients of the offence or the magistrate has charged the accused person orally.[13]

III. BAIL AND FIRST COURT APPEARANCE

A. Bail by Police

2.18 Once charged, an accused person must be given a notice which sets out his or her rights regarding release on bail pending the determination of the charge.[14] Where an accused person is charged with an offence for which there is no entitlement to bail as of right, the police must decide whether or not to grant bail. An accused person who is granted bail

must sign an undertaking to appear in court at the time and place specified in the notice given or sent to him or her.[15] An accused person who fails to respect an undertaking to appear in court is guilty of an offence.[16] Where bail is refused, or the accused person is unable to meet the terms on which bail has been granted, he or she is kept in custody until the case is next before the court, where the question of bail is reconsidered.

B. The First Appearance in Court

1. The Requirement to Bring an Arrested Person Before a Justice

2.19 Section 352 of the Crimes Act 1900 provides that a person who has been arrested and charged must be taken before a justice. This provision has been interpreted to encompass the common law rule that the person must be taken before a justice "as soon as is reasonably practicable and by the most direct route".[17] What this means in practice was far from clear until a recent judgment of the High Court of Australia.[18] The English Court of Appeal had held that a period of almost 24 hours between the time of arrest and appearance in court may be lawful in some circumstances.[19] In Williams' case the High Court rejected this approach and held that legislation in similar terms to the New South Wales legislation[20] in effect expresses the common law rule as it is accepted in Australia. According to this law it is unlawful for a police officer to delay taking an arrested person before a justice in order to use the time to investigate his or her complicity in the offence for which he or she was arrested, or any other offence,

by questioning or in some other way. So far as we are aware, this decision has not been judicially considered in a reported case in New South Wales.[21] South Australian[22] and Victorian[23] courts had already indicated that they were not prepared to fully endorse the approach taken by the Court of Appeal in England.

2.20 There are various sanctions available for failure to comply with the requirement in question. The trial court may exclude in its discretion evidence obtained after the detention has become illegal. In addition, the accused person may have an action for false imprisonment. In practice, these sanctions are not often exercised. In recent years, the High Court has dealt relatively frequently with the question of illegally and unfairly obtained evidence.[24] The approach taken in these cases has been carefully analysed by several authors.[25] The discretion available to a trial judge should now be exercised in accordance with the principles set out in the judgments of the High Court. We should note at this stage that the issue dealt with by the High Court in Williams' case will be the subject of separate consideration by the Commission. We intend to publish a Report on this subject at an early date.

2. First Appearance in Court

2.21 The accused person first appears in court by complying with a summons or bail undertaking, or by being brought there directly from police custody. The main purpose of the first appearance is to record the fact of the charge and to place the

continued conduct of the matter under the supervision of a court. For people who have not been released on bail, the first court appearance serves as an opportunity to review the bail decision made by the police.

2.22 The charge is read out in court and the accused person is normally given an opportunity to plead guilty or not guilty. Except in relatively minor cases, a plea is not usually entered at this stage. If the accused person intends to defend the charge, the case is almost invariably adjourned. The accused person will probably want to prepare his or her case, the prosecution is unlikely to be in a position to proceed to present its evidence, and the court will rarely have time available to hear the matter immediately. Even where the accused person wishes to plead guilty, an adjournment is usually granted if requested by either of the parties.

2.23 In fact many criminal cases are decided at the first appearance, most of them by way of guilty plea. In 1982 approximately 50% of defendants in Courts of Petty Sessions (now called Local Courts) had their cases finalised on the day of their first appearance. More than 90% of these cases involved guilty pleas and less than 1% were contested cases.[26] If the matter is not heard immediately, a date for hearing or for further mention is discussed before the question of bail is dealt with.

C. Bail at Court

2.24 The magistrate hearing the bail application is required to take into consideration specific criteria listed in the Bail Act 1978. Evidence relevant to those criteria may be called by each side. Where the prosecution opposes the bail application, the hearing of the application may result in the accused person discovering a great deal about the prosecution case. This is because the magistrate must consider "the circumstances of the offence (including its nature and seriousness)" and "the strength of the evidence against the person".[27] Similarly, should the accused person wish to call evidence in support of his or her application, the prosecution may discover a great deal about the nature of the defence.

2.25 Only a small percentage of accused people are refused bail by the magistrate conducting the initial hearing.[28] In many cases, bail will have been refused by the police overnight or over a weekend and then be granted by a magistrate at the initial court hearing. One explanation for this may be that, by the time of the court hearing, there is usually more information available concerning the accused person's social ties and the likelihood of his or her compliance with a bail undertaking.

2.26 The length of the adjournment which follows the first court appearance will depend upon whether the accused person is held in custody or released on bail. Where bail is refused, the adjournment can be up to a maximum of eight days without the consent of the accused person.[29] Where bail is granted,

the period of remand may be a matter of months. When an adjournment is ordered, the case is normally listed "for plea or mention" on a future date. This means that the magistrate will determine the case on that date if the accused person pleads guilty, but that the case will only be "mentioned" in order to set a date for a contested hearing if the accused person pleads not guilty.

D. Other Matters

1. Legal Representation

2.27 Accused people can obtain legal aid for the first appearance in court through the Duty Solicitor scheme administered by the Legal Aid Commission of New South Wales. There is a duty solicitor present at every sitting of a Local Court in New South Wales which hears criminal cases. Before court commences, the duty solicitor visits those held in custody and is available to see others whose cases are listed. The duty solicitor will appear in court at the first hearing for any accused person if requested to do so.

2. Pre-trial Delay

2.28 In contrast to the requirement that an arrested person be brought before a court without delay, there is often a considerable time lapse between the first court appearance and the resolution of the case. The speed with which matters move following the first court appearance depends largely upon whether the accused person is in custody or on bail. The nature and complexity of the prosecution in question is also

relevant. Little can be said which is of universal application to this stage of criminal proceedings as the cases vary greatly. The problems of delay in the criminal justice system are particularly acute where the accused person is refused bail or is unable to meet the bail conditions imposed. The court statistics for 1984 show that 7.1% of accused people dealt with by the Local Courts were in custody at their final appearance.[30] Whilst the cases of accused people in custody are generally given priority in being listed for hearing, there may still be many months between first appearance and final disposition. There is a fuller discussion of this topic in Chapter 3.

2.29 The pace of the proceedings and their progress through the courts is accelerated by an early indication from the accused person that he or she intends to plead guilty to the charge in question. The best that can be said is that these cases are dealt with relatively quickly. It is inevitable that some accused people take this factor into account in deciding whether or not to plead guilty. There is still, in many cases, an unacceptable delay between the initial hearing in which an accused person may indicate a desire to plead guilty and the ultimate disposition of the matter. In 1982 in the magistrates' courts, 15% of accused people who pleaded guilty had to wait for more than two months for their cases to be finalised and 3.5% (more than 1000 people) for more than six months.[31] The relevant statistics are not available for the higher courts, but the time span would probably be greater

because an accused person pleading guilty must first be committed for sentence in the Local Court and then appear for sentence in a higher court.

IV. PROCEDURE AFTER FIRST APPEARANCE

2.30 The court procedures which apply to a particular criminal prosecution vary according to whether the charge is for:

* a summary offence;
* an indictable offence;
* an indictable offence which may be dealt with summarily by a magistrate; or
* an indictable or summary offence triable in the summary jurisdiction of the Supreme Court.

A. Summary Offences

2.31 Summary offences are generally less serious matters which must be heard to finality by a magistrate in a Local Court. The accused person in such a case has no right to a trial by jury. The penalties which may be imposed for a summary offence are generally much lower (usually a maximum of imprisonment for one year) than those available for indictable offences. The important exceptions are penalties for some drug and firearms offences, which may be a maximum of two years imprisonment.[32] Prosecutions are usually conducted by the Police Prosecuting Branch of the New South Wales Police.

2.32 Pre-trial procedure in summary cases is quite straightforward. Where the accused person pleads guilty "and shows no sufficient cause why he should not be convicted", the magistrate records a conviction.[33] In a defended matter, the case may be adjourned "for plea or mention" more than once until a hearing date is set. There may be some informal negotiations between the accused person or his or her lawyer and the prosecution, but there are no formal procedures or obligations which apply. Normally the police prosecutor who presents the case in court will have received the file on the same day as the hearing. Similarly the defence lawyer, if there is one, may often have seen his or her client on only one occasion before the case is heard. The procedure followed at the hearing is described in the Commission's First Issues Paper.[34]

B. Indictable Offences

2.33 Indictable offences are more serious offences which are triable before a judge and jury. Many indictable offences may alternatively be tried summarily by a magistrate.[35] Before a person charged with an indictable offence can be tried before a judge and jury, he or she must normally be committed for trial by a magistrate. The committal proceedings are a preliminary hearing conducted in the Local Court. The function of the committal hearing is to determine whether a person should be put on trial for an indictable offence.

1. The Procedure at Committal Proceedings

2.34 The usual procedure followed at committal proceedings is for the charge to be read to the accused person, who must usually be present for the entire proceedings.[36] The evidence in chief of the prosecution witnesses is then taken and they may be cross-examined by the accused person or his or her lawyer. After all the evidence from the prosecution has been taken, the committal hearing will proceed further only if the magistrate is of opinion that "the evidence is capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence".[37] If the magistrate is not of that opinion, the accused person must be discharged. If the proceedings do continue, the accused person is asked whether he or she wishes to say anything. The accused person is not obliged to say anything and in practice rarely does. The accused person is then given the opportunity to present evidence, but again the usual practice, certainly prior to recent amendments to the Justices Act which changed the criteria for committal,[38] is for no evidence to be offered. When all the evidence for the prosecution and any evidence for the defence has been taken, the magistrate must make a second determination. If the magistrate is of the opinion that "a jury would not be likely to convict the defendant of an indictable offence", the accused person must be discharged.[39] If not of that opinion, the magistrate must commit the accused person for trial. The accused person may be committed for trial in respect of any indictable offence revealed by the evidence, not only the offence charged.

2.35 The accused person may plead guilty to the offence at any time during the committal proceedings. If the magistrate considers the plea appropriate, the accused person will be committed to the higher court for sentencing. The accused person is not bound by the plea of guilty and may change it to a plea of not guilty when he or she appears in the higher court. In such a case the trial judge may treat the committal for sentence as a committal for trial and may set a date for trial.[40]

2.36 The accused person is entitled to be legally represented at committal proceedings but legal aid is generally not available.[41] The prosecution case is usually presented by an officer of the Prosecuting Branch of the New South Wales Police. Once a person has been committed for trial, all the relevant papers are transmitted by the magistrate to the Office of the Solicitor for Public Prosecutions. The accused person is entitled to a copy of the transcript of the committal hearing,[42] commonly referred to as "the depositions".

2. The Crown Prosecuting Authorities

2.37 The papers referred by the magistrate are considered by an officer of the Office of the Solicitor for Public Prosecutions. It is the responsibility of that officer to review the file, to obtain whatever further information is required, and to prepare a brief for consideration by a Crown Prosecutor. On the material contained in this brief, the Crown Prosecutor must determine whether or not to "find a bill", that

is, whether or not a document known as an indictment should be presented against the accused person. The indictment contains the terms of the formal charge. If the Crown Prosecutor does not consider that a bill should be found, the case is referred to the Attorney General with a recommendation that "no bill" be found. The "no bill" procedure is more fully discussed in Chapter 10.

2.38 If a bill is found, the brief is returned to the Solicitor for Public Prosecutions for any "follow-up" work directed by the Crown Prosecutor. Such work might include notifying the accused person of any changes made in the charges or that a particular witness will or will not be called, or inviting the defence to make any formal admissions regarding matters which appear to be not in dispute. At this stage the matter can also be listed for mention in court in order to fix a date for trial. The listing of cases in the District Court is an additional responsibility of the Office of the Solicitor for Public Prosecutions.[43] The Supreme Court is responsible for listing its own cases but works in close consultation with the Solicitor for Public Prosecutions.

2.39 The brief is finally given to a Crown Prosecutor for the purpose of conducting the trial. This may be done only shortly before the trial and the Crown Prosecutor will not necessarily be the one who found the bill. The terms of the formal charge or indictment may not be settled until immediately before the start of the trial. Prior to the trial, there may be negotiations between the Crown Prosecutor and the legal

representatives of the accused person regarding the nature of the charge and the possibility that the accused person may plead guilty to a less serious charge or to only some of the charges in an indictment containing multiple counts. It should also be noted that the Crown Prosecutor is not obliged to present the indictment on the day the matter is listed for hearing. Once the matter is listed before a court there may also be applications of various kinds heard before the trial. These may involve questions such as the venue of the trial or whether, if more than one person or one offence is charged in the indictment, there should be separate trials.

2.40 Sometimes accused people are required to stand trial without having first been committed for trial at the conclusion of committal proceedings. The Attorney General has power to issue an "ex officio" indictment against the accused person. The decision to issue an ex officio indictment is a matter for the discretion of the Attorney General acting on the advice of the senior Crown Law officers. This matter is further discussed in Chapter 7.

C. Cases "Triable Either Way"

2.41 There is a large range of criminal offences which are capable of being dealt with either summarily or on indictment. Most indictable offences in the Crimes Act are capable of being dealt with summarily at the option of the accused person and with the concurrence of the presiding magistrate.[44] Under other legislative provisions,[45] various offences may be dealt

with either on indictment or by way of summary prosecution irrespective of the consent of the accused person. In such cases, the initial decision as to the mode of trial which should be used is made by the prosecution. Whilst in most of these cases the magistrate has the power to commit the matter to a higher court, this power is rarely exercised.

2.42 The procedure for the determination of jurisdiction in cases "triable either way" is a matter of pronounced confusion. The practice of magistrates varies considerably. The statutory provisions which enable indictable offences to be dealt with summarily are in our view largely to blame for this state of affairs because they are ambiguous, incomplete and uncertain. The vast majority of indictable offences are in fact dealt with summarily. Even in those cases where jurisdiction is dependent upon the consent of the accused person, most accused people elect to have the charge against them disposed of summarily. The reasons for this are not entirely clear but it is probable that the attraction of summary jurisdiction is to be found in the fact that cases are disposed of much more quickly and that a convicted person is liable to a much smaller maximum penalty when convicted before a court exercising summary jurisdiction.[46] "Either way" offences are an important subject in the criminal law in New South Wales. We examine them in greater detail in Chapter 6.

D. The Summary Jurisdiction of the Supreme Court

2.43 The Supreme Court (Summary Jurisdiction) Act 1967 was introduced to give the Supreme Court the power to deal with criminal offences which carried such large monetary penalties as to render them inappropriate to be dealt with by the Local Courts. Most of the offences in question concern serious environmental pollution committed by corporations.[47] The summary jurisdiction of the Court was expanded in 1979 to include a range of offences in the nature of "white collar crimes" which can, if the accused person consents, be dealt with summarily by the Supreme Court.[48] This jurisdiction is used so infrequently as to make it unnecessary to deal with it at any length here. There is only one case of which we are aware in which the accused person has consented to such summary jurisdiction.

Footnotes

1. See para 3.5.

2. Bales v Parmeter (1935) 35 SR (NSW) 182; (1935) 52 WN (NSW) 41.

3. Justices Act 1902 s63.

4. Justices Act 1902 s75.

5. Justices Act 1902 s75B.

6. McLachlan v Pilgrim [1980] 2 NSWLR 422 at 425, per Yeldham J.

7. N Stevenson "Criminal cases in the NSW District Court: a pilot study" in J Basten et al The Criminal Injustice System (1982) 106 at 108-109.

8. See C Willis The Tape-Recording of Police Interviews with Suspects: an interim report (1984); E Wozniak The Tape-Recording of Police Interviews with Suspected Persons in Scotland (1985).

9. The major exception concerns a person's obligation to identify himself or herself or another person as the driver of a particular motor vehicle: Motor Traffic Act 1909 ss5, 8(3). Similar obligations are imposed under the Local Government Act 1919 s636, the National Parks and Wildlife Act 1974 s157 and the Meat Industry Act 1978 s40.

10. Webb v Cain [1965] VR 91.

11. See extracts from the Police Commissioner's instructions reproduced in Watson and Purnell Criminal Law in New South Wales Vol I(A) para [1187].

12. P Byrne et al (Criminal Law Review Division, Attorney General's Department, New South Wales) Tape Recording Police Interviews: Summary of Findings and Recommendations (June 1984); R Howie et al (Criminal Law Review Division, Attorney General's Department, New South Wales) A Proposed System of Electronically Recording Police Interviews with Suspected Persons (October 1986).

13. A magistrate's power to substitute a charge which is supported by the evidence is discussed in Ex parte Williams Re Singleton (1928) 45 WN (NSW) 189.

14. Bail Act 1978 s18(1).

15. Id s34.

16. Id s51.

17. Clarke v Bailey (1933) 33 SR (NSW) 303. See also Ex parte Evers Re Leary (1945) 62 WN (NSW) 146; Bales v Parmeter (1935) 35 SR (NSW) 182. The Bail Act 1978 s20 also provides that a person who has been charged and denied bail must be taken before a court "as soon as practicable". See also Mr Justice M D Kirby "Controls Over Investigation of Offences and Pre-Trial Treatment of Suspects" (1979) 53 Australian Law Journal 626; E Campbell and H Whitmore Freedom in Australia (1973) at 32-50.

18. Williams v The Queen (1986) 60 ALJR 636. See also R v Iorlano (1983) 151 CLR 678.

19. Dallison v Caffery [1964] 2 All ER 610. In England the powers of detention by police have been significantly changed by the Police and Criminal Evidence Act 1984 (UK). See also T Gibbons "The Conditions of Detention and Questioning by the Police" [1985] Criminal Law Review 558; D J Birch "Powers of Arrest and Detention" [1985] Criminal Law Review 545; K W Lidstone and T L Early "Questioning Victims: Detention for Questioning in France, Scotland and England" (1982) 81 International and Comparative Law Quarterly 488. For a recent analysis of the extent of these powers see H Brayne "Detention Under the Police and Criminal Evidence Act 1984" The Law Society's Gazette 7 January 1987 at 28.

20. The Justices Act 1959 (Tas) s34A(1) provides that where a person has been taken into custody he shall be brought before a justice "as soon as is practicable" after he has been taken into custody.

21. The subject of detention after arrest is examined without reference to any specific authority in the unreported decision in R v Kushkarian, Court of Criminal Appeal, New South Wales, 4 July 1984. It is submitted that the decision is overruled by Williams.

22. Drymalik v Feldman [1966] SASR 227; R v Stafford (1976) 13 SASR 392; R v Miller (1980) 25 SASR 170.

23. R v Banner [1970] VR 240. But see now Crimes Act 1958 s460 as amended by the Crimes (Criminal Investigations) Act 1984. Recommendations for reform of this provision have been made in Report on Section 460 Crimes Act 1958 (Melbourne April 1986), a report prepared by a consultative committee under the Chairmanship of John Coldrey QC Director of Public Prosecutions at 111. See also J Willis and P A Sallmann "The Debate About Section 460 of the Victorian Crimes Act: Criminal Investigation in a Nutshell" (1985) 18 Australia and New Zealand Journal of Criminology at 215.

24. R v Ireland (1970) 126 CLR 321; Bunning v Cross (1977-1978) 141 CLR 54; Cleland v The Queen (1982) 151 CLR 1.

25. New South Wales Law Reform Commission Working Paper: Illegally and Improperly Obtained Evidence (WP 21 1979). See also papers by Mr Justice M D Kirby and Dr G D Woods QC in "Illegally Obtained Evidence" Proceedings of the Institute of Criminology, University of Sydney (Sydney 19 September 1984); S France "Exclusion of Improperly Obtained Evidence" (1985) 11 New Zealand Universities Law Review 334.

26. The apparent discrepancy is explained by the number of cases in which there was no evidence offered by the prosecution. For offences other than those concerning drugs and drink/driving, the rate is 90% including s75B "deemed" pleas of guilty. The rate in respect of drink/drive offences is over 99%.

27. Bail Act 1978 s32(1)(a)(iii).

28. J Stubbs Bail Reform in NSW (1984) at 53.

29. Bail Act 1978 s25.

30. NSW Bureau of Crime Statistics and Research Court Statistics 1984, Table 2.8. The same figures for 1982 revealed that 7.4% were in custody at their final appearance. In drug cases the figure was 9.2%.

31. NSW Bureau of Crime Statistics and Research Court Statistics 1982.

32. See Drug Misuse and Trafficking Act 1985; Listening Devices Act 1984; Firearms and Dangerous Weapons Act 1973.

33. Justices Act 1902 s78(2). See also Crimes Act 1900 s556A.

34. NSW Law Reform Commission First Issues Paper: Criminal Procedure: General Introduction and Proceedings in Courts of Petty Sessions (1982) at para 4.11.

35. See Chapter 6.

36. Justices Act 1902 s41(1B).

37. Justices Act 1902 s41(2).

38. Justices Act 1902 s41(2) and (6).

39. Justices Act 1902 s41(6).

40. Justices Act 1902 s51A.

41. D Buchanan "Appearing for the Defendant in Committal Proceedings" in Lawyers' Practice Manual (NSW) at 106/5-106/6.

42. Justices Act 1902 s40.

43. For further discussion, see Chapter 8.

44. Crimes Act 1900 s476.

45. Crimes Act 1900 s501; Drug Misuse and Trafficking Act 1985 s30; Listening Devices Act 1984 s11; Firearms and Dangerous Weapons Act 1973 s80.

46. For example, a person convicted on indictment of an offence under s112 of the Crimes Act 1900 is liable to penal servitude for a maximum period of 14 years. A person who is convicted of an offence under that section in summary proceedings before a magistrate is liable to a maximum penalty of two years imprisonment.

47. Clean Air Act 1961 s33 and Clean Waters Act 1970 s33. Under the former, the maximum fine available for an offence against the Act when committed by a corporation is initially $40,000 but increases by a further $20,000 for each day on which the offence continues.

48. Crimes Act 1900 s475A.

Chapter 3

Time Limits on the Prosecution of Offences

I. INTRODUCTION

3.1 Where the length of time which elapses between the various stages in the process of criminal justice is unreasonably long, there may be serious consequences which defeat the objectives of the criminal justice system outlined in our discussion of fundamental principles in Chapter 1.[1] Mr Justice Mahoney of the New South Wales Court of Appeal has written:

> Delay in criminal proceedings is socially corrosive and it is important that it be publicly discussed. That which the criminal law does is, on the one hand, to protect person and property and, on the other, to protect the liberty of those who, to this end, are arrested and to ensure that they are not overlong in jeopardy. The effectiveness of the law depends upon public confidence that it is doing what it should do. If people, sufficiently and in sufficient numbers, cease to have that confidence, the force of the law will be destroyed. And there are few things more calculated to destroy that confidence than long delay in criminal justice.[2]

3.2 Delays can occur, but rarely do, between the time an accused person is charged and the time he or she makes an initial appearance in court. It is much more likely that substantial and avoidable delay occurs, in relation to summary offences, between the initial appearance in court and the trial and, in relation to indictable offences, between the initial appearance and the committal hearing and then between the committal hearing and the commencement of the trial. It should be emphasised that delay is a more serious problem in relation

to indictable criminal offences than it is in relation to summary offences. The reasons for delay cannot be easily ascertained. Various factors have been suggested, including:

* The lack of resources available to prosecuting agencies to cope with an increasing workload.

* The lack of sufficient courtrooms, judges and ancillary staff necessary to process the cases required to be heard by the courts.

* The inefficient use of available resources.

* The incidence of long criminal proceedings.

* The developing complexity of criminal cases, including the tendency for technical evidence to be called, with the result that increasingly difficult decisions need to be made by judges, magistrates and juries.

* Deliberate tactics adopted by accused people or their legal representatives for the purpose of delaying the case in the hope or belief that this will benefit the accused person.

3.3 In Part II of this chapter, we examine the current law and practice in New South Wales regarding time limits for the prosecution of both summary and indictable matters. In Part III we examine provisions imposing time limits in some other jurisdictions. Finally, in Part IV, we advance certain tentative proposals for reform in New South Wales in this area of criminal procedure.

II. THE PRESENT LAW AND PRACTICE IN NEW SOUTH WALES

A. Empirical Information

3.4 Information regarding the length of time which elapses between the various stages in the criminal justice system is not readily available. However, the following case histories illustrate the nature and length of the delay in some cases. This information has been given to the Commission by barristers

who frequently appear in criminal cases. We wish to emphasise that these cases were all uncompleted at the time this survey was made, namely in June 1985. They represent examples of the current extent of delay in the prosecution of indictable offences in New South Wales.[3]

Case 1: A person accused of murder

Date of Arrest and Charge: 26 April 1983.

Committed for Trial: 23 September 1983.

Listed for Hearing: 17 June 1985.

Minimum Time Between Arrest and Trial: 2 years 2 months.

Case 2: A charge which is almost five years old

Date of Arrest and Charge: 2 August 1980.

Committed for Trial: 14 September 1981.

Listed for Hearing: 1 March 1985, 22 May 1985.

Minimum Time Between Arrest and Trial: 4 years 9 months.

Case 3: A person accused as a juvenile who is now 22 years of age and still awaiting trial

Date of Arrest and Charge: 17 March 1981.

Committed for Trial: 14 February 1982.

Listed for Hearing: 31 May 1985.

Minimum Time Between Arrest and Trial: 4 years 2 months.

Case 4: A person in custody who has pleaded guilty and is awaiting sentence

Date of Arrest and Charge: 24 February 1985.

Committed for Sentence: 2 May 1985.

Listed for Hearing: 12 June 1985.

Minimum Time Between Arrest and Trial: 4 months in custody.

Case 5: A person on bail whose case has been listed for trial on four separate occasions

Date of Arrest and Charge: 8 October 1981.

Committed for Trial: 5 April 1982.

Listed for Hearing: 2 November 1984, 4 March 1985, 17 April 1985, 15 July 1985.

Minimum Time Between Arrest and Trial: 3 years 9 months.

Case 6: A person in custody whose case has been listed for trial on four separate occasions

Date of Arrest and Charge: 21 July 1984.

Committed for Trial: 7 August 1984.

Listed for Hearing: 27 November 1984, 28 November 1984, 5 March 1985, 21 May 1985.

Minimum Time Between Arrest and Trial: 10 months in custody.

Case 7: A charge which is over three years old where the investigation has not been completed

Date of Arrest and Charge: 19 December 1981.

Committed for Trial: 18 November 1982.

Listed for Hearing: Not listed pending further investigation.

Minimum Time Between Arrest and Trial: 3 years 7 months.

Case 8: A delay of over three years between committal and trial

Date of Arrest and Charge: 4 August 1981.

Committed for Trial: 20 May 1982.

Listed for Hearing: 29 April 1985.

Minimum Time Between Arrest and Trial: 3 years 9 months.

Case 9: Eight months spent in custody awaiting trial

Date of Arrest and Charge: 4 September 1984.

Committed for Trial: 4 December 1984.

Listed for Hearing: 8 May 1985.

Minimum Time Between Arrest and Trial: 8 months in custody.

3.5 We should observe by way of a postscript (added more than a year after the material in the preceding paragraph was written) that there is no evidence to suggest that this picture has changed dramatically. Indeed, we have been informed that there were at least three trials still pending as of December 1986 where the accused person was committed for trial in 1985 and had been in continuous custody on remand since the time of arrest. In two cases then still waiting to be heard which involved the issue of fitness to plead, the accused people had each been in custody for more than 18 months since the time of committal for trial.[4] In some of the Local Courts, delays exceeding six months are currently being experienced but the reasons for these delays are varied.[5]

3.6 There is also some older statistical information available on delays generally.[6]

Cases Determined in the Higher Courts 1983
Time Between Charge and Determination

Period	No	%
Less than 1 month	114	1.7
1 month to 2 months	279	4.2
2 months to 3 months	446	6.8
3 months to 6 months	1607	24.4
6 months to 1 year	1922	22.6
1 year to 2 years	1493	22.6
2 years or more	736	11.2
	6597	100.0

These figures include trials and pleas of guilty. Since there is a plea of guilty in the overwhelming majority of criminal cases, it can be seen from the figures that many, if not most, trial cases were taking more than a year to be heard.

3.7 In a speech delivered in 1984,[7] Mr Justice Yeldham of the Supreme Court of New South Wales said that there were some 2500 cases awaiting trial in the District Court at the end of November 1983 and, of these, 1300 were to be tried in Sydney. For people in custody, the approximate delays were in the order of six months from the date of committal. For people on bail, the delay was about 18 months. His Honour pointed out that these figures represented an improvement on the corresponding figures for 1980.

3.8 According to one official report,[8] there were, on 9 December 1983, some 236 people in custody awaiting trial in New South Wales. Twenty-eight had been there for more than six months and only 13 of this group were in custody because they were serving sentences for other offences.[9] We do not have any reliable material immediately available which reveals the present situation in precise detail. Even if the recent figures were to show an improvement in the average period of delay awaiting trial, the case examples cited at paras 3.4 and 3.5 above demonstrate that there is room for further improvement. These figures compare unfavourably with those of the other States and Territories dealt with at paras 3.14-3.20 and with the English statistics in para 3.29.

B. Delay Between Arrest and First Appearance in Court

3.9 As we explained in para 2.19, s352 of the Crimes Act imposes a requirement that an arrested person be brought before a magistrate as soon as reasonably possible. The fact that there is very little complaint about the length of delays occurring in this phase of the criminal process suggests that the impact of the law which makes it mandatory for certain action to be taken within a reasonable period has been successful in virtually eliminating unnecessary delays. The impact which s352 has had on the practice of those responsible for the administration of that phase of the criminal justice system immediately following arrest illustrates that positive rules about delay can be effective.

C. The Prosecution of Summary Offences

3.10 In New South Wales there are no statutory rules which prescribe the time within which a person charged with a summary offence must be brought to trial. The only time limit imposed on the prosecution process relates to the period between the time of commission of the summary offence alleged and the time that proceedings are instituted against the accused person. Legislation provides that the information or complaint which initiates the criminal proceedings must be laid or made within six months of the date on which the summary offence is alleged to have been committed.[10] The relevant legislation also provides that this rule does not apply where some other time limit is specified in another Act.[11] Nor does the requirement apply:

* to the summary prosecution of indictable offences under the provisions of the Crimes Act 1900;[12]

* to offences dealt with under s501 of the Crimes Act;[13] and

* where a fresh summons is issued after abortive proceedings on the original information, provided that the original information was laid within the prescribed time limit.[14]

There is a similar provision in the relevant Commonwealth legislation.[15]

D. The Prosecution of Indictable Offences

3.11 There are no general statutory time limits on the prosecution of indictable offences. However, statutory time limits do apply to the commencement of proceedings for some offences. For example, a prosecution for certain sexual offences committed against a female aged between 10 and 16

years old must commence within 12 months of the alleged offence.[16] There are also time limits for the initiation of certain other sexual offences.[17] These provisions are somewhat curious. There is not, in our view, any obvious reason why these offences should be the subject of provisions of this kind. The provisions are even more puzzling when one considers that, whilst a charge must be laid within a specified time, there is no limit imposed by legislation on the time that may be taken in prosecuting the offence charged. For indictable offences, the rule of practice which permits the Crown Prosecutor not to present an indictment if he or she is not ready to proceed also requires examination.[18]

E. Abuse of the Court's Process

3.12 Although there are no general statutory limits on the pursuit of criminal prosecutions, the courts nevertheless have some control over unjustified delays in prosecutions. This control derives from the court's recognition of two important legal principles. An accused person has what has been described as a "constitutional right" to a prompt trial which will be protected by the courts.[19] This right is enforced by the courts' inherent power to prevent abuse of their process by declining to hear proceedings brought before them on the ground that they are oppressive.[20] Delay in a criminal prosecution may amount to such an abuse.[21] In New South Wales there have been a number of recent cases in which these principles have been applied, resulting in the dismissal of the charge against the accused person or an order for a permanent stay of the

proceedings.[22] It appears from those cases that the critical matters to be considered in determining whether there has been a breach of the right to a prompt trial or an abuse of the court's process are the length of the delay in the prosecution, the reasons for the delay, whether the accused person asserts the right to a speedy trial, and the degree of prejudice to the accused person in the continued prosecution of the charge.[23] While the judicial recognition and application of these legal principles to control delays in criminal prosecutions is significant, there appear to be certain problems associated with this development. Because the principles are expressed in such general terms and the circumstances attending a particular prosecution are unique, it is necessarily difficult to predict with any certainty the result of the application of the principles in a given case. Furthermore, it appears that it is only in extreme and exceptional instances of delay that the courts have been prepared to find that a breach of the right to a prompt trial amounts to an abuse of the court's process.[24] The introduction of specific time limits on criminal prosecutions would largely eliminate these problems. There is, however, a need to maintain an appropriate degree of flexibility. The sanction of dismissal, if it is to be effective in achieving speedier trials, requires a determinate period within which the prosecuting authority must act, rather than a period later assessed, with the benefit of hindsight, to be excessive.

F. Conclusion

3.13 Apart from the powers of the courts discussed in the preceding paragraph, there are no real constraints on the time between the first appearance in court and the commencement of a summary trial or committal hearing, nor on the time between committal for trial and the commencement of the trial. The trial court has no effective control over the prosecution process until the case is brought before the court by the agency responsible for the prosecution. Undoubtedly delays in bringing an accused person to trial, especially where he or she is in custody, should be reduced as much as possible. The important question is whether the introduction of time limits governing the prosecution process is an appropriate means of tackling the problem. In order to consider this question, we intend to examine in the next part the approach taken in various jurisdictions overseas. However, before doing so, we look at waiting times in other parts of Australia.

III. THE POSITION IN OTHER JURISDICTIONS

A. Waiting Times in Australian States and Territories

1. Northern Territory[25]

3.14 The statistics kept in the Northern Territory do not enable the time period from charge to committal to be readily ascertained. However, it is possible to give an average period from the time of the alleged offence (some time may of course elapse between offence and charge) until the committal and then from the committal to the conclusion of the case. For 1983, an average period of 4.1 months elapsed between offence and committal and a further 2.5 months from committal to

disposition of the case. For 1984 the figures were 5.2 months and 2.6 months respectively, for 1985 they were 4.2 months and 2.1 months and in 1986 they were 4.4 months and 3.2 months. These statistics take into account matters in which there has been a plea of guilty as well as those which have gone to trial. We have no information as to whether there is on occasion extreme delay between arrest and trial but these average figures would appear to suggest that the delays are not as serious as those experienced in New South Wales.

2. Australian Capital Territory[26]

3.15 There has been a general reduction over recent years in the time which elapses between committal and trial. As at May 1986, for cases where the accused person was pleading not guilty, the average delay from the time of charge to the time of committal for trial was 4.4 months. The average delay from the time of committal to commencement of the trial was 5.9 months. For accused people who pleaded guilty, those figures were six weeks and 15 weeks respectively. It should be noted that these figures cover all criminal cases irrespective of whether the accused person was remanded in custody or released on bail pending trial. For those held in custody awaiting trial, the time between committal and trial averaged nine weeks.

3. Victoria[27]

3.16 Relevant statistical information is available for Victorian criminal cases from the period 1 July 1983 to 30 June 1985. The average time between arrest and committal for cases "heard" (we take this to mean concluded) during this period was

19 weeks. For the period from committal to the start of the trial, statistics for Victorian cases are available to cover the period 1 January 1985 to 30 June 1985. They reveal that the relevant periods varied considerably according to whether the accused person pleaded guilty or not guilty. In the case of a plea of guilty in the County Court, the average delay between committal and trial was 16 weeks. In the case of a plea of not guilty, it was 37 weeks. For a plea of not guilty in the Supreme Court, the average delay between the committal and the commencement of the trial was 46 weeks. For the period 1 January 1985 to 30 June 1985, the average time from arrest to verdict, taking into account cases in both the County Court and Supreme Court and irrespective of plea, was 58 weeks.

4. Queensland[28]

3.17 Queensland has experimented with new procedures and it is apparent that the Queensland courts have responded very quickly and effectively to the demands placed on their resources by the continuing increase in the workload of the criminal courts. At the present time in the District Court in Brisbane, which handles more than three-quarters of all District Court matters in Queensland, the average delay from the time of committal to the time of trial varies according to the time of year from between six to eight weeks. In extreme cases the delay can be as high as six months but this is regarded as an exceptional period. This position has been achieved by changes in the administrative structure of the District Court and by the temporary commitment of massive resources to removing a backlog which had established itself

some years ago. The position has now been reached where cases are usually being tried in the sittings to which they are committed and the backlog has been reduced below 100 compared with the backlog of almost 1000 that existed some years ago. At that time the period from committal to trial could be as long as two years.

5. Tasmania[29]

3.18 In Tasmania, a system of "paper committals" similar to that which is available in New South Wales is used in most cases. The time taken between charge and committal is usually only a matter of weeks and most of this delay is attributed to the time taken for the accused person to obtain legal advice and to decide whether to plead guilty or not guilty. For cases dealt with in the Supreme Court, the average time between committal and completion of the matter is about one month in a case where there is a plea of guilty and from two to four months where there is a trial.

6. South Australia[30]

3.19 The most recent official statistics available for South Australia dealing with the duration of criminal proceedings in that State cover a period of six months to the end of 1984. So far as the Supreme Court is concerned, the average time from the first lower court appearance after being charged to the case being finalised was 30 weeks where there had been a plea of guilty and 51 weeks where there had been a plea of not guilty. For the District Court the same relevant periods were 28 weeks and 39 weeks respectively. Where an accused person

pleaded guilty to an indictable offence at first appearance before a magistrate and was committed for sentence, the average time from first appearance to disposition of the case was 24 weeks. The Commission has been advised that the current position in the District Court is an average delay of seven to eight months between charge and committal, with a further four months between committal and trial.[31]

7. Western Australia[32]

3.20 The conventional means of dealing with indictable offences in Western Australia is to conduct committal proceedings prior to the commencement of any trial. For the period from 1 July 1983 to 30 June 1985, the average delay between first court appearance after charge and the commencement of the committal proceedings was six weeks in the case of a person who had indicated at an early stage an intention to plead guilty and seven weeks in the case of people who had not given such an indication. The interval between the time of the committal and the commencement of the trial varied considerably according to whether there was a plea of guilty or not guilty. For guilty pleas, there was an average delay of nine weeks between the committal and the hearing of the case. For pleas of not guilty, the average delay from committal to trial was 21 weeks. Summarising these figures for the two years from July 1983 to June 1985, the delays experienced in indictable cases where there was a plea of guilty have remained reasonably constant at approximately 16 weeks. On the other hand, where there was a plea of not guilty, the delay between

arrest and the commencement of the trial has increased slightly from 27 weeks in the last half of 1983 to 31 weeks in the first half of 1985.

B. Speedy Trial in Other Jurisdictions

3.21 Procedures have been introduced in some other jurisdictions to reduce delays before the commencement of the trial. In this part, we examine the "speedy trial" procedures in the United States, Scotland and England and those recently introduced in Victoria.

1. The United States

3.22 In the United States, the Sixth Amendment to the Constitution expressly provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...

The Sixth Amendment itself does not contain any specific time limits, nor have the courts interpreted the Amendment in a manner imposing specific time limits upon prosecutors.[33] This has prompted the enactment of legislation at both Federal and State levels in relation to time limits. In this discussion, attention is focused on the federal legislation.

3.23 The Federal Speedy Trial Act 1974[34] came into full effect on 1 July 1980. It provides that an accused person must be brought to trial within 100 days of arrest prior to indictment.[35] This period is itself divided into three periods. Thirty days are allowed between arrest and the filing of an information or indictment, 10 days between the filing of

the information or indictment and arraignment proceedings (in which the accused person's plea is taken), and 60 days between a plea of not guilty at arraignment and trial. Where a person has been arrested after an indictment has been found by a grand jury, the trial must commence within 70 days. If the information or indictment is not filed within 30 days of arrest, charges against the accused person are dropped automatically. If arraignment or trial does not occur within the prescribed time, a dismissal must be granted upon application by the accused person. However, if the accused person fails to move for dismissal, he or she is deemed to have waived the right to dismissal of the charge.[36] Similarly, a plea of guilty or "nolo contendere"[37] is considered a waiver of the right to dismissal. If the charges are dismissed, the court must stipulate whether the dismissal is absolute (a "with prejudice" dismissal) or whether the prosecution can recommence proceedings at a later time (a "without prejudice" dismissal). Cases where the relevant limits are exceeded are normally dismissed absolutely.[38]

3.24 The legislation has an "excludable delays clause"[39] which provides that the time taken for the following procedures are not taken into account in calculating the relevant time periods:

* mental or physical examination of the accused person;
* trial of the accused person on other charges;
* interlocutory appeals;
* pre-trial motions by the accused person;

* transfer from other courts;

* deferred prosecution to allow the accused person to demonstrate good behaviour; or

* the absence or unavailability of witnesses.

On the other hand, the legislation specifies that general congestion of the court calendar, lack of diligent preparation by the prosecution and the prosecution's failure to obtain witnesses will not be excused as justifiable delays. The court has a general discretion to waive the time limits in circumstances where the interests of justice outweigh the interest of the public and the accused person in having the trial held within a reasonable time. One situation where this discretion has proved valuable is where time limits do not allow the accused person to make adequate preparation for trial. The prosecution may not be so disadvantaged because its effective preparation has been completed prior to arrest.

3.25 The United States "speedy trial" legislation was passed in 1975 and phased in over a period of four years. This was done in order to permit the prosecuting agencies and the courts to examine the problem of delay and to submit requests for any additional resources needed to achieve speedy trials.[40] The sanction of dismissing a case where a time limit is exceeded was not made available to the courts until 1980. In 1981, after the dismissal sanction clause was introduced, the courts had to resort to the "excludable delays" clause in 40% of the 35,000 cases in which a challenge was made to the length of time taken for prosecution.[41] A majority of these were based

on the time taken for pre-trial motions, with the residual "interests of justice" category being the second most frequent. As one commentator has noted, the exceptions created in the "excludable delays" clause could be used "to achieve technical compliance, with no real impact on disposition times".[42]

3.26 It should be noted that the application of the legislation has, on occasion, led to public furore where a serious criminal prosecution has been dismissed because of a seemingly technical breach by the prosecuting agency. The objection is that, in the case of very serious crime, accused people should not be able to escape trial by reliance upon technical rules. On the other hand, the American Bar Association has criticised the practice of dismissing cases "without prejudice", that is, in a manner which permits the prosecution to be recommenced, on the ground that such a practice makes the "speedy trial" legislation meaningless.

2. Scotland

3.27 In Scotland, the law of criminal procedure is specifically designed to prevent undue delay in the criminal justice system.[43] In indictable matters, where the accused person is held in custody, the order committing him or her for trial must be made within eight days of arrest. However, it should be noted that committal proceedings such as take place in New South Wales are unknown in Scotland. The trial of an accused person held in custody must commence within 110 days of

the "full committal", that is, the time at which the order committing the accused person for trial is made.[44] The "110 day rule" has been in existence since early in the eighteenth century.[45] In indictable matters where the accused person is on bail, the trial must commence within 12 months of his or her first court appearance. For summary offences, the trial must begin within six months of the alleged offence unless the statute creating the offence specifies a different period. A person charged with a summary offence cannot be detained in custody for more than 40 days after the complaint has been made unless the trial is commenced within that period.

3.28 Where these requirements are not complied with, the accused person must be discharged and cannot be prosecuted at any subsequent time for that offence. The Sheriff or a single judge of the High Court may extend the relevant period where this course is justified. The legislation expressly excludes the right to extend if the delay has been caused by the prosecution.[46] It must be shown that the delay is attributable either to the accused person, for example, that he or she made a late change of plea, or to other factors beyond the control of the prosecution.

3. United Kingdom

3.29 In the United Kingdom, according to the Lord Chancellor, the workload of the Crown Court, which is responsible for hearing indictable criminal cases, rose 50% between 1979 and 1984.[47] During this period, the overall waiting times were

actually reduced from 17.6 weeks to 14.3 weeks. This has been achieved largely by an increase of 25% in the number of judges and the implementation of a large number of court building programs. It is apparent that the length of time accused people must wait between charge and trial is gradually being reduced. The most recent statistics[48] show that the average waiting time throughout the country for those in custody was 10.1 weeks. In London the average was 15.9 weeks, in the south-east circuit it was 11.5 weeks, while on the Wales and Chester circuit it was only 6.6 weeks. Although they are very short when compared with New South Wales, these waiting times are generally the cause for concern and have recently been described by a leading commentator as "disturbing".[49]

3.30 At present, there are rules which state when an indictment is to be presented and how long after the committal hearing a trial is to commence.[50] It has been held by the English Court of Appeal that these rules are guidelines only and are not mandatory.[51] Nevertheless, it is instructive to consider the time limits which are set out in the rules. An indictment should be preferred within 28 days of the committal[52] and the trial should commence within 56 days of the date of the committal.[53] The Court has an unfettered discretion to grant an extension of time in both situations.[54] Perhaps because of the ineffectiveness of these rules, the Home Secretary has announced that the government was prepared to legislate for the introduction of time limits for various stages of the criminal process.[55] "Field trials" have

been conducted with maximum limits of 56 days in custody between first court appearance and summary trial and 70 days in custody between first court appearance and committal. For accused people not in custody, a maximum of 140 days between first court appearance and either summary trial or committal is specified. These time limits have been described as "absurdly generous".[56]

4. Victoria

3.31 The Victorian Crimes Act 1958 was amended in 1983 to allow for the making of regulations prescribing time limits within which the prosecution of criminal cases must commence.[57] The relevant provision covers all indictable offences where the accused person has been committed for trial to the Supreme Court or County Court of Victoria. Regulations were enacted late in 1984 specifying time periods of nine months between committal and presentment of the indictment and nine months between presentment and trial. There is no distinction drawn between accused people held in custody and those released on bail pending the trial. A judge of the Supreme Court or County Court may grant an extension of time and such an extension may be granted more than once.[58] The legislation does not specify the grounds on which an extension may be made.

3.32 The statute enabling the enactment of regulations to prescribe time limits was passed during 1983, but it was not until some 18 months later that the regulations were in fact enacted. Clearly there was, as in the United States, a

perceived need to allow prosecution agencies some time to adjust to the operation of the new rules before they could take effect. Furthermore, the introduction of the legislation (as distinct from the regulations) was accompanied by a major reorganisation of prosecuting agencies in that State. The office of the Director of Public Prosecutions was established and there was a massive increase in the resources devoted to the prosecution of indictable criminal offences. The procedures for the listing of criminal cases were also streamlined. By themselves, these measures led to such a reduction in the backlog of cases that the new time limits did not present significant difficulties for the prosecuting authority.

3.33 Specific time limits have been established for criminal proceedings involving a charge of rape, attempted rape or assault with intent to rape. The preliminary examination must commence within three months of the date of the charge, although the magistrate may order an extension of this time limit if there are "special circumstances".[59] Furthermore, the trial must commence within three months of the date of committal or, where there has been no preliminary examination, within three months of the date of the charge, unless a Supreme Court judge thinks fit to grant an extension of time.[60]

IV. TENTATIVE PROPOSALS FOR REFORM

3.34 The Commission is of the firm view that every effort must be made to eliminate unjustified or unreasonable delays in bringing an accused person to trial. We reiterate the remarks we made at para 1.13 about the importance of this objective within the overall criminal justice system. The rapid disposition of criminal cases is not only in the interest of the accused person, it is also in the public interest. The law in New South Wales should give some practical recognition to the right of an accused person to be brought to trial within a reasonable time, especially where that person is in custody and to the interest of the community in ensuring an early trial. However, the imposition of time limits must be reasonable and, in particular, should not be seen to create the potential for injustice because of a failure by the prosecution to comply with inflexible requirements.[61] Exemptions should be permitted in cases where the prosecution can provide a reasonable explanation for the failure to meet the time constraints imposed or where the accused person can demonstrate that he or she has had insufficient time to prepare for the case.

A. Summary Proceedings

3.35 The Commission does not consider that it is impractical to require that summary trials commence within a specified time of the date of charge. Our tentative view is that, in summary cases, the prosecution should be required to commence the trial of an accused person on bail within six months of the date of

charge and that of an accused person in custody within two months of the date of charge. We regard these proposals as generous when compared to the general rule, described in para 3.10, that a prosecution cannot be launched where more than six months has elapsed since the commission of the alleged offence, a rule which operates to allow an alleged offender to avoid prosecution even where there is no negligence on the part of the investigating or prosecuting agencies.

3.36 There should, in our view, be one exception to the time limits for the prosecution of summary offences. This follows from a proposal we have put forward in Chapter 6 suggesting that where an accused person is charged with summary and indictable offences arising from the same incident, and the indictable offence is to be dealt with by a higher court, then the higher court should also have jurisdiction to deal with the related summary offences.[62] If this occurs, the time limits prescribed for summary offences would be unrealistic and, in our view, should no longer apply. Where summary offences are associated with indictable charges, we consider the relevant time limits for offences dealt with on indictment should apply.

B. Indictable Proceedings

3.37 Far longer delays are experienced in indictable proceedings than in summary matters. As we recognised in para 1.27, some of these delays are an inevitable aspect of the process of criminal justice, since some period of time is obviously required for each party to prepare the case for

trial. Furthermore, some delays are a result of factors which are peculiar to a particular case. For example, the complexity of a case may justify what is apparently an excessive delay. Notwithstanding the variety of circumstances which give rise to delay and the inherent justification for some delay, our tentative view is that legislation should be enacted which requires the prosecution to commence proceedings within a reasonable time. We suggest appropriate time limits for each stage of the prosecution at paras 3.40-3.41.

C. The Need for the Higher Court to Have Jurisdiction

3.38 In its First Issues Paper on Criminal Procedure, the Commission made reference to the period between committal and trial which it described as the "hiatus" period during which no court has jurisdiction in the case until an indictment is presented to the court of trial. Under the present law, an order for committal has the sole effect of initiating the involvement of the Solicitor for Public Prosecutions. Since the court does not have jurisdiction to compel the prosecution to present an indictment, the accused person has no power to force the prosecution to commence proceedings. The rules which we propose prescribing time limits could not be enforced effectively unless the court of trial has the jurisdiction to monitor compliance with such rules. We therefore propose that where a person is committed by a magistrate for trial in either of the higher courts, the committal order should have the effect of giving the relevant higher court jurisdiction in the case.

D. The Need to Present Indictments Promptly

3.39 We are also of the tentative view that a new approach is necessary in relation to the presentation of indictments in the higher courts.[63] In our opinion, there should be an intermediate procedure introduced between the time of committal (if committal proceedings are to be retained) or determination to proceed to trial and the commencement of the trial, namely, the formal notification to the accused person and the court of the terms of the indictment. We shall refer to this procedure as "the presentment". The indictment should be required to be presented within a specified time after committal. The presentment will not have to be followed immediately by the commencement of the trial, although we see no objection to that course being taken in certain circumstances. The implementation of such a procedure would make the practice in New South Wales consistent with that in other jurisdictions, such as England, Scotland and Victoria, by creating a specific procedure for determining the nature of the allegation to be prosecuted. It would ensure that rules prescribing time limits in the prosecution process would be effective and would also facilitate the scheme of pre-trial hearings which we propose in Chapter 9.

E. Proposed Time Limits

3.40 The following charts set out the time limits the Commission considers appropriate. We have tentatively decided on these periods as the maximum time for which criminal charges should be pending against accused people. In setting these periods, we have taken the approach of being realistic rather

than idealistic. This is particularly so in relation to indictable proceedings involving accused people on bail. The ideal would be to have such cases dealt with in 12 months. We note that the periods specified are generally longer than those prescribed by the law in the other jurisdictions we have dealt with in this chapter.

Summary Proceedings - Charge to Trial - Proposed Time Limits	
Accused person in custody	2 months
Accused person on bail	6 months

Proceedings on Indictment - Charge to Trial - Proposed Time Limits	
Accused person in custody	6 months
Accused person on bail	18 months

The time limits set out in the chart above for indictable offences do not mention intermediate limits for the commencement of committal proceedings because the Commission has proposed in Chapter 7 that committal proceedings should be abolished in criminal cases.

3.41 If the proposal to abolish committal proceedings is not adopted and committal proceedings are retained in their current form, we would suggest that there should be two distinct stages in the criminal process within the period from the time a person is charged until the time of trial and that each of these should be subject to prescribed limits. In the first place, there should be a limited period from charge to the commencement of committal proceedings. Secondly, the indictment should be filed within a limited period from committal. If committal proceedings are to be retained we propose the following time limits:

Proceedings on Indictment - Charge to Trial - Proposed Time Limits

	Charge to Committal	Committal to Presentment	Presentment to Trial
Accused person in custody	2 months	2 months	2 months
Accused person on bail	6 months	6 months	6 months

If the proposal that the indictment be filed within a specified period of the conclusion of committal proceedings is not adopted, we suggest that the time limits relating to the commencement of committal and the commencement of the trial should nevertheless remain the same.

F. Calculation of Relevant Time Periods

3.42 It should be noted that the periods specified for people held in custody are, in each case, one-third of those specified for people on bail. Where a person has been in custody for a period and then released on bail, we tentatively propose that each day spent in custody should count as three days in the calculation of the time limits. For example, take the case of a person who is arrested and charged with an indictable offence on 1 January 1985 and spends one month in custody before being released on bail on 1 February 1985. Allowing three months for the period spent in custody, the calculation of the relevant time limit is that the trial should be commenced within 15 months of his being released on bail, that is, by 1 May 1986.

3.43 The time limits proposed above for indictable proceedings do not appear to take into account the length of the committal proceedings. It should be emphasised that the first stage is from the time of charge to the beginning of the committal hearing. The second stage is from the end of the committal hearing to the presentment. The period between the time of charge and the time of trial is therefore xclusive of the time taken to complete the committal proceedings. If, for example, a person is charged with an indictable offence on 1 January 1985 and released on bail, the committal proceedings should commence within six months of being charged, that is, by 1 July 1985. If the committal hearing takes three weeks and terminates on 20 July 1985, the presentment should occur within

six months of 20 July, that is, by 20 January 1985. The trial should then commence within six months of the date of presentment.

G. Extensions of Time

3.44 In Part III we noted the approach taken in various jurisdictions to the question of whether, and if so in what circumstances, extensions of time may be granted. The United States Federal legislation specifies the grounds on which extensions may be granted, although there is also a general provision that extensions may be granted where it would be "in the interests of justice". The United States legislation makes it clear that lack of diligent preparation by the prosecution does not amount to justifiable delay. The Victorian legislation permits extension of the time limits but does not specify the grounds upon which such extensions may be granted. The Scottish legislation provides that extensions of time may be granted where there are reasonable grounds for the delay, but not where the delay is attributable to the prosecution. At this stage, the Commission prefers a modified version of the Scottish approach which provides a broad indication of the basis upon which the discretion to extend time limits should be exercised. Because we believe that it is not possible to cover or predict all the circumstances which might justify the exercise of the power, we consider it necessary to make this a matter for the discretion of the courts. We would expect that, in most cases, delay which is attributable entirely to the fault of the prosecution would not be regarded as justifiable.

We are concerned that exceptional circumstances may occur in which the court should have a discretion to permit the prosecution to proceed notwithstanding that it is responsible for the failure to meet the prescribed time limits.

H. Failure to Comply with Time Limits

3.45 In the United States, failure to comply with the time limits specified in Federal legislation usually results in the charges being withdrawn or dismissed. The charges are normally dismissed "with prejudice", that is, the prosecution cannot be revived. In Scotland, failure to comply with time limits results in the charges being dismissed and, where the accused person is in custody, his or her immediate release. In Victoria, the consequences of failure to comply with time limits are not specified in relation to indictable matters other than sexual offences. Where the accused person is charged with a sexual offence and the prosecution fails to commence the preliminary hearing within three months of the charge being made, the charges must be dismissed unless special circumstances exist.[64]

3.46 Our tentative view is that, where the prosecution does not comply with the time limits and is unable to justify an extension, the court should order that the charges be withdrawn or dismissed, depending on the stage the proceedings have reached. Since the court would need to consider the question of responsibility for delay before making any order, earlier proceedings would need to be adequately recorded so that

responsibility for delays could be accurately assessed. Where charges have been withdrawn or dismissed, the prosecution should be prohibited from laying fresh charges arising from the conduct which formed the basis of the original charge against the accused person. We consider that any other rule would be likely to enable the time limits to be breached with impunity and therefore to make them less effective.

I. The Delayed Implementation of Time Limits

3.47 In both the United States and Victoria, the new rules prescribing time limits did not come into force until some time after they were announced. It is obviously unrealistic to impose a new set of rules upon a system which is not equipped to implement them. It would therefore be necessary to allow some "breathing space" so that the prosecuting agencies could adjust to the new rules. It would probably also be necessary to increase the prosecuting authorities' resources, at least in the short term, to enable them to clear the backlog of cases which has built up. Before implementation, the progress of cases should be carefully monitored in order to assess the changes that need to be made to meet the new rules.

J. The Consequences of Court Control

3.48 There are two further issues to be considered. Firstly, who should have the responsibility for ensuring that time limits are observed? Secondly, who should have the power to grant extensions of time? In our view, the most satisfactory means of meeting the problem of unacceptable delays is to give the ultimate control over delays to the courts.[65] Such an

important question should be determined in public. Assuming that the time limits prescribed are workable and reasonable, the courts must be able to enforce the deadlines by way of effective sanctions such as the power to order that a case be dismissed if the prosecution does not respect the time limits set by legislation. As one commentator has noted:

> What are considered to be the essential ingredients of effective delay reduction programmes? Taken as a whole these empirical data lend support to the suggestion from speedy trial studies that, as a prerequisite, the courts must assume responsibility, independently of the parties, for expediting case disposition. The main elements of this so-called "case management" philosophy are judicial activism, a commitment to enforce deadlines at successive stages of proceedings, and improved communication between key courtroom actors.[66]

We do not consider that there should be any diminution in the powers of the courts regarding protections against abuse of process based on delays. On the contrary, the rules proposed would give the courts more clearly defined powers to control delay in the criminal process.

V. SUMMARY OF TENTATIVE PROPOSALS

1. Specification of Time Limits: Trials on Indictment

3.49 There should be prescribed time limits within which the hearing of offences to be tried on indictment must be commenced in the higher courts. For accused persons held in custody pending trial, there should be a maximum of six months between the time of charge and trial. For those on bail, the maximum period should be 18 months. Where the hearing of the charge has not commenced within the prescribed period, the court

should, unless there is a reasonable explanation for the delay, dismiss the case. If committal proceedings are to be retained, the time limits set out in para 3.41 should apply.

2. Specification of Time Limits: Offences Tried Summarily

3.50 There should be prescribed time limits within which the hearing of summary offences must be commenced. Where a person accused of a summary offence is detained in custody pending the disposition of the case, the trial should commence within two months of the date on which the accused person was charged. Where a person accused of a summary offence is released on bail, the trial of the case should commence within six months of the date on which the accused person was charged. Where the hearing of the charge has not commenced within the prescribed period, the court should, unless there is a reasonable explanation for the delay, dismiss the case.

3. Time Limits for Offences Triable Either Way

3.51 This category of offences includes indictable offences which may be tried summarily and statutory offences which may be prosecuted either summarily or on indictment. If an offence in this category is to be tried before the Local Court, it should be regarded as a summary offence for the purpose of calculating the time within which the trial must commence. If such an offence is to be tried in the higher courts, it should be regarded for this purpose as an indictable offence. However, the relevant time period should commence at the conclusion of the mode of trial hearing[67] at which the prospective court of trial is determined.

4. Calculation of Time Limits

3.52 The time periods specified should commence to run from the time the accused person is charged. Where a person has spent part of the time pending trial on bail and part in custody on remand, each day spent in custody should count for three days for the purpose of calculating the time within which the trial must be commenced.

5. The Power of the Court to Allow Exemptions

3.53 In order to avoid the potential for injustice which may be created by the imposition of inflexible time constraints, the prospective court of trial should have the power to permit exemptions from the time limits in those cases where there is a reasonable explanation for the failure to meet the time limits. Such exemptions may be granted on the application of the prosecution or the defence. We suggest that the legislation which creates the power to grant exemptions should give some guidance to the courts by specifying those grounds which justify an exemption and those which do not.[68]

6. Delayed Introduction of Prescribed Time Limits

3.54 The introduction of prescribed time limits should be delayed in order to give the courts and the prosecuting authority sufficient time to adjust their procedures and to arrange for the efficient allocation of the resources required to meet the demands imposed by the time limits.

7. Power to Grant Stay of Proceedings

3.55 The inherent power of the courts to grant an indefinite stay in a criminal case on the ground that permitting the prosecution to proceed would amount to an abuse of the court's process should be confirmed. With the implementation of rules specifying time limits, it would be expected that the courts would only find it necessary to exercise the power to grant a stay in a case involving unreasonable delay between the time of the discovery of the offence and the time of charging the accused person.

Footnotes

1. Paragraphs 1.8-1.18. See also Article 9 of the International Covenant on Civil and Political Rights, Human Rights Commission Act 1981 Schedule 1; Bell v Director of Public Prosecutions of Jamaica [1985] 1 AC 937.

2. Foreword to "Problems of Delay in Criminal Proceedings" Proceedings of the Institute of Criminology, University of Sydney No 42 1980.

3. The Commission is grateful to the Public Defenders of New South Wales who assisted us in gathering this information.

4. Personal communication, Criminal Indictable Division, Legal Aid Commission of New South Wales. See also K Whalan "Judicial System in Crisis" The Daily Telegraph (Sydney) 17 Feruary 1987 citing comments regarding delay made by Mr Justice Enderby at the opening of the law term in Wollongong.

5. Hansard (NSW) Legislative Assembly, 3 December 1986 at 7993.

6. Information kindly supplied to the Commission by Ms Jan Houghton of the Bureau of Crime Statistics and Research, New South Wales.

7. Mr Justice D A Yeldham "Delays in Criminal Trials", paper delivered to the Criminal Law Committee of the University of Sydney Law Graduates Association (13 March 1984, Sydney) at 2-3.

8. New South Wales Public Service Board Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence (NSW) Interim Report, (December 1983).

9. Id at 33-34.

10. Justices Act 1902 s56.

11. Justices Act 1902 s56(1).

12. Ex parte Griffith Re Lalor (1931) 48 WN (NSW) 133.

13. Ex parte Cusack Re Searson (1935) 52 WN (NSW) 214.

14. Ex parte Malouf Re Gee (1943) 43 SR (NSW) 195.

15. Crimes Act 1914 (Cth) s21.

16. Crimes Act 1900 s78.

17. Crimes Act 1900 s78T.

18. See paras 3.39 and 8.14.

19. The right to a prompt criminal trial was established by the common law and recognised in Magna Carta (25 Edward I c29) 1297. In its original form of 1215 the concluding sentence of c29 was the fortieth clause of the 1215 Charter which reads, "Nulli vendemus, nulli negabimus aut deferenus rectum aut justiciam" - "To no one will we sell, to no one will we deny or delay right or justice": R v McConnell (1985) 2 NSWLR 269 at 272 per Moore DCJ. For England, see Connelly v Director of Public Prosecutions AC 1254 at 1347 per Lord Devlin; R v Reibold (1967) 1 WLR 674; R v Heston-Francois [1984] 1 All ER 785; R v Grays Justices Ex parte Graham [1982] 3 All ER 653; R v Secretary of State of the Home Department Ex parte Phansopkar [1976] QB 606.

20. Mills v Cooper [1967] 2 QB 459 at 467 per Lord Parker CJ. Compare Regina v Chairman London County Quarter Sessions Ex parte Downs [1954] 1 QB 1 at 6.

21. Herron v McGregor (Unreported, Court of Appeal of New South Wales, 12 September 1986); R v Derby Crown Court Ex parte Brooks (1985) 80 Cr App R 164 at 169.

22. See Whitbread v Cooke (Unreported, Supreme Court of New South Wales, Maxwell J, 9 December 1986); Herron v McGregor (Unreported, Court of Appeal of New South Wales, 12 September 1986); R v McConnell (1985) 2 NSWLR 269 per Moore DCJ; R v Climo and Bentley (Unreported, District Court of New South Wales, Herron DCJ, 5 May 1986) 1. The Commission wishes to record its gratitude to Mr Justice Maxwell, his Honour Judge Merron and his Honour Judge Moore for their assistance in obtaining copies of their respective judgments at an early date.

23. See Bell v Director of Public Prosecutions of Jamaica [1985] 1 AC 937, Herron v McGregor (unreported, Court of Appeal of New South Wales, 12 September 1986).

24. See eg the circumstances of "Case Four" explained at para 1.29; Director of Public Prosecutions v Humphrys [1977] AC 1; R v Oxford City Justices Ex parte Smith (1982) 75 Crim App R 200 at 204. For further discussion, see R Pattenden "The Power of the Courts to Stay a Criminal Prosecution" [1985] Criminal Law Review 175. See also Barton v The Queen (1980) 147 CLR 75 at 95 per Gibbs CJ and Mason J as he then was; at 116 per Wilson J.

25. Letter of 5 August 1986 to the Commission from Mr Rod Hocking, Deputy Sheriff, Supreme Court of the Northern Territory of Australia.

26. Letter of 20 June 1986 to the Commission from P G Dingwall, Registrar, Supreme Court of the Australian Capital Territory.

27. The statistics are taken from comparative material in a paper by R Harman "Western Australian Court Listing Intervals for Indictable Cases: 1983 to 1985" at 18-20 provided to the Commission by the Crown Law Department of Western Australia.

28. Letters to the Commission from Mr Justice W J Carter of the Supreme Court of Queensland (27 August 1986) and E J Davison, Executive Officer of the District Court of Queensland (17 June 1986).

29. Letter of 5 June 1986 to the Commission from Mr Jacobs, Assistant Crown Solicitor, Crown Law Office, Hobart.

30. "Crime and Justice in South Australia" Series A, No 14 covering the period 1 July 1984 to 31 December 1984. The Commission gratefully acknowledges the assistance of Dr Adam Sutton, Director of the Office of Crime Statistics in the Attorney General's Department, South Australia.

31. Letter of 6 June 1987 to the Commission from Graham Harris, Supervising Clerk of Arraigns, District Court of South Australia.

32. R Harman "Western Australian Court Listing Intervals for 1983 to 1985" at 18-20.

33. See generally Barker v Wingo 407 US 514 (1972) and particularly the opinion of Justice Powell.

34. See generally R S Frase "The Speedy Trial Act of 1974" (1976) 43 University of Chicago Law Review 667.

35. Speedy Trial Act 1974 18 USC s3161(b), (c).

36. Speedy Trial Act 1974 18 USC s3162(a)(2).

37. See generally 22 Corpus Juris Secundum Criminal Law section 425 at 1202-1209.

38. R L Misner Legislatively Mandated Speedy Trials (unpublished Commission document, 1982) at 7. An amended version was later published in (1984) 8 Criminal Law Journal 17.

39. See note 35 at s3161(h).

40. Frase, note 34 at 669.

41. J Vennard "Speeding up Justice in the United States" Home Office Research Bulletin No 17.

42. Ibid. See also by the same author "Court Delay and Speedy Trial Provisions" [1985] Criminal Law Review 73 at 77.

43. A V Sheehan Criminal Procedure in Scotland and France (HMSO Edinburgh 1975) at 144-146. See also "Time Limits for Prosecutions" (1984) 148 Justice of the Peace 788.

44. Criminal Procedure (Scotland) Act 1975 s101(1), as substituted by Criminal Justice (Scotland) Act 1980 s14.

45. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat, London 1980).

46. Criminal Procedure (Scotland) Act 1975 s101(5). See also I Dean "Speedy Trials: The Scottish 110-Day Rule" [1985] Criminal Law Review 459.

47. "Counsel Cross-Examines the Lord Chancellor" in Counsel, the journal of the Bar of England and Wales, Hilary Term 1986 at 34.

48. Judicial statistics of the Lord Chancellor's Department 1985, Table 5.11, noted in D A Thomas "Real Time" New Law Journal 936 at 937, 3 October 1986. See also D Speed "Waiting Times in Magistrates Courts" (1984) 148 Justice of the Peace 551.

49. D A Thomas "Real Time" (1986) 136 New Law Journal 936, 3 October 1986. See also editorial "Delays in the Criminal Process" (1986) 136 New Law Journal 813, 29 August 1986; editorial "Delays in Magistrates' Courts" (1986) 136 New Law Journal 453, 16 May 1986.

50. See discussion of Supreme Court Act 1981 (UK) s77 in J N Spencer "Time Limits for Prisoners on Remand" (1985) 149 Justice of the Peace 35.

51. R v Urbanowski [1976] 1 All ER 679; (1976) 62 Cr App R 229; R v Sheerin (1976) 64 Cr App R 68. See also R v Stentiford [1976] Crim L R 383; R v Raymond (1981) 72 Cr App R 151. See generally Archbold Criminal Pleading Evidence and Practice (41st ed 1982) para 1-104.

52. Indictments (Procedure) Rules 1971 (UK) Rule 5.

53. Crown Court Rules 1982 (UK) Rule 24.

59. Crown Court Act 1981 (UK) s76.

55. W Merricks "Briefing" New Law Journal, 12 October 1984.

56. Editorial "Delays in Magistrates' Courts" (1986) 136 New Law Journal 453, 16 May 1986. See also "Statistics of Time Taken to Process Criminal Cases in Magistrates' Courts" Home Office Statistical Bulletin Issue 11/1986.

57. Crimes (Procedure) Act 1983 (Vic) s3(2) as amended by Crimes Act 1958 (Vic) s353 .

58. Crimes Act 1958 (Vic) s353(5), (6).

59. Magistrates (Summary Proceedings) Act 1975 (Vic) s47A.

60. Crimes Act 1958 (Vic) s359A.

61. G McFarlane "Trial Delays: Should Time Limits be Introduced?" (1984) 128 Solicitors' Journal 655, 28 September 1984.

62. See the discussion at paras 6.32-6.37 and tentative proposal at para 6.68.

63. See discussions of this procedure at paras 3.39 and 8.14. In letters to the Commission Mr Peter Garling and Mr Martin Sides of the Sydney Bar have drawn our attention to the difficulties associated with this aspect of criminal procedure.

64. Magistrates (Summary Proceedings) Act 1975 (Vic) s47A(10).

65. I R Scott "Is Court Control the Key to Reduction in Delays?" (1983) 57 Australian Law Journal 16.

66. J Vennard "Court Delay and Speedy Trial Provisions" [1985] Criminal Law Review 73 at 82.

67. For discussion of the mode of trial hearing see generally Chapter 6.

68. R L Misner "Legislatively Mandated Speedy Trials" (1984) 8 Criminal Law Journal 17 at 29.

Chapter 4

Disclosure by the Prosecution

I. INTRODUCTION

4.1 The prosecutor's duty to disclose evidence to the defence has attracted little real attention in Australia to date. Whilst articles have examined the current law and practice[1] and made suggestions for change which have been echoed by law reform agencies[2] and by at least one Australian judicial inquiry,[3] no significant reforms have been made in any Australian jurisdiction in this area of criminal procedure. It is perhaps indicative of the Australian position that the guidelines currently applied by the Commonwealth Director of Public Prosecutions[4] do not mention the prosecution's obligations to disclose evidence to the defence before trial. It is ironic that whilst the law and practice of discovery before trial in civil cases has been well established for many years, comparable procedures in criminal cases are a relatively neglected area of the law. Despite this lack of attention in Australia, there is no doubt that disclosure by the prosecution is a crucial issue in any general discussion of pre-trial procedure.

4.2 The purpose of disclosing the prosecution case against the accused person is fourfold:

(a) to ensure, unless there is a compelling reason to the contrary, that the accused person has access to all the evidence relevant to the case;

(b) to ensure the accused person is aware of the case which must be met, is not taken by surprise and is able to adequately prepare his or her defence;

(c) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(d) in some cases to encourage the entering of guilty pleas at an early stage of the proceedings.[5]

4.3 Traditionally, the prosecution is under an obligation to conduct its case fairly and impartially and with due regard to the interests of the accused person; it should not be motivated solely by the desire to secure a conviction. The prosecution also has a responsibility to ensure that the accused person receives a fair trial. In England, this obligation has been expressed in the following terms:

> It is not the duty of Prosecuting Counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts.[6]

In a recent decision of the High Court of Australia, Mr Justice Deane discussed the role of the prosecution:

> Prosecuting counsel in a criminal trial represents the State. The accused, the Court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.[7]

These approaches are also reflected in the New South Wales Bar Council Rules:

> A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a

> conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind.[8]

The manner in which these rules are applied in practice is not clear. Since there are considerable variations in the practice of prosecutors who are bound by these principles,[9] and since the majority of prosecutors in the Local Court are not barristers but members of the Police Prosecuting Branch of the New South Wales Police Force, there can be no certainty that these statements of principle are applied uniformly. By saying this, we do not wish to reflect on the integrity of either Crown Prosecutors or Police Prosecutors. We are merely emphasising the point that there are few rules effectively governing the practice of disclosure by the prosecution.

A. Prosecutorial Discretion

4.4 The prosecution has a wide and largely unfettered discretion to choose the evidence that will be tendered in the prosecution case.[10] That evidence may be in the following forms:

* oral evidence of observations by witnesses;
* evidence of scientific tests or experiments;
* records, books, photographs and other documentary exhibits;
* material exhibits;

* statements by the accused; and

* evidence of mental or physical examinations of the accused;

4.5 In practice, the prosecution can disclose to the accused person the evidence upon which it intends to rely at a number of stages prior to or during the trial. In indictable cases these stages include:

* when the accused person is charged;

* during preliminary hearings such as bail applications;

* before the committal hearing where informal negotiations may take place between the prosecution and defence;

* before or at the committal hearing where the prosecution uses the "paper committal" system whereby statements of prosecution witnesses and information regarding exhibits are provided to the accused person;

* at the committal hearing when the prosecution presents its case by calling witnesses in person;

* after committal and before trial where informal negotiations may take place between the prosecution and defence;

* after committal and before trial where the prosecution provides the accused person with the statements of witnesses who were not called at the committal proceedings; and

* at trial when the prosecution presents its case.

In cases dealt with summarily, the occasions on which disclosure may be made are fewer and the general practice is for the evidence to be called at the hearing without previous disclosure to the accused person. The concept of "trial by ambush"[11] is for this reason a more prominent feature of summary prosecutions than of indictable cases.

4.6 The outstanding feature of the system described above is that disclosure must ultimately be made by the prosecution before the defence is required to present its case. This is a consequence of the rule that the prosecution carries the onus of proving the alleged offence. The crucial issue is not whether but rather when the prosecution case should be disclosed. It is a widely held view that the prosecution should present its case as early as possible in the criminal process. Whilst there are clear exceptions which will be mentioned later, early disclosure would generally permit prompt identification of matters in issue and allow for better preparation of the case for trial by both parties. Better preparation contributes towards improving the overall standard of the administration of justice. The early identification of those matters which would not go to trial would reduce congestion in the criminal lists and thereby reduce the incidence of unnecessary delay in the criminal process.

4.7 A related problem is disclosure by the prosecution of material it does not intend to present at the trial. It may be difficult for the defence to discover evidence to which the prosecution has access but which it does not intend to use in its case. Nevertheless, in general no legal obligation is imposed on the prosecution to disclose such evidence, even though the evidence may be credible, relevant and consistent with the innocence of the accused person. The issue here is whether, and, if so, when such evidence should be disclosed.

B. Structure of this Chapter

4.8 This chapter examines procedures which regulate pre-trial disclosure by the prosecution and which impose obligations on the prosecution to disclose relevant evidence prior to the trial. Part II contains a detailed description of the law and practice regarding pre-trial disclosure by the prosecution in New South Wales. It identifies the stages in the process when disclosure may occur, describes the material which can be disclosed to the defence, and evaluates the adequacy of the current position. Although this Part is almost exclusively concerned with procedure in the higher courts, reference to the procedure in courts of summary jurisdiction is made where appropriate. Part III contains a comparative analysis of relevant procedures in other jurisdictions, both in Australia and overseas. Part IV discusses policy issues relevant to disclosure, Part V examines the principal arguments for and against mandatory disclosure and Part VI explains the various options for reform available. In Part VII, we advance some tentative recommendations for reform of this aspect of criminal procedure in New South Wales.

II. THE CURRENT LAW AND PRACTICE IN NEW SOUTH WALES

A. Evidence Which the Prosecution Intends to Call at Trial

1. Notification of Charge

4.9 The precise terms in which an accused person is charged will amount to a form of disclosure of the prosecution case. A charge usually contains the following information:

* the nature of the alleged offence;
* the time of its commission;

* the place of its commission; and
* the name, where there is one, of the alleged victim.

4.10 The accused person must be notified in writing of the nature of the charge.[12] In addition, the police have been instructed by the Commissioner of Police to provide an accused person with a copy of any handwritten statement made by the accused person as well as a copy of any formally recorded interview conducted between the police and the accused person.[13] This written record should be given to an accused person at the conclusion of the interview.

2. Preliminary Court Hearings

4.11 Whether proceedings are initiated by summons or arrest, a person charged with a serious offence appears in court soon after being charged. The presiding magistrate requests information regarding the nature of the allegation in order to make a determination regarding bail. The amount of information disclosed at this stage will vary considerably according to the nature of the proceedings. For example, if the police contest an application for bail by an accused person, a substantial amount of information may be disclosed in support of the objection.

3. Informal Negotiations Before Committal Proceedings

4.12 After a person has been charged with an indictable offence, there will usually be a degree of informal exchange of information between the accused person and the prosecution. Where the accused person is legally represented, substantial

disclosure by the prosecution will be much more likely to occur because one of the tasks of the defence lawyer is to discover the nature of the case. The lawyer will usually be able to find out the number of witnesses to be called by the prosecution and the nature of the evidence that they are likely to give. In certain circumstances, the lawyer may be given access to the statements made by the witnesses for the prosecution. Lawyers are accustomed to doing this but it is highly unlikely that accused people will themselves take the initiative and approach the prosecution.

4.13 There are no legal rules which regulate this informal exchange of information. However, the rules of professional ethics exert some measure of control by establishing standards of conduct for lawyers whose breach may lead to disciplinary action being taken against the offending lawyer.

4. The Paper Committal System

4.14 In 1983 a system of paper committals was introduced in New South Wales.[14] The legislation is modelled on similar provisions which exist in other Australian and overseas jurisdictions. The system enables written statements made by prospective witnesses to be admitted in evidence at the committal hearing in lieu of oral evidence. Certain procedural requirements must be met. A copy of the statement must be given to the accused person prior to the committal hearing and within the time specified by the presiding magistrate. The statement must be in a prescribed form, properly endorsed and attested. The accused person has a choice as to whether the

committal hearing is to be conducted in this way and can ask the magistrate to order the person who made the statement to attend court to give evidence and be available for cross-examination.

4.15 This system contemplates the disclosure of statements made by prosecution witnesses which might not otherwise be available to the accused person prior to the committal hearing. However, the paper committal system will probably not significantly increase the amount of evidence disclosed to the defence for two main reasons. Firstly, the system is not mandatory. Since the prosecution decides whether or not to proceed by way of paper committal, the procedure is not used in all cases.[15] Secondly, even where the system is used, the prosecution need only provide the defence with copies of the written statements of witnesses whom it proposes to call at the committal proceedings. There is no statutory obligation, and arguably none under the general law, to provide the statements or even disclose the identity of witnesses whom the prosecution does not propose to call at the committal hearing but whose evidence may be relevant, credible and consistent with the innocence of the accused person.

5. Committal Proceedings

4.16 The primary purpose of committal proceedings is to decide whether there is sufficient evidence to warrant the accused person being placed on trial. They also provide a vehicle for the defence to discover the prosecution's case. In the course of attempting to establish a case which justifies

the accused person being put on trial, the prosecution will inevitably disclose the nature of its case to the accused person. Although the prosecution is only required to present so much of its case as will justify an order committing the accused person for trial,[16] in practice the prosecution usually presents the whole of the case it has available at this stage. According to the recently changed criteria for committal, the accused must be discharged if the magistrate is of the opinion that "a jury would not be likely to convict"[17] the accused person of an indictable offence. Arguably this new criterion establishes a higher standard to be met before an accused person is committed for trial than that which magistrates were previously required to apply, namely, whether there was evidence sufficient to warrant the accused person being put on trial for an indictable offence.[18] The introduction of the higher standard will probably result in the presentation by the prosecution of a stronger and more comprehensive case at the committal hearing, thus increasing the extent of the disclosure made by the prosecution at this stage of proceedings.

6. Statements of Additional Witnesses

4.17 If the prosecution intends to call at the trial witnesses who did not give evidence at the committal proceedings, it is virtually universal practice to supply the accused person or his or her lawyer with a list of such witnesses and either a copy of their statements or an outline of the evidence which the prosecution anticipates they will give. The courts have elevated this practice to an

obligation[19] and will usually enforce it in the rare instances where it is not followed by refusing to allow such witnesses to give evidence where the defence objects.

7. Informal Negotiations before Trial

4.18 Finally, there may be informal negotiations between the prosecution and the defence prior to the trial itself. The observations already made regarding negotiations which may occur before committal proceedings are applicable here. Although there are no strict rules regulating or controlling informal negotiations, they are a significant source of disclosure by the prosecution. Again, an accused person who is unrepresented is unlikely to take advantage of the opportunity for disclosure through informal negotiations.

B. Additional Means Available to the Accused Person to Discover Evidence to be Called by the Prosecution

1. Further and Better Particulars

4.19 There are other means of obtaining disclosure at the committal hearing. At the commencement of the hearing, the presiding magistrate has the inherent discretionary power to order the prosecution to provide the defence with further and better particulars of the charges against the accused person. It has been held that an accused person has no right to particulars in relation to a committal hearing but that the magistrate can exercise the power to order the giving of particulars so as to facilitate the proper performance of his or her duties as a magistrate.[20]

2. The Police Brief

4.20 In addition, the presiding magistrate can order the police prosecutor to produce the "police brief" to the court and the defence during the course of the committal hearing. The New South Wales Court of Appeal has held that, before making such an order, the magistrate must be satisfied that the defence requires the documents for a "legitimate forensic purpose".[21] The majority of magistrates have apparently interpreted this case in a restrictive manner with the result that it has proved difficult for the defence to satisfy the magistrate that the documents are required for a "legitimate forensic purpose" and to specify the documents with sufficient precision to justify an order for disclosure.

3. Specific Requests for Evidence

4.21 The defence may request the prosecution to disclose witnesses' statements prior to or at the trial. In a murder trial conducted in England, the defence requested the production of all prior statements made by the accused person and a particular witness. The request for disclosure was refused. On appeal, the Privy Council held that there is

> ... no question but that they [the statements] ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production ... [C]ounsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents in extenso with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.[22]

4.22 The Full Court of the Supreme Court of Victoria[23] has distinguished this case on the basis that, in the special circumstances of the case, the relevant statement should have been produced in the interests of justice, and that the failure to produce the statement, coupled with other defects in the trial, involved a miscarriage of justice. The Court said that the case did not decide that an accused person has a legal right to production of all statements made by all witnesses to be called by the Crown. However, the Court did say that interests of justice in a particular case might require production and that the failure to produce might result in a miscarriage of justice. In a recent and thorough analysis of the relevant principles, the Court of Appeal in New South Wales has concluded that a magistrate conducting committal proceedings may require the prosecution to produce evidence notwithstanding that there is a claim of public interest immunity based on the fact that the evidence discloses the identity of police informers.[24]

4. Subpoenas

4.23 It is open to an accused person in a criminal case to issue a subpoena requiring the prosecution to produce specified evidence in its possession. Since the terms in which the subpoena is drafted must be sufficiently precise as to enable compliance, this procedure would appear to be limited to material of which the accused person has knowledge. In order to comply with the subpoena, the person or organisation to whom it is addressed must produce the specified material to the

court (not to the accused person) on a nominated day. Unless specific arrangements have been made by the court to conduct pre-committal or pre-trial proceedings, the nominated day will usually be the day the committal proceedings are scheduled to begin or the day the case is listed for trial. This will mean that the accused person may not have adequate time to consider the significance of the subpoenaed material prior to the committal hearing or the trial.

4.24 A subpoena may be issued to compel the attendance of any person who can give relevant evidence or produce any relevant material exhibit. There are certain categories of evidence which are more likely to attract the issue of a subpoena or a specific request for evidence. These categories include:

* identification evidence, namely, the evidence of witnesses to the events with which the proceedings are concerned, including records of any descriptions of the offender given by people interviewed by the investigating police;

* information regarding grants to witnesses of immunity from prosecution;

* internal records of the police investigation of the case including details of the times when relevant information was obtained and the source of that information;

* records of prior convictions of both the accused person and the witnesses for the prosecution;

* material evidence to which the accused person wishes access for the purpose of inspection or scientific examination; and

* results of mental or physical examinations of the accused person conducted on behalf of the prosecution.

4.25 In this context the observations we make in para 4.27 about legal representation are apposite. Accused people who are adequately represented will be in a much better position to make use of the subpoena procedure.

5. The Transcript of the Committal Proceedings

4.26 For all people who are put on trial, the transcript of the committal proceedings will be the major source of information about the prosecution case. The Justices Act 1902 requires that an accused person be given a copy of this transcript free of charge before the trial begins.[25] In order for this to be a useful source of disclosure, the transcript should be made available to the accused person sufficiently far in advance of the trial to allow adequate preparation of the defence case.

6. Legal Representation

4.27 It should be emphasised that the extent of disclosure before trial depends largely on two factors: firstly, whether the accused person is legally represented and secondly, whether the standard of such representation is adequate. Most of the procedures available to increase the extent of disclosure made by the prosecution at committal proceedings can only be used effectively by lawyers. The testing of evidence by subjecting witnesses to cross-examination, laying the groundwork for the presentation of the defence case, and gathering material which may be relevant to the admissibility of evidence at trial are three examples. The more effective the lawyer, the better the

results obtained by the use of these procedures should be. Because the availability of legal aid for committal proceedings is officially restricted to charges of murder and attempted murder, most accused people who appear at committal proceedings are not legally represented.[26] Accordingly, the potential for disclosure at committal proceedings may not be fulfilled.

C. Evidence Which the Prosecution Does Not Intend to Present

4.28 The prosecution may often be in possession of evidence and information which is not known to the accused person. In such circumstances, there is an issue as to whether or not the prosecution should disclose the material. As we have noted, this issue is particularly significant where the evidence is not only relevant and credible, but also consistent with the accused person's innocence. In Australia, there is no formal requirement for the prosecutor to disclose information which is not to be called as part of the prosecution's case. However, the courts have held that it is preferable as a matter of practice that the prosecutor disclose such material to the accused person.

4.29 Some time ago the Full Court of the Supreme Court of South Australia stated that the discretion of the prosecutor in regard to the conduct of the prosecution is not free from limitations. Specifically in regard to disclosure, it said:

> Where the Crown has in its possession a statement of a credible witness who can speak of material facts "which tend to show the prisoner to be innocent", it must either call that witness or make his statement available to the defence.[27]

To fall within this principle, the Court said, the evidence must possess three qualities:

* it must be credible, in the sense of having the appearance of truth, reasonableness and worth and of being capable of belief;

* it must be material in the sense of being admissible and relevant to the issues or the vital facts in issue; and

* it must tend to establish the innocence of the prisoner.[28]

4.30 However, a majority of the High Court of Australia has held more recently that the law did not impose any obligation on the prosecution to disclose to the defence either the identity of any witness or a copy of the statement made by any witness whom the prosecution does not intend to call at trial.[29] The evidence in question was that of an eyewitness to certain events which occurred after a fatal shooting. The evidence of the witness was inconsistent with evidence given by the prosecution's principal witness at the trial. Chief Justice Barwick and Mr Justice Stephen, two of the judges in the majority, stated that it is preferable in practice for the prosecution to inform the defence of the identity of any witness from whom a statement has been obtained, but that there was no legal requirement to do so.[30] Mr Justice Mason said that there is no rule of law which compels the prosecution to provide to the defence statements made by witnesses whom it does not propose to call as witnesses for the prosecution.[31] Mr Justice Murphy said in a dissenting judgment:

> The applicant contended that the prosecution caused a miscarriage of justice by suppression of credible material favourable to the applicant on a crucial issue at the trial. Those prosecuting

> on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution's suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial.[32]

4.31 The Commission has conducted a survey of New South Wales Crown Prosecutors which reveals widely divergent approaches towards the practice of disclosure to the defence. For example, the Crown Prosecutors were asked whether they would provide the defence with a copy of the statement of a person who was not called at committal and who is not to be called at trial but who may be able to give relevant evidence. One-third of Crown Prosecutors replied that they would sometimes disclose the existence of such a statement, one-third would only rarely and one-third never would. Similarly, the approach taken by Crown Prosecutors to disclosure of criminal records of prosecution witnesses varies significantly. Some prosecutors never give such information to the defence, while others do it frequently.

D. Judicial Control of Trial Proceedings

4.32 The earlier decisions of the High Court of Australia confirmed the "fundamental proposition"[33] that it was a matter for the prosecutor to determine what witnesses would be called for trial. It is clear, however, that the discretion to call a witness must be exercised with due regard for the need to conduct a fair trial.[34] The question raised is the extent to which the trial judge and later a court of criminal appeal

may influence the presentation of the prosecution case. We do not propose to deal with this issue in detail since it is not concerned with pre-trial procedure. For the purposes of this Discussion Paper, it should be borne in mind that the trial judge does not have the power to direct the prosecution to call a witness,[35] but does have a very limited right to call a witness of his or her own motion in exceptional circumstances.[36] It is clear that an appellate court may set aside a conviction if the failure to call a witness gives rise to a miscarriage of justice.[37]

E. Summary Jurisdiction of the Supreme Court

4.33 Special rules of court have been made for pre-trial proceedings in matters heard in the summary jurisdiction of the Supreme Court of New South Wales[38] which was established in 1967 primarily to deal with serious criminal offences committed by corporations.[39] The rules provide that the judge may make directions of his or her own motion or on the application of a party for the efficient and just disposition of a case and, in particular, may direct the prosecution to give the defence:

* better particulars;
* a list of prosecution witnesses;
* the statements of prosecution witnesses or, if they have not made a statement, a summary of the evidence they are expected to give;
* a list of witnesses whom the prosecution does not intend to call in its case;
* a list, and copies of, documents to be tendered as exhibits;
* the opportunity to inspect documents and material exhibits;
* access to business records.[40]

The judge can also make orders in relation to any alibi defence raised by the accused person and any admissions made.[41] The procedure made available by these provisions leave the control of the process of disclosure entirely to the discretion of the court.

III. DISCLOSURE BY THE PROSECUTION IN OTHER JURISDICTIONS

A. Introduction

4.34 The Commission has conducted an extensive research program to examine systems of pre-trial disclosure elsewhere in Australia and in various criminal jurisdictions overseas.[42] In general, the law and practice in other Australian jurisdictions closely resembles the position as we have described it in New South Wales. However, the practice overseas is significantly different. We examine the law and practice in the United States, England and Canada and also make reference to the position in Scotland and New Zealand.

B. The United States

4.35 Comparisons between the law and procedure on pre-trial matters in the United States and Australia are not easy to make for a number of reasons. One is that the criminal justice systems in the two countries differ significantly. Another is that, despite the fact that the Sixth Amendment to the United States Constitution prescribes that "in all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation", there is

no single position adopted by the various States. In this analysis, attention is focused on the position under Federal law.

4.36 In common with many American States, the Federal Rules of Criminal Procedure provide for a system of pre-trial disclosure by both the prosecution and the defence. In relation to disclosure by the prosecution, the prosecution must disclose the following material if requested to do so by the accused person:[43]

* the accused person's prior statements;
* the accused person's prior record;
* documents and tangible objects which are material to the case for the accused person and are intended to be used by the prosecution;
* reports of examinations and tests including scientific examinations and tests; and
* the names and addresses of all prosecution witnesses and their records of prior convictions.

4.37 The prosecution's internal working documents relating to the investigation of the case are exempt from disclosure.[44] Beyond this, the rules leave the regulation of the disclosure process to the courts. The courts may make orders denying, restricting or deferring disclosure where a sufficient reason for so doing has been shown. They can make orders directing parties to comply with the disclosure requirements and have the power to rule that evidence will not be admissible where the requirements have not been fulfilled.[45] It can be argued that the Federal Rules are limited because they do not expressly

extend to the disclosure of statements made by witnesses the prosecution does not intend to call but whose evidence may be favourable to the accused person. However, the rules do not take precedence over the requirements of the Constitution and must be read in conjunction with the various rulings of the United States Supreme Court on constitutional requirements as to disclosure.

4.38 The standard of disclosure required by the Constitution was, in the early cases on the question, held to be met if the indictment or information identified the essential facts constituting the offence charged and sufficiently apprised the accused person of the prosecution case he or she must be prepared to meet.[46] Disclosure requirements were extended in the landmark case of Brady[47] in which the Supreme Court held that when the defence has requested disclosure and the prosecution suppresses evidence which is both "material either to guilt or punishment" and "favorable (sic) to the accused", due process is violated "irrespective of the good faith or bad faith of the prosecutor". The Supreme Court's decision in Agurs[48] established that the Sixth Amendment requires the prosecution to disclose evidence which is favourable to the accused person and which might create a reasonable doubt as to his or her guilt, even though disclosure has not been requested by the defence or where the request is a general one for "anything exculpatory". Where the evidence is obviously of such substantial value to the defence that elementary fairness

requires it to be disclosed even without a specific request, the failure to disclose will violate the due process requirement and result in the denial of a fair trial.

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.
>
> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.[49]

4.39 In the federal courts, disclosure by the prosecution at trial is governed by legislation requiring the prosecution to hand over to the defence upon request statements made by prosecution witnesses.[50] It provides that, after a witness other than the accused person has given evidence, the court, on application by the party who did not call the witness, must order the prosecution or the defence lawyer to produce for examination any statement of the witness concerning the subject matter of his or her evidence. The witness may then be cross-examined on the statement. Under the legislation, counsel is not entitled to the statement until the witness has completed his or her evidence in chief. In practice, however, the prosecution often makes the statement available before the witness gives evidence.

C. England

4.40 Disclosure by the prosecution in England was formerly regulated by a combination of ethical rules, court decisions and statutory requirements, which neither by themselves nor in combination provided a clear statement of the law. Decisions of the English courts established that the prosecution was obliged to supply to the defence the name and address of any witness it did not intend to call at the trial but who could nevertheless give material evidence. It is not clear whether the duty extended to the production of the statement of that witness.[51]

4.41 Following the report of the Royal Commission on Criminal Procedure[52] and a report of a Home Office Working Party on the issue of prosecution disclosure,[53] the Attorney-General issued guidelines on the disclosure of information to the defence in indictable cases.[54] The guidelines provide that, in all cases which are to be committed for trial, all "unused material" should normally be made available to the defence if the material has some bearing on the offence charged and the surrounding circumstances of the case. Disclosure should be made before the committal hearing because the material may have some influence on the course of the committal proceedings or the charges on which the accused person might be committed for trial. If this requirement will cause inconvenience or delay, the guidelines require that disclosure should occur at, or as soon as possible after, the committal hearing.[55] One other feature of the guidelines is that they provide that the

prosecution should disclose to an unrepresented accused person the same material that would normally be released under the guidelines to one who is represented.

4.42 The guidelines refer to three classes of "unused material" which ought to be disclosed to the defence:

* all material in the committal papers;

* all witnesses' statements and documents which are not included amongst the committal papers;

* all statements of any witnesses who are to be called to give evidence at the committal hearing.[56]

4.43 The prosecution is given a discretion not to disclose information to the defence in a number of circumstances, including where:

* there are grounds for fearing that disclosure may lead to an attempt being made to intimidate a witness, causing the original statement to be retracted or the witness failing to appear in court;

* to compel the prosecution to disclose information of this kind might have the effect of denying the prosecution effective use of that material in challenging the credibility of the witness called by the defence;

* the statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, may give the defence a quite different, and false, story favourable to the accused person;

* the statement is quite neutral or negative and there is no reason to doubt its truthfulness but there are grounds to believe that the witness might change his or her story and give evidence for the defence; or

* the statement is "sensitive" and should not be disclosed in the public interest.[57]

4.44 The guidelines suggest that statements contain "sensitive" material where they disclose:

* matters of national security or material identifying a member of the secret service;
* the identity of an informer;
* the name of a witness who might be in danger of assault or intimidation if his or her identity were to be revealed;
* a new form of surveillance or method of detecting crime;
* information supplied on a confidential basis;
* information of a private nature; or
* information whose disclosure might result in domestic strife.[58]

4.45 In deciding whether to disclose sensitive material, the guidelines call on the prosecution to weigh the degree of sensitivity of the subject material against the assistance which the information may give to the defence. In resolving a dispute, the guidelines require that, where the competing interests are evenly balanced, disclosure should be made to the accused person. It is possible to release only part of a statement where it is considered that it would be too dangerous to disclose the entire statement. The guidelines also provide that if, before or during the trial, it becomes clear that there is a duty to disclose but the evidence is so sensitive that disclosure would not be in the public interest, it will probably be necessary for the prosecution to be abandoned. In such a case the interests of national security are to prevail over the public interest in the prosecution of individual offenders.[59]

4.46 The English guidelines provide a code for prosecutors in cases tried on indictment. Implementation of the guidelines is dependent on the exercise of discretion by the prosecution. Both the Royal Commission on Criminal Procedure and the Home Office Working Party referred to in para 4.41 recommended that it should be a matter for the prosecution to decide what material should be disclosed. The Royal Commission considered the suggestion that there might be some scope for allowing the defence to apply to a judge to determine disputes about disclosure, but rejected the suggestion on two grounds. Firstly, the proposal would make demands on scarce judicial resources. Secondly, in order for the judge to determine whether material would be useful, the defence would have to disclose its case to the judge beforehand, a requirement which was said to be inconsistent with the prosecutor's duty to prove the guilt of the accused person without assistance from the defence.

4.47 New rules providing for disclosure before trial in cases to be heard in the Magistrates' Courts came into force on 1 May 1985.[60] According to the rules, a person accused of an offence which is triable either way is entitled to request that the prosecution disclose its case. This can be done by supplying either copies of statements or a summary. It is the duty of the court to satisfy itself that the accused person is aware of his or her right to information before the mode of trial procedure.[61] The new rules have a dual purpose, "natural justice at one extreme, the avoidance of delay at the

other".[62] Early experience of the rules suggests that, where a request for disclosure is made, cases are usually delayed between three and four weeks.[63] On the other hand, it has been said that the real advantage of the scheme is that it has given a greater sense of fairness to the proceedings.[64]

D. Canada

4.48 The subject of pre-trial disclosure has been extensively examined by the Law Reform Commission of Canada. The Commission published a Working Paper in 1974[65] in which it canvassed the prospect of a more open approach to pre-trial disclosure by the prosecution. It reported on the subject in 1984.[66] The Commission concluded that no orderly system of discovery existed either in formal rules or in the exercise of prosecutorial discretion. In its Report, the Commission said:

> It cannot be said that Canadian criminal law enforces a policy of pre-trial disclosure by the prosecution. Apart from specific and limited requirements currently prescribed by law, pre-trial disclosure in Canada is characteristically an informal process, predicated upon the Crown's discretion in the management of its case. To the extent that it exists, pre-trial disclosure is subject to the vagaries of regional practice, plea bargaining and personal relations among members of the criminal bar; for these reasons alone it defies systematic analysis as an integral feature of Canadian criminal procedure.[67]

4.49 The Canadian Law Reform Commission recommended the enactment of statutory provisions giving the accused person a right to full disclosure of the prosecution case before being called upon to elect the mode of trial or to plead to a charge alleging the commission of an indictable offence.[68] Under its

proposals, the accused person would be entitled upon request to the following:

* copies of his or her criminal record;
* copies of relevant statements made by him or her;
* access to enable inspection of exhibits and, where practicable, copies of exhibits;
* copies of statements made by people whom the prosecution intends to call as witnesses or, in the absence of statements, a summary of the witnesses' anticipated testimony;
* copies of the criminal records of those the prosecution intends to call as witnesses; and
* names and addresses of other people who could be called by the prosecution or other details enabling them to be identified.[69]

In order to avoid what the Commission aptly describes as an "administrative nuisance", where such a request is made, there is a continuing obligation imposed on the prosecution to disclose items within the class requested without the need for any further request.[70]

4.50 The suggested provisions would not allow the prosecution to seek exemption from the requirements. However, the prosecution would be able to seek an order delaying disclosure where disclosure would probably endanger life or safety or interfere with the administration of justice.[71] Where the requirements laid down have not been complied with by the prosecution, the court would be able to order, at the accused person's request, an adjournment of the proceedings until there has been compliance by the prosecution. The court would also be able to make any other orders considered appropriate in the circumstances.[72]

4.51 The Canadian Law Reform Commission's report was reviewed by the delegates to the Uniform Law Conference of Canada in 1984.[73] A resolution was carried endorsing the principle of complete disclosure, but opposing the proposal to make this procedure the subject of legislation. A committee was established to formulate uniform disclosure guidelines for the consideration of the Attorneys General. At its next meeting, the Criminal Law Section of the Uniform Law Conference adopted a statement of guidelines for disclosure by the prosecution and directed that they should be submitted to the Attorneys General for consideration.[74] The main features of those guidelines are those contained in the proposals for legislation put forward by the Law Reform Commission of Canada.[75] There are, however, some notable differences. It is suggested that the prosecution should have a discretion to withhold disclosure of the names and addresses of potential witnesses. In addition, the method of disclosure to an unrepresented accused person should be a matter for the prosecution to decide. Both these provisions are practical manifestations of the policy statement contained in the guidelines:

> The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.[76]

A recent Canadian decision has concluded that a court has jurisdiction to require production of the statements of prosecution witnesses and that this discretion should be exercised in favour of production in the absence of any cogent reason to the contrary.[77]

E. Scotland

4.52 In "solemn" cases (serious cases) a prosecutor is required to serve on the accused person a list of witnesses on or before the date of the service of the indictment and must lodge with the court a list of prosecution witnesses proposed to be called at trial.[78] The list can be added to where notice is given to the accused person two clear days prior to the trial but an additional witness may only be examined with the court's approval. Authority exists for the proposition that the prosecution is obliged, both during the trial and after conviction, to lay before the court any facts known to the prosecution, but not to the defence, which are favourable to the accused person.[79] There has been a long-standing tradition of prosecutorial independence in Scotland and it is recognised that prosecutors are under a duty to put all relevant evidence before the court. Pursuant to this duty, the prosecution is under an obligation to disclose exculpatory evidence to the defence and also to disclose evidence which the prosecution initially thought would not be relevant but which becomes relevant in the light of information provided about the defence case.[80]

4.53 The system of pre-trial disclosure in serious cases was examined by a committee appointed by the Secretary of State for Scotland and the Lord Advocate. The Committee reported that the procedure existing in Scotland worked "reasonably well" and suggested only minor alterations to certain time limits provided in the legislation.[81] Since the Committee's Report, the Lord Advocate has considered certain options in relation to

the reform of the procedure for pre-trial disclosure. The prosecutors have been instructed to make available to the defence copies of statements made by formal or technical witnesses and copies of scientific reports.[82] In addition to these alterations, the Lord Advocate has published a consultative document on disclosure by both the prosecution and the defence.[83] The paper does not advance any detailed suggestions for change. However, in broad terms, it identifies two options.[84] First, a system could be established enabling the exchange between the prosecution and defence of witnesses' statements. Secondly, a system could be established requiring the prosecution to hand over the statements made by prosecution witnesses, known as "precognitions", to the defence with no reciprocal requirement being placed on the defence.

F. New Zealand

4.54 The New Zealand law and practice regarding disclosure by the prosecution in criminal cases is similar to that in Australia. In general, the courts in New Zealand have followed the decisions of the English courts.[85] However, there have been certain notorious cases in which the shortcomings of the current position have been clearly demonstrated. The case of Arthur Allan Thomas[86] and that of Dean Wickliff[87] have raised a number of important and troubling questions about the adequacy of disclosure to accused people of information held by the prosecution. The position has changed, however, since the passage of the Official Information Act 1982 which gives citizens of New Zealand the right to certain official

information held by government departments, including the Police Department.[88] One of the difficulties is that the degree of access available before trial is not as extensive as that available after the trial. A recent report published in New Zealand has concluded that there is a pressing need for reform in this area.[89] It is conceded in the report that this reform will have to achieve a delicate balance between the competing interests of the prosecution and the defence but contended that the accused person's interest in achieving a fair trial in the particular case must be the paramount consideration.[90] A Royal Commission report has also recommended the implementation of a scheme by which the prosecution should provide the defence with an outline of the facts upon which it intends to rely in summary prosecutions.[91] The Criminal Law Reform Committee of New Zealand is currently examining the subject of pre-trial disclosure in criminal cases. It is expected that its report will become available during the consultation phase of our project on procedure from charge to trial.

IV. THE NEED FOR REFORM

4.55 It is the Commission's view that the law and practice regulating disclosure by the prosecution in New South Wales is in need of reform. The law's haphazard development has resulted in there being few clearly stated rules governing disclosure. Such rules as there are do not oblige the prosecution to disclose evidence not proposed to be called at trial. Whilst pronouncements have been made by the courts as to the preferable course of conduct by the prosecution, these

do not amount to rules of practice and are not binding on prosecutors. The practice of prosecutors varies to such an extent that some change is called for to ensure a greater level of uniformity, and hence a generally fairer system of criminal procedure.

4.56 The introduction of the paper committal system in New South Wales has not significantly altered the position. While the system does offer a potential new avenue for disclosure, its use is at the discretion of the individual prosecutor. Furthermore, the system does not require disclosure of evidence which is not intended to be used by the prosecution.

4.57 In practice, the prosecution usually discloses, during the course of informal negotiations with the defence, much more material than is required by the strict letter of the law. Nevertheless, the practice is far from uniform. The extent of disclosure depends on the prosecutor's own perception of his or her duties, the relationship between the prosecutor and defence counsel, and other such fortuitous circumstances.

4.58 It is clear that the failure to disclose material evidence does have the potential to occasion a miscarriage of justice. Reliance has been placed on the power of appellate courts to quash a conviction where it is considered that there has been a miscarriage of justice[92] or to order a new trial on the basis of the "fresh evidence" rule.[93] Sometimes such appeals have succeeded on the facts of the particular case, but

the appeal courts have not laid down rules to remedy the position generally by requiring the prosecution to make disclosure in all similar cases. Whilst in the past the High Court has said that it would quash a conviction wherever it was satisfied there was a risk that a miscarriage of justice may have occurred, it appears to be retreating from this position. In a recent case some members of the Court said that, notwithstanding the risk that there had been a miscarriage, special leave to appeal would only be granted where a point of law of general importance was also at issue.[94]

4.59 There is in any case little comfort to be found in the powers of appellate courts over individual cases. Where evidence is not disclosed, it may never be discovered by the convicted person and the fact of a miscarriage of justice may therefore never be established. Furthermore, review of the conduct of trials by appellate courts is an indirect and expensive way to regulate disclosure by the prosecution. Reforms are required not only to regulate procedures for pre-trial disclosure of the prosecution case, but also to impose positive obligations upon the prosecution to disclose to the defence evidence which it is not going to put before the court but which may be relevant, credible and consistent with the innocence of the accused person.

4.60 Finally, the failure of the prosecution to disclose relevant information can cause delay and inefficiency in the later stages of criminal proceedings. It may on occasion become apparent during the course of the presentation of the Crown case at trial that some further information is

available. For example, it may emerge that there is a person who can give relevant evidence. If the accused person or the judge persuades the prosecutor to call that person as a witness, much valuable time will be lost while he or she is located. Furthermore, in the absence of full disclosure, the accused person is required to plead to the charge without knowing the full extent of the prosecution case. In some cases the accused person, unaware of the strength of the prosecution evidence, may choose to contest some part of the prosecution case where there is no realistic prospect of success. On the other hand, an injustice will be done if an accused person who is in fact innocent pleads guilty not knowing, for example, that the prosecution is aware of the existence of a person who can verify his or her version of events. Where there is a likelihood of substantial delay, no perceived prospect of acquittal at trial and the virtual certainty of a reduced sentence for a plea of guilty, there may be pressures on even an innocent accused person to plead guilty. The requirement of disclosure should at least ensure that the likelihood of an innocent person entering a plea of guilty is reduced.

V. ARGUMENTS FOR AND AGAINST COMPULSORY PRE-TRIAL DISCLOSURE

4.61 In this part the policy arguments for and against compulsory disclosure by the prosecution are canvassed and evaluated. The arguments for prosecution disclosure centre around increased efficiency, reduced costs and delays, and improved standards of fairness and justice. The arguments against compulsory prosecution disclosure are increased costs, a lack of reciprocal obligations on the accused person, and the risk of interference with the administration of justice.

A. Arguments For Compulsory Pre-Trial Disclosure

1. Efficiency

4.62 A formal system of disclosure is likely to result in criminal proceedings being conducted more efficiently. The accused person can make a more informed decision whether or not to plead guilty. If the accused person decides to plead not guilty, he or she will be better equipped to prepare a defence. Pre-trial disclosure is likely to be most effective where the relevant requirements are imposed on both the prosecution and the defence and where pre-trial conferences involving the parties are held. This would enable the parties to prepare their respective cases after they have ascertained what are the areas of real dispute, thereby enabling more effective preparation. This could result in a reduction in the length of trials. The point has often been made that disclosure of the facts and legal issues in dispute is essential to the effective operation of an adversary system. As one American commentator has noted:

> Without such notice, each party is precluded from making the most of the facts potentially at his disposal or of legal research. If, for example, defense counsel does not learn until late in the trial that two conspiracies are involved rather than one, he faces the problem of belatedly mustering his proofs or of having to re-call witnesses - at best inefficient procedures making for disjointed testimony.[95]

2. Reduced Costs

4.63 The introduction of formal rules to regulate pre-trial disclosure by the prosecution has the potential to reduce the financial costs associated with the administration of criminal justice. Considerable savings may flow from an increase in

efficiency. Unnecessary adjournments of cases may be eliminated. Experience elsewhere has shown that enforced pre-trial disclosure has reduced the number of cases ultimately going to trial.[96] In Canada experiments with pre-trial hearings showed a significant reduction in the number of witnesses required to give evidence at the trial.[97] Identifying those witnesses who are not required for the trial saves court time and witness expenses. It eliminates the inconvenience caused to witnesses who are unnecessarily called. We shall say more about cost when we consider the problems associated with compulsory pre-trial disclosure by the prosecution.

3. Reduction of Delay

4.64 There is a greater likelihood that the real issues between the parties will be made clear where the prosecution must disclose its case before the committal hearing. In some cases, and this has been the experience elsewhere,[98] it can be expected that a case which would have been contested in court will be terminated either by a plea of guilty or by an abandonment of the prosecution. The effect of disclosure in the magistrates' courts has been summarised:

> It has been the universal experience of courts that, where disclosure has been introduced (particularly when combined with some form of pre-trial review), it has proved a valuable aid to the court administration in listing cases for trial and has facilitated the early settlement of cases. Indeed, the bolder and more complete the disclosure that has been provided, the higher the levels of case settlement have proved to be. This is a direct result of the defence being properly acquainted with the nature of the prosecution case.[99]

One may reasonably expect that those trials which do proceed will be shorter. If there are fewer contested committals, and fewer and shorter trials, there will naturally be less congestion in the criminal courts. The desirable objective of reducing delays will be obtained without prejudicing the essential features of fairness and justice. Indeed, the introduction of pre-trial disclosure will contribute to maintaining these features as characteristics of the criminal justice system.

4. Fairness and Justice

4.65 Ideally, the judge and jury in a criminal trial should reach decisions in the light of all the relevant and admissible evidence available. Where relevant and credible evidence is not put before the jury by the prosecution, the accused person may be deprived of a fair trial. Any obligation which is imposed upon the prosecution to disclose its case in advance should include an obligation to disclose relevant evidence which it does not propose to call at the trial. Since the real benefit of disclosure may be to provide the accused person with important material to assist in the effective preparation of the case for trial, the obligation to disclose should cover all relevant information in the possession of the prosecution irrespective of its admissibility.

4.66 There is an additional reason why fairness requires the prosecution to disclose evidence upon which it does not intend to rely, particularly where the evidence is favourable to the accused person. The prosecution usually enjoys a considerable

advantage over the defence in the investigation of the circumstances of the crime. In addition to greater financial resources, the prosecution has available to it the expertise of the police force and forensic and scientific experts. Disclosure to the defence of all relevant evidence accumulated during the course of an investigation will to some extent redress the balance of advantage enjoyed by the prosecution in this area. The accused person should generally be entitled to know the results of investigations carried out by the extensive network of investigative agencies available to the prosecution.

B. Arguments Against Compulsory Pre-trial Disclosure

1. Increased Costs

4.67 Clearly there would be some additional costs associated with the introduction of a formal system of pre-trial disclosure in New South Wales. There would be preparation costs involved in photocopying statements and reports and photographing exhibits. These costs may not be very significant in the average case but could be considerable in a complex matter. Where the process is coupled with pre-trial hearings, there may be the need for extra judicial resources but the cost of those resources should be recognised as largely a result of the introduction of pre-trial hearings, rather than of compulsory disclosure by the prosecution. It is difficult to estimate the potential costs of compulsory disclosure, partly because the extent of informal disclosure is difficult to quantify. Any reasonable estimate must be balanced against

the potential savings discussed in para 4.63 above as well as the fact that the criminal justice system will have gained in fairness and efficiency.

2. Reciprocity Between the Prosecution and the Accused Person

4.68 A process which calls only upon the prosecution to disclose its case may result in the defence enjoying a considerable advantage at the trial. It is arguable that it would be fairer to require both the prosecution and the defence to disclose their respective cases prior to trial. A system of mutual disclosure would enable both parties to prepare their cases for trial in a more efficient and informed manner. Efficiency would be further enhanced if, during pre-trial hearings, the areas of dispute between the parties were defined and limited. On its face, a system of this kind has considerable appeal.

4.69 However, proposals for mutual disclosure by the prosecution and the defence raise difficult problems. It is fundamental that the accused person has no obligation to assist the prosecution to prove his or her guilt. Procedural rules requiring disclosure by the defence may undermine the presumption of innocence and the rights which flow from it. Compulsory disclosure contravenes the accused person's traditional right to silence and the right not to answer incriminating questions. It is difficult to define a process requiring disclosure by the defence which does not compromise the accused person's rights. Nevertheless, the Commission is

addressing this problem and in Chapter 5 at paras 5.42-5.57 we discuss procedures which will encourage pre-trial disclosure but at the same time respect the traditional safeguards afforded to the accused person.

3. Facilitating Interference with the Administration of Justice

4.70 The major argument against a system of mandatory pre-trial disclosure by the prosecution is that there may be unwarranted interference in the administration of justice. It has been asserted that disclosure of the prosecution's case will make it easier for the accused person to fabricate defences, procure perjured testimony and intimidate witnesses. In addition, it has been argued that people may be reluctant to assist the police where they know that their identities will be revealed to the accused person. The latter argument is unsound in the case of witnesses since the very nature of the criminal process requires that the witnesses for the prosecution give their evidence in the presence of the accused person. However, the argument may have some strength in the case of people giving information to the police. Although the anonymity of informants is more likely to be protected under the current rules governing disclosure by the prosecution, we consider that there should be some flexibility in the rules providing for disclosure of this kind of information.[100]

4.71 The risk of interference in the administration of justice can be minimised by providing for adequate control of the process. It should be noted that it is an offence in New South Wales to procure a person to give perjured evidence or to

interfere with witnesses.[101] A common feature of the disclosure procedures operating in the jurisdictions examined in Part III is that certain categories of information are exempt from disclosure.[102] In most of these jurisdictions the court has the power to restrict or deny disclosure which could lead to the intimidation, harassment or abuse of witnesses or others involved in the prosecution. A judicial discretion to deny disclosure usually exists where disclosure could lead to physical harm, threats, bribes, economic reprisals or other forms of intimidation of prosecution witnesses or their families. Provisions of this kind are designed to substantially eliminate any danger to the proper administration of justice.

VI. THE SCOPE FOR REFORM

4.72 There are five models for pre-trial disclosure by the prosecution:

* informal negotiations (found in all jurisdictions);
* rules of professional ethics for prosecutors (found in many common law jurisdictions);
* prosecutorial guidelines (found in England);
* rules of court (found in the New South Wales Supreme Court (Summary Jurisdiction) Act 1967); and
* legal requirements (found in the United States and in Canadian proposals).

Many jurisdictions have systems based on more than one of these models. In some, the procedures for pre-trial disclosure are combined with procedures for pre-trial conferences, a combination which the Commission favours.

1. Informal Negotiations

4.73 We have already noted that information may be communicated by the prosecution to the defence in the course of informal discussions. Informal negotiations are entirely unregulated (apart from rules of professional ethics) and their effectiveness depends largely on idiosyncratic factors such as the relationship between the particular prosecutor and the lawyer for the accused person. They do not by themselves provide a sufficient safeguard against the injustice which can be caused by failure to disclose the prosecution case, nor do they promote the desirable feature of uniformity in the criminal justice system.

2. Rules of Professional Ethics

4.74 In some jurisdictions, professional associations which regulate the conduct of lawyers have included rules on criminal prosecutions in their codes of conduct. These rules may stipulate duties to be followed by the prosecution in the conduct of criminal cases. However, a breach of the rules does not normally have a legal consequence but may result in a prosecutor being required to justify his or her conduct to the professional association. The association will usually have a limited range of penalties that can be imposed on a lawyer who breaches the code of ethics. Courts in some jurisdictions have expressed views as to the procedure that ought to be followed by prosecutors conducting criminal proceedings. As stated earlier, such decisions do not often establish legal requirements, but merely indicate desirable practices which

prosecutors ought to follow to ensure a fair trial. These decisions may supplement the codes of conduct enforced by professional associations. In the Commission's opinion, this option standing alone is the least effective and hence the least desirable option for ensuring adequate pre-trial disclosure.

3. Prosecutorial Guidelines

4.75 One initiative which has been taken in some jurisdictions is to develop guidelines to govern the exercise of the prosecution's discretion in relation to disclosure. These guidelines may be developed and authorised by the relevant authority responsible for criminal prosecutions. In Australia, it has been noted that the prosecution policy of the Commonwealth makes no reference to disclosure procedures. In England, the Attorney-General has issued guidelines for disclosure by the prosecution. They are a comprehensive statement of the relevant principles which must be applied by prosecutors. Whilst the guidelines approach has the attraction of flexibility, guidelines lack the force of law. They are purely permissive and administrative and do not establish rights enforceable by the accused person in order to enable discovery of the prosecution's case. We also consider that this approach is inadequate.

4. Rules of Court

4.76 The courts could be given the power to make rules of court governing pre-trial disclosure. One available model is the power given to the civil courts to make rules to regulate procedure in matters before the court, including rules about

discovery and interrogatories. A party to a civil action who is dissatisfied with another party's disclosure is at liberty to apply to the court for an appropriate order. The respective rules committees of the New South Wales Supreme and District Courts already have a wide range of rule-making powers which may be used to provide criminal courts with a discretion to make orders relating to disclosure.

4.77 A system of this kind has been established for summary criminal trials conducted by the Supreme Court of New South Wales. A similar system is under consideration by the District Court of New South Wales. The rules established under the Supreme Court (Summary Jurisdiction) Act 1967 permit a judge to make directions on his or her own motion, or on the application of a party, for the efficient and just disposal of the case. The judge may direct the prosecution:

* to give better particulars;
* to furnish a list of prosecution witnesses to the defence;
* to provide the statements of prosecution witnesses or, if a witness has not made a statement, a summary of the evidence the witness might give;
* to produce a list of witnesses whom the prosecution does not intend to call in its case;
* to produce a list of, and copies of, documents to be submitted at the hearing; and
* to permit the inspection of documents and property.

4.78 There is one problem with relying on rules of court. An application could not be made to the court of trial prior to that court gaining jurisdiction over the case. At present a

court does not have jurisdiction until the indictment is presented by the prosecution which, according to current procedure, would normally occur on the day of trial. In Chapter 3 we tentatively proposed that the higher court should obtain jurisdiction as soon as the accused person is committed for trial or sentence. Even if this proposal were adopted, the court would only be able to make orders about disclosure after committal. We have already stated that, in our view, disclosure should occur as early as possible. An approach based upon rules of court is therefore not entirely satisfactory. Nevertheless, the Commission believes that the powers discussed in this section should be given to all courts which hear criminal cases. They would provide a useful adjunct to other methods of disclosure by the prosecution.

5. Legal Requirements

4.79 The final model mentioned, and the one most favoured by the Commission at this stage, is to regulate prosecutorial disclosure by legislation. Such legislation would give accused people enforceable rights to disclosure by the prosecution subject to certain exceptions. The exceptions would specify certain classes of material which would be, at the discretion of the prosecution, exempt from disclosure. This discretion could be subject to review by the courts. If necessary, material which is absolutely exempt from disclosure could be specified, in which case the courts would have no power to order disclosure. One function of legislation of this kind would be to specify how the courts are to exercise their power to control pre-trial disclosure.

6. The Watson Draft Commonwealth Criminal Code

4.80 Mr Justice Watson, a senior judge of the Family Court of Australia, has prepared a draft Criminal Code for the Commonwealth.[103] The notable features of the proposed provisions for pre-trial examination and discovery in the Code[104] are that:

* the accused person must apply to the court for disclosure by the prosecution;
* the scheme is limited to offences triable on indictment and indictable offences triable summarily with the consent of the accused person;
* the scheme is primarily intended for use in Magistrates' Courts in either committal proceedings or summary trials;
* there is provision allowing for reciprocal disclosure by the defence of "special defences"; and
* the procedure proposed gives wide discretionary powers to the magistrate to make consequential orders which might limit the expense and simplify the conduct of the trial proceedings.

VII. TENTATIVE PROPOSALS FOR REFORM

4.81 The Commission believes that the prosecution should be obliged to disclose its case and all relevant material to the defence before trial. At this stage, we prefer a combination of the models based upon "legal requirements" and "rules of court". In our view, a system of pre-trial disclosure by the prosecution should be established by appropriate legislation which would govern the general nature of the rules of court while leaving the specific details for the courts to determine.

4.82 We have framed our tentative recommendations as responses to the following questions:

* If legislation is to regulate pre-trial disclosure by the prosecution, what should that legislation specify?
* What material should be disclosed?
* What material should be exempt from disclosure?
* When should disclosure be made?
* How should pre-trial disclosure requirements be enforced?
* What may be some of the problems encountered in implementing such legislation?

1. Scope of the Legislation

4.83 The Commission considers that the legislation should specify the following:

* the categories of evidence that must be disclosed;
* the categories of evidence that can be exempt from disclosure;
* when disclosure should take place; and
* the court's powers to control the disclosure process through "protective" and "compliance" orders.

2. Material to be Disclosed

4.84 Subject to the exemptions listed in para 4.85, the Commission considers that the prosecution ought to be required to disclose the following information to the accused person:

* a list of names and addresses of all witnesses who can give relevant evidence including those witnesses whom the prosecution does not intend to call at trial;

* copies of statements of all witnesses who can give relevant evidence including those witnesses the prosecution does not intend to call at trial, or, where a witness has not made prior statements, a summary of the evidence the witness is expected to give at the trial;

* copies of any statements made by the accused person or his or her co-accused to the police;

* copies of the criminal records of the accused person, any co-accused and all witnesses;

* copies of all relevant documents or, where this is not practical, information permitting inspection of such documents;

* sufficient information to enable the inspection of potential exhibits and any items of real or personal property relevant to the trial of the accused person;

* copies of reports of any relevant medical examinations, scientific experiments or other tests;

* details of any electronic surveillance and copies of transcripts of any intercepted conversations, or, where this is not practicable, sufficient information to enable the defence to hear or view such recordings; and

* details of any indemnity given to a witness intended to be called by the prosecution.

This is a guide to the proposed extent of disclosure. It is not intended to be exhaustive and should be supplemented by a provision which would provide for disclosure of any other relevant information or thing.

3. Material Exempt From Disclosure

4.85 The classes of evidence which may be exempt from disclosure are not closed. Whether or not an order for disclosure should be made may depend more on the circumstances of the particular case than on the inherent nature of the material in question. In overseas jurisdictions, the following material has been declared to be exempt:

* internal working records of the prosecuting agency;

* information revealing the identity of a police informant;

* material which is a potential risk to national security;

* material which may lead to the intimidation of witnesses;

* information protected by a legally recognised confidential relationship;

* information about a secret or unusual form of investigation or crime detection; and

* statements of private delicacy to the maker.

However, the fact of the existence of such material and the basis of the exemption claimed should be disclosed.

4.86 The Commission's tentative view is that the courts should be given a general discretion to order that any information should not be disclosed to the accused person where disclosure is not in the public interest.[105] The range of this discretion should cover those situations where disclosure could lead to intimidation of a witness, a breach of confidence, the revelation of sensitive information, or where the disclosure may amount to an abuse of the administration of justice. Since the relevant categories are not capable of precise or exhaustive definition, it is, in our view, necessary to provide a general discretion to enable the courts to do justice in a particular case. The question that must be determined is whether a general discretion alone is sufficient, or whether there should be specific categories of exemption together with a general discretion. Whatever approach is taken, the legislation may need to specify the criteria to be referred to when this discretion is exercised.

4. Time of Disclosure

4.87 Ideally, disclosure should occur before the accused person is called upon to make any decisive step toward the disposition of the case. We propose that disclosure should be made by the prosecution either before the accused person is called upon to elect the mode of the trial or to plead to the charge, whichever first occurs. Whatever time is ultimately chosen for disclosure, it is important to allow for a continuing right to disclosure. Where a request or order for disclosure has been made, the obligation to disclose should attach to any additional evidence discovered after the request or order has been made. The prosecution's obligation should be to give prompt notification of the additional material to the defence and to the court. This will entitle the defence to discover evidence which comes to light after the initial requirement for disclosure is complied with.

5. Enforcement of Disclosure Requirements

4.88 The Commission's tentative view is that the disclosure process should be monitored by the courts. The courts should be given various powers to enforce compliance with the disclosure provisions. In some jurisdictions the courts are given the power to make "protective" orders denying, restricting or delaying the disclosure of certain evidence. This power will enable the court to order the disclosure of the evidence with the exception of any sensitive material, where it is considered that part of certain evidence should be withheld. In those jurisdictions the court is also given the

power to make "compliance" orders, that is to say, the court can order a party who has not complied with the disclosure requirements to do so. The court may also have the power to prohibit the prosecution from introducing at trial the evidence which has not been disclosed. Finally, the court may have the power to order that the charge against the accused person be dismissed. The Commission's tentative view is that similar powers should be given to courts in New South Wales.

VIII. SUMMARY OF TENTATIVE PROPOSALS

1. Complete Disclosure by the Prosecution

4.89 If there is a decision to prosecute, the prosecuting authority should immediately file in court a copy of the statements of all persons who may be able to give relevant testimony, together with a copy of relevant documentary exhibits and information regarding access to material exhibits, indicating those intended to be called in the prosecution case at the trial. Unless the court orders that the statements or the names of witnesses be withheld or that access to exhibits be restricted on the ground that it is in the public interest to do so, or unless the accused person makes an informed and deliberate waiver of the right to disclosure, the prospective court of trial should ensure that the accused person is provided with a copy of all the statements which have been filed, together with a copy of intended documentary exhibits and information regarding access to material exhibits.

2. Disclosure by the Prosecution in Summary Proceedings

4.90 Where the prosecuting authority or its delegate has nominated the Local Court as the prospective court of trial, the prosecuting authority should be required, as it is under the current law, to provide the accused person with a written statement of the charge. It should, in addition, be required to give the accused person a brief outline of the facts alleged in the form which is currently given to the police prosecutor by the investigating police for the purpose of a plea of guilty. Where the accused person makes a request to the court for complete disclosure of the prosecution case, the statements of all witnesses whom the prosecution proposes to call should be filed in court, together with any other relevant information or materials necessary to make full disclosure. These statements, materials, and information should then be provided to the accused person unless the prosecution can satisfy the court that they should be withheld, in whole or in part, in the public interest.

3. Continuing Disclosure by the Prosecution

4.91 In addition to the obligation established by the procedures described above, there should be a continuing obligation upon the prosecuting authority to disclose to the accused person all relevant information known to it or material in its possession, irrespective of its admissibility at trial and whether it is intended to be called at the trial or not. This will include statements of witnesses obtained after the court is first notified of the decision to prosecute. The

court should have the power to ensure that this obligation has been fulfilled by making appropriate inquiries of the prosecuting authority.

4. Verification of Disclosure by the Prosecution

4.92 The prosecuting authority should be required to declare in writing at the commencement of the trial proceedings, or before this time if the court so orders, that all relevant materials in the possession of the prosecution have been disclosed to the defence. The ability of the prosecuting authority to determine whether material is relevant will be affected by the extent to which the defence has made disclosure of its own case.

5. Sanctions for Failure to Disclose

4.93 If the prosecuting authority does not make the disclosure required, the court may of its own initiative or on the application of the accused person make one or more of the following types of order:

(i) an order requiring the prosecuting authority to comply with its obligations regarding disclosure;

(ii) an order granting the accused person an adjournment;

(iii) an order prohibiting the prosecuting authority from calling specific evidence at the trial;

(iv) an order staying or dismissing the proceedings against the accused person.

6. Exemptions From Disclosure

4.94 The court should have the power to order that any evidence or other material may be exempted from provisions relating to disclosure by the prosecution. The legislation which establishes the power to make such an order should include the specific grounds on which it might be made but the court should also have a general discretion to make such an order on any other ground which appears to be appropriate in the circumstances. An order of this kind may be made by the court of its own motion, on the application of the prosecuting authority or on the application of any person who can satisfy the court that there is a legitimate ground for ordering that the evidence should not be disclosed to the accused person.

7. Desirability of Reciprocal Disclosure

4.95 In order for the prosecuting authority and the courts to determine whether evidence is relevant so that it should be disclosed under the proposed rules, it may be necessary for the prosecuting authority to be provided with additional information about the case to be presented by the defence. A system of pre-trial disclosure is much more likely to be effective where there is reciprocal disclosure between the prosecuting authority and the accused person.

8. Statements of the Accused Person to be in Writing

4.96 Where the prosecution proposes to call evidence of any statement alleged to have been made by the accused person, the terms of that statement should be reduced to writing or some

other reliable record made of the statement and given to the accused person. Such a rule would avoid the accused person being met with evidence of an alleged confession or incriminating statement at a late stage of the proceedings. Where the existence of all such evidence is disclosed in advance of the trial, it is less likely that the trial will be disrupted or prolonged by unexpected disputes over the admissibility or reliability of evidence of this kind.

9. Witness Indemnities to be Disclosed

4.97 The prosecuting authority should be required to disclose to the defence and to the judge at trial, prior to cross-examination by the defence, and in detail, any favouritism given or promises of favourable treatment made to prosecution witnesses. This disclosure may be made in writing or by the prosecution eliciting the relevant evidence from the witness in examination in chief.[106]

10. Investigating Police to Make Disclosure to the Prosecuting Authority

4.98 Imposing obligations of disclosure upon the prosecuting authority and requiring verification that disclosure has been complete will be of minimal value in ensuring fairness in the prosecution process if there is no corresponding obligation upon the investigating police to disclose relevant information to the prosecuting authority. Accordingly, the investigating police should be obliged by rules of law or practice to make full disclosure to the prosecuting authority of the relevant information in their possession.

11. Criminal Records of Prosecution Witnesses

4.99 The rules relating to pre-trial disclosure in criminal prosecutions should include an obligation on the prosecuting authority to disclose to the accused person the record of criminal convictions of witnesses whom the prosecution intends to call. Bearing in mind that this gives rise to a serious issue regarding protection of individual privacy, we suggest that the criminal records of prosecution witnesses should only be supplied by the prosecuting authority where the defence makes a request for them.

12. Disclosure to an Unrepresented Accused Person

4.100 The rules relating to disclosure should not vary according to whether the accused person is legally represented. The entitlement of an unrepresented accused person to disclosure should be given some practical force by requiring that the court before whom the accused person appears at a hearing before the commencement of the trial inform the accused person of his or her rights regarding disclosure by the prosecution. The fact that an accused person is unrepresented is a relevant matter which should be capable of being taken into account by a court in determining whether disclosure of particular information should be withheld in the public interest.

Footnotes

1. G B Elkington "Discovery Upon Indictment in New South Wales" (1980) 4 Criminal Law Journal 4; W B Lane "Prosecutors: Non-disclosure of Exculpatory Evidence" (1981) 5 Criminal Law Journal 251; J L Glissan "Limitations and Controls on the Exercise by Prosecutors of their Discretion" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985) at 105; I G Campbell "Discovery in Criminal Trials": Prosecutorial Duties and Judicial Remedies" (1984) 13 University of Queensland Law Journal 154.

2. See eg Criminal Law and Penal Methods Reform Committee of South Australia Court Procedure and Evidence (Third Report, Adelaide, 1975) at 112-114.

3. Report of Board of Inquiry into Allegations Against Members of the Victorian Police Force ("The Beach Report") (Melbourne 1978) Vol 1 at 115.

4. Commonwealth Director of Public Prosecutions Prosecution Policy of the Commonwealth, Guidelines for the making of decisions in the prosecution process (AGPS Canberra January 1986).

5. Uniform Law Conference of Canada, Proceedings of the 67th Annual General Meeting, Halifax, Nova Scotia, August 1985 at 38, 45 and 48-49.

6. Code of Conduct for the Bar of England and Wales, reproduced in Archbold Criminal Pleading Evidence and Practice (41st ed 1982) Appendix C at 2140-2141. See also Editorial "The Duties of a Prosecutor" (1981) 145 Justice of the Peace 511, 29 August 1981.

7. Whitehorn v The Queen (1983) 152 CLR 657 at 663-664.

8. New South Wales Bar Council Rules Rule 20.

9. In June 1985 the Commission conducted a survey of Crown Prosecutors in New South Wales which contained a series of questions regarding disclosure. The Commission wishes to record its gratitude to the Crown Prosecutors who participated in the survey for their assistance.

10. See generally I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985), being a record of a seminar conducted at the Institute in November 1984.

11. Maddison v Goldrick [1976] 1 NSWLR 651. See the comments of Samuels JA at 668:

> But, over recent years, the endeavours of law reformers, in most cases supported by the judges, have been directed to disposing of the last vestiges of trial by ambush, and to enabling each side to start the contest with the greatest possible knowledge of what is going to be alleged against him.

12. Justices Act 1902 ss41, 78.

13. New South Wales Police Commissioner's Instructions, Instruction No 31, s11(8). Watson and Purnell Criminal Law in New South Wales Volume 1: Indictable Offences Part A para [1187].

14. The reforms resulted from the amendment of the Justices Act 1902 by the Justices (Procedures) Further Amendment Act 1983 Schedule 1. See now Justices Act 1902 s48-48I.

15. To date, information is not available on the frequency of paper committals. The NSW Bureau of Crime Statistics is in the process of collecting statistics on paper committals used from the beginning of 1985 and the Commission will be obtaining the relevant empirical data in due course.

16. I G Campbell "Discovery in Criminal Trials: Prosecutorial Duties and Judicial Remedies" (1984) 13 University of Queensland Law Journal 154.

17. Justices Act 1902 s41.

18. For further discussion of these criteria for committal, see Wentworth v Rogers (1984) 2 NSWLR 422; Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182. See also Chapter 7 of this Discussion Paper at paras 7.26-7.27

19. R v Greenslade (1870) 11 Cox CC 412 at 413; R v Pearson [1953] QWN 18 at 20; R v Smith (1872) 11 SCR (NSW) 69 at 70-71.

20. Moss v Brown [1979] 1 NSWLR 114.

21. Authority for such an order derives from the combined operation of the Justices Act 1902 s26 and the Evidence Act 1898 s12. See Maddison v Goldrick [1976] 1 NSWLR 651; Attorney General for New South Wales and Another v Findlay and Another (1976) 50 ALJR 637.

22. Mahadeo v R [1936] 2 All ER 813 at 816-817. See also Seneviratne v The King [1936] 3 All ER 36.

23. R v Charlton [1972] VR 758 at 760-762.

24. Cain v Glass (No 2) [1985] 3 NSWLR 230 applying D v National Society for the Prevention of Cruelty to Children [1978] AC 171 at 218.

25. Justices Act 1902 s40.

26. See the policy of the New South Wales Legal Aid Commission discussed in Chapter 7 of this Discussion Paper at paras 7.48-7.49.

27. In Re Van Beelen (1974) 9 SASR 163 at 249.

28. Ibid. See also The Queen v Perry (No 1) (1981) 27 SASR 166; The Queen v Harry ex parte Eastway (1985) 39 SASR 203.

29. Lawless v The Queen (1979) 53 ALJR 733. See also Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279; Richardson v The Queen (1974) 131 CLR 116.

30. Lawless v The Queen (1979) 53 ALJR 733 at 736 per Barwick CJ and at 739 per Stephen J. Craig v The King (1933) 49 CLR 429 at 452 per Evatt, McTiernan JJ.

31. Id at 741.

32. Id at 742. See also Re Ratten [1974] VR 201 at 214 per Smith J.

33. Richardson v The Queen (1974) 131 CLR 116 at 121-122.

34. Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279; Richardson v The Queen (1974) 131 CLR 116.

35. Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279 at 292 per Fullagar J; The Queen v Apostiiides (1984) 154 CLR 563 at 575; R v Evans [1964] VR 717 at 719; R v Lucas [1973] VR 693; R v Eastwood and Boland [1973] VR 709.

36. Titheradge v The King (1917) 24 CLR 107; The Queen v Apostilides (1984) 154 CLR 563 at 575-577; Richardson v The Queen (1974) 131 CLR 116 at 122; Whitehorn v The Queen (1983) 152 CLR 657 at 682-684. Cf Regina v Damic [1982] 2 NSWLR 750.

37. Richardson v The Queen (1974) 131 CLR 116 at 121-122; Whitehorn v The Queen (1983) 152 CLR 657; Apostilides v The Queen (1984) 154 CLR 563 at 577. See also Mr Justice I F Sheppard "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?" (1982) 56 Australian Law Journal 234. For England see R v Oliva [1965] 3 All ER 116; R v Cleghorn [1967] 2 QB 584.

38. Supreme Court (Summary Jurisdiction) Act 1967 s29.

39. For example the Petroleum (Submerged Lands) Act 1967, the Companies Act 1961 and the Clean Air Act 1961.

40. Supreme Court Rules 1970, Part 75 Rule 11.

41. Id Rule 11(4). See also para 9.17.

42. Mark Richardson "Disclosure by the Prosecution in Criminal Proceedings" (unpublished Background Paper, 1985).

43. Federal Rules of Criminal Procedure (1975) Rule 16(a)(1).

44. Federal Rules of Criminal Procedure (1975) Rule 16(a)(2).

45. Federal Rules of Criminal Procedure (1975) Rules 16(2) and 26 (2)(a)(b) and (c).

46. United States v Debrow 346 US 374 (1953); Russell v United States 369 US 749 (1962).

47. Brady v Maryland 373 US 83 (1963). See also Moore v Illinois 408 US 786 (1972); Clewis v Texas 386 US 707 (1967).

48. United States v Agurs 427 US 97 (1976). See also "The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence in the Absence of a Focused Request from the Defense - United States v Agurs" (1976) 14 American Criminal Law Review 319.

49. Id at 109-110.

50. Originally the Jencks Act 1957, following the Supreme Court decision in Jencks v United States 353 US 657 (1957) now embodied in Federal Rules of Criminal Procedure (1980) Rule 26.

51. R v Bryant and Dickson (1946) 31 Cr App R 146; Dallison v Caffery [1965] 1 QB 348.

52. Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (1981) at 178 para 8.14.

53. Report of the Working Party on Disclosure of Information in Trials on Indictment (November 1979).

54. Attorney General's guidelines: "Disclosure of Information to the Defence in Cases to be Tried on Indictment" (1982) 74 Cr App R 302; (1982) 146 Justice of the Peace 34.

55. Id clauses 2, 3(a), 3(b).

56. Id clause 1 at 302.

57. Id clause 6 at 303.

58. Id clause 6(v) at 303. See R v Rankine [1986] 2 All ER 566; Marks v Beyfus (1890) 25 QBD 494.

59. Id clauses 7-9 and 13-15 at 304-305.

60. Magistrates' Courts (Advance Information) Rules 1985 implementing the provisions of the Criminal Law Act 1977 s48.

61. "Advance Disclosure - The Rules in Practice" (1985) 149 Justice of the Peace 499. See also J Baldwin "Research on Advance Disclosure in Magistrates' Courts" (1985) 149 Justice of the Peace 179.

62. (1985) 149 Justice of the Peace 499.

63. Id at 500.

64. J N Spencer "Advance Disclosure - the Effect of the Provisions" (1986) 150 Justice of the Peace 356 at 357.

65. Law Reform Commission of Canada, Discovery in Criminal Cases (Working Paper No 4 1974).

66. Law Reform Commission of Canada, Disclosure by the Prosecution (Report No 22 1984).

67. Id at 3.

68. Id at 13.

69. Id at 13-14 and at 22-27.

70. Id at 155 and 21.

71. Id at 14 and at 28-29.

72. Id at 15.

73. Uniform Law Conference of Canada, Proceedings of the 66th Annual General Meeting, Calgary, Alberta, August 1984 at 38.

74. Uniform Law Conference of Canada, Proceedings of the 67th Annual General Meeting, Halifax, Nova Scotia, August 1985 at 38, 45 and 48-49.

75. See above paras 4.49-4.50.

76. See note 74 at 48. The Commission gratefully acknowledges the assistance of Josseline Bujold, Counsel in the Department of Justice, Canada, in providing this information.

77. A D Gold "Trial - Production to the Defence" (1984-85) 27 Criminal Law Quarterly 405 dealing with R v Doiron, a judgment of the Court of Appeal of Nova Scotia.

78. Criminal Procedure (Scotland) Act 1975 ch 21 s70. For a description of the Scottish system of prosecution, see J Toombs "Prosecution - In the Public Interest?" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985) at 11.

79. McBain v Chricton [1961] SC(J) 25.

80. Smith v H M Advocate [1952] SC(J) 66.

81. Committee on Criminal Procedure in Scotland (the Thomson Committee) Criminal Procedure in Scotland (Second Report) (Edinburgh, 1975) Cmnd 6218 at 92.

82. Practice Direction (1980) 25 Journal of the Law Society of Scotland 132.

83. Consultative Paper on the Disclosure of Crown Precognitions and Police Statements to the Defence (1983).

84. Id at 23.

85. R v Thomas (No 2) [1974] 1 NZLR 658.

86. See "Disclosure to a Defendant in Criminal Proceedings of Information Held by the Prosecution" Report of the Public Issues Committee, Auckland District Law Society, April 1986. The contents of this report which deal in detail with Wickliff's case are summarised in Commonwealth Law Bulletin, July 1986 at 797-802.

87. R v Church (1974) 2 NZLR 116; R v Mason [1975] 2 NZLR 289 per Moller J; [1976] 2 NZLR 122, Court of Appeal. See generally M W Doyle "Criminal Discovery in New Zealand" (1976) 7 New Zealand University Law Review at 23.

88. See Commissioner of Police v Ombudsman [1985] 1 NZLR 578; R v Connell [1985] 2 NZLR 233.

89. See note 86.

90. See Commonwealth Law Bulletin, July 1986 at 802.

91. New Zealand, Royal Commission on the Courts (1978) at 319.

92. See Whitehorn v The Queen (1983) 152 CLR 657; Lawless v The Queen (1979) ALJR 733.

93. See eg Ratten v The Queen (1974) 131 CLR 510; Gallagher v The Queen (1986) 60 ALJR 404.

94. See also J Waterford, "The High Cost of a Ticket in the High Court Appeal Lottery" Canberra Times 24 November 1985; R v Liberato (1985) 61 ALR 623.

95. Abraham S Goldstein "The Balance of Advantage in Criminal Procedure" (1959-60) 69 Yale Law Journal 1149 at 1179. See also G Williams "Proposals to Expedite Criminal Trials" [1959] Criminal Law Review 82.

96. J A Osborne "Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience" Commonwealth Secretariat, London 1980 at 49 citing Law Reform Commission of Canada "Report on Criminal Procedure Part I: Miscellaneous Amendments" (Ottawa, 1978).

97. Id at 48-49.

98. See note 96.

99. J Baldwin "Research on Advance Disclosure in Magistrate's Courts" 149 Justice of the Peace 179 at 181. Cf J N Spencer "Advance Disclosure - The Effect of the Provisions" 150 Justice of the Peace at 356.

100. Cain v Glass (No 2) [1985] 3 NSWLR 230, Court of Appeal, Supreme Court of New South Wales, Kirby P, Priestley JA, McHugh JA. See also note "A Prosecutor's Duty to Disclose Promises of Favourable Treatment Made to Witnesses for the Prosecution" (1981) 94 Harvard Law Review 887.

101. Crimes Act 1900 ss334, 336.

102. It is common for pre-trial disclosure rules to exempt evidence that relates to national security, work product and police informants. Cf Canadian Law Reform Commission proposals at para 4.50.

103. The Honourable R S Watson "Review of the Criminal Law of the Commonwealth" presented to the Attorney-General of the Commonwealth on 14 July 1986.

104. Draft Criminal Code in Watson note 103 s282.

105. See Cain v Glass (No 2) [1985] 3 NSWLR 230 at 233-234 per Kirby P and 246-250 per McHugh JA; Alister v The Queen (1984) 58 ALJR 97; (1984) 50 ALR 41; (1983-1984) 154 CLR 404.

106. P Byrne "Granting Immunity from Prosecution" in I Potas (ed), note 10 at 155, 168-169.

Chapter 5

Disclosure by the Defence

I. THE CURRENT LAW AND PRACTICE

A. The General Position

5.1 The present law regarding pre-trial disclosure by the defence in criminal cases can be very simply stated. Apart from one specific obligation imposed by statute, there is no requirement for an accused person to give advance notice of his or her defence. The absence of a general requirement for disclosure by the defence stems from the adversarial nature of the proceedings and three well established and closely related principles of criminal law. Firstly, the accused person is presumed to be innocent. Secondly, the prosecution at all times bears the onus of proving the guilt of the accused person. Thirdly, the accused person has a right to remain silent and has no obligation to provide the prosecution with any material which might assist it. In general, proof of all the elements of the offence should rebut all defences other than those where the accused person bears the onus of proof as, for example, the defence of diminished responsibility.

B. Disclosure of Alibi

5.2 Legislation requiring disclosure of alibi defences is the only exception to the general rule that the accused person is not obliged to give information to the the prosecution.[1] The relevant statutory provision in New South Wales is s405A of the Crimes Act 1900 which was enacted in 1974. This section,

which only applies to cases dealt with on indictment, imposes a duty on the accused person to give notice (to the Solicitor for Public Prosecutions within 10 days of the date of committal) of the names and addresses of witnesses who are to give evidence of an alibi, together with certain particulars of the evidence proposed to be called. If this notice is not given, the court may refuse to admit alibi evidence which is sought to be introduced at the trial by the defence.[2] This power is rarely used. We return to the subject of the alibi rule at paras 5.38-5.41.

C. Currently Available Means of Disclosure by the Defence

5.3 Notwithstanding the legal position outlined above, disclosure by the defence can and does occur on a voluntary and informal basis at the following stages of the criminal process:

* The participation of the accused person in the police investigation and interrogation may result in information about an intended defence being given to the prosecution.

* Informal pre-trial negotiations between the prosecution and the lawyer for the accused person may involve a degree of disclosure of the accused person's case.

* The manner of the conduct of committal proceedings and, in particular, the matters to which questions are directed by the defence in cross-examination, may clearly reveal the "line" the defence will take.

* The defence may disclose statements by experts whom the defence proposes to call as witnesses during the course of an exchange of such statements with the prosecution. In particular, the reports of psychiatrists where mental illness is an issue are frequently exchanged.

* Undertakings may be given by the lawyer for the accused person regarding the nature of the defence, factual matters which are not in issue or the making of formal admissions. Each of these involves disclosure of part of the defence case.

The last three categories are only relevant to cases dealt with in the higher courts.

5.4 At present, in New South Wales, it is almost universal practice for the lawyer for the accused person to reveal to the prosecution the nature of any proposed defence based on psychiatric evidence, such as insanity or diminished responsibility. Similarly, reports from scientific or medical experts are usually exchanged. If this is not done, and the prosecution is surprised by the defence calling a doctor or other expert, the court will invariably grant the prosecution's application for an adjournment to call evidence in reply.

5.5 The significance of these informal practices is frequently misunderstood or overlooked. The extent of the issues between the parties may be substantially diminished. The charge against the accused person may be reduced and prosecutions may even be abandoned as a result of informal disclosure by the defence. Conversely, in many cases, the exchange of information between the prosecution and the defence may result in the most absolute form of disclosure by the defence, a plea of guilty. However, there are no written rules which govern these practices. Controls over their operation cannot be found anywhere except in oblique references to ethical standards which ought to be observed by the legal

profession. These informal practices are not open, precise, reliable or consistent, characteristics we have identified earlier as being fundamental to the criminal justice process.

II. ISSUES FOR CONSIDERATION

A. Five Main Questions

5.6 In considering whether or not formal rules prescribing a system of mandatory disclosure by the defence should be introduced, we address five important questions. Firstly, should the interests of the prosecution which are served by mandatory disclosure by the defence prevail over the right of an accused person to reserve his or her defence?

5.7 Secondly, are there circumstances in which the achievement of certain objectives of the criminal justice system may justify mandatory disclosure by the defence? In particular, does the objective of reducing the duration and complexity of criminal proceedings justify the introduction of rules which require the defence to disclose its case or any specific part of it?

5.8 Thirdly, if some form of defence disclosure is to be prescribed, should there be any material exempt from disclosure? If so, should this exemption be expressed in absolute terms or qualified terms, or should it be made subject to the general discretion of a court, to be exercised so as to do justice in the particular case? Fourthly, if disclosure by the defence is made mandatory, what sanctions should be

available to enforce compliance? Fifthly, is there a procedure other than compulsory disclosure by the defence which would, while respecting the traditional rights of the accused person referred to in para 5.1, expedite proceedings and enable the prosecution to deal effectively with surprise evidence?

5.9 In the remainder of this part we set out the arguments for and against mandatory disclosure. In Part III we describe the position in the United States, Canada and England. In Part IV we outline some tentative proposals on mandatory disclosure and describe several possible measures which would create incentives for voluntary defence disclosure.

B. Arguments For Mandatory Disclosure by the Defence

1. Efficiency

5.10 Disclosure by the defence should increase the efficiency of the criminal justice system. The necessity for the prosecution to present lengthy evidence of matters which are not at issue between the parties would be avoided. This should reduce the duration and complexity of the trial proceedings and eliminate unnecessary inconvenience to witnesses whose evidence is not disputed. In addition, the risk of proceedings being terminated or interrupted because of unexpected developments would be reduced.

2. Advantages to the Prosecution

5.11 The investigating and prosecuting agencies would be able to allocate their resources to the real issues in the case. The prosecution would also be protected from being taken unfairly by surprise by a defence raised at a late stage of the proceedings. This is not to suggest that every course taken by the defence which may surprise and even disadvantage the prosecution is necessarily unfair. However, the criminal process should not be structured so as to facilitate the presentation of fabricated defences. The likelihood of such a defence succeeding is much less if the prosecution has had an opportunity to test it effectively.

3. Advantages to the Defence

5.12 Early disclosure of defence evidence can be a positive advantage to the defence. Where that evidence is compelling, the prosecution may abandon the proceedings at an early stage or offer no evidence when the matter comes before a Local Court either to be heard or for the purpose of committal proceedings. Even where there has been a committal for trial on an indictable charge, defence disclosure may ultimately lead to the matter being "no billed" or the charge being reduced.

5.13 If the matter does proceed to trial, the accused person may derive an advantage from making early disclosure of a relevant defence. This would ensure that evidence in the defence case is not left open to the criticism that it has been recently invented or fabricated in response to the prosecution

case. Where evidence is disclosed late in the criminal process, in circumstances where it would have been reasonable to disclose it earlier, it may be diminished in value. Although the court or jury cannot draw an inference of guilt solely from the failure of the accused person to reveal exculpatory facts where a reasonable opportunity has been given to do so, such a failure will clearly be taken into account when deciding what weight to give to evidence introduced at a late stage. It is well established, for example, that a trial judge is entitled to make adverse comment upon the failure of an accused person to raise an alibi where that failure deprives the prosecution of an opportunity to test the truth of the defence. Whilst the application of this principle in New South Wales has been affected by s405A of the Crimes Act, which prescribes the time at which formal notice of an alibi must be given, it is still open to a jury to reject evidence of an alibi because the evidence was not raised at a time when it might have been expected to be raised.[3]

4. Practical Examples

5.14 The desirability of disclosure by an accused person can best be demonstrated by the following practical examples.

* Where an accused person is charged with the offence of culpable driving occasioning death, one of the elements which the prosecution must prove is the death of the victim of the alleged offence. In most cases this would require the prosecution to call as a witness the relative of the deceased who identified the body. This is

naturally a traumatic experience for the witness. The Commission has been unable to discover any case where the fact of death, as distinct from the cause of death, was an issue in such a trial. An accused person can, and usually does if he or she is invited to do so, inform the prosecution before trial that the fact of death is not in issue. The relative of the deceased is then spared the ordeal of giving evidence. It would seem to be neither unreasonable nor unjust to require that the relevant admission be given in advance of the trial.

* A particular case against an accused person charged with trafficking in prohibited drugs involved evidence from many witnesses called to establish a pattern of international travelling on the part of the accused person. The prosecution had to call these witnesses to prove that the accused person was present in a number of overseas destinations and that he was seen to be engaged in certain activities there. In particular, evidence was given that in each place the accused person had in his possession various parcels which were ultimately found to contain heroin. When the accused person gave evidence he acknowledged that he had been in each place and had been in possession of the various parcels. The bulk of the prosecution evidence was

therefore undisputed. However, the accused person claimed that he was at all times unaware of the contents of the packages. The duration and cost of the trial would have been substantially reduced had the accused person indicated the essence of the defence case before the trial.

* Where an accused person is charged with a complex fraud of the type commonly referred to as "white collar crime", there may be a number of strictly formal matters which must be proved by the prosecution in order to establish its case. It may be necessary for the prosecution to prove that the accused person is a director of a registered company, a matter which may involve lengthy formal evidence. It may be necessary to prove that various documents are authorised publications of the company, which may also involve complicated and lengthy evidence. Where, as is usual, these matters are not in dispute, the position of the accused person would be unaffected by admitting that he or she is a director of the registered company and that the relevant papers were documents of that company. The defence will normally be based on some completely unrelated ground. A requirement to disclose such formal and uncontested matters

would not appear to cause any damage to the accused person's right to a fair trial nor to his or her prospects of acquittal.

C. Arguments Against Mandatory Disclosure by the Defence

1. Breach of Fundamental Principles

5.15 It has been noted that requiring an accused person to disclose any part of his or her defence may breach some fundamental principles of our criminal justice system. Mandatory disclosure by the defence may in some cases relieve the prosecution of its burden of proving all the elements of the offence with which the accused person is charged. It would place an obligation upon an accused person inconsistent with the right to remain silent. A legal obligation to make admissions regarding aspects of the prosecution case may breach the traditional privilege against self-incrimination. Further, a sanction for failure to disclose prescribed material in the form of a discretion in the court to rule such material inadmissible if tendered by the defence, would appear to contravene the right of an accused person to make full answer and defence to the charge.

2. Intimidation of Prospective Witnesses

5.16 There are significant practical disadvantages which may be suffered by an accused person who discloses the nature of his or her defence at an early stage. If the accused person were required to provide the names and addresses of prospective witnesses, the investigating agency would then be in a position

to harass or intimidate these witnesses. For some people, the mere fact of being contacted by the police and questioned in relation to a criminal case might amount to an intimidating experience. As one commentator dealing with the general issue of fabricated prosecutions has warned:

> ... an official system that can produce this tissue of false accusations against you is capable (you may genuinely believe) of getting at your witnesses if it knows who they are; and some of them are perhaps criminals enjoying a precarious liberty that the police are in a position to terminate at any moment.[4]

It should be noted that what amounts to the same argument is also raised in opposition to the suggestion that the prosecution should make full disclosure to the accused person.[5]

3. Tactical Disadvantages to the Accused Person

5.17 Another practical disadvantage to the accused person is that he or she may be deprived of the tactic of being able to demolish or weaken the evidence of a prosecution witness. This point, which is essentially the converse of that made in para 5.11, is best illustrated by an example.[6] A man was charged with murdering a woman by hitting her with a hammer. At the trial the prosecution called as only a part of its case a medical expert who gave evidence that certain clothes of the accused person were stained with human blood. The expert said that the blood appeared to have been spurted on to the clothes from a distance, as though from a severed artery. The lawyer for the accused person brought the doctor's theory out in full detail in cross-examination, committing him to the opinion that

the accused person was wearing these clothes at the time of the killing. The defence later established irrefutably that the clothes in question had been bought by the accused person some time after the woman's death.

5.18 The impact of this cross-examination was infinitely more effective than if the testimony of the expert witness had been dispensed with before trial by early disclosure of the defence's rebutting evidence. The demolition of the evidence of an important witness for the prosecution may taint the prosecution case as a whole, leaving the jury with a strong impression of uncertainty and unreliability. It can be argued that there would be no injustice to the accused person if he or she were required to disclose the rebutting evidence beforehand, thus giving the prosecution an opportunity to omit from its case evidence which is clearly mistaken. On the other hand, there may be an injustice in compelling the accused person to take some positive steps which have the effect of enabling the prosecution to present its case to the jury in a more favourable atmosphere. From a completely different point of view, it may be argued that strictly tactical advantages which do not bear upon the real issues at the trial should not be able to be enjoyed by either of the parties.

III. DISCLOSURE BY THE DEFENCE IN OTHER JURISDICTIONS

A. The United States Position

1. Federal Rules of Criminal Procedure

5.19 The revised Federal Rules of Criminal Procedure contain a section on disclosure in criminal cases. The rules designed to regulate disclosure by the defence are as follows:

> Disclosure of Evidence by the Defendant
>
> (1) Information subject to disclosure
>
> (a) Documents and tangible objects. Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies of portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.
>
> (b) Reports of examinations and tests. Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.
>
> (c) Defence witnesses. Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

> (2) Information not subject to disclosure
>
> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defence documents made by the defendant, or his attorneys or agents in connection with the investigation or defence of the case, or by statements made by the defendant, or by government or defence witnesses, or by prospective government or defence witnesses, to the defendant, his agents or attorneys.
>
> (3) Failure to call witness
>
> The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.[7]

5.20 The Rules also provide for the regulation of these procedures. The powers vested in the courts include a general power to order that disclosure be denied, restricted or deferred to ensure that witnesses and exhibits are protected. Such powers may be exercised upon application to the court by any party to the litigation. In addition, the court has the power to make various orders where there has been a failure to comply with the disclosure rules. The court may order discovery, grant an adjournment, prohibit the party from introducing evidence not disclosed or make such other orders as it deems just under the circumstances. There is also an express provision which enables the prosecution to obtain an order from the court that the defence produce for examination any written statement made by a person (other than the accused person) who has been called as a witness in the defence case.[8]

5.21 If the accused person intends to rely on an alibi defence, the Federal Rules of Criminal Procedure provide that notice of such defence must be given to the prosecution.[9] After receipt of such notice, the accused person must be informed of the specific date, time and place of the offence charged. The accused person must then inform the prosecution of the place where he or she claims to have been at the time of the crime, together with the names and addresses of alibi witnesses. The prosecution must inform the accused person of the names and addresses of witnesses who will place the defendant at the scene of the crime. Some states have rules similar to the federal rule. The Supreme Court has rejected the proposition that rules requiring disclosure of alibi are a breach of that part of the Fifth Amendment which establishes the privilege against self-incrimination. The Court held that that privilege does not give the accused person the right to surprise the prosecution with an alibi defence and that, given the ease with which an alibi can be fabricated, the prosecution has a legitimate interest in protecting itself by such a rule.[10] By requiring notice, the accused person was not forced to give evidence, but only to advance the timing of a disclosure that was going to be made.

2. The American Bar Association Standards

5.22 The standards proposed by the American Bar Association governing disclosure by the accused person are subject to constitutional protections and limitations relating to self-incriminating statements and the right to counsel. The standards are formulated to deal with three separate areas of

disclosure by the defence: the criminal investigation process, the nature of the defence and evidence at trial. Whilst they do not have the force of law, the standards represent a position arrived at after extensive research and consultation among eminently qualified academic and practising lawyers.

5.23 It has been proposed that a judicial officer should have the power to make orders to assist in the criminal investigation process by requiring an accused person to:

* appear in an identification parade;
* speak for the purpose of identification by witnesses;
* be fingerprinted;
* pose for photographs not involving re-enactment of a scene;
* try on articles of clothing;
* permit the taking of specimens of material under his or her fingernails;
* permit the taking of samples of his or her blood, hair and other materials of the body which involve no unreasonable intrusion thereof;
* provide specimens of his or her handwriting; and
* submit to a reasonable physical or medical inspection of his or her body.[11]

These proposals essentially require the accused person to make non-testimonial disclosures of his or her case. This form of disclosure has been held to be outside the scope of the constitutional privilege against self-incrimination.[12] The other features of the American Bar Association standards establishing a model of compulsory disclosure include:

* An order requiring the accused person to appear for the purpose of making such non-testimonial disclosures may be made a condition of bail.

* The trial court may order the accused person to produce the reports of examinations or tests conducted on behalf of the accused person.

* The court may also direct the accused person to disclose the nature of the defence and the names and addresses of intended witnesses.[13]

5.24 Police investigation techniques and the response made to them by accused people are significant in considering disclosure by the defence. They are probably the most important source of disclosure by the defence. More generally, investigating techniques have a crucial impact on the conduct of criminal proceedings at every level. In the Commission's view there must be a consistent and comprehensive set of rules prescribing the powers of the police and the duties of the suspected or accused person respectively. The Commission intends to address this and other related issues in greater depth when it comes to deal with the subject of police investigation in the course of its reference on criminal procedure. This will involve an examination of the "right of silence", and the general law regarding the que ioning of suspects and accused people by police.[14]

B. The Canadian Position

5.25 In 1974, the Law Reform Commission of Canada published a comprehensive working paper on criminal discovery.[15] It considered the question of prosecutorial discovery of the accused person's case in some detail. The Commission expressed its preferred view in these terms:

> The defence should not be obliged in law to disclose or supply to the prosecution any material or information relating to the defences it intends to raise or witnesses it intends to call at trial. If the prosecution should in fact be taken by surprise at trial by the introduction of evidence or the raising of a defence for which it is not prepared, it should be entitled as of right to obtain an adjournment of the trial in order to conduct all necessary investigation and preparation occasioned by the surprise.[16]

5.26 Whilst firmly rejecting any system which involved compulsory disclosure by the defence, the Commission noted that, if the prosecution were entitled to an adjournment whenever it was taken by surprise, there would be a number of incentives for the defence to make pre-trial disclosures to the prosecution:

> In a number of cases an adjournment would allow the prosecution to investigate and rebut surprise evidence. But even more important, a policy of granting adjournments to allow the prosecution to counter surprise evidence would encourage defence discovery to the prosecution. As well, the very fact that evidence is disclosed later in the process will, in many instances, operate to diminish the weight to be attached to it and thereby encourage defence discovery. In addition to these existing incentives, the establishment of a formal system providing discovery to the accused would create new incentives for the defence to make discovery to the prosecution. The pre-trial hearing suggested in this proposal to review the completion of discovery from the prosecution to the defence, would serve as an opportunity for the defence to make disclosures and admissions. The judge could inquire of defence counsel if there were any disclosures to be made or issues which could be resolved by admissions of fact to avoid unnecessary witness attendances at trial. While there would be no compulsion in this inquiry and while in the existing law the prosecution is free to ignore defence admissions of fact and to tender proof at trial anyway, fact-admissions and disclosures as to defences would be made.[17]

5.27 The Canadian Law Reform Commission's rejection of compulsory disclosure rules was based on the clear conflict which would exist between such rules and the traditional principles of criminal justice such as the presumption of the innocence of the accused person, the burden of proof on the prosecution, the accused person's right against self-incrimination, and his or her right to make full answer and defence at any time.

5.28 In reaching its conclusion, the Commission expressly rejected the proposition that the requirement of compulsory disclosure by the accused might be limited to the defence of alibi, to expert evidence and to evidence that was not incriminatory. The only effective sanction to enforce the disclosure required in such cases is to declare inadmissible at trial any information which has not been disclosed but which should have been disclosed. This sanction would conflict with the present right of the accused to make full answer and defence to the charge against him or her.

C. The English Position

1. The Royal Commission on Criminal Procedure

5.29 The Royal Commission on Criminal Procedure (the Phillips Commission) published its findings in 1981. It was primarily concerned with questions of efficiency in the prosecution of criminal cases and examined the subject of disclosure by the defence from that perspective. The Commission's report outlined the familiar background against which the subject must be considered:

> The objection of principle that the burden of proof is upon the prosecution applies to any formal requirement of general disclosure by the defence, and there is the problem that it is impossible to devise effective sanctions against a defendant who fails to comply with the requirement. He could not subsequently be prevented from adducing evidence which demonstrated his innocence. The failure might not even be a matter under his control, arising for example from inadvertence or from an omission on the part of his solicitor.[18]

5.30 The Royal Commission's Report questioned two of the traditional arguments put forward in support of disclosure by the defence, firstly, that time and expense during the trial would be saved and secondly, that dubious acquittals would be fewer. With the benefit of empirical research, the Report concluded:

> There is no firm information, for example, on how much time is wasted because the defence produces surprise evidence. Baldwin and McConville found that major new facts were adduced at trial by about 10 per cent of the defendants in their sample (370 contested cases in one Crown Court). Police officers interviewed by the researchers considered that in only about 1 per cent of cases did new facts of themselves lead to an acquittal which was thought unjustified.[19]

5.31 After noting the requirement in England for advance notice of alibi in cases heard in the Crown Court, the Commission's report explained the justification for the rule and recommended its extension to other defences:

> This seems to us to be based upon the principle that the introduction of a defence of this kind can take the prosecution by surprise at trial, in that they could not reasonably have anticipated it and would have had no opportunity to carry out the investigation required to confirm or rebut it. It would be reasonable for the judge in such circumstances to grant an adjournment for that

> purpose. The requirement for advance notification is designed to avoid the inconvenience and expense of such adjournments. We consider that this principle could be extended to other defences which by taking the prosecution by surprise can cause the trial to be adjourned while investigation is carried out to confirm or disprove them. The obvious examples are defences depending on medical evidence or expert forensic scientific evidence which the prosecution needs an opportunity to evaluate or on which it may wish to call its own expert witnesses. Consideration will need to be given to the specific defences to which advance notification apply if the principle is to be extended as we propose.[20]

The Royal Commission rejected any general requirement of disclosure by the defence on the grounds of both principle and practicability. In doing so, it confirmed the view of the James Committee which observed that there were objections in principle to the notion of defence disclosure and did not recommend its introduction.[21] However, the Royal Commission did suggest the extension of the provisions relating to the notification of alibi to certain other defences which will normally require evaluation by the prosecution and time for the preparation of a case in rebuttal. This recommendation was implemented in part by legislation which authorises the Crown Court to prescribe rules requiring both the defence and the prosecution to give advance notice of expert evidence and in the absence of this notice, to prohibit its use without the leave of the court.[22]

2. The Criminal Bar Association

5.32 Like its counterpart in the United States of America, the Criminal Bar Association of England and Wales has also proposed that there should be extended obligations of disclosure on the defence. It took the existing alibi provisions as a starting point and argued:

> If it is proper (that is, consistent with basic principles) to require the defendant to disclose an alibi answer with particulars - as the [Association] believes it is proper - then it is proper to impose the same obligation in respect to duress, mental illness or incapacity and claim of right. The information to be disclosed should be the particulars to be relied upon and the witnesses to be called.[23]

The Association went on to suggest that:

> ... the defence ought to be required to disclose to the prosecution what the real issue(s) in the case will be about, and this requires that they should disclose the title of their answer. Armed with this information, the prosecution will be able to identify the witnesses whose evidence is not disputed or not necessary and it will be possible for them to direct the jury's attention at the outset of the case to the evidence and issues that really matter.[24]

We will make further use of the notion of the "title" of a defence as it is used in this passage to describe the very broad indication of the answer which may be given by the defence.

IV. OPTIONS FOR REFORM

5.33 There are two different approaches which may be taken to the question of disclosure by the defence. The first is to make disclosure by the defence compulsory. The second is to adopt measures which would encourage rather than compel the accused person to make disclosure.

A. Compulsory Disclosure

5.34 A system of compulsory disclosure might require that the accused person do one or more of the following:

* give notice of the title of any "special defences" such as alibi, insanity, diminished responsibility, automatism, intoxication, duress, mistake, self-defence, provocation, lawful excuse, claim of right and accident;

* give notice of the titles of those defences which impose either an evidentiary or probative burden upon the accused person which would include those defences listed above as well as, for example, the defence in a drug case that possession was not for the purpose of sale and supply;

* give advance notice of any statutory provision, judicial decision or legal writing which is to be relied upon in submissions to the court of trial;

* provide a list of the names and addresses of those people whom the accused person intends to call as witnesses;

* provide the prosecution with copies of the statements of those people whom the accused person proposes to call as witnesses;

* nominate and permit the prosecution access to the exhibits, whether documentary or material, which the accused person proposes to tender at trial;

* provide the prosecution with copies of reports of a scientific or technical nature or any other expert evidence which the accused person intends to use at trial; or

* submit to physical or medical examinations specified by statute or ordered by the court.

Titles of Defences

5.35 A requirement to nominate in advance the title of any defence upon which an accused person intends to rely at trial may be characterised by some as an interference with the traditional rule that the accused person may not be compelled to assist the prosecution to prove its case. However, the interests of ensuring efficiency without unfairness in the administration of justice may demand that the accused person be encouraged to make some contribution towards confining the trial proceedings to the issues in contention between the parties. We consider the prosecution should be entitled to know at least the general nature of the defence which will be

put forward. Such a requirement does not create any obvious risk of prejudice to the accused person nor give any unconscionable advantage to the prosecution. However, because a requirement for more detailed disclosure may create a substantial risk of both these consequences occurring, the prosecution should not, in our view, be entitled to know the details of that defence nor should it be entitled to know the identity of the witnesses who will be called.

Expert and Technical Evidence

5.36 The potential use or misuse of expert and technical evidence has been the subject of considerable concern. The issues have been highlighted, indeed sensationalised, by notorious cases where the use of expert evidence has resulted in verdicts, whether acquittals or convictions, which are perceived by many to be unjust. We support the view that special rules are required in respect of expert and technical evidence. However, we do not think that there should be mandatory disclosure by the defence of all such information. If there is to be a disclosure requirement, it should be limited to that evidence which the defence proposes to call at trial, that is reports of technically qualified people whom the defence proposes to call as witnesses and any exhibits relevant to their evidence. We think that to require disclosure of all information, whether it is intended for use at trial or not, would impose an unconscionable burden on the accused person and would be an unjustifiable invasion of individual privacy.

5.37 If the disclosure of technical or expert evidence is to be made mandatory, the rules which govern its operation should be the subject of legislation. On one view, the prosecution should be entitled to an adjournment of the proceedings or perhaps a discharge of the jury where the introduction of evidence of a technical or scientific nature takes it unreasonably by surprise. According to this point of view, evidence which tends to exculpate an accused person should never be excluded from the evidence in the trial. The other view is that the trial judge should have a wide discretion to deal with each case on its merits and to make such orders as appear to do justice in the particular case including the power not to admit the evidence where disclosure has not been made as required. We are conscious that a rule of this kind would breach one of the fundamental principles referred to in the first paragraph of this chapter, but that this may be justified in the case of technical and scientific evidence. The Commission is presently divided on this issue and our tentative proposal at para 5.66 is accordingly expressed in the alternative.

Notice of Alibi

5.38 As noted in Part I of this chapter, the accused person is obliged to give advance notice of any defence of alibi proposed to be put forward at trial by providing the prosecution with brief details of the nature of the alibi and the names and addresses of the witnesses to be called. There was very strong opposition to the relevant legislation at the time of its introduction. It was criticised in the following terms:

> The simple fact is that although we may indulge in all the forensic semantics we like about the difficulties of the Crown, surprise and all of those other things, this is another inroad into the basic right of the accused to remain silent - an age-old right that has been an absolute pillar of British justice for centuries. The bill compels the accused to disclose part of his case ... if we are to make this inroad into this ancient right and provide that an accused give notice that an alibi will be presented and give the names and the addresses of the witnesses to be called to substantiate that alibi, there should be an absolute prohibition on the police interviewing those witnesses. In considering this legislation we are talking about adopting a dangerous course. If we saw this sort of system operating in another society we would deplore it and say it was an unnecessary intrusion into the rights of people.[25]

5.39 In its Working Paper Discovery in Criminal Cases, the Law Reform Commission of Canada also rejected proposals to make the defence of alibi an exception to the general rule that the defence should not be compelled to disclose anything to the prosecution.[26] It adopted the words of an Israeli commentator responding to similar proposals in his own country:

> What distinguishes the alibi defence from all other defences, so as to call for an exceptional rule? The accused will be free, in the future as today, to reserve till the end of the case for the prosecution, defences such as necessity, drunkenness, consent of the victim, a legal right to perform the act. But if he intends to say "I stood behind a fence", or "I was 10 metres away - too far to participate", then he must announce it before the opening of the case for the prosecution. What is the logic of this arrangement? ... the effect of the pragmatic approach to the isolated question of alibi is to threaten one of the basic rules of ... criminal procedure - i.e., that the case for the defence should be opened only after the completion of the case for the prosecution, not for the purpose of secrecy or surprise, but because the accused must see the case against himself, before he is in a position to answer it - and what is the defence of alibi if not part, or even the essence, of the

> answer to the charge? ... Nor is this mere theory of legislation ... the accused has to answer ... the case as presented after hearing the prosecution evidence and not before it. For in court a witness may give a description of time and place which is more accurate, more vague, or altogether different from that noted by the police. The charge itself may be changed from theft to receiving, so that the alibi for the place of theft becomes useless. As long as such alterations are possible - is it just, is it logical to elicit from the accused an allegation of alibi which may hamper him in his defence against amended allegation of the prosecution? Here the practical importance of the aforementioned principle becomes apparent: as long as the factual allegations against the accused have not become unalterable by the closure of the case for the prosecution, the defence is still in a stage of internal preparation and must be fluid, to meet changes in the evidence brought against the accused; there can be no "alibi" before the "ibi" is definitely fixed.[27]

5.40 In practice, evidence of alibi is rarely ruled inadmissible for want of compliance with the obligations on the defence to give notice.[28] Trial judges often admit the evidence while allowing the prosecution to have the benefit of an adjournment so that it can call a case in reply. This practice is preferable as it does not infringe the accused person's right to defend the charge. Nevertheless, since the provision came into force in New South Wales in 1974, there have been many serious complaints about the fairness of its operation.

5.41 The Commission is presently divided on its views on the requirement to disclose an alibi defence. One view is that the requirement to reveal the names and addresses of defence witnesses to be called in support of an alibi is unfair and

anomalous. The tentative proposal put forward from that point of view is that the accused person should be required to give notice of the fact that he or she intends to raise an alibi defence at trial, but should not be compelled to reveal the names and addresses of witnesses or the circumstances of the alibi. We are all agreed that if the law is to remain as it is, there should be, as in the United States, a reciprocal obligation for the prosecution to notify the accused person of the alibi witnesses to be called by the prosecution case. Consideration should also be given by the police to a procedure under which the investigation of an alibi disclosed pursuant to the statutory provisions should be conducted by police officers who are not involved in the investigation of the offence.[29] The other view is that the law requiring the disclosure of an alibi defence should generally remain in its current state. According to this point of view, there are legitimate reasons for requiring disclosure of an alibi defence. The question then arises for consideration whether the persuasive arguments in favour of requiring disclosure of an alibi defence would also support extending the requirements of defence disclosure so that similar rules apply to other "special defences" raised by the accused person. The Commission is unanimously of the view that where the defence has been presented unfairly or unreasonably, the trial judge should have a wide discretion to grant an adjournment to the prosecution or to make an appropriate comment to the jury. As we have observed, in an extreme case, the judge has an inherent power to call witnesses to remedy an apparent cause of injustice.[30]

B. Incentives to Encourage Disclosure

5.42 The real danger in making disclosure mandatory is the creation of a clear exception to the general principle that an accused person should not be required to assist the prosecution in the presentation of its case. The Commission acknowledges that any requirement for the defence to disclose its evidence will breach this fundamental principle. We are unanimous in our view that the titles of special defences and reports of scientific, technical and medical experts should be disclosed, but the Commission is currently divided in its views as to the extent to which compulsory disclosure can be required of the defence. We are agreed that a climate which encourages disclosure can and should be created with a view to limiting the dispute at the trial to the real issues.

1. Existing Incentives to Disclosure

5.43 A number of incentives to disclosure by the defence already exist. We have referred to some of these in paras 5.12-5.13. The accused person may be attracted by the prospect that disclosure by the defence might reduce the charge or the length of the proceedings and thereby both the ordeal of the trial and its cost.

5.44 Disclosure of matters which are not in dispute contributes to maintaining the defence's credibility. The fact that a particular line of defence has been revealed at a stage which gives the prosecution little opportunity to test it properly, may influence the weight which the jury attaches to

that evidence. At present, it is open to the judge in directing the jury to make some comment, if he or she considers it appropriate, on the fact that a defence was not disclosed until a late stage. The judge may inform the jury of the opportunities available to the accused person to make relevant disclosure before the trial.

5.45 The fine line between what may and may not be said is illustrated by comparing the direction given in R v Hoare[31] with that given in R v Littleboy.[32] In the first case, a direction which suggested to the jury that they might consider the defence explanation false because an innocent man would have raised it earlier was held to be improper and the accused person's appeal was allowed. In the second case, a direction which invited the jury to take the fact of late disclosure into account when considering the weight to be attached to the evidence, was approved by the Court of Appeal in England. Put simply, an accused person's failure to mention an important fact excusing criminal liability until the last minute may be taken into account to decrease the weight of the evidence, but not to draw an inference of guilt.[33] In some circumstances, the response made by an accused person to an allegation may be evidence of the facts stated in the allegation, if the accused person can be said by his or her conduct to have accepted it.[34] It should also be noted that the Crown Prosecutor is entitled to remark upon the late disclosure of a defence and is not generally restricted in the same way as the trial judge.

2. Incentives Which Will Exist if Full Disclosure by the Prosecution Becomes Mandatory

5.46 In Chapter 4 we proposed that the prosecution be required to make full disclosure as early as possible in the course of criminal proceedings. The atmosphere which this creates may encourage the accused person to disclose voluntarily relevant information about the defence case. This phenomenon is already encountered in practice. In those cases where the prosecutor takes a restricted approach to disclosure, the defence will usually respond in kind. Where there is a more open approach by the prosecutor, the defence will usually be more prepared to make disclosures and admit facts which are not in issue, nominate prosecution witnesses who are not required and make concessions as to the evidence which may be admitted without objection. Moreover, the prosecuting agency can better assess the relevance of evidence which it has in its possession where it has some knowledge of the nature of the case for the defence. Where the defence discloses relevant parts of its case, it may therefore obtain more relevant information from the prosecution. Where defence disclosure does take place, both the prosecution and the defence save time and money and can direct their resources towards resolving the real issues in the case.

3. Other Possible Incentives to Disclosure

5.47 There are several other ways of encouraging the defence to disclose its case without infringing the principle that it should not be forced to do so. Any scheme enabling or requiring disclosure by the defence should be assessed in the

light of the approach taken by many defence lawyers in practice. Where the defence case is based on a challenge to a single aspect of the case for the prosecution or on evidence to be adduced by the defence which is in a relatively small ambit, counsel for the defence will be anxious to impress the important point upon the jury at every available opportunity and for that reason may be prepared to concede that much of the prosecution case is not in dispute. This is purely a matter of advocacy and will depend on various circumstances. A strict scheme of rules for disclosure by the defence should not change the current practice of many lawyers to make the defence case known as early and as frequently as possible. The real effect of disclosure rules must be assessed in the light of their practical impact in a trial.

5.48 It should not be overlooked that juries would probably be aware of the existence of disclosure procedures. There would often be an adverse impact upon a jury where the defence has forced the prosecution to spend considerable time proving a matter which is not in issue. Such a practice, even though permitted by strict application of the law, would reflect poorly on the defence. The success of the defence case is often dependent upon persuading the jury or the judge to accept the propositions put forward. Tactics which serve only to put the jury offside are not of much value to the defence. The defence is more likely to maintain its credibility and maintain the jury's respect if it adopts a more open and realistic approach.

Right of the Prosecutor to Call a Case in Reply

5.49 At present the prosecution may, in certain circumstances, re-open its case or call evidence in reply at the conclusion of the defence case. The law on this topic is not altogether clear. It was most recently considered by the High Court in Chin's case.[35] Two of the judges stated the rule as follows:

> The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. Although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen. The principle applies where the prosecution seeks to call evidence to rebut matters raised for the first time by the defence; if the rebutting evidence was itself relevant to prove the prosecution case ... and the need to give it could have been foreseen it will, generally speaking, be rejected. The principle would not prevent the prosecution from giving in reply evidence directed to an issue the proof of which did not lie on the prosecution, such as insanity, or from rebutting evidence of the accused's good character, provided that the prosecution had not anticipated the raising of an issue of this kind and led evidence with regard to it, for the prosecution must not split its case on any issue. Also, it has been held that evidence may be given in reply to prove some purely formal matter the proof of which was overlooked in chief.[36]

The trial judge has a wide range of discretion as is shown by the apparent contrast between the opening and closing sentences. The exercise of that discretion is not made easier by the division of opinion on the High Court which is exemplified by the earlier but recent decision in Killick.[37] The judgments in that case reveal a wide divergence of opinion

regarding the circumstances in which it is legitimate to allow the prosecution to call a case in reply. Whilst the law itself may be agreed upon, the manner in which it should be applied is not. This is illustrated by the judgments in cases such as Lawrence,[38] Killick, Chin and in the recent application for special leave to appeal in Wasow.[39]

5.50 In our view, the case in reply could play a significant role in the operation of rules regarding pre-trial disclosure by the defence. The right to call a case in reply could be extended beyond the narrowly confined circumstances in which it is presently allowed. In particular, where the accused person does not disclose before trial material which could have been revealed without prejudice or disadvantage, the prosecution could be given the right to call evidence in reply. Alternatively, a prosecution application for an adjournment to consider its position and make further investigation could be granted more readily. Where disclosure is made, the prosecution can call evidence in rebuttal as part of its case, as is the current practice.

Admissions and Concessions by the Accused Person

5.51 The introduction of a procedure at trial whereby, prior to the opening address by the prosecution the accused person gives notice of admissions or concessions to the prosecutor and after the prosecution has completed its opening address, the accused person or defence counsel is invited to say whether any of the elements of the charge are admitted or are not in issue,

might encourage disclosure before trial. We recognise that this is strictly a matter of courtroom procedure, but it has clear potential for encouraging disclosure before the trial itself. Facts which are required to be proved by the prosecution to establish its case must be formally admitted by the accused person. According to the terms of the legislation, this procedure is not available to unrepresented people nor, apparently, in cases heard in the Local Court.[40] Where there is a matter which the prosecution intends to prove but which is neither an essential element nor in issue between the parties, it is only necessary for a concession to this effect to be made by counsel or the accused person.

Allowing the Defence to Open Its Case

5.52 Alternatively, the defence could be given the right to address the jury briefly at the conclusion of the opening address for the prosecution.[41] This address could be restricted to outlining the defence case for the parties and identifying the issues which the jury will be called upon to decide and those which they can regard as being unimportant in the context of the case. We emphasise that the procedures described in this and the previous paragraph are alternative approaches to enable early disclosure at the trial itself. Each of these procedures should be an option open to the defence rather than a practice in which they are obliged to engage. To provide otherwise would run counter to well established rules based on preserving the presumption of innocence of the accused person unless and until a conviction is obtained.

Credit Towards Sentence

5.53 As disclosure before trial will reduce the duration and cost of criminal proceedings, the accused person should be entitled to rely on this as a factor in mitigation of sentence. This is analogous to the principle which has been recognised by the practice of the criminal courts in the context of guilty pleas.

5.54 It is a well established principle of sentencing that a person should be given "credit" for a plea of guilty for various reasons. This credit is traditionally reflected in a reduction in penalty from that which would otherwise be appropriate for the offence in question. At the same time, it is a fundamental principle of sentencing that a person is never to receive a more severe penalty because he or she has exercised his or her right to put the prosecution to proof of its case.[42]

5.55 One reason why a discount in penalty is given to those who plead guilty is that the State is saved the considerable effort and expense involved in conducting a contested criminal case.[43] As the costs of criminal cases have escalated so rapidly, this has become a much more important factor. Such economic considerations are the basis of the prevalent use of "plea bargaining" in the United States. These matters are more fully canvassed in Chapter 11.

5.56 Similarly, one of the important objectives of pre-trial disclosure by the defence is to save time and public money. Where the defence has co-operated by limiting the issues at trial, it has contributed towards reducing the cost and complexity of the trial. The convicted person should therefore be given credit by way of an appropriate reduction in the penalty that would otherwise be imposed.

5.57 It has been proposed by some that statutory recognition be given to the notion that the penalty be reduced where there is a plea of guilty. If it is decided that this is desirable, it would be logical to recommend the same where the accused person has actively contributed to shortening or simplifying the disposition of the case by making relevant admissions and disclosures about the defence case.

C. Sanctions

5.58 As a means of encouraging disclosure, sanctions could be directed against the legal representatives of the accused person where the court considers that the failure to disclose relevant material before the trial amounts to an abuse of the court's process. In some parts of the United States the court may order the lawyer to pay the costs incurred as a result of unjustified failure to disclose relevant information. In Canada the lawyer for the accused person is invited, at a pre-trial hearing, to nominate those prosecution witnesses whose evidence is not disputed and who can for that reason be excused from attending in person at the trial. If, at the

trial, the lawyer does not cross-examine a prosecution witness, he or she may, in the absence of a satisfactory explanation, be called to account before his or her professional association.[44] This may result in a monetary penalty.

5.59 Under the legislation requiring the disclosure of a defence of alibi, the sanction established to enforce disclosure is the right of the trial judge to disallow, in the exercise of his or her discretion, the alibi evidence sought to be introduced by the accused person. In our view, and this is consistent with current practice, this is a sanction which should only be used rarely since it effectively prevents the accused person from presenting evidence in defence of the charge. We consider that the sanctions available to a court should remain a matter of discretion in order to meet the circumstances of the particular case. We also consider that the range of sanctions available to the trial judge, and specified in relevant legislation, should be extended to include greater use of the power to allow the prosecution to call a case in reply and the power to grant adjournments to the prosecution if it is unfairly disadvantaged.

D. Exemptions from Disclosure Rules

5.60 In our discussion of disclosure by the prosecution to the accused person, we dealt with the question of evidence and information which should be exempt from disclosure.[45] Whilst circumstances justifying exemption from disclosure are not likely to arise, certainly not with the same frequency, in the

area of defence disclosure to the prosecution, we think it necessary to establish a procedure whereby an accused person may make an application to a court to be exempted from any rules which may provide for disclosure by the defence. In order that the accused person may properly prepare the defence case for presentation at the trial, it is important that he or she knows in advance of the trial whether that evidence which is not disclosed in accordance with the rules will nevertheless be admitted at the trial. If this procedure were not available, an accused person who has failed to make the required disclosure would be limited to making an application to the judge at trial that the circumstances justified the exercise of his or her discretion in favour of admitting the evidence which should have been disclosed.

E. The Timing of Disclosure

5.61 Under the legislation requiring the disclosure of a defence of alibi, it is provided that the notice must be given within 10 days of the date on which the accused person is committed for trial.[46] In our view, this is unrealistic. Accused people who are not represented at their committal proceedings may take some time to engage the services of a lawyer and some further time may elapse before the lawyer receives complete instructions. Although this would certainly be a factor taken into account by a court in deciding whether to admit evidence of an alibi where the required notice has not been given within time, we consider it preferable that the time within which the notice must be given should be a nominated

period prior to the date of the trial and that this date for giving notice should be specified by the prospective court of trial in each case, thus enabling the circumstances of the particular case to be taken into account and a more realistic time within which notice must be given to be fixed.

F. Reciprocal Disclosure

5.62 In the tentative proposals we made regarding disclosure by the prosecution, we suggested that a system of reciprocal disclosure, whereby both the accused person and the prosecution disclosed information for the purpose of reducing the length and complexity of the trial proceedings, was likely to be the most effective in achieving that goal.[47] It may be recalled that there is provision under the Federal law in the United States for a system of reciprocal disclosure. In addition, the practice of criminal lawyers in New South Wales and other jurisdictions[48] is to engage in informal negotiations at various stages of the criminal process. This frequently results in various forms of disclosure being made by both the prosecution and the accused person. We emphasise, however, that this is a voluntary and informal practice. Whilst some defence lawyers may consider such a practice a breach of fundamental principle, others take the view that it is generally in the best interests of the accused person. In our view, there is no point in seeking to resolve this difference of opinion. The preferable approach will in any event depend upon the circumstances of the case.

5.63 Mr Justice Watson has included a scheme for pre-trial examination and discovery in his draft Commonwealth Criminal Code.[49] The main features of this system, so far as it relates to disclosure by the defence are:

* if the accused person requests disclosure by the prosecution, the prosecutor may apply to a magistrate conducting committal proceedings for directions that the accused person make disclosure;

* the specific range of matters which can be the subject of such a direction include affirmative or "special" defences to be raised by the accused person, any evidence to be called from expert witnesses and the results of any scientific tests or experiments conducted;

* there is, in addition, a general discretion to direct the accused person to disclose any matter the court considers necessary "to ensure that the prosecutor has full knowledge of any matter relied on by the person charged".

Whilst we have reservations about the very wide general discretion established, the Commission is inclined to believe that there is some merit in the proposal to implement a system under which the accused person is obliged to make some form of disclosure. We consider, however, that this should be limited to the matters we have canvassed elsewhere in this chapter. There is no doubt that a system under which both the prosecution and the defence make relevant disclosures with a view to reducing the time taken by the court of trial is preferable.[50] We consider, however, that it is important to consider whether such a procedure is likely to contribute towards a better standard of justice being achieved. We are not at this stage of the view that compulsory disclosure by the defence beyond that envisaged by our tentative proposals is desirable.

G. Conclusion

5.64 In the previous chapter we suggested that the prosecution should, subject to limited exceptions, be required to make complete disclosure of its case. In this chapter we have canvassed a number of measures which could be implemented to compel or encourage disclosure by the defence. The Commission's view is that a system where the prosecution and the defence both make relevant disclosure is undoubtedly more reasonable, effective and professional than one where there is either no disclosure or disclosure by the prosecution alone. We believe that there are many circumstances in which disclosure by the defence before trial is in the best interests of the accused person. However, we recognise that disclosure by the defence is an area in which it is difficult to advocate proposals for reform without the benefit of public consultation and consideration of the competing principles. In the following part, we summarise our tentative proposals on this issue.

V. SUMMARY OF PROPOSALS AND ISSUES RAISED

1. Defence Disclosure Generally

5.65 In order to clarify the issues at the trial, the accused person should be invited to nominate before the trial the "titles" and the general nature of any defence upon which he or she intends to rely and to give notice of any matters sought to be proved by the prosecution which are not in dispute. Subject to the next paragraph, the accused person should not be compelled to disclose the names and addresses of the witnesses intended to be called. The practical effect of this proposal

would be to change the current law requiring an accused person to disclose particulars of a defence of alibi. This change is suggested on the basis that alibi evidence is not sufficiently different from other forms of defence to justify a special rule of disclosure. Alternatively, if disclosure is to be mandatory, it may be thought that there should be disclosure of defences other than alibi. The present views of the Commission are divided on this issue and submissions would be welcome.

2. Defence Disclosure of Technical Evidence

5.66 Any party proposing to call evidence of an expert, scientific or technical nature should disclose that intention to the court before trial and provide an outline of the evidence and the names of the witnesses who are to give it. The use which may be made of any material disclosed under such a rule and the sanction for failure to disclose should be a matter for the determination of the court. The Commission is currently divided as to the powers that should be available to the trial judge. One view is that he or she should have the discretion, where the requisite notice is not given, to refuse to admit such evidence at the trial. The other view is that the powers of the trial judge should be limited to granting the prosecution an adjournment or a discharge of the jury.[51]

3. Obtaining Physical Evidence from the Accused Person

5.67 We raise for consideration the question whether the current law permitting the police to obtain physical evidence from the accused person (Crimes Act s353A) should be amended to provide that this may only be done with the approval of the

court. That is to say, where the court is satisfied that evidence capable of being obtained by physical means may be of relevance to a criminal case and cannot practicably be obtained from another source, the court may direct that any person, including the accused person, participate in one or more of the following procedures:

(i) try on clothing;

(ii) provide handwriting samples;

(iii) submit to the taking of photographs;

(iv) submit to the taking of fingerprints and other bodily impressions;

(v) submit to the taking of specimens of saliva, breath, hair, nails;

(vi) submit to bodily examinations which do not involve unreasonable affronts to the dignity of the individual; and

(vii) submit to the taking of a blood or urine sample.

4. Incentives to Defence Disclosure

5.68 There should be a range of measures designed to encourage rather than compel disclosure by the accused person. Amongst those should be an extension of the right of the prosecutor to call a case in reply to answer evidence which could have been disclosed before the trial by the defence without prejudice to the accused person, and a procedure which gives the accused person the opportunity to address the jury immediately after the prosecutor's opening address for the purpose of identifying those issues which are in dispute in the case. This latter proposal is consistent with a recommendation made in our Report The Jury in a Criminal Trial.[52]

5. Exemption from Disclosure

5.69 The accused person should have the right to apply to the prospective court of trial for an order that compliance with the rules regarding disclosure by the accused person is not required.

6. Timing of Disclosure

5.70 The accused person should be informed by the prospective court of trial at a pre-trial hearing of any obligation to make disclosure of any part of the evidence to be called in the defence case at the trial. The court should specify, having regard to the date on which the case is listed for hearing and the relevant circumstances of the case, the time within which the disclosure is to be made.

Footnotes

1. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat London 1980) at 49-53.

2. Crimes Act 1900 s405A(1). See also paras 5.38-5.41. The provision is based on the Criminal Justice Act 1967 s11. Criminal Law Revision Committee Ninth Report: Evidence (HMSO Cmnd 3145 London 1966) at 13ff.

3. R v Littleboy [1934] 2 KB 408 overruling R v Naylor [1933] 1 KB 685. See also R v Ryan (1966) 50 Cr App R 144 at 148. We deal with this subject in greater detail at para 5.45.

4. C H Rolph Personal Identity (1957) at 121-122.

5. See para 4.70, 4.71.

6. This example is taken from G Williams "Advance Notice of the Defence" [1959] Criminal Law Review 548.

7. Federal Rules of Criminal Procedure.

8. Federal Rules of Criminal Procedure, Rule 26. See also United States v Nobles 422 US 225 (1975); see also M S Wilder "Prosecution Discovery and the Privilege Against Self-Incrimination" (1967) 6 American Criminal Law Quarterly 3; S W Dyer "Prosecutorial Discovery: How far may the prosecution go?" (1973) 7 University of San Francisco Law Review 261; K R Bishop "The Self-Incrimination Privilege: Barrier to Criminal Discovery?" (1963) 51 California Law Review 135.

9. Federal Rules of Criminal Procedure, Rule 12.1. See also Wardius v Oregon 412 US 470 (1973); R J Traynor "Ground Lost and Found in Criminal Discovery" (1964) 39 New York University Law Review 228; D W Louisell "Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma" (1965) 53 California Law Review.

10. Williams v Florida 399 US 78 (1970). See commentary in J Baldwin and F Feeney "Defence Disclosure in Magistrates' Courts" (1986) 49 Modern Law Review 593 at 595.

11. American Bar Association Project on Standards for Criminal Justice The Administration of Criminal Justice (1974) at 258-259. For New South Wales see Crimes Act 1900 s353A.

12. Id at 249.

13. Id at 244, 259. See also Wardius v Oregon 412 US 470 (1973).

14. See eg Criminal Law Revision Committee Eleventh Report: Evidence (General) (HMSO Cmnd 4991 London 1972) at 6ff.

15. Law Reform Commission of Canada Discovery in Criminal Cases (Working Paper No 4, 1974).

16. Id at 183.

17. Ibid.

18. Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (HMSO Cmnd 8092, 1981)at 179 para 8.20.

19. Id at 179 para 8.21. The reference to Baldwin and McConville is to unpublished research materials prepared by the authors and made available to the Royal Commission.

20. Id at 179 para 8.22.

21. Report on the Interdepartmental Committee on the Distribution of Criminal Business Between the Crown and the Magistrates Courts (Chairman: Lord Justice James) (HMSO Cmnd 6323, 1975) para 229.

22. Police and Criminal Evidence Act 1984 s81.

23. Criminal Bar Association (UK) Discussion papers on the Shortening of Criminal Trials in the Crown Court (1980) at 34.

24. Id at 35. See also J Baldwin and F Feeney "Defence Disclosure in the Magistrates Courts" (1986) 349 Modern Law Review 593.

25. Hon D P Landa, Hansard (NSW) Legislative Council, 27 March 1974 at 1991-1992.

26. Law Reform Commission of Canada Discovery in Criminal Cases (WP4 1974) at 184.

27. Id at 94-95.

28. See R v Visser (Unreported, Court of Criminal Appeal of New South Wales, 15 November 1985, 21 November 1985) referring to R v Sullivan (1971) 1 QB 253 at 258.

29. An analogous procedure is contemplated by the instructions to police issued by the Commissioner of Police in New South Wales on the questioning of suspected people and the verification of records of interview. See Watson and Purnell Criminal Law in New South Wales Volume 1 Indictable Offences Part A para [1187] at 463. The Commission gratefully acknowledges the assistance of Stephen Norrish, Public Defender, for this suggestion.

30. R v Apostilides (1984) 154 CLR 563. See also R v Damic [1982] 2 NSWLR 750. In Apostilides' case the High Court cautioned that the judge's power to call witnesses should only be used in an exceptional case. See also Whitehorn (1983) 152 CLR 657. The issue is discussed in greater detail at para 4.32.

31. [1966] 2 All ER 846; 50 Cr App R 166.

32. [1934] 2 KB 408. See also Criminal Law Revision Committee, Ninth Report, cited at note 2.

33. J Baldwin and F Feeney, note 10 at 598.

34. R v Grills (1910) 11 CLR 400; R v Christie [1914] AC 545.

35. (1985) 157 CLR 671; (1985) 59 ALJR 495.

36. Id per Gibbs CJ and Wilson J at 676-677, 497.

37. (1981) 147 CLR 565. The majority consisted of Gibbs CJ, Murphy and Aickin JJ. Wilson and Brennan JJ dissented.

38. (1981) 38 ALR 1.

39. R v Wasow (1986) 18 A Crim R 348. An application for special leave to appeal to the High Court was refused on 6 August 1986. See also R v James Francis Murray (Unreported, Court of Criminal Appeal of New South Wales, 7 March 1985).

40. Crimes Act 1900 s404.

41. This is a specific recommendation contained in our Report The Jury in a Criminal Trial (LRC 48), Recommendation 43 para 6.26.

42. D A Thomas "Principles of Sentencing" (2nd ed 1979) at 50, 52. See also R v Spinks (1980) 2 Cr App R (S) 335.

43. R v Skilton and Blackham (1982) 4 Cr App R (S) 339.

44. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat London 1980) at 49-53.

45. See paras 4.85-4.86.

46. Crimes Act 1900 s405A, ss1, 7; see Lattouf and Carr (1980) 2 A Crim R 65.

47. Para 4.95

48. See eg J Baldwin and F Feeney, note 10 at 598 and 599-601.

49. The Honourable R S Watson "Review of the Criminal Law of the Commonwealth" Draft Criminal Code s282.

50. Grayson "Crown Court Efficiency: A Plea for Pleading Points in Issue in Criminal Trials" [1981] Criminal Law Review 142-150.

51. See Note "The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense" (1972) 81 Yale Law Journal 1342.

52. See note 41.

Chapter 6
The Determination of the Mode of Trial

I. INTRODUCTION

6.1 In Chapter 2 we explained the distinction between summary offences and indictable offences. Almost all of the statutory summary offences are dealt with by a magistrate sitting alone in a Local Court, but a few exceptional offences are dealt with by a single judge of the Supreme Court when exercising the summary jurisdiction of that Court.[1] Many indictable offences may be tried summarily before a magistrate and a limited class of indictable offences may be tried summarily before a single judge of the Supreme Court.[2] When indictable offences are tried on indictment, they are tried before a judge and jury of 12 people in either the District or Supreme Court.

6.2 The distinction between indictable and summary offences, which appears to be clear, has become blurred by a series of changes to the substantive and procedural law. As a result, the conduct which exposes a person to a criminal charge will often constitute both an indictable offence and an equivalent or similar summary offence.[3] The general rule which prohibits a person from being prosecuted twice for the same offence means that the prosecution must elect whether to charge a summary offence or an indictable offence. In making this decision, the prosecution may effectively determine the form of procedure which will apply. For indictable offences triable summarily without the consent of the accused person, the prosecution has

a similar role in determining the court in which the case will be heard. Furthermore, many indictable charges can be dealt with summarily in the Local Court with the consent of the accused person and the concurrence of the magistrate.[4] There is a further complication caused by the fact that certain conduct may involve the commission of a number of offences, some of which may be summary and others indictable. In those cases which involve a mixture of offences, there are procedural difficulties caused by the fact that the various matters must be heard in different courts.

6.3 In this chapter we consider the problems associated with the procedure for determination of jurisdiction in cases "triable either way" and the similar problems which arise when an indictable charge is "backed up" by a summary charge arising from the same incident. Cases "triable either way" represent an increasingly significant part of the criminal justice process since the jurisdiction of the Local Courts to hear indictable cases has been extended greatly by a series of amendments in relatively recent years.[5]

6.4 Part II of this chapter discusses the advantages which accrue to the prosecution and the community, and also to the accused person, through the use of summary procedure. Part III describes the current provisions governing cases triable either way, noting some of the problems with these procedures. Part IV discusses the position where both indictable and summary charges arise from a single course of conduct. Part V analyses

recent English proposals for reform in this area. Finally, Part VI outlines some tentative proposals for reform in New South Wales.

II. THE ADVANTAGES OF SUMMARY PROCEDURE

A. Rapid Disposition

6.5 The first advantage of summary procedure, which, in many cases, is of benefit to both the prosecution and the accused person, is that a case so dealt with will be disposed of much more quickly than one dealt with on indictment. Cases dealt with summarily take less time because there is no committal hearing to be conducted. It is also argued that proceedings before a judge or magistrate sitting alone will necessarily be faster than before a judge and jury. The fact that the hearing of cases in the higher courts is delayed because of the congested state of the lists in those courts must also be taken into account.

6.6 It should be acknowledged that a speedy trial is not always beneficial to accused people.[6] It may sometimes be advantageous to an accused person who is on bail and at risk of being imprisoned if convicted, to delay the trial as long as possible. This may enable a more persuasive argument in favour of a less severe penalty if the accused person is convicted, based on both the staleness of the offence[7] and the person's demonstrated potential for rehabilitation. Prolonged delays also increase the likelihood of the prosecution case diminishing in strength through the unavailability of crucial

witnesses. There may also be a need for considerable delay in order for the defence to investigate and prepare a difficult case. These factors should be borne in mind when considering the advantages of rapid disposition of criminal charges and may explain why some accused people appear not to mind that their cases appear to be unduly delayed. The fact that there is no complaint in these cases is, of course, no argument in favour of permitting delay.

B. Lower Maximum Penalty

6.7 Another important incentive, at least from the point of view of the accused person, for electing summary jurisdiction is that the maximum penalty which can be imposed upon conviction is normally much lower than that available to the higher courts. For example, breaking, entering and stealing is an offence which can be tried summarily or on indictment. A person convicted on indictment is liable to a maximum penalty of penal servitude for 14 years.[8] If convicted of the same offence in a court of summary jurisdiction, the maximum penalty is penal servitude for two years.[9]

C. Lower Costs

6.8 Cases dealt with summarily cost the community much less than those dealt with on indictment. Since there is no committal hearing, and no jury to be empanelled at the trial, costs are substantially reduced. If the accused person is held in custody, the cost of pre-trial detention is reduced because of the speedier disposition of the case. Witnesses' expenses

are reduced because the Local Courts are likely to be more conveniently located. An accused person who is privately represented also benefits as the professional costs charged for appearances in the Local Courts are lower than in the higher courts. There are also likely to be fewer appearances. Where the State funds legal representation to the accused person, the savings obtained from summary trial will benefit the State.

D. Less Intimidating Atmosphere

6.9 Criminal proceedings conducted in the Local Courts are considerably less formal than those conducted in the higher courts. Trials conducted before a judge and jury in the higher courts are generally more stressful for an accused person who may prefer the less intimidating atmosphere of the Local Court. The fact that proceedings in the Local Court usually involve less publicity than those which are heard before one of the higher courts should also be considered. There is, in the first place, no jury in the Local Court. Secondly, proceedings there are less likely to attract widespread media publicity although they may be covered by local newspapers. On the other hand, it should be acknowledged that some accused people might prefer that their cases be dealt with in the greater solemnity of a higher court.

III. CURRENT PROCEDURES FOR DETERMINING MODE OF TRIAL

A. Introduction

6.10 Offences triable either way fall into two categories. The first category is created by s476 of the Crimes Act 1900. The procedures set out in that section for determining mode of trial effectively allow the accused person to elect to be tried by a judge and jury if he or she so desires. The second category includes those where the prosecution must choose whether to charge an indictable or summary offence.[10] It also includes, for practical purposes, the offences listed in s493 and s501 of the Crimes Act.[11] In the second category of cases the accused person is not entitled to trial by jury where the prosecution has elected summary disposition and the presiding magistrate decides to hear the case rather than commit it to a higher court.[12]

B. Summary Disposition With the Consent of the Accused Person

6.11 Section 476 of the Crimes Act provides that a large range of indictable offences may be dealt with summarily if two conditions are met. Firstly, the magistrate must be of the view that the case is a suitable one for summary jurisdiction. This essentially means that the magistrate needs to be satisfied that the maximum penalty available in the event of a conviction would be sufficient to meet the circumstances of the offence, taking into account the character of the convicted person. Secondly, the accused person must consent to having the matter dealt with summarily.[13]

6.12 The first legislative provisions which enabled certain indictable matters to be dealt with summarily appeared in New South Wales in 1883.[14] They were based on similar provisions which existed in the United Kingdom. The range of indictable offences capable of being dealt with summarily has gradually increased over the years and now includes:

* certain property offences including stealing, embezzlement, false pretences and malicious injury where the value of the property or the amount of the damage caused to it does not exceed $10,000;

* stealing a motor vehicle irrespective of its value;

* certain offences against the person including malicious wounding, assault, indecent assault and unlawful carnal knowledge;

* offences of culpable driving involving the infliction of serious injury; and

* attempts to commit any of the above.

The penalty which may be imposed upon a person convicted of an offence which is dealt with summarily under s476 is limited to a maximum of two years imprisonment for any one offence or the maximum sentence that could be imposed were the case to be dealt with on indictment, whichever is the lesser. The power to impose cumulative sentences is limited so that the maximum aggregate term of imprisonment available is three years.

The Problems Caused by Section 476

6.13 The procedure to be followed when a s476 case is before the Local Court is not altogether clear. Since the terms of the section do not provide a clear and complete guide to procedure, the practice of magistrates varies considerably. The following are the three major issues:

* At what stage of the proceedings should the decision as to the mode of trial be made?
* What criteria should be used to determine the mode of trial?
* What role should the prosecution play in deciding the mode of trial?

When Mode of Trial is Determined

6.14 The most serious problem with the application of s476 is determining the stage of the proceedings at which the magistrate should decide whether the case is suitable for summary jurisdiction. The legislation itself is uncertain and ambiguous.[15] Some magistrates make the decision as to whether s476 is to be applied before formal proceedings are commenced. Others will not entertain submissions on this issue until the prosecution case has been completed. Such inconsistency causes difficulty for both the prosecution and the accused person because the approach taken to the introduction of evidence and the conduct of the proceedings will naturally vary according to whether the proceedings are committal proceedings or a summary trial. It appears to us that the legislation should be clarified by a suitable amendment which specifies the procedure to be followed in complete terms. The tentative recommendation we make at paras 6.43-6.47 is that a decision as to mode of trial should be made before the hearing of evidence commences.[16]

Criteria for Deciding Mode of Trial

6.15 The second area of difficulty is that there are uncertainties as to the criteria which magistrates should apply in determining whether a matter can be suitably dealt with summarily rather than on indictment.[17] The legislation expressly mentions only the accused person's consent and the concurrence of the magistrate as prerequisites to summary disposition. Some other matters which have been considered relevant are:

* the circumstances and seriousness of the alleged offence;
* the penalty limitations prescribed by the section;
* the criminal record, if any, of the accused person;[18] and
* the attitude of the prosecution.

Again, the practice among magistrates varies considerably, probably as a result of the inadequate guidance provided by the legislation, but also because of the absence of case law authoritatively establishing the procedure to be followed.

The Role of the Prosecution

6.16 The third area of difficulty is the role of the prosecution in the determination of whether or not summary jurisdiction should be available in a given case. The section makes no express or implied reference to this question. A reasonable inference may be drawn from this that the legislature did not intend the prosecution to have any role in this process. The issue is complicated by the varying practices of magistrates. Some magistrates invite the

prosecution to make submissions on the suitability of summary jurisdiction. Although the position adopted by the prosecution is not binding upon the magistrate, some are significantly influenced by the prosecution's submissions. Other magistrates do not invite the prosecution to make submissions on this point, taking the view that the opinion of the prosecution is irrelevant. In our view, the prosecution has a clear interest in ensuring that criminal cases are dealt with in the appropriate jurisdiction. Accordingly, there is a need to clarify the role of the prosecution. We return to this question again at paras 6.47 and 6.51-6.52.

C. Summary Disposition Without the Consent of the Accused Person

6.17 Various procedural provisions enable indictable offences to be prosecuted summarily before the Local Courts without the consent of the accused person. The important provisions are:

* s501 and s529 of the Crimes Act 1900 which apply to various property offences where the property involved is valued at less than $2,000;

* s493 of the Crimes Act 1900 which concerns the offence of common assault;

* s30 of the Drug Misuse and Trafficking Act 1985 which deals with offences involving prohibited drugs;

* ss54, 55, 80 of the Firearms and Dangerous Weapons Act 1973 which deals with the unlawful use and possession of certain implements; and

* s11 of the Listening Devices Act 1984 which deals with the unauthorised use of eavesdropping devices.

Summary conviction in most cases exposes the accused person to a lower maximum penalty than that provided for conviction on indictment.

Deciding Whether a Case will Proceed Summarily

6.18 The decision as to whether a prosecution will be launched summarily or on indictment is, in the first instance, a matter for the prosecuting authority. The wording of some of the relevant legislative provisions leaves it uncertain as to whether the decision of the prosecuting agency to conduct a summary prosecution is conclusive, or whether the court hearing a charge which the prosecution wishes to be dealt with summarily can commit the matter to a higher court. We are unaware of any authority directly on the point. In Stramandinoli's case the Court of Criminal Appeal of New South Wales held that offences which fall within the jurisdictional limits of s501 can nevertheless be heard in the District Court.[19] The case is authority for the proposition that s501, is procedural rather than substantive. That is, it does not create summary offences but merely provides a means by which indictable offences may be dealt with summarily. However, in Stramandinoli, the prosecution did not seek to have the matters dealt with summarily. For that reason the Court did not decide whether a magistrate is bound by the decision of the prosecuting authority to proceed summarily.

Undervaluing the Property Involved

6.19 As noted above, s501 is only applicable to property offences where the value of the property is under a set limit, the current limit being $2000. There have been occasions on which prosecutors have undervalued the property involved in the offence. For example, when the property value limitation in

s501 was $500 between 1974 and 1983, stolen motor vehicles would sometimes be described in the information charging the offence as being "of the value of $499" so that the matter would be dealt with summarily. On at least one view as to the operation of the section, this entails the consequence that the accused person is denied the right to elect jury trial. Even though the accused person may not have objected and may have actually desired this result, practices such as this do nothing to enhance respect for the administration of justice.

Degree of Criminality

6.20 A further criticism of s501 (and it could equally be applied to s476) is that the value of the property in question does not itself determine the degree of the criminality involved, nor does it reflect the consequences of conviction for the accused person. This fact appears to have been recognised by those amendments to s476 which included in that section the offence of stealing a motor vehicle irrespective of its value. On the other hand, there are factual circumstances involving the theft of property worth less than $2000 which, having regard to the criminality involved, could justify a penalty much more severe than the maximum available penalty of 12 months imprisonment. Putting this another way, the nomination of a monetary value is an arbitrary exercise which will not in every case reflect the criminality involved in the offence charged.

Absence of Guidelines for Decision Makers

6.21 At present there is little guidance for prosecutors or the courts regarding the factors which render a case suitable for summary disposition. There is, of course, a limit to the scope of s501 established by the specification of a maximum property value. The Commission is of the view that it is generally desirable that certain criteria other than the value of the property should form the basis of decisions as to mode of trial.[20] This need is more acute with legislative provisions other than those listed in para 6.17, since the seriousness of the offences in question cannot be determined by reference to property values. For these offences there are no legislative criteria for the availability of summary jurisdiction.

The Grounds for the Prosecution Decision are Not Made Public

6.22 The grounds upon which the prosecution bases its decision to prosecute summarily rather than on indictment are not made public. In many cases, the grounds for such a decision will be clear and the decision will not be contested by the accused person or queried by the court. However, where the decision to prosecute summarily is called into question, as it has been in some cases, the fact that the reasons for the decision are not disclosed will make it more difficult to assess the correctness of that decision. The publication of grounds serves the important features of openness and accountability which we have identified earlier as desirable aspects of the criminal justice system.

No Submission By the Accused Person

6.23 The accused person is not usually given an opportunity to make a submission as to whether a case which is capable of being dealt with summarily without his or her consent should be so dealt with. Notwithstanding the relatively minor nature of an indictable offence triable summarily, the accused person may risk severe consequences upon conviction. Leaving aside the penalty imposed by the court, these consequences may include the stigma of a conviction, consequent loss of certain civil rights, termination of employment or, in the case of a person who is on parole or has been released on licence, loss of liberty for a substantial period. Although an accused person probably has the right to make application to a magistrate that a s501 case be dealt with by a higher court, we are not aware of any case in which an application of this kind has been granted. In our view, the law should be clarified so that the accused person is given the right to be heard on the question of mode of disposition. In accordance with a specific recommendation made in our Report The Jury in a Criminal Trial, we consider that, in cases where the circumstances of the case are "serious", the right to trial by jury should be preserved.[21]

Restriction on Trial by Jury

6.24 Legislation permitting an indictable criminal matter to be dealt with summarily irrespective of the accused person's consent restricts the use of trial by jury. The gradual erosion of the right to trial by jury in criminal cases is a

matter of considerable concern to those who think that the traditional safeguards of a jury trial should be available to everyone charged with a serious criminal offence.[22] Although some of the offences where jury trial is for practical purposes no longer available may be regarded as relatively trivial, it should be borne in mind that the consequences which flow from conviction may be serious.

6.25 By vesting the discretion to decide whether to proceed summarily or by way of indictment in the prosecution, an accused person is denied the right to trial by jury if the prosecution's decision as to mode of trial is effectively treated as conclusive of the issue. Among offences which are triable either way, many which may be of considerable importance to the general community are included. If it is accepted that one of the important contributions of the jury system to the administration of criminal justice is to ensure that community standards play a part in the determination of guilt, the question arises whether a jury should be prevented from hearing cases where community attitudes are of special concern. Summary prosecution denies the community, through its representation on a jury, an important opportunity to comment upon the general validity of the criminal law or its application in a particular case.[23]

6.26 In England, trial by jury is available to people charged with, for example, stealing from retail stores, minor drug offences and certain driving offences.[24] In the United States, trial by jury is even more widely available in criminal cases.[25]

6.27 The argument against extending the right to trial by jury to less serious cases is that jury trials are expensive and time-consuming and should therefore be reserved for the more serious categories of crime. We do not suggest that there should be an unqualified right to trial by jury in minor criminal cases. We suggest, however, that in those cases in which the accused person has shown compelling reasons why his or her case should be heard by a jury, magistrates should be prepared to grant an application for jury trial in the higher courts.

D. Other Issues

The Relationship Between Sections 476 and 501

6.28 The relationship between s476 and s501 of the Crimes Act is uncertain. Where the value of the property which is the subject of the alleged offence is less than $2000, there is an obvious overlap between the two sections. The application of the sections in a case where the factual circumstances mean that both sections could be applied is not clear from the terms of the legislation and, so far as we are aware, has not been clarified by judicial interpretation.

Disputes as to the Value of Property

6.29 There is further uncertainty where a dispute arises over the value of the property involved. For example, if a person is charged with theft of property alleged by the prosecution to be worth $10,500 and the accused person claims that it is worth only $9500, and would ask for the case to be dealt with summarily on that basis, how is that dispute to be resolved and what are the consequences of the decision? It can be argued that this is a preliminary matter which should be determined before jurisdiction can be exercised by the magistrate. If jurisdiction is contingent upon a question of fact such as the value of property, should it be a decision for the magistrate or for a jury?

Appeals to the District Court

6.30 Section 476 is silent on the question whether a District Court judge, sitting in the special jurisdiction of that Court on appeal from the decision of a magistrate, has the same powers as the magistrate regarding the exercise of the discretion to grant summary jurisdiction under s476. The question arises whether a District Court judge can make a determination that the case cannot properly be disposed of summarily and commit the accused person for trial or sentence in the District Court. Although the better view appears to be that a judge may only exercise the powers of a magistrate hearing the matter, not in considering whether to hear it, this question has not, so far as we are aware, been conclusively

resolved. It is clear, however, that a District Court judge sitting on appeal from a decision of a magistrate has the same powers as the magistrate regarding sentence and cannot therefore impose a greater penalty than the maximum available to the magistrate.[26]

The Specific Power to Commit to a Higher Court

6.31 The Listening Devices Act 1984 expressly empowers a magistrate to change a summary prosecution to an indictable prosecution. It provides that a magistrate who is of the opinion that an indictable offence should be prosecuted on indictment has the power to order that proceedings begun as summary proceedings should become committal proceedings. Unless the court orders that the prosecution should begin again, so much of the proceedings as occur before the magistrate makes such an order are deemed to have been conducted as committal proceedings.[27] There was a similar provision in the Poisons Act 1966 but it is not contained in the legislation which replaced it, the Drugs Misuse and Trafficking Act 1985. In our view, there should be a general power of this kind irrespective of the offence being tried. This would enable the Local Court to remedy the position if summary jurisdiction is granted in an unsuitable case.

IV. "BACK-UP" CHARGES

A. Introduction

6.32 It very often happens that a person charged with an indictable offence will also be charged with one or more summary offences arising out of the same incident. A person charged with the indictable offence of culpable driving may also be charged with one or more summary traffic offences. Similarly, a person charged with the indictable offence of sexual assault may be charged with the offence of common assault, frequently dealt with summarily. Minor drug offences such as "use" and "possess implements" often are charged along with more serious indictable drug offences such as "supply". These summary charges are commonly referred to as "back-up" charges. This expression accurately reflects their purpose as they are rarely proceeded with if the accused person is convicted of the indictable offence. In the Commission's first Issues Paper on Criminal Procedure, we raised the issue whether it was desirable to avoid the necessity for separate determination of "back-up" charges.[28]

B. The Problem

6.33 The current jurisdiction of the higher courts is, apart from a limited range of offences capable of being dealt with by the Supreme Court in its summary jurisdiction,[29] exclusively limited to indictable offences. Where an accused person is charged with an indictable offence and a summary offence arising out of the same incident, the former must be dealt with by a higher court and the latter by a Local Court. For

example, a man charged with both culpable driving and driving in a manner dangerous to the public must be tried on the former charge in the District Court. If he is acquitted on that charge, he may be prosecuted on the latter charge in a Local Court. The facts and circumstances giving rise to the summary charge will have been canvassed in the trial of the indictable charge. This means that the prosecuting authority must present the same evidence twice and that the accused person is required to appear in court on two separate occasions.

6.34 Recent legislation in Victoria empowers a judge hearing an indictable matter to deal with a summary offence charged against the accused person arising out of the same facts, but only where the accused person pleads guilty to that offence and consents to the judge hearing the matter.[30] In order to avoid the possibility that judges in the higher courts, or even juries, may become involved in the protracted trial of summary offences, the legislation provides that, if the accused person intends to plead not guilty to the summary offence, the case is sent back to the magistrate's court for trial.[31] We are not convinced that this power should necessarily be limited to those cases where there is a plea of guilty to the summary offence. Accordingly, we propose that legislation be introduced in New South Wales giving judges in the higher courts the power to deal with summary offences which are related to indictable offences heard by the court. It should be a matter for the discretion of the court to determine whether this power should be exercised or whether the summary matter should be remitted to the Local Court.

6.35 A jury hearing the trial of an indictable offence does not have the power to find the accused person guilty of a summary offence which they consider is proved by the evidence. In our view, the determination of guilt in related summary offences is not the proper function of a jury. Such a procedure may give rise to compromise verdicts where a jury is unable to agree on the more serious charge. We tentatively suggest in para 6.68 an alternative procedure to permit the judge to convict the accused person of a summary offence with which he or she has been charged and which the judge considers to be proved by the evidence tendered in the trial of the indictable offence. We also suggest in para 6.69 that the power to take other indictable offences into account "on a schedule"[32] when sentencing a person convicted of an indictable offence should be extended to permit the judge, where the accused person consents, to take into account summary offences in respect of which the accused person admits his or her guilt.

C. Appeals

6.36 There is a further issue which arises in relation to "back-up" charges. At present appeals from the higher courts in New South Wales go directly to the Court of Criminal Appeal, usually constituted by three Supreme Court judges. This may pose some problems if the higher courts were to deal with "back-up" summary charges as we propose in para 6.34. It could be argued that it is inappropriate for the Court of Criminal Appeal to deal with relatively minor matters such as the length

of disqualification periods in driving cases. This argument overlooks the fact that the Court of Criminal Appeal may currently be required to decide such a matter where it hears appeals in cases of culpable driving. An argument to this effect was rejected in Victoria when the County Court (the Victorian counterpart to the New South Wales District Court) was given the power to deal with summary offences at first instance.[33] Nevertheless, we are tentatively of the view that appeals brought against decisions of the District Court when hearing 'back-up' summary offences would not usually warrant the attention of the Full Court of Criminal Appeal. For these cases, the Court of Criminal Appeal could be constituted instead by a Supreme Court judge sitting alone[34] who would have the power to refer a matter of sufficient importance to the Full Court.

6.37 One desirable consequence of allowing the higher courts to deal with summary matters is that the Court of Criminal Appeal would have the opportunity to determine the law in a manner which is binding upon all courts exercising summary jurisdiction. At present the Local Courts rarely receive any authoritative guidance on the application of the principles of sentencing, in particular, in cases of a relatively minor nature. This is because decisions of the District Court when exercising its special jurisdiction as an appellate court are not binding on magistrates. We should note that this question will be examined by the Commission in greater depth in that part of the Criminal Procedure reference concerning appeals in criminal cases.

V. DETERMINATION OF MODE OF TRIAL IN ENGLAND

A. Current Practice

6.38 In England, cases which may be tried summarily or on indictment are dealt with initially by conducting a "mode of trial" hearing. Depending on the decision made, that hearing is followed either by a summary trial or by committal proceedings. The mode of trial hearing procedure is governed by the Magistrates' Courts Act 1980.[35] The court begins by considering which mode of trial appears more suitable. The court is required to make a complete and adequate inquiry into the circumstances of the case before reaching a decision as to mode of trial and both the accused person and the prosecutor are given the opportunity to make representations on this issue.[36] Legislation provides that if the prosecution is being conducted by the Attorney General, the Solicitor General or the Director of Public Prosecutions, the consent of the prosecution is necessary before summary jurisdiction can be granted.[37] There is also provision for the mode of trial hearing to be conducted in the absence of an accused person if he or she is legally represented.[38] Where the court considers that a summary trial would be more suitable, it must explain to the accused person "in ordinary language" that a summary trial would, in the court's opinion, be more suitable and that the accused person can either consent to this mode of trial or elect to be tried by a jury. The court must also explain to the accused person that, if tried summarily and convicted, he or she can be committed for sentence in a higher court.[39]

Where the court which has convicted is of the opinion that a higher penalty than it has the power to order is warranted, the determination of penalty is made by a superior court.

6.39 The English experience has been that the mode of trial hearing does not normally take a great deal of court time since in most cases there is little argument over the issue. However, it is apparent that in some cases the nature and purpose of the mode of trial hearing has not been made clear to an unrepresented person and applications to change an election have often been made on the basis that the accused did not understand the significance of the original choice as to jurisdiction.[40] Whilst it is desirable that the mode of trial hearing should take place at the earliest opportunity, it is essential that there should be a means available to change an election, particularly if the accused person is unrepresented.[41]

6.40 The effectiveness of the English system has been enhanced by the recent implementation of rules prescribed under s48 of the Criminal Law Act 1977.[42] The rules entitle a person who is charged with an offence "triable either way" to information about the prosecution case before the mode of trial hearing in the magistrates' courts. The prosecution is obliged to give the accused person copies of the prosecution statements or a summary of the prosecution case. As well as assisting in the preparation of the defence case, this information may be of considerable value to the accused person in formulating a submission as to the appropriate mode of trial.

B. Proposals for Reform in England

6.41 The Justices Clerks' Society, whose members are the principal legal advisers to magistrates in England and Wales, has suggested that, in cases "triable either way", the matter should proceed summarily unless the accused person elects to be tried by judge and jury.[43] It argues that neither the magistrate nor the prosecution should have any say in the mode of disposition. The Society suggests that the likely consequences of such a change would be:

* a considerable increase in the number of indictable matters dealt with summarily;
* a reduction in the workload of the higher courts;
* a reduction of delays within the criminal justice system generally since more cases will be dealt with by a quicker method;
* a reduction in the overall costs of the administration of criminal justice;
* a reduction in the population of remand prisoners; and
* a reduction in the population of sentenced prisoners.

6.42 The Society has proposed that another means of overcoming some of the difficulties in this area is to reclassify certain offences as summary offences. It has suggested that many of those offences which are nominally indictable but which are invariably dealt with summarily should be formally recognised as having changed their character to being summary offences. If this were done, the range of offences which are triable either way would be reduced, but it would mean that, in cases where the circumstances of the

offence are particularly serious, the matter would be heard in an inappropriate court. We do not consider that the decision as to the court they are to be heard in should be left entirely in the hands of the accused person.

VI. OPTIONS FOR REFORM IN NEW SOUTH WALES

A. The Mode of Trial Hearing

6.43 In New South Wales, offences "triable either way", whether or not with the consent of the accused person, are usually listed for mention before they are finally heard. This is particularly so when the charge is contested. There is normally no determination of the eventual mode of disposition at that mention. The English "mode of trial" procedure could be very easily adapted to New South Wales so that this mention includes a mode of trial hearing. Listing matters for a pre-hearing mention would also be useful in identifying at an early stage those cases where a plea of guilty will be entered.

6.44 Cases in which the prosecution has the initial election as to jurisdiction should also be preceded by a short "mode of trial" hearing. Either party should be entitled to apply to the magistrate for an order that the hearing in the Local Court be conducted as committal proceedings on the ground that it was not suitable for summary determination. The magistrate would also be entitled to make such an order of his or her own motion. This mode of trial hearing need not be on a different date to that on which the matter is heard, but the determination of mode of trial and thus of the type of hearing

which is to follow, either committal proceedings or summary trial, should be made prior to the commencement of the proceedings.

6.45 A mode of trial hearing would ensure that the accused person knows precisely the nature of the proceedings which are to take place. If it is to be a summary trial, witnesses can be cross-examined and the defence presented in the appropriate manner. If it is to be a committal proceeding, the approach taken by the defence may be entirely different because the hearing is only a preliminary hearing and not a final determination of the matter.

6.46 It might be argued that additional pre-trial proceedings would aggravate the congestion which already exists in the courts and thereby cause even greater delays. In the Commission's view, determining the mode of trial at an already existing mention date or on the same day as (but prior to) the hearing would, on the contrary, reduce the congestion by improving the efficiency of listing procedures in the Local Court. The allocation of the workload of the court would be assisted by more accurate prediction of the length of the cases it is to hear.

6.47 If our proposal for a mode of trial hearing were to be adopted, three additional issues would need to be addressed. Firstly, should the accused person or the prosecution have the right to withdraw and change the election for either form of trial and, if so, when and in what circumstances? Secondly,

what should be the role of the prosecution in the determination of the mode of trial? A person should not lightly be deprived of his or her right to trial by jury, regardless of whether the magistrate might regard summary trial as more appropriate. On the other hand, the prosecution has a legitimate interest in ensuring that criminal cases are heard in courts of appropriate jurisdiction. Thirdly, if the presiding magistrate commits a person for trial in a higher court after a mode of trial hearing at which both the accused person and the prosecution have elected for summary jurisdiction, should there be any means available to refer the case back to the Local Courts? Under the current procedure, if a magistrate commits a person for trial in a case which is considered unsuitable for trial before a judge and jury, the "unsuitable" trial can be conducted in the higher courts or a recommendation made to the Attorney General that "no bill" be found, in which case the accused person is not tried on the charge. We address these issues in the summary of tentative proposals in Part VII of this chapter.[44]

B. A New Classification for Offences "Triable Either Way"

6.48 In our view, it is necessary to examine the offences covered by the legislation which provides for alternative means of disposition, such as s476 and s501 of the Crimes Act. It may be that some of the offences referred to in s476 should be omitted and that others should be included. Similarly, the monetary limit under s476 should be reviewed now or at regular intervals in the future. At present the section generally

applies to offences involving property or damage worth less than $10,000. One of the Commission's terms of reference on criminal procedure is to inquire into the classification of criminal offences. In due course we will be publishing a Discussion Paper on this aspect of the reference and it will cover this issue.

C. The Relevance of a Criminal Record

6.49 The question of whether the accused person's criminal record should be considered by the magistrate prior to making a determination as to mode of trial is a controversial issue of principle, although the practice has been approved by high authority.[45] An accused person who pleads not guilty to an indictable offence before a magistrate and requests that the matter be dealt with summarily in accordance with s476 may feel justifiably concerned if the magistrate looks at his or her criminal record before deciding whether or not to deal with the case. If the magistrate decides to deal with the matter summarily, both the general community and the accused person may be given the impression that the criminal record is taken into account when determining guilt. The practice of excluding prejudicial evidence from the consideration of the tribunal of fact is well established. In criminal trials before a jury, evidence of the record of prior convictions of the accused person is inadmissible in the prosecution's case in chief unless it either comes within the narrow confines of the rule permitting the prosecution to lead evidence of "similar facts" or if the accused person raises character as an issue in the

trial. The primary reason why evidence of prior convictions is excluded is to avoid the risk that an accused person will be convicted, not on the evidence presented in the case, but because of his or her previous bad character.

6.50 One suggestion is that any reference to or consideration of an accused person's record should not be made until after a conviction, if any, is recorded. If thought appropriate, the accused person could be committed to the District Court for sentence. In England, a similar procedure applies to some offences triable either way.[46] The Commission does not regard this approach as satisfactory. It is a fundamental principle of sentencing that the penalty which a convicted person receives should not be increased because of a previous criminal history.[47] A magistrate or judge can look to the criminal record of a convicted person only for the purpose of ascertaining if there is some ground for extending leniency to the accused person or if there is some reason for mitigation of sentence. If these principles are strictly applied, a magistrate who determines prima facie that the case should proceed summarily cannot then decide, on the basis of the accused person's criminal history, that he or she does not have an appropriate range of sentencing options. The criminal history of the offender should, as a matter of strict principle, have nothing to do with the decision as to mode of trial. However, the practical reality is that there are some circumstances where it will be relevant.[48]

6.51 If the criminal history of the accused person is to be a factor in deciding whether the case is appropriate for summary disposition, then this matter should be taken into account by the prosecution, for it is in a position to assess in the first instance whether the maximum penalty available to the magistrate is adequate to meet the degree of criminality involved. There is, in addition, no problem of apparent prejudice caused by the prosecution having access to the relevant information. This gives added weight to the proposition that the prosecution should have a role in determining whether s476 cases should be dealt with summarily or not.

6.52 The Commission tentatively proposes that a magistrate conducting a mode of trial hearing should not be entitled to take into account the previous criminal history of the accused person in determining the mode of trial. In order that the magistrate's decision in this regard can be an informed one, we make the further tentative proposal that the prosecution should have a right to be heard on the question of mode of trial wherever the offence charged is capable of being tried "either way". We examine below some additional measures which might be considered to ensure that criminal cases are heard in a court whose jurisdiction reflects the seriousness of the case from the point of view of the community, the court and the accused person.

D. The Power to Transfer Cases to a Higher Court

6.53 To enable the review of the decision to proceed summarily, legislation could be enacted to provide for any one or more of the following. Firstly, the magistrate could, in the manner discussed in para 6.31, be given the general power to change the nature of the proceedings from summary to indictable and in particular to commit for sentence to a higher court wherever, in the magistrate's opinion, the maximum penalty available to the Local Court is inadequate.[49] We suggest, however, that this power should not be used where an accused person has been convicted after trial. It appears to us to be unfair to a person who has foregone the right to jury trial on the understanding that the maximum penalty will be limited, to then be committed for sentence to a court which has the power to impose a much greater penalty. We do not have the same concern where there is a plea of guilty entered in the Local Court on the understanding that the case will be dealt with summarily. In such a case the accused person should be required to plead again before the higher court and should be entitled to change his or her plea to not guilty.[50] Secondly, both parties could be given the right to appeal to a higher court for the purpose of reviewing the magistrate's decision to deal with a case summarily. Thirdly, either of the parties may be given the power to elect at any time to have the case dealt with by a higher court. Such a provision would require clarification of the rights of the parties to elect jurisdiction in the first instance. These suggested changes need not be mutually exclusive; it may be advantageous to

implement all three in order to provide greater flexibility to deal with the various problems that may be encountered in ensuring that criminal cases are heard in the appropriate court. We raise these as matters for consideration, but would note that we have not made any tentative proposal that they should be implemented.

E. Implications for Legal Representation

6.54 Where accused people are tried before a judge and jury, they are almost certain to be provided with legal representation if they cannot afford it. The increase in the range of offences which can be dealt with by courts exercising summary jurisdiction has meant that the Local Courts are now dealing with cases of greater seriousness. This has important implications. Not only are these cases being dealt with by a single judicial officer sitting without a jury, but the standard of legal representation may be lower than that available in the higher courts. So far as legal aid is concerned, an accused person whose case is dealt with in the higher courts is usually represented by a barrister and solicitor without fee. This will only rarely occur if the case is dealt with in the Local Court. When legislation has extended the jurisdiction of the Local Courts in New South Wales to cover more serious cases, there has been a corresponding increase in the availability of legal aid for accused people whose cases are dealt with in the Local Courts. Our attention has been drawn to a suggestion made in England that the availability of legal aid should in some cases be

dependent upon the accused person consenting to his or her case being dealt with summarily. In our view, the current policy of the Legal Aid Commission of New South Wales in this regard should continue, namely that the consent of the accused person to summary jurisdiction is irrelevant to the granting of legal aid.

F. Conclusion

6.55 The mode of trial hearing which we tentatively propose should not cause additional congestion in the Local Courts because the hearing itself will normally be very brief. It need not be separated from the hearing of the case, particularly in uncomplicated and uncontested matters of a relatively minor nature. Indeed, the mode of trial hearing should enable the Local Courts to deal with their workload more efficiently because hearing times can be more accurately predicted when the nature of the proceedings is known in advance. Where the parties and the court do not agree as to the mode of trial, the hearing would also assist the prosecution to distinguish those cases which should be heard summarily from those which should be heard in a higher court.

VII. SUMMARY OF TENTATIVE PROPOSALS

1. Range of Offences Requiring a Mode of Trial Hearing

6.56 Offences "triable either way" includes those indictable offences triable summarily with the consent of the accused person and the concurrence of the presiding magistrate (for example Crimes Act s476), those indictable offences triable summarily irrespective of the consent of the accused person

(for example Crimes Act s501) and those criminal offences which may, according to the legislation which creates them, be prosecuted either summarily or on indictment (for example offences related to firearms and listening devices).

2. Disclosure by the Prosecution in Cases Tried Summarily

6.57 Where the prosecuting authority has nominated the Local Court as the prospective court of trial for an offence triable either way, the accused person should be informed of that decision. The prosecuting authority should be required, as it is under the current law, to provide the accused person with a written statement of the charge. It should, in addition, be required to give the accused person a brief outline of the facts alleged in the form which is currently given to the police prosecutor by the investigating police for the purpose of a plea of guilty. Where the accused person does not indicate an intention to plead guilty, he or she may request the court for complete disclosure of the prosecution case. If this is done, the statements of all witnesses whom the prosecution proposes to call should be filed in court, together with any other relevant information or materials necessary to make full disclosure. These statements, materials and information should then be provided to the accused person unless the prosecution can satisfy the court that they should be withheld, in whole or in part, in the public interest. (For fuller discussion of disclosure by the prosecution see Chapter 4.)

3. The Mode of Trial Hearing

6.58 Where the accused person indicates an intention to plead guilty to an offence triable either way, the court in which the case will be dealt with may be determined immediately or at the convenience of the court. If there is no plea of guilty, disclosure should be made by the prosecution in accordance with the proposals in para 6.57. After the accused person has had an opportunity to consider the case to be presented by the prosecution, but before he or she is required to plead to the charge, there should be a short hearing in the Local Court to determine the mode of trial. At this hearing, which should be conducted as soon as is reasonably practicable after the decision to prosecute has been made, both the accused person and the prosecuting authority should have the opportunity to be heard on the issue. It should be open to the accused person to notify the prosecuting authority in advance if the mode of trial nominated by the prosecuting authority is to be disputed.

4. Criteria for Determining Mode of Trial

6.59 The legislation prescribing the procedure to be followed in determining the mode of trial for an offence "triable either way" should expressly specify the conditions which must be satisfied before jurisdiction can be granted and also the matters which a magistrate should take into account in deciding whether the case is more suitable for summary trial or for trial on indictment.

5. Criminal History of the Accused Person Not to be Considered

6.60 In determining whether a case may properly be disposed of summarily, the Local Court should not be informed of the criminal history of the accused person because this is not a factor which may be used to increase an otherwise appropriate sentence. Since the prosecuting authority would have, according to our proposal in para 6.61, a more significant role in determining the mode of trial, we propose that the accused person's criminal history should be taken into account by the prosecuting authority.

6. Consent of the Prosecuting Authority Required

6.61 One of the practical effects of giving the prosecuting authority the power to nominate the prospective court of trial would be that, in indictable cases where the availability of summary jurisdiction is currently dependent upon the consent of only the accused person and the presiding magistrate, the consent of the prosecuting authority to summary jurisdiction would also be required. Where the consent of the accused person is not required for the Local Court to have jurisdiction, the determination of mode of trial will initially be a matter for the prosecuting authority, but ultimately for the presiding magistrate to decide.

7. Disposition Following Grant of Summary Jurisdiction

6.62 In a case where both parties and the court agree that the matter should be heard summarily, the case may be disposed of immediately following the mode of trial hearing, particularly if there is a plea of guilty to the charge. Where

summary jurisdiction is granted after a mode of trial hearing but the matter is not ready to proceed immediately, it should be listed for hearing in the Local Court after consultation with the parties to determine a suitable date for hearing.

8. Refusal of Summary Jurisdiction

6.63 Where summary jurisdiction is refused after a mode of trial hearing, the accused person should be transferred to the appropriate higher court and the matter referred to the prosecuting authority to consider whether there should be a prosecution in a higher court. This will not mean that the question of mode of trial is considered twice by the prosecuting authority because the initial decision will usually have been made by a delegate of the prosecuting authority. The Local Court should formally notify the relevant higher court that the matter has been transferred to it and referred to the prosecuting authority. The higher court should acquire jurisdiction over the case immediately upon it being transferred from the Local Court.

9. A General Power to Commit to a Higher Court

6.64 A magistrate conducting trial or sentence proceedings in an offence "triable either way" should have the power to transfer the matter to a higher court if he or she is of the view, at any stage of the proceedings, that having regard to the evidence and the circumstances of the case, it is unsuitable for disposition in a court of summary jurisdiction, and should be heard by a higher court. However, this power

should not be capable of being used after an accused person has been convicted having pleaded not guilty to the offence. An accused person who pleads guilty to an indictable offence on the understanding that it is to be dealt with summarily, and who is then committed to a higher court, should be entitled to change that plea to not guilty in the higher court.

10. Local Court May Order Trial by Jury of an Indictable Offence

6.65 Since some indictable offences capable of being prosecuted summarily without the consent of the accused person are, because of their subject matter or the consequences of conviction for the accused person, so serious that the accused person should not be denied the right to trial by jury, a magistrate conducting a mode of trial hearing should have the power to order that any indictable offence should be heard before a judge and jury, but only where the accused person consents to such an order. This proposal is consistent with the recommendations made by this Commission in its Report The Jury in a Criminal Trial.[51]

11. The Power of the Prosecuting Authority to Refer Cases Back

6.66 In a case where the accused person has indicated a willingness to have the matter dealt with summarily, but summary jurisdiction has been refused, the prosecuting authority should have the power, to be exercised in exceptional cases, to refer the matter back to the Local Court to be disposed of by a different magistrate. If the accused person does not consent to having the matter dealt with summarily,

there should be no power in the prosecuting authority to refer the case back to the Local Court. This proposal would mean that the direction of the prosecuting authority as to the mode of trial, where it is consistent with the view of the accused person, should prevail over the contrary decision of the magistrate who conducted the mode of trial hearing. It is designed to overcome the difficulty created where a magistrate orders a jury trial in a case which is inappropriate for trial before a judge and jury.

12. Withdrawing Election on the Mode of Trial

6.67 Where a case which may be heard either in the Local Court or the higher courts has been listed for hearing in the prospective court of trial after a mode of trial hearing, neither the accused person nor the prosecuting authority should be entitled to alter the election made as to mode of trial unless the prospective court of trial grants leave to the party making such an application. Where such an application is made to the higher courts, the court should only grant leave if the other party consents to the change. The prospective court of trial may itself raise the issue of the appropriate mode of trial.

13. Concurrent Jurisdiction

6.68 Where an accused person is charged with both a summary offence and an indictable offence arising out of the same incident, and the indictable offence is prosecuted in a higher court, the judge presiding in the higher court should have the power to deal with the summary offence. The Commission is

currently divided on the question of whether this should be subject to the consent of the accused person. Accordingly, the prosecuting authority should be obliged to advise the court before the trial of any summary charges related to the indictable prosecution. We suggest, subject to further consideration on this question when we come to deal specifically with the subject of appeals in criminal proceedings, that appeals from a court (other than the Supreme Court) hearing summary charges may be heard by the Court of Criminal Appeal constituted by a single judge of the Supreme Court.

14. Taking Matters into Account on Schedule

6.69 There should be an extension of the range of offences to which the procedure under the Crimes Act s447B whereby a "schedule" of other offences is taken into account for the purpose of sentence, applies. Where an accused person appearing in one of the higher courts either pleads guilty to or is convicted of an indictable offence, the court should have the power to take summary offences into account on the schedule in the same way that other indictable offences may be so dealt with.

15. Time Limits for Offences "Triable Either Way"

6.70 If an offence "triable either way" is to be tried before the Local Court, it should be regarded as a summary offence for the purpose of calculating the time limit within which the trial must commence. If such an offence is to be tried in the higher courts, it should be regarded for this purpose as an

indictable offence. However, the relevant time period should commence at the conclusion of the mode of trial hearing at which the prospective court of trial is determined. (The specification of time limits for the prosecution of criminal charges is dealt with in Chapter 3.)

16. Clarification of Powers of District Court

6.71 The powers of the District Court when sitting in its special jurisdiction as a tribunal hearing an appeal against a conviction or a penalty imposed by a magistrate should be clarified by legislation.[52] The determination made by the magistrate that the case is suitable for summary jurisdiction should not be capable of being reviewed by the District Court.

17. Legal Aid for Offences "Triable Either Way"

6.72 The current policy of the Legal Aid Commission of New South Wales, namely that the attitude of the accused person to having the case dealt with summarily should not have any bearing on the decision whether legal aid should be granted to a person accused of an offence "triable either way", should be maintained.

Footnotes

1. Supreme Court (Summary Jurisdiction) Act 1967. It should be noted for the sake of clarity that the District Court does not have a summary jurisdiction. The fact that the term "summary" is used to describe a type of offence classification as well as a form of procedure should also be noted. The meaning should be clear from the context.

2. Crimes Act 1900 s475A.

3. See Firearms and Dangerous Weapons Act 1973, Listening Devices Act 1984.

4. Crimes Act 1900 s476.

5. Legislation introduced in 1974 incorporated a completely redrafted s476 into the Crimes Act 1900. This new section extended the range of indictable offences which could be dealt with summarily to include those involving property valued at less than $2000. The section was further amended in 1983 to increase this monetary limit to $10,000 and to extend the range of indictable offences capable of being dealt with summarily even further.

6. See discussion of Speedy Trial Legislation, Chapter 3.

7. R v Todd [1982] 2 NSWLR 517. See also R v Gannon (Unreported, Court of Criminal Appeal of New South Wales, 29 August 1984).

8. Crimes Act 1900 s112.

9. Crimes Act 1900 s476.

10. See examples cited above in note 3.

11. See discussion of the effect of these sections at para 6.17ff.

12. These provisions are discussed, and certain recommendations for reform made in New South Wales Law Reform Commission Report The Jury in a Criminal Trial (LRC 48, 1986) paras 2.15-2.21. The position is complicated by the repeal of s548A Crimes Act 1900 in 1974. It is unclear why this section, which expressly provided that the magistrate had the power to commit for trial on the hearing of a charge "for any offence referred to in section(s) five hundred and one" was repealed.

13. Crimes Act 1900 s476(2).

14. See generally New South Wales Law Reform Commission Discussion Paper The Jury in a Criminal Trial (DP 12, 1985) para 1.17.

15. Melek v Borthwick [1979] 1 NSWLR 350 per Sheppard J. See also Grech v Drake (Unreported, Court of Appeal New South Wales, 7 August 1979) noted in (1979) 4 Petty Sessions Review 1967.

16. This would make the procedure the same as that followed under the equivalent Commonwealth legislation: Crimes Act 1914 s12; see also Perry v Nash (1980) 32 ALR 177.

17. R v Justices of Bodmin Ex parte McEwen [1947] KB 321.

18. See Hall v Braybrook (1956) 95 CLR 620.

19. R v Stramandinoli (Unreported, Court of Criminal Appeal, New South Wales, 2 September 1977) noted at vol 4 Petty Sessions Review 1888. Cf Watson and Purnell Criminal Law in New South Wales: Volume 1: Indictable Offences Part A para [1274].

20. See eg Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process Office of the Director of Public Prosecutions (1986) at 14. See also Magistrates' Courts Act (UK) 1980 s19(3).

21. New South Wales Law Reform Commission Report The Jury in a Criminal Trial (LRC 48, 1986) Recommendation 2 and paras 2.15-2.21. In this Report, the Commission suggests that the assessment of "seriousness" should be made by reference to specified criteria.

22. Mr Justice L K Murphy "Trial by Jury: The Scope of Section 80 of the Constitution" in D Challinger (ed) The Jury Proceedings of the Australian Institute of Criminology (Canberra 1986). See also M J Faraway "Election for Trial" (1986) 150 Justice of the Peace 171; C J Armstrong "Mode of Trial - A Sacred Cow?" (1986) 150 Justice of the Peace 488; Chiu v Richardson [1983] NZLR 513.

23. See the judgment of Mr Justice Deane in Kingswell v The Queen (1985) 60 ALJR 17.

24. There have been recent proposals to limit the availaiblity of trial by jury in cases involving property of a specified low value, driving whilst disqualified and common assault: White Paper on Criminal Justice (HMSO Cmnd 9658 March 1986). See D Wolchover "The Right to Jury Trial - I" (1986) 136 New Law Journal 530; "The Right to Jury Trial - II" (1986) 136 New Law Journal 576. There have also been recommendations to abolish the jury in "commercial fraud" trials: see Report of the Fraud Trials Committee (Chairman: Lord Roskill) (HMSO London 1986). See also Regina v Harrow Justices Ex parte Osaseri [1986] 1 QB 589; B Gibson "Assault and Jury Trial - Ex parte Osaseri Explored" (1985) 149 Justice of the Peace 659.

25. The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

26. Crimes Act 1900 s476; Attorney General for New South Wales v Dawes [1976] 1 NSWLR 242, see also In the Appeal of Baldock (1958) 75 WN (NSW) 21.

27. Listening Devices Act 1984 s26. See also Magistrates' Courts Act 1980 (UK) s25.

28. New South Wales Law Reform Commission General Introduction and Proceedings in Courts of Petty Sessions (First Issues Paper, 1982) para 8.40.

29. Supreme Court (Summary Jurisdiction) Act 1967.

30. Crimes Act 1958 (Vic) s359AA inserted by Crimes (Procedure) Act 1983 s4.

31. Id s359AA(b).

32. Crimes Act 1900 s447B. See also para 6.69.

33. Crimes Act 1958 (Vic) ss567, 567A, 569 and 570 inserted by Crimes (Procedure) Act No 10026 of 1983 s8.

34. Criminal Appeal Act 1912 s22.

35. Magistrates' Courts Act 1980 (UK) ss18-23.

36. Id s19(2). See also R v Tower Bridge Magistrate Ex parte Osman [1971] 2 All ER 1018; R v Lymm Justices Ex parte Brown [1973] 1 All ER 716.

37. Id s19(4).

38. Id s23.

39. Id s20(2)(b). See also R v Kent Justices Ex parte Machin [1952] 2 QB 355; R v Folkestone and Hythe Juvenile Court Justices Ex parte R [1981] 3 All ER 840.

40. R v Craske, ex parte Metropolitan Police Commissioner [1957] 2 QB 591; R v Southampton City Justices Ex parte Briggs [1972] 1 All ER 573; R v Birmingham Justices Ex parte Hodgson and Another [1985] 1 QB 1131; R v West London Metropolitan Stipendiary Magistrate (1985) The Times, 9 March 1985. See also B Gibson "Mode of Trial and Unrepresented Defendants" (1985) 149 Justice of the Peace 67.

41. W F Miles "Reconsidering Mode of Trial Decisions" (1986) The Law Society's Gazette 526, 19 February 1986 referring to R v Highbury Corner Metropolitan Stipendiary Magistrate Ex parte Weekes [1985] 1 QB 1147. See also S D Baggott "Reconsidering Mode of Trial Decisions - An Alternative View" (1986) The Law Society's Gazette 1389, 7 May 1986; W H Donnelly "Changing Your Mind in the Magistrate's Court - A Defendant's Prerogative?" (1987) The Law Society's Gazette 246, 28 January 1987.

42. Magistrates' Courts (Advance Information) Rules 1985 which came into force on 1 May 1985. See discussion in para 4.47.

43. Justices' Clerks' Society "Streamlining the Criminal Justice System" February 1984.

44. See paras 6.61, 6.64, 6.65.

45. Hall v Braybrook (1956) 95 CLR 620; compare cases noted in R v Colchester Justices Ex parte North Essex Building Co Ltd [1977] 3 All ER 567.

46. Magistrates' Courts Act 1980 (UK) s38. Note also s22 which prohibits committal for sentence in cases where the value of the property involved is less than 200 pounds. See also J N Spencer "Knowledge by the Magistrates of the Defendant's Bad Character" (1986) 150 Justice of the Peace 307 citing R v Birmingham Magistratres Court Ex parte Robinson (1986) 150 Justice of the Peace Reports 1; R v Metropolitan Stipendiary Magistrate Ex parte Gallagher (1972) 136 Justice of the Peace Reports 80. The principle established by these cases is that knowledge of the accused person's antecedents does not necessarily preclude the court from trying the case. It would only be wrong for magistrates to proceed where the previous convictions are disclosed to the court in a way which might lead to bias or a suggestion of bias in the minds of the public.

47. D A Thomas "Principles of Sentencing" (2nd ed 1979) at 197. See also R v Hall (1979) 1 Cr App R (S) 27; R v Galloway (1979) 1 Cr App R (S) 311; R v Ferguson (1980) 2 Cr App R (S) R v Cohen (1984) 6 Cr App R (S) 131. Compare R v Maher (1979) 1 Cr App R (S) 52.

48. One situation in which criminal history is clearly relevant is where the accused person is already subject to a sentence in excess of three years. In such a case the magistrate would have no power to impose a cumulative sentence; see Crimes Act s444(4); R v Hayes [1977] 1 NSWLR 364.

49. See para 6.31 above and Magistrates' Courts Act 1980 (UK) ss25, 38. See also Justices Act 1921 (SA) s129(4) as amended by Statutes Amendment (Jurisdiction of Courts) Act 1981 (SA) s57.

50. For a similar procedure, see Justices Act 1902 s51A.

51. See note 21.

52. The appeal of William Grech (Unreported judgment of his Honour Judge Thorley, 20 June 1979) noted in 4 Petty Sessions Review 1965; In the Appeal of Baldock (1958) 75 WN (NSW) 21.

Chapter 7

Committal for Trial or Sentence

I. INTRODUCTION

7.1 Committal proceedings, which are conducted by a magistrate sitting alone in the Local Court, are held in almost every case where a person charged with an indictable offence is to be tried before a judge and jury. In recent times the fairness and efficiency of the present committal procedure has been criticised. In the High Court of Australia, the late Mr Justice Murphy said:

> The desirability of committal proceedings in modern times is doubtful, at least in certain kinds of cases. A trend has developed in New South Wales in which conspiracy, fraud, and various corporate charges become delayed because of committal proceedings which go on for months or years. These are often interrupted with excursions into the Supreme Court for rulings on points of law or procedure. This not only tends to improperly frustrate prosecutions, but also can result in embarrassment and oppression to defendants. While I do not criticise the magistrates who unfortunately have to preside over them, such committal proceedings have become a disgrace to the administration of criminal justice in New South Wales.[1]

More recently, Mr Justice O'Brien, formerly the Chief Judge of the Criminal Division of the Supreme Court of New South Wales, observed:

> Committal proceedings have in many cases, at least in this State, gone beyond their intended legitimate purpose in the interests of the community and the defendant and have degenerated into a prolonged contest, intended almost exclusively to design and set up a basis for the conduct of a trial regarded as inevitably justified. They have come to involve for this purpose persistent, repetitive and much irrelevant cross-examination as well as long debates upon the admissibility of evidence, the

> conduct of voir dire examinations, the exercise of discretions and the like, much of it appropriate only to an actual trial. The process has therefore come under substantial criticism as subjecting the community to unjustified inconvenience, delay and expense and amounting in itself almost to an actual trial in which the fundamental role of the jury as the only constitutional tribunal for the determination of issues of fact and the role of the presiding judge in the determination of questions of law and of the issues to be left to the jury tends to be forgotten.[2]

The purpose of this chapter is to discuss a number of issues relating to committal proceedings and to suggest changes to particular aspects of the proceedings. At the end of the chapter we outline three broad alternative strategies for reform.

II. HISTORICAL DEVELOPMENT OF COMMITTAL PROCEEDINGS

7.2 In England from the fourteenth century onwards, justices of the peace were responsible for the investigation of criminal offences.[3] The evidence they collected was presented to a "grand jury" of between 12 and 23 people from the local district. The grand jury had to decide whether, on the basis of that evidence, the accused person should be put on trial before a "petty jury" of 12. If at least 12 members of the grand jury considered that the person should stand trial, they would find the written information alleging the commission of a crime to be a "true bill". The information would then become an indictment.[4] If the grand jury found "no true bill", the accused person would be discharged. The procedure was at first inquisitorial rather than adversarial.[5] The duty of the justice was strictly to gather evidence against the accused

person, not to decide whether there should be a trial. With the creation of a public police force in the early nineteenth century, the investigative function of the justices gradually disappeared. In 1848 the Indictable Offences Act (Sir John Jervis's Act) created committal proceedings in England as we know them today. For the first time the accused person was required to be present at the hearing and was given the right to cross-examine prosecution witnesses, to make a statement and to present evidence. The justice was given the task of deciding whether the case was suitable for trial. If in the justice's opinion there was sufficient evidence to put the accused person on trial, or if the evidence raised a strong or probable presumption of guilt,[6] then the accused person was to be committed for trial. The grand jury became superfluous and was ultimately abolished in England in 1933.[7]

7.3 In New South Wales the grand jury system probably survived the legislation which established in 1833 the office of Crown Prosecutor,[8] a state official who decided whether or not an indictment should be filed. Although it is not certain whether the grand jury system was used in practice, there is mention made of it in various legislative enactments. However, it is clear that the grand jury system has not been used in New South Wales since 1850 when the English legislation which created the modern form of committal proceedings was adopted in this State. The conduct of these proceedings is now regulated by various provisions of the Justices Act 1902. The grand jury

system has recently been used in Victoria following a long period of apparent obsolescence. We understand that it is to be formally abolished by legislation.

III. PRESENT PROCEDURE AT COMMITTAL PROCEEDINGS

7.4 At the committal hearing, the accused person is usually referred to as "the defendant". In this Discussion Paper we use the term "the accused person", the term employed in the relevant legislation. The prosecution case is usually presented by a police officer attached to the Police Prosecuting Branch. In exceptional cases the prosecution may be presented by a Crown Prosecutor or by a member of the private bar. The accused person is usually required to be present throughout the committal hearing.[9] Although accused people are entitled to be represented by a lawyer, the majority are unrepresented. This is probably because legal aid is generally not available for committal hearings,[10] notwithstanding the fact that recent changes in the range of indictable offences which may be dealt with summarily with the consent of the accused person have probably had the effect of increasing the availability of legal aid in committal proceedings.[11]

A. Guilty Pleas

7.5 At the committal hearing the accused person may indicate an intention to plead guilty at any time after the charge has been read.[12] Before accepting such a plea, the magistrate receives and examines a written statement of the prosecution evidence, known as a "hand up brief". If the magistrate

accepts the plea, the accused person is committed to the District Court or the Supreme Court for sentencing. If the accused person changes his or her plea to not guilty in the higher court, the judge can either refer the case back to the magistrate or direct that the accused person stand trial for the offence charged. A direction of the latter kind is deemed to be a committal for trial.[13]

B. Contested Committals

7.6 The accused person is not required to enter a plea after the charge is read. If the accused person does not plead guilty, or if the magistrate does not accept a plea of guilty, the prosecution then calls its witnesses who may be cross-examined by the accused person or his or her lawyer. At the conclusion of the prosecution case, the magistrate must decide whether the evidence is "capable of satisfying a jury beyond reasonable doubt"[14] that the accused person has committed an indictable offence. If the magistrate is not so satisfied, the accused person must be discharged. If the magistrate is so satisfied, the hearing continues. The accused person must then be allowed to make "full answer and defence" to the charge.[15] He or she is given an opportunity to make a statement, to give evidence and to call witnesses.[16] Accused people are not obliged to say anything, and in practice they generally "reserve their defence", especially where they intend to plead not guilty at trial. After hearing the evidence for the prosecution and any evidence for the defence, the magistrate must discharge the accused person if he or she is of

the opinion that "a jury would not be likely to convict the defendant of an indictable offence".[17] If not of that opinion, the magistrate must commit the accused person for trial for any indictable offence disclosed by the evidence, not only that offence actually charged.[18]

C. Paper Committals

7.7 In 1983 a system of "paper committals" was introduced in New South Wales.[19] The system is modelled on similar provisions in other jurisdictions both in Australia and overseas. The relevant legislation provides that written statements tendered by the prosecution are admissible in committal proceedings as if the statements were given orally.[20] However, certain procedural requirements must be met. For example, copies of the statements must be served on the defence within the time specified by the presiding magistrate and a statement must be sworn by the person making it in a prescribed form.[21] The prosecution has a choice whether or not to proceed by way of paper committal. If it chooses to do so, the consent of the accused person is required before the committal may be conducted in this way. The defence can request the magistrate to order the attendance of the person who made the statement so that the witness can give evidence orally and be cross-examined.[22] We should point out that our proposals in Chapter 4 would, if implemented, effectively amount to making the "paper committal" procedure mandatory for the prosecution.

D. Statistics

7.8 In 1980 there were 5096 committal proceedings.[23] In 505 of these there was no committal for trial or sentence because the charges were either withdrawn or dismissed. A charge is withdrawn where the prosecution offers no evidence and the presiding magistrate is therefore not called upon to consider the sufficiency of the evidence. Although the precise figures are not available, withdrawn charges would account for a significant proportion of those dismissed at committal proceedings.[24] Little information is available on the frequency of the use of the paper committal procedure. However, the New South Wales Bureau of Crime Statistics has begun collecting statistics on all committals, including paper committals, from the beginning of 1985. The Commission will be obtaining relevant information from the Bureau in due course.

IV. ISSUES FOR CONSIDERATION

A. The Functions of Committal Proceedings

7.9 The first step in any project to consider the possible reform of committal proceedings is an examination of the functions they serve and the benefits they provide for the prosecution, the accused person and the community. The following discussion analyses the various functions said to be served by committal proceedings in their current form.

1. Establishing a Case to be Tried by a Jury

7.10 The function of the magistrate at a committal hearing is, essentially, to consider whether there is a sufficient case to be tried by a jury. Committal proceedings afford potential benefits for both the accused person and the State. An accused person who has been wrongly charged with a serious crime is given an opportunity to demonstrate that fact in a public hearing in which the prosecution is required to show that there is justification for the charge. An accused person who is discharged by a magistrate after committal proceedings can be reasonably sure that he or she will not subsequently be tried for the offence charged and is thereby spared the ordeal of a criminal trial. The circumstances in which a trial can be commenced without prior committal procedings are discussed at paras 7.39-7.40. The enormous strain associated with being an accused person which may be manifested in various forms is removed at a relatively early stage if there is a discharge of the accused person after committal proceedings. The State benefits because it is saved the cost of a criminal trial and, in some cases, the cost of imprisonment pending trial.

7.11 The statistics cited in para 7.8 show that only a small percentage of accused people actually have their cases concluded by having the charge dismissed at the committal hearing. A much greater percentage of accused people have their cases concluded either by a decision made by the prosecuting authority not to proceed with the charge despite the accused person's committal for trial or by the trial judge's direction for a verdict of acquittal during the trial

because the prosecution has failed to present a case capable of proving the guilty of the accused person. This information may suggest that committal proceedings are not adequately performing the function of removing from the criminal process those cases where there is no justification for holding a trial.[25] Although the figures quoted reflect the situation before the criteria for committal were altered, there is no evidence to suggest that the general position has changed in any significant way.

2. Disclosure of the Prosecution Case

7.12 Under the present system, the committal hearing informs the accused person, often for the first time, of the strength of the prosecution case. Whilst the importance of this information to the defence has long been acknowledged, there has been disagreement as to whether this is a deliberate or fortuitous result of committal hearings.[26] Recent judicial decisions have acknowledged that one of the functions of committal hearings is to provide information about the case to the accused person and that a committal hearing might be defective in some circumstances for failing to do so adequately.[27] Nevertheless, so long as the emphasis remains on the need to establish a case for trial, committal proceedings perform the disclosure function only incidentally and sometimes incompletely.[28]

3. Testing the Prosecution Case

7.13 Committal proceedings give the accused person information which is helpful in deciding whether a criminal prosecution should be contested and, if so, in what way. At the committal hearing, the accused person has an opportunity to test the prosecution evidence by cross-examination, to discover potentially inadmissible evidence, and to "rehearse" the defence case, at least to the extent of trying out possible lines of cross-examination.[29] Since the testimony of witnesses at the committal hearing is recorded, the credibility of any witness who changes his or her version of events at trial can be challenged by reference to the evidence given at the committal hearing.

7.14 The extent to which the prosecution case can be tested may depend on whether the accused person is capable of effective cross-examination or whether he or she is adequately represented. As we noted earlier, most accused people are not represented. The strategy adopted by the defence at committal proceedings is also important. One approach is to attempt to have the case dismissed at the committal hearing. The more usual approach is to use the committal proceedings to determine what, if any, defence should be raised at the trial. If the latter approach is followed, the cross-examination of the prosecution witnesses will attempt to discover the strengths and weaknesses of the prosecution case in order to know what questions should and should not be asked by the defence at the

trial. The accused person can pursue a line of defence at the committal hearing which may be abandoned at trial because it has been demonstrated to have little prospect of success.

4. Testing the Consistency of Evidence

7.15 A further benefit of committal proceedings is said to be that they require the witnesses for the prosecution to give their evidence before a court on two separate occasions. This means that the accused person will have the opportunity to compare the evidence given at trial with evidence given at the committal proceedings and to use any inconsistencies in the evidence to call the credibility of the witness into question. There is a greater likelihood that a dishonest or unreliable witness will be exposed and a jury is better able to assess the weight which should be attached to the evidence. In this way the committal proceedings contribute towards the jury coming to a more accurate verdict and guard against the risk that innocent people may be wrongly convicted.

5. Assistance to the Prosecution in Preparing Its Case

7.16 The committal hearing may assist the prosecution in the preparation of its case, in particular by revealing that the credibility of one or more of its witnesses is weakened by cross-examination. Again, this is more likely to occur when the accused person is legally represented. The prosecution may discover that further evidence is needed before the case is ready to go to trial. The cross-examination of prosecution witnesses may also be a valuable aid in deciding whether or not to "find a bill", since the Crown Prosecutor would otherwise

have to rely on the written statements of witnesses without the benefit of having had that evidence tested by cross-examination. The prosecution may be able to predict what the defence case will be at the trial either from the approach taken in cross-examination at the committal hearing or from any evidence called at the committal hearing by the accused person.

6. The Perpetuation of Testimony

7.17 All evidence given at the committal hearing is recorded. Among other things, this enables the testimony of a witness who cannot appear at the trial, for example, because of death or serious illness, to be received into evidence.[30] It also enables witnesses to be excused from attending the trial where their evidence is not in dispute or is of a purely formal nature. This "perpetuation of testimony" may benefit both the prosecution and the accused person. However, whilst it is undoubtedly advantageous that the testimony of witnesses should be recorded close to the time of the events which are the subject of the charge, it is not clear that committal proceedings are the only means of achieving this objective.

7. Early Disposition of the Case

7.18 Although it has been said that it is not part of the function of committal proceedings to ensure that the tactical objectives of either party are served,[31] the committal hearing gives both the prosecution and the defence a first view of the case as it will appear to the court of trial. This preliminary view may lead to the early disposition of the case where the prosecution decides not to proceed despite the fact

that the accused person has been committed for trial. Conversely, after the prosecution case has been disclosed at the committal hearing, the accused person may decide to plead guilty at trial. It is also open to the prosecution to accept a plea of guilty to a less serious charge in full discharge of an indictment for a more serious offence or to change the charge to one which it considers more suitable to the circumstances of the case. Both parties can use the knowledge of the case derived from the committal hearing to avoid a contested trial.

8. Identification of Issues Between the Parties

7.19 The experience of the committal hearing and the transcript of those proceedings are valuable sources of assistance in the preparation for trial. One of the most important potential benefits of the committal proceedings is that the issues which will be in dispute at the trial are clarified. This may avoid the need to call evidence to prove undisputed matters and consequently reduce the duration of the trial.

9. Publicity of the Proceedings Attracting Previously Unknown Witnesses

7.20 It has been suggested that the publicity given to the evidence at committal proceedings may result in potential witnesses coming forward, leading to a more accurate and just result at trial.[32] This is in fact an infrequent occurrence and would appear in any event to apply only to the relatively small percentage of criminal cases which are given publicity in

the media. In practice, there is usually greater publicity given to the fact that a person has been charged with an offence and to the preliminary court proceedings which follow the laying of the charge.

B. Limits on the Full Realisation of These Functions

1. Representation of the Accused Person

7.21 The functions of committal proceedings listed above are not all effectively realised in every case for a number of reasons. Most of the potential benefits of the proceedings, from the point of view of both the accused person and the prosecution, depend to a large degree on the accused person having adequate legal representation. Yet the majority of accused people are not represented at committal proceedings and so lack the ability to conduct a skilled cross-examination of the prosecution witnesses. We return to the subject of legal representation at committal proceedings in paras 7.48-7.49.

2. Prosecution Not Obliged to Call All Witnesses

7.22 The committal hearing is principally directed towards establishing whether or not the accused person should be required to stand trial before a judge and jury. Since the prosecution need only adduce sufficient evidence to satisfy the magistrate that the accused person should be committed for trial, it is not obliged to call all of the witnesses it proposes to call at the trial.[33] In many cases the prosecution decides not to call certain evidence at the

committal hearing. This evidence is therefore not disclosed to the defence at that stage, not tested by cross-examination and not available at the trial if the witness cannot later be found.

3. Duplication of Resources

7.23 The potential savings in the time taken to prepare a case for trial are not fully realised because the prosecution at the committal proceedings is usually conducted by a different agency from that conducting the prosecution at the trial and the two agencies operate independently of each other. The legal officer from the Office of the Solicitor for Public Prosecutions who prepares the matter for trial and the Crown Prosecutor who conducts the prosecution at the trial itself, are generally not involved in the committal hearing. These officers must familiarise themselves with the case after the committal proceedings have been completed and therefore prepare and present the matter by reference to the transcript of the committal hearing. In the "Croatian Conspiracy" case, an officer of the Solicitor for Public Prosecutions was involved in the committal proceedings. This enabled the trial brief for the Crown Prosecutor to be prepared quickly after the conclusion of the committal proceedings. In the committal proceedings involving the Milperra shootings, the prosecution case was presented by a senior Crown Prosecutor assisted by another Crown Prosecutor and instructed by the Solicitor for Public Prosecutions. The time taken to prepare this major prosecution for trial was dramatically reduced because those

responsible for prosecution at the trial were already familiar with the case through their involvement in the committal proceedings.

4. Delay Between Committal and Trial

7.24 In Chapter 1 and again in Chapter 3 we gave some case histories which illustrated the extent of delay currently being experienced in the criminal justice system in New South Wales. In some cases, committal proceedings are separated from the trial by periods as long as three years where accused people are on bail and sometimes up to 12 months for accused people held in custody. One of the serious consequences of such long delays is that the events about which witnesses are giving evidence happened so long ago as to make their independent recollection of them unlikely. Witnesses must rely on their statements or earlier evidence in order to refresh their memories. This means that the consistency of the evidence cannot be tested as effectively. Any discrepancy in the evidence can be explained away by the passage of time. More seriously, witnesses may be unable to give evidence on important matters in issue which have not been the subject of prior testimony because they simply cannot remember relevant details. The considerable delay may cause substantial inconvenience to witnesses and generate understandable resentment.

C. The Grounds for Committal

7.25 The magistrate must apply two separate tests when deciding whether or not to commit an accused person for trial under s41 of the Justices Act 1902:[34] the first after hearing the evidence for the prosecution, the second after all the evidence for the prosecution and the defence has been taken. Recent legislation has changed the terms in which these tests are expressed. In order to understand the intention of the current legislation, its likely effects and its possible problems, it is necessary to consider the criteria for committal which applied before the recent amendments.[35]

1. The Old Formula

7.26 The original version of the first test required the magistrate to be of the opinion that a "prima facie case" had been made out by the prosecution before continuing with the committal hearing. On the other hand, if the evidence for the prosecution was "not sufficient to warrant the defendant being put upon his trial", the magistrate had to discharge the accused person at the end of the case for the prosecution without inviting the accused person to call evidence. The meaning of this test was considered most recently in the case of Wentworth v Rogers.[36] According to one of the judges of the New South Wales Court of Appeal, the magistrate was required to rule upon the sufficiency of the prosecution case without taking into account the credibility of prosecution witnesses or the proper weight to be given to their evidence. Nor was account to be taken of any evidence favourable to the accused person which emerged during the prosecution case.[37]

In our view, the validity of these observations is questionable since, as the judge went on to say, another formulation of the question the magistrate was bound to ask was "whether the evidence adduced by the prosecution is capable of producing satisfaction beyond reasonable doubt in the minds of a reasonable jury".[38] The notions of "reasonable doubt" and "a reasonable jury" seem in our view to demand a consideration of credibility and weight.

7.27 The second test in the repealed section required the magistrate to commit the accused person for trial if he or she was "of opinion that the evidence is sufficient to warrant the defendant being put upon his trial for an indictable offence, or if the evidence raises a strong or probable presumption of the guilt of the accused".[39] There was considerable confusion and disagreement regarding the application of this test. The main question was whether or not it required the magistrate to consider something more than was required under the first test, in particular whether there was a need to make some assessment of the credibility or weight which a jury might attach to the evidence of the prosecution witnesses. In Wen.. 'rth v Rogers, the Court of Appeal held that the first part of the second test was in fact the same as the first test to be applied.[40] It was further held that the test of whether "the evidence raises a strong and probable presumption of guilt" must be resolved by the magistrate deciding whether, on the whole of the evidence, he or she - and not a hypothetical jury - thinks it probable that the accused person is guilty of the offence charged.[41] According to Samuels JA:

> Nothing in s41 authorizes a committing magistrate to discharge a defendant on the ground that in the magistrate's opinion a jury would not convict the defendant. It is no part of a committing magistrate's function to conjecture what a jury would or might do or not do. His duty is confined to determining what it could reasonably and properly do.[42]

Whilst his Honour recognised and recalled from his own experience that a convention had developed permitting magistrates to speculate as to what a reasonable jury properly instructed might do, his Honour concluded that this development was plainly not authorised by the language of the section.

2. The Current Formula

7.28 The terms of the current law have been explained in para 7.6. The amendments were intended to make the law and practice correspond with the convention to which Samuels JA referred in Wentworth v Rogers. Under the first test, to be applied at the completion of the evidence for the prosecution, the magistrate must consider all the evidence available at that stage and not just that favourable to the prosecution. Under the second test, to be applied after any evidence for the defence has been called, the magistrate must have regard to the prospects of conviction. The new criteria arguably require higher standards to be met before an accused person can be committed for trial than those which magistrates were required to apply according to the law as it was held to be in Wentworth v Rogers.[43] Before that case, only a small percentage of accused people were discharged following committal hearings[44] and yet as many as 6% of cases were discontinued after committal but before trial.[45] The cases where "no bill" was found must have

included many where the Attorney General, acting on the advice of Crown Law Officers, did not consider that the evidence available justified the accused person being put on trial. It is clear that committal proceedings had not been adequately performing the function of screening out "weak" cases. Whether the new criteria mean that such cases will in future be screened out remains to be seen.

Interpretation of the New Criteria

7.29 Three highly publicised committal hearings conducted during 1985 have resulted in three different interpretations of the new section. In Wong's case,[46] the magistrate decided to discharge the accused person, who had given sworn evidence at the committal proceedings, because in his view a reasonable jury would be more likely to believe her version of events than not. If they believed her evidence might be true, they would be obliged to acquit. On all of the evidence a jury "would not be likely to convict", and hence in accordance with the terms of the legislation the accused person must be discharged. In Murphy's case, the magistrate held that the new powers did not require or permit a court to evaluate or speculate on whether a jury was likely to believe the evidence of one witness against another.[47] A third approach was adopted by the magistrate in Foord's case.[48] In his view, the new provision does require consideration by the magistrate of the credibility of testimony and of the weight to be given to such testimony.

7.30 The Supreme Court of New South Wales has considered the new legislation in two cases. In the first,[49] Mr Justice O'Brien made a thorough analysis of the development of the relevant law and concluded that the terms in which the first test is now couched require the magistrate to base the relevant opinion solely upon an examination of the evidence. His Honour held that it was no part of the magistrate's function to entertain considerations favouring the prosecutor or favouring the accused person, as would occur, for example, if a determination were made in favour of the accused person based on an "apprehension of oppression"[50] in ordering that the matter proceed any further.[51]

7.31 In relation to the second test, his Honour held:

> It is clear, therefore, that at the second stage of the committal proceedings the magistrate is now to make some kind of forecast of the outcome of a trial of the defendant. And that is to be done upon all the evidence he has heard without regard to any considerations outside the evidence since there is again, as in s41(2), the dual intimation that "after considering all the evidence" the opinion to be formed is one "having regard to all the evidence".
>
> It is obvious that the magistrate must give attention to the weight and acceptability of the evidence in relation to the character of the evidence itself and the credibility of the witnesses who gave it. But he is to do so from the point of view of a reasonable jury which is presented with the evidence, and neither more nor less than the evidence, he has heard. He is required to make an assessment of the effect of all that evidence would have upon the hypothetical reasonable jury properly instructed and to make a forecast of the possibility of conviction upon that evidence. There must, of necessity, be some standard set for such an exercise in forecasting. Out of all the expressions used in Wentworth v Rogers for what the magistrate might not do the amendment introduces the word "likely" or rather "not likely" as the standard of forecasting.[52]

7.32 In considering the meaning to be given to the word "likely" as it appears in s41(6), his Honour observed that the committal proceedings were not to be in effect a preliminary trial as to the guilt of the accused person, nor was it the function of the magistrate to usurp the role of the jury. He concluded:

> In determining then whether a defendant should be committed for trial the function intended by s41(6) as best serving the interests or competing interests of all concerned is, in my opinion, that the defendant should be discharged when an opinion can affirmatively be reached that there is no real chance or prospect of conviction but that in the absence of such an opinion the defendant should be committed. No useful purpose is, in my opinion, served by talking in this connection of percentage chances or of the gambler's odds which is not in any event how the mind works in matters of this kind. Rather is it necessary to talk of real and not mere possibilities as the standard of forecasting which is required in applying s41(6).[53]

7.33 In a later decision,[54] Mr Justice Yeldham expressly approved the construction of s41(6) made by Mr Justice O'Brien in Chid's case. In doing so his Honour referred to more recent authority which tended to support that construction[55] and concluded:

> Perhaps another way of putting the test which O'Brien (CJ of Cr D) enunciated is that a defendant should be discharged when an opinion can affirmatively be reached that there is a substantial (i.e. a "real and not remote") chance that a jury would not convict the defendant.[56]

With respect, this formulation of the test appears to run contrary to the construction given to the legislation in the judgment of Mr Justice O'Brien. "No real chance of conviction" is a much different test from "a real chance of acquittal". Perhaps all that can safely be said is that the interpretation

of the legislation is unclear and will remain so until the matter has been considered by the Court of Appeal or the High Court of Australia.

D. The Consequences of the Committal Hearing

7.34 Where an accused person pleads not guilty, the magistrate must determine at the conclusion of the committal hearing whether to discharge the accused person or to commit for trial. If the accused person pleads guilty, the magistrate must commit the accused person for sentence in a higher court.

1. The Effect of an Order Discharging the Accused Person

7.35 A magistrate's order discharging an accused person is not equivalent to an acquittal. The prosecution may be continued by a further committal hearing, or the Attorney General may issue an ex officio indictment. There is no requirement that the prosecution must have further evidence before taking either of these steps, although the circumstances in which the prosecution believes it can obtain a conviction with the same evidence as that which failed to persuade a magistrate to commit for trial must be rare. Nevertheless, a person who has been acquitted at a trial is in a better position than a person who has been discharged at the committal proceedings or, for that matter, one who has been granted a "no bill" subsequent to committal. One of the fundamental principles of our system of criminal justice is that a person who has been acquitted of an offence may never again be tried on that charge. However, this principle, frequently referred to as the doctrine of autrefois acquit, only applies following acquittal at trial.

2. The Jurisdiction of the Higher Courts Where an Accused Person has Been Committed for Trial or Sentence

7.36 The magistrate's decision to commit for trial is not of itself sufficient to place the accused person on trial. The trial can only take place when a Crown Prosecutor has decided that the accused person should be tried and "finds a bill" (for a fuller analysis of this procedure, see Chapter 10). More importantly, the decision to commit a person for trial in the Supreme Court or the District Court does not give the higher court jurisdiction in the case, except to the extent of the relevant court being able to hear an application for bail.

7.37 Because the higher court's jurisdiction in the case only commences upon presentation of the indictment, the courts do not have effective control over the case between committal and trial. The practical effect is that the prosecuting authorities decide the time at which the trial will commence. Although a case might be listed to be heard on a certain date, the prosecution may decide not to present the indictment, thus preventing the trial from proceeding on that date. We are satisfied from our own inquiries that the prosecuting authorities only rarely adopt such a practice and then only where they consider it to be justified. Notwithstanding the fact that the prosecution may have acted in good faith, it may nevertheless have acted wrongly. It is the potential for error that causes us concern. The fact that the court has no effective and immediate jurisdiction to control and remedy any injustice appears to be the root of the problem. We have noted at para 3.12 that some courts have recently used the power to

grant an indefinite stay of proceedings where the continuance of the prosecution would be an abuse of process. It should be emphasised that this power has only been used on a few occasions and only in cases where the circumstances have been considered exceptional. It is not entirely clear but it is apparent that in each case the court made the order after the indictment was presented or after the Crown Prosecutor had indicated an intention to present the indictment.

7.38 The Supreme Court can exercise a limited control over accused people awaiting trial who are being held in custody. This control derives from the ancient process of "gaol delivery". Cases involving accused people on remand are reviewed by a Supreme Court judge four times each year. The judge can order the release from gaol of any prisoner who, in his or her view, has been held in custody for too long. In practice, prisoners are seldom discharged because the judge is usually satisfied by the prosecution's explanation of the delay. "Gaol delivery" is not an adequate safeguard against the damaging effects of delay in the prosecution of criminal offences.

3. The Ex Officio Indictment Procedure

7.39 The Attorney General can launch a prosecution by means of an ex officio indictment.[57] This is an exceptional means of prosecuting and is rarely used. The following are the circumstances in which it may be used:

* Where there has been, for example, a coronial inquest, an ex officio indictment may be filed, after the prosecuting agencies have considered the evidence presented or finding made at that hearing. This action may often follow a decision at the earlier hearing to formally "refer the papers to the Attorney General".

* Where a person charged with an indictable offence has been discharged by a magistrate at committal proceedings, the prosecuting authorities may nevertheless decide that the case is one in which a prosecution is justified.

* In some cases, the order made by a magistrate to commit a person for sentence in a higher court is invalid in a formal respect and an ex officio indictment is presented in order to overcome that technical irregularity.

* Where there have been no preliminary proceedings of any kind, an ex officio indictment may be used to bring an accused person to trial in the higher courts.

7.40 It is unusual for an ex officio indictment to be filed where there have been no preliminary proceedings of any kind. In Barton v The Queen[58] a majority of the High Court[59] dealt with an application by the accused person for a stay of proceedings on an ex officio indictment by ordering that the matter be remitted to the Supreme Court of New South Wales for further consideration in the light of the judgment of the High Court. Three of the judges of the Court expressed the view that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair."[60] The practical effect of the Barton case appears to be that an ex officio indictment presented in the absence of some form of preliminary proceedings runs the risk of being successfully challenged on the basis that the accused person is significantly

disadvantaged by the conduct of a prosecution in this manner. The accused person is denied knowledge of what the prosecution witnesses say on oath, the opportunity of cross-examining the witnesses, the opportunity of calling evidence in rebuttal and the possibility of the magistrate ordering that the accused person be discharged. It was said in Barton that the deprivation of these advantages is "a serious departure from the ordinary course of criminal justice".[61] However, there may be circumstances where an accused person refrains from challenging the indictment and effectively consents to the prosecution proceeding by way of ex officio indictment. An accused person's consent is not likely to be given except in those cases where he or she may be anxious to avoid the publicity attending the committal proceedings or wishes to have the charge dealt with quickly and in particular where there is a plea of guilty intended.

E. Review of Committal Proceedings

1. Judicial Review

7.41 The higher courts have generally been reluctant to review decisions made by magistrates in the course of committal proceedings.[62] This attitude is well summarised in the following remarks made by Chief Justice Gibbs of the High Court:

> This Court has in a number of cases said that it is wrong that the ordinary course of proceedings in the criminal courts should be interrupted by applications for declarations as to questions that will or may arise in the criminal proceedings.[63]

In a recent decision Justice Kirby, the President of the Court of Appeal of the Supreme Court of New South Wales, has identified the reasons for the "rule of restraint" which operates to limit the intervention of the higher courts in the conduct of committals to those cases where "special" or "exceptional" circumstances exist. He cites the following reasons:

> * the undesirability of discontinuity, disruption or delay in committal proceedings;
>
> * the superior knowledge of the committing magistrate concerning the whole facts and circumstances of the case under his or her consideration;
>
> * the undesirability of the beneficial remedies of declaration or the prerogative writs being misused to justify transfer to the superior courts of matters committed by law to the magistracy;
>
> * the cost, much of it borne by the public purse, of proliferating litigation, especially at an interlocutory stage, which diverts attention from the real substance of the accusations brought and concentrates instead upon peripheral and often procedural matters;
>
> * the undue advantage that may be given to rich and powerful accused people to interrupt and delay the operation of the criminal law in a way not so readily available to ordinary citizens; and
>
> * the power of the Attorney General to present an ex officio indictment or to refuse to present an indictment, whatever the outcome of the committal proceedings.[64]

7.42 Until relatively recently, the higher courts would not review decisions of committing magistrates at all. In the leading case in New South Wales, Ex parte Cousens Re Blackett,[65] an application for an order in the nature of the prerogative writ of prohibition, which prevents any action

being taken to enforce the order made, was denied on the ground that committal proceedings are administrative and not judicial in nature. Whilst it was acknowledged in that case that many administrative decisions are subject to review, it was held that the magistrate's decision in committal proceedings is not reviewable. Cousens' case was followed in several later cases but was doubted by the Chief Justice, Sir Laurence Street, in Connor v Sankey[66] and later by Mr Justice Mason, as he then was, in the High Court of Australia.[67] In a recent Court of Appeal decision, Mr Justice Glass affirmed the correctness of Cousens with respect to the remedies of prohibition and certiorari but said that the case did not preclude a court of review making an order for mandamus which requires the magistrate to perform a particular duty in accordance with the law as the higher court holds it to be.[68] In the course of concluding that a declaration would be the most appropriate order, Mr Justice Hutley said that Cousens should be reconsidered.[69] Not surprisingly in the light of these authorities, the present state of the law regarding the availability of prerogative relief in the nature of prohibition has been described as uncertain.[70]

7.43 It has also been held that the Supreme Court has the power to grant declaratory relief[71] to a person who is charged with an offence which is unknown to the law,[72] where a statutory procedural requirement has not been complied with[73] or where there has been a denial of natural justice at the committal hearing.[74] Courts have been prepared to examine whether, on the evidence at the committal hearing, the

magistrate could have formed the opinion that a prima facie case existed against the accused person.[75] Nevertheless, it is clear that the mere fact that a magistrate has made a mistake is not enough.[76] The power to grant declaratory relief in respect of the finding of a prima facie case should only be granted in exceptional circumstances and the discretion to do so should be exercised with great care.[77]

7.44 To summarise, the circumstances in which the remedies of prohibition or certiorari are available in respect of committal hearings remain unclear. Mandamus has now been allowed at the suit of a private informant in exceptional circumstances. Declarations are available where a magistrate acts contrary to law, but again, only in exceptional circumstances. Curiously, these remedies appear to have been more readily granted to the informant rather than to the accused person. This may be because an accused person has other avenues of review available, notably the right to make an application to the Attorney General requesting that "no bill" be filed and the trial itself.

2. Commonwealth Offences

7.45 Where an accused person has been charged with an indictable offence created by a law of the Commonwealth, the decision of a New South Wales magistrate in the course of committal proceedings may be reviewed by the Federal Court under the provisions of s16 of the Administrative Decisions (Judicial Review) Act 1977 (Cth). Since the decision is administrative rather than judicial in nature, relief similar

in effect to the prerogative writs or to a declaration is clearly available under this Act to accused people who have been committed for trial and may even be available to challenge the decision to lay a charge in the first place. It has been held that the court should only interfere with the normal course of criminal proceedings in exceptional cases.[78] We understand that there is currently considerable concern about the frequency with which applications of this kind are made.[79] The legislation was not originally intended to provide a means of reviewing committal decisions as a matter of course. This Commission is not charged with the task of examining Commonwealth laws but we should note that, in our view, it is unsatisfactory that different remedies for the review of committal proceedings conducted by magistrates in New South Wales should be available depending on whether the prosecution has been launched by the State or the Commonwealth.

3. Other Procedures for Review

7.46 Following committal, the magistrate's decision is, in effect, reviewed by both the prosecuting agency and the court of trial. The prosecuting agency is not, of course, empowered to declare that the magistrate made an error or to compel the magistrate to rehear the proceedings. Nevertheless, the Crown Prosecutor must consider whether the accused person should be tried and whether the charge in respect of which the accused has been committed is appropriate. If the Crown Prosecutor disagrees with the magistrate's decision to commit for trial and recommends that "no bill" be found, the matter will be considered by either the Solicitor General or the Crown

Advocate. The accused person may at any time before trial apply for a "no bill", in which case the matter is given similar consideration. This procedure is dealt with in greater detail in Chapter 10.

7.47 At the commencement of the trial, that is, after the indictment has been presented, the accused person is entitled to request the judge to rule that the conduct of the committal proceedings, or the absence of committal proceedings,[80] has been unfair or an abuse of process. In one recent case, where it was held that the conduct of the committal proceedings had not been in accordance with the law, those proceedings were declared to be void and fresh committal proceedings were ordered to be held.[81] In another recent case, the accused person had been brought before the District Court on an ex officio indictment following a lengthy coronial inquiry where he had been legally represented and had been allowed to cross-examine all witnesses. On the accused person's application to the trial judge, committal proceedings were ordered to be held.[82] At the conclusion of those proceedings, the accused person was discharged.

7.48 We have noted that judicial review of a magistrate's decision at committal proceedings is available on the application of the informant. In addition, where a magistrate has discharged an accused person after committal proceedings, a dissatisfied informant may make representations to the prosecuting authority that it take a different view of the case and file an ex officio indictment.[83]

F. Other Issues

1. Legal Representation

7.49 Legal aid is generally not available to accused people for the purpose of providing representation at committal proceedings. Because of financial and staff constraints, the policy of the Legal Aid Commission of New South Wales is to grant legal aid for committal proceedings to young people and people charged with murder (or attempted murder) or where exceptional circumstances exist.[84] In addition, people who are charged with indictable offences capable of being dealt with summarily may qualify for legal aid for the hearing of the matter in the Local Court. If that hearing is conducted as committal proceedings rather than summary trial, then they will have had, by an indirect means, the benefit of legal representation at committal proceedings. The result of this policy, combined with the cost of obtaining private legal representation, is that a minority of accused people are represented at the committal hearing. It should be noted that the Legal Aid Commission's policy regarding the provision of legal aid at committal proceedings is currently under review. The following have been put forward as reasons in favour of extending legal aid to this area:

* It would remove the anomalous gap in the existing provision of aid in indictable criminal cases whereby assistance is given at the initial appearance at court (the duty solicitor scheme) and then withheld until the final step in the proceedings.

* It is important that the system of criminal justice have the appearance of manifest fairness. A system in which a professional prosecutor is matched against an unrepresented, perhaps inarticulate, accused person does not have that appearance.

* From a humanitarian viewpoint, it would greatly benefit accused people by assisting them through an important part of the criminal justice process which they would otherwise often find frightening and bewildering.

* It would be of significant benefit to accused people and their legal representatives at trial by laying early groundwork for subsequent defences, as well as preventing unrepresented accused people doing harm to their later chances of acquittal by asking inappropriate questions. A significant number of charges may well be dismissed at the committal stage if the accused person is properly represented.

* The fact that accused people were represented would usually ensure the protection of their rights in respect of matters such as bail, delays in dates for hearing, "no bill" applications and plea negotiations with the proscution.[85]

7.50 At para 7.21, we pointed out that the absence of legal representation severely restricts the usefulness of committal proceedings. In fact, the full benefits which are supposed to flow from committal hearings are virtually unobtainable without effective representation. The evidence given at the committal proceedings will not have been properly tested. The lawyer who acts for the accused person at trial will not usually have been involved in the committal hearing and therefore will not have the benefit of the additional preparation, nor the benefit of discovering the strengths and weaknesses of the prosecution case, which the hearing might have provided. For these reasons, the unavailability of legal aid frequently results in committal proceedings failing to achieve their objectives.

2. Waiting Times and Delay

7.51 One frequent and important criticism of committal proceedings has been that they take up a significant amount of court time and, consequently, are a cause of delay. The proceedings involve the presentation of evidence-in-chief and cross-examination of most or all of the prosecution witnesses to be called at the trial. Where an accused person is legally represented, argument on matters of law, particularly concerning the admissibility of evidence, is often lengthy and in any event does not conclude the issue, for the decision made on such a matter at the committal hearing is not binding on the court of trial. The time taken by committal proceedings uses resources which could otherwise be devoted to dealing with the remainder of the enormous workload carried by the Local Courts. As we have noted, cases are usually prepared by two different prosecuting agencies. This adds to the time which must necessarily be taken up before the case can come to trial in one of the higher courts.

3. Expense

7.52 In order to estimate the overall cost of committal proceedings, the following expenses must be taken into account:

* Court costs including the provision of facilities and the salary of the magistrate and ancillary court staff.

* The cost of legal representation for the prosecution and the accused person.

* Recording and transcription costs to produce a transcript of proceedings.

* Witnesses' fees and the disruption caused to their everyday lives.

* The costs caused by the unavailability of police required to give evidence at committal hearing.

* The cost of providing escorted transport from prisons for accused people held in custody.

It is not necessary to attempt to quantify these costs in order to gather support for the proposition that committal proceedings are expensive. It is self-evident that the costs borne by the community for committal proceedings, both direct and indirect, are substantial. The cost to accused people is also enormous. Even the moderately wealthy often find their resources are so drained by the cost of legal representation at committal proceedings that they need to apply for legal aid at the trial. In considering the factor of expense, it should not be overlooked that the prosecution of accused people on serious charges is a burden which must be discharged responsibly by the State in a civilised community. Whilst we accept that the proper administration of justice will necessarily be expensive, we consider it important to ensure that the most cost efficient procedures consistent with the maintenance of a high standard of justice are used.

4. Publicity Given to Committal Hearings

7.53 Publicity given to committal proceedings, such as reports of the evidence or of the fact of committal, can be prejudicial to the proper administration of justice. In particular, jurors may be affected in one or both of two ways. Firstly, jurors may have formed an impression of the nature and strength of the case against the accused person as a result of publicity given to the evidence called at committal proceedings

which will usually only be evidence in the prosecution case. This may include evidence which will not be admitted at the trial, or which was incompletely, inaccurately or sensationally reported. Secondly, publicity of a magistrate's opinion, made in accordance with the terms of the legislation, that a jury would "not be unlikely" to convict the accused person may prejudice potential jurors. This problem is exaggerated where the magistrate goes beyond the requirements of the legislation and declares that, in the magistrate's opinion, a jury would be "likely" to convict. These aspects of publicity present a real threat to an accused person's right to a fair trial in which the jury should base its verdict solely on an impartial assessment of the evidence admitted at the trial. We deal with the question of publicity in greater detail in Chapter 13 but for present purposes we point out that the combined effect of the criteria for committal and media publicity may serve to jeopardise the prospect of conducting a fair trial.[86]

5. Transcript of Committal Proceedings

7.54 At present the transcript of the committal proceedings is not immediately available to the parties after committal. Indeed, complaints about the transcript becoming available only just before trial are frequently made by accused people. This delay results in less adequate preparation for trial. In the first place, where the prosecuting authority takes time to obtain the transcript, its decision as to the charges that should be pursued is delayed. Secondly, delay in getting the transcript to the accused person or his or her legal

representatives means the defence will be slow to make an informed decision as to the plea that will be made to the charge or to prepare for the trial in the event of a contested case. In our opinion, the additional resources required to ensure that the transcript is available promptly after committal would be relatively small. The cost of producing the transcript of the committal proceedings is an expense which can be postponed but never avoided. Once this is recognised, it should also be realised that it is desirable for the transcript to be provided sooner rather than later. Any additional expenditure would be more than justified by the prospect of earlier and more effective preparation by both the prosecution and the defence and a consequent reduction in delays.

5. Incidental Matters

7.55 A number of incidental matters were raised in the Commission's First Issues Paper on Criminal Procedure.[87] Some of these remain unresolved. We intend to repeat the suggestions for reform of these matters in this Discussion Paper.[88]

V. THE POSITION IN OTHER JURISDICTIONS

A. England

7.56 The procedures followed in oral committal hearings in England are similar to those applicable in New South Wales. The hearing is presided over by a magistrate or a justice of the peace, assisted by a legally qualified justice's clerk. According to a recent article,[89] the practice of justices in hearing "old style committals" has changed, at least in London. The considerations previously applied by justices to

decide whether an accused person should be committed for trial[90] have been replaced by the test formulated for use by trial judges in determining a submission of no case to answer[91] namely, that if the prosecution evidence taken at its highest is such that a jury properly directed could properly convict, then the justices should hold that there is a case to answer and commit the accused person for trial. Whilst the accused person has the right to call evidence at committal proceedings,[92] it is suggested[93] that there is no point in the accused person exercising this right since nothing that he or she may do will alter the strength of the case for the prosecution "taken at its highest".

7.57 Since 1968, "paper committals" have been available in England.[94] The prosecution must serve the written statements of its witnesses on the defence. Each statement must be signed by the witness and include a declaration that the witness believes the contents of the statement to be true and is aware of the possibility of prosecution for wilfully making a false statement. A preliminary hearing is then held at which the accused person is given the opportunity to object to any of the written evidence tendered by the prosecution. If there is no such objection made by an accused person who is legally represented, the right to a committal hearing is effectively waived. The court is not required to consider the material disclosed by the papers and simply commits the accused person for trial. Alternatively, the accused person may require prosecution witnesses to attend to give oral evidence and may

elect to call witnesses to give evidence. He or she may also choose to make a submission of no case to answer. If the accused person takes any of these steps, the proceedings are conducted in the conventional form and the court must consider the sufficiency of the evidence against the accused person in deciding whether there should be a committal for trial. The overwhelming majority of committal proceedings are conducted by the "paper committal" method.[95]

B. Scotland

7.58 In Scotland there are no committal proceedings as we know them. The decision whether or not to commit an accused person for trial is made by the Procurator Fiscal, a legally qualified public official whose jurisdiction operates within a defined geographical area. Upon receiving a police report of a crime, the Procurator makes inquiries, issues instructions to the police and examines all available witnesses, but cannot interview the suspect. The initial investigation will usually uncover evidence in favour of, as well as against, the accused person. The results of the investigation are not disclosed to the defence. In deciding whether to charge summarily or on indictment, the Procurator must consider first the gravity of the offence and secondly what he or she regards as an appropriate penalty having regard to the background of the accused person. If the maximum penalty on summary conviction is not regarded as being high enough to meet the circumstances of the case, the Procurator will decide to proceed by means of "solemn procedure", that is, on indictment. The decision as to

mode of trial depends very much on the discretion of the individual Procurator Fiscal. The Procurator makes his or her decision independently of the police or the courts.[96]

7.59 If there is a decision to proceed on indictment, the accused person is arrested and brought before a judicial officer, known as a Sheriff, on the next possible day after arrest. A hearing known as a "committal for further examination" is held. The only people present are the Sheriff, the Sheriff's Clerk, the Procurator, the accused person and his or her lawyer. The charge is read to the accused person who normally remains silent, although there is an opportunity to make a statement. No witnesses are called. The purpose of this procedure is to bring an accused person before a court as soon as reasonably practicable after arrest.

7.60 No later than eight days after the first appearance, the Procurator Fiscal again brings the accused person before the Sheriff. On this occasion, the Procurator requests that the Sheriff grant a warrant to commit the accused person for trial. This is known as the "full committal". The request is granted by the Sheriff automatically without hearing any evidence or being given any detailed information about the case against the accused person. The absence of a requirement that the Sheriff consider the sufficiency of the evidence has been criticised.[97] On the other hand, it has been argued that the Procurator Fiscal would not make such a request unless there was a substantial case against the accused person.[98]

7.61 The Scottish system of criminal procedure appears to depend heavily on the proposition that the Procurators, as people of integrity and as responsible officials, will act fairly and properly and only where the justification for taking action against a citizen is well founded. Without in any way seeking to reflect adversely upon the administration of the Scottish system, we do not consider that a presumption of this kind should be such a fundamental feature of the process of criminal justice. Fairness and integrity are not by themselves enough to guarantee that a correct decision is made. More importantly, however, the principles, firstly, that justice should be seen to be done and, secondly, that those responsible for the administration of justice are publicly accountable for the decisions they make, are ignored by this process.

C. United States

7.62 A comprehensive discussion of the various committal systems in the United States is beyond the scope of this Discussion Paper. The determination of whether a case will go to trial is usually made at a preliminary hearing conducted by an examining magistrate who is often not legally qualified. Although most States provide for a preliminary hearing, there is wide variation as to whether it is mandatory or not and when it should occur. Usually the preliminary hearing must be held promptly after arrest. The tribunal determines whether the accused person should be bound over to stand trial for the offence charged.[99] The standard criterion used is whether "probable cause" exists to justify a trial. It is not necessary that the evidence establish the guilt of the accused

person beyond reasonable doubt nor prove all the details of the offence.[100] Although constitutional provisions guaranteeing certain rights to the accused person in a criminal trial have no application to preliminary proceedings, the hearing is conducted in an adversary manner with the prosecution presenting its evidence first. The accused person is present, has the right to counsel, and may cross-examine witnesses and introduce evidence in his or her favour.

7.63 In many States and in the Federal system, the procedure for bringing accused people to trial is based on the grand jury system. Some States, notably California, have abolished the grand jury system and use a procedure of preliminary hearings which are not unlike committal proceedings in New South Wales. In some States, both systems operate and either may be used to bring an accused person to trial. In these States the accused person is usually entitled to waive the preliminary hearing and allow the matter to go directly before a grand jury. The grand jury system appears to be generally favoured by prosecuting agencies, whereas defence lawyers generally appear to favour the preliminary hearing system since it gives them more information about the prosecution case.

7.64 The grand jury consists of between 12 and 23 citizens randomly selected from the local register of voters. A judge presides at the hearing and instructs the grand jurors on matters of law and on their duties. The prosecution presents a formal accusation and supporting evidence to the grand jury in private. Unless the accused person is invited by the grand

jury to be present, he or she has no opportunity to rebut the charge. However, if the grand jury decides that the accused person should be put on trial, he or she is entitled to know the names of witnesses that have appeared before the grand jury. Grand jurors should not find a bill on evidence merely sufficient to render the truth of the charge probable, but they should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a trial jury.[101] If the grand jury is satisfied by the evidence, it returns an indictment known as a "true bill" and the accused person is committed for trial. Where the grand jury is not so satisfied, it returns "no true bill" and the accused person is discharged.

D. Canada

7.65 The procedure at the "preliminary inquiry" in Canada resembles that followed in committal proceedings in New South Wales.[102] The presiding magistrate must order the accused person to stand trial "if there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction".[103] There is no rule in Canada which requires the prosecution to present all of its evidence at the preliminary inquiry and the defence cannot require the Crown to go beyond the establishment of a prima facie case. The principal difference between the two jurisdictions is that, in Canada, the accused person may choose, with the consent of the prosecution, to waive the preliminary hearing and proceed straight to trial.

7.66 In a report examining the subject of discovery in criminal cases, the Law Reform Commission of Canada recommended the abolition of the preliminary inquiry[104] and its replacement by a uniform system of discovery. The Commission's Report noted that the procedure of the preliminary inquiry is only available in a small percentage of criminal cases, and that in recent times the procedure has been used primarily as a cumbersome and expensive vehicle for achieving discovery before trial. The Commission considered that the introduction of a uniform system of discovery should be complemented by the availability of a pre-trial procedure at which the adequacy of the case for the prosecution could be reviewed.

VI. OPTIONS FOR REFORM

7.67 The Commission has concluded from its examination of the current procedure between charge and trial that committal proceedings do not usually achieve the various objectives for which they were designed. The fact of this failure is, in our view, the most disturbing aspect of committal proceedings, since it has the potential to cause injustice to be done. This is more important than considerations of time and money. To say that committal proceedings are expensive and time consuming is not enough by itself to justify their reassessment. Committal proceedings are designed to serve an important function in the administration of criminal justice and it is inevitable that they should take time and cost money. However, there is widespread concern that these resources are being used inefficiently.[105] It seems to us that the intended functions

of committal proceedings may be served by alternative procedures which are faster, fairer and far less expensive. In this part, three options for changing the law and practice of committal proceedings are examined. Firstly, the current form of committal proceedings could be retained with specific improvements to the procedure. Secondly, a right to waive committal proceedings exercisable at the option of the accused person might be introduced. Thirdly, a new system of procedure before trial could be developed. This would involve the abolition of committal proceedings in their current form. At this stage we tentatively express a preference for the abolition of committal proceedings and their replacement by a more effective alternative procedure. Such an alternative procedure would be designed to serve the legitimate functions currently intended to be served by committal proceedings as well as certain functions which committal proceedings do not serve but which we consider should be features of a fair and efficient system of procedure before trial. We are conscious that the abolition of committal proceedings represents a fundamental change in criminal procedure. The tentative proposal we make should be seen as substituting a new procedure rather than merely abolishing an existing one. Before expressing a final view as to the most desirable option, we await the completion of the process of consultation.

A. Improved Committal Proceedings

7.68 The first approach is to retain committal proceedings in their present form with relatively minor changes. Before dealing with those changes, it should be emphasised that certain of the problems associated with committal proceedings in their current form would be ameliorated by the introduction of some of the proposals canvassed elsewhere in this Discussion Paper. For example, in Chapter 3 we discussed the implementation of time limits on the prosecution of criminal offences which would, in many cases, serve to reduce the delay in the commencement of committal proceedings. A requirement of full disclosure by the prosecution in advance of the committal proceedings, as proposed in Chapter 4, effectively making an extended "paper committal" system mandatory, taken in conjunction with the system of pre-trial hearings suggested in Chapter 9, would overcome some of the present limitations of committal proceedings such as their failure to adequately identify the real issues between the parties and to disclose all of the evidence to the accused person.

1. Criteria for Committal for Trial

Potential Problems With the New Criteria

7.69 Questions as to the interpretation and operation of the new provisions which have arisen in the cases which have dealt with them,[106] or which may well arise in the future, include the following:

* Does the legislation mean that the role of the jury as a finder of fact is being taken over by magistrates at committal proceedings?

* Does the legislation give to magistrates a greater power to discharge an accused person than the power of a judge presiding at a jury trial to direct a verdict of acquittal? In this sense, is the magistrate in a stronger position to usurp the function of the jury?

* In the second test to determine committal for trial, the magistrate has to consider whether "a jury would not be likely to convict". Does the word "likely" mean "having a tendency to" or "more probable than not"?

* Will the finding of the magistrate that, in his opinion, a jury would not be unlikely to convict, tend to prejudice the accused person at trial?

* Will the practical application of the new criteria lead to an increase in the number of cases prosecuted by way of an ex officio indictment?

An Alternative Formula for Committal

7.70 The atmosphere of uncertainty and the criticisms that have been made of the current law, together with the need to ensure that committal proceedings do act as an effective screening of cases that should not go before a jury, suggest that changes to the criteria for committal may be required. In our view, the function of the magistrate in determining whether or not to commit an accused person for trial should simply be expressed as deciding whether the evidence is sufficient to warrant the accused person being put on trial. We consider that this same standard may be used both at the end of the case for the prosecution and after any evidence has been called in the case for the defence. It does not seem to us that there is any reason to have two tests to be applied in making a determination as to whether there should be a committal for trial. If this were to be the law, it would be broadly

consistent with the procedural law at trial regarding submissions of "no case" which may be put to a trial judge either at the conclusion of the prosecution case or at any time thereafter.

7.71 In our view, the criteria for committal might be conveniently expressed in legislation in the following terms:

> A magistrate conducting committal proceedings shall commit the accused person for trial if he or she is of the opinion that the evidence is sufficient to warrant the accused person being tried before a judge and jury. In making such a determination the magistrate shall have regard to:
>
> (i) Whether there is evidence capable of proving each of the elements of the offence charged beyond reasonable doubt.
>
> (ii) The weight which a jury could reasonably attach to the evidence.
>
> (iii) The likelihood of a conviction.

This test could be applied at the end of the case for the prosecution and again, if necessary, after evidence has been called for the defence. The third factor to be taken into account is one which has the potential to cause prejudice. Whilst we consider it necessary and desirable for the magistrate to publish his or her reasons for a decision to commit for trial, care should be taken to avoid statements which might prejudice the trial of the accused person.

7.72 A statutory provision of this kind would be consistent with the trend to state the existence of a judicial discretion in legislation but at the same time to guide that discretion by citing the matters which should be taken into account in exercising it.[107] It may be suggested that a provision of

this kind goes too far towards usurping the jury's function in that the magistrate is called upon to give consideration to, indeed to forecast the outcome of the trial. We reiterate our view that committal hearings should be used to screen those cases which, whilst there is some evidence upon which a jury may rely, should not ultimately be tried. We think it preferable that this function be performed in the first place by magistrates in open court having the opportunity to see and hear the witnesses. The magistrate's decision would be subject to review by the prosecuting authorities in the same way that it is at the moment. There would be no change in procedure apart from the likelihood, if not the certainty, of more cases being discharged by magistrates and fewer cases being the subject of orders for "no bill".

2. The Effect of Discharge at Committal Proceedings

7.73 The Commission is of the view that the law and practice regarding the consequences of a discharge at committal proceedings may be unfair in some cases. This potential for unfairness derives primarily from the fact that the position of an accused person who has been discharged is uncertain. It is desirable that the position of an accused person who is discharged should, if possible, be made more definite. There are four possible approaches:

* The doctrine of autrefois acquit could be extended so that a discharge is for all purposes equivalent to an acquittal. The doctrine, so far as it applies to preliminary proceedings, may be expressed in absolute or qualified terms.

* The magistrate could be given a discretion to declare that the discharge is equivalent to an acquittal.

* The accused person could be given a right to apply to a higher court for a declaration that his or her discharge is equivalent to an acquittal.

* The accused person could be given a right to apply to the Attorney General for a certificate that his or her discharge is equivalent to an acquittal.

7.74 One disadvantage of the first approach is that, in a case where a magistrate is uncertain whether to commit for trial, the prospect of the accused person being forever free from prosecution may tip the balance against ordering a discharge. Another is the doubt as to whether a determination by a magistrate, as opposed to a jury verdict, should have that effect. This difficulty may be overcome if the application of the doctrine of autrefois acquit is qualified. The second approach has the attraction of flexibility but one difficulty might be that the prosecution, according to the current principles of appeals in criminal cases, would have no power to correct a clearly wrong decision to order an "acquittal" at this early stage in the criminal process. The disadvantage of the third approach is that it would require court proceedings to decide the question which would have been the ultimate issue at trial and some or all of the costs which would have been saved in avoiding a trial might therefore be incurred. The fourth approach is unsatisfactory because it involves the Attorney General making a formal adjudication on the question of guilt. This would not normally be done even by the exercise of the power of pardon after a formal judicial inquiry.[108] Traditionally, only a judicial determination or that of a jury

would decide such a question. We tentatively consider that the current practice should be changed to provide that where an accused person is discharged at committal proceedings, the prosecution should not be able to be recommenced unless the prosecuting authority can show that there is significant new evidence which was not available at the time of the original prosecution.

3. Jurisdiction After Committal

7.75 We tentatively consider that if committal proceedings are to be retained, an order committing an accused person for trial or sentence in a higher court should have the effect of immediately vesting jurisdiction in that court. This could be achieved without difficulty by requiring that the committal order be filed in the registry of the prospective court of trial together with the appropriate accompanying papers. This would enable the courts to gain effective control over the delays which occur before trial and thus eliminate the existing potential for unjustified delay by the prosecution. If a system of prescribed time limits for the commencement of criminal trials, such as we have tentatively suggested in Chapter 3, were introduced, the observance and enforcement of those time limits would naturally be a matter for the courts. The notion of an independent listing authority which we discuss in Chapter 8 should also be considered in this context.

4. Ex Officio Indictments

7.76 When considering the power to file an ex officio indictment, we distinguish the four categories listed in para 7.39 since they vary greatly in their operation. However, the Commission is of the view that the use of the ex officio indictment is only likely to cause injustice where there have been no preliminary proceedings of any kind and the accused person is given insufficient information about the case. Since this objection has been effectively overcome by the decision of the High Court in Barton's case in which the High Court affirmed the general duty of the courts to ensure in each individual case that the accused person has a fair trial, we do not consider that the use of the ex officio indictment requires substantial reform.[109] The Commission is satisfied that the current powers of the courts to ensure that prosecutions are not unfairly launched are sufficient to safeguard accused people against any improper use of the ex officio indictment procedure. The courts' power in this regard is well demonstrated by Barton as well as the recent cases of Cordell and Bailey which are discussed at para 7.47.

5. Review of Committal Proceedings

7.77 The need for streamlined procedures enabling judicial review of committal proceedings to prevent the interruption and delay caused by the present system has been advocated.[110] It must be recognised, as the more recent authorities have done, that the decisions made by a magistrate at committal proceedings affect the rights of the parties in those proceedings.[111] In particular, a decision to commit an

accused person for trial exposes that person to the ordeal of a trial before a judge and jury and to the risk of being held in custody or subjected to other deprivation during the period pending trial.[112] It is essential therefore that the conduct by magistrates of committal proceedings should be subject to some level of supervision by a superior court.[113] The existence of a formal means of review of committal proceedings is necessary both to ensure that an error in a particular case can be corrected and to provide some authoritative guidance for the future conduct of such proceedings.

7.78 Insofar as the current law regarding the availability of prerogative relief is uncertain, we consider that this shortcoming is remedied by the clear availability of declaratory relief to define the rights of the parties to the litigation even though such relief will only be granted in exceptional circumstances. The jurisdiction to make declaratory orders is very wide and limited only by the discretion of the court or where it is ousted by statute.[114]

7.79 We recognise the concerns that have been expressed about the serious consequences of interrupting the progress of cases through the criminal courts by permitting appeals against decisions of a preliminary kind.[115] We also recognise the need to ensure that there is adequate power in the courts to ensure that such decisions are made in accordance with the law. This has been acknowledged by the Federal Court:

> The Court should entertain a submission for review, upon the ground that there is no prima facie case, of a magistrate's decision to commit only where it is abundantly clear, without intricate consideration of the evidence, that there is a failure to establish a necessary ingredient in the charge. To depart from that principle is significantly to erode the requirement of exceptional circumstances, and to create the opportunity, in a substantial proportion of cases, for yet another review of the facts, additional to committal proceedings and a trial, with attendant costs and delays. Once it appears that a no case submission requires investigation of the minutiae of the evidence and the consideration of the proper inferences from circumstantial events then the stage has been reached at which it is proper to dismiss the application for review without further consideration.[116]

We agree that the discretion to grant declaratory relief should be limited to cases in which the circumstances are exceptional. In their absence, the committal proceedings should be permitted to run their ordinary course.

6. Legal Aid in Committal Proceedings

7.80 We regard it as essential, if the full benefit of committal proceedings is to be realised, that legal aid should be available in such proceedings upon request by otherwise eligible accused people. Whilst this will probably impose an extra burden on the legal aid budget, such a policy would ensure that committal hearings achieve their intended purpose and provide cost-saving benefits in reducing the work necessary to prepare cases for trial. We should add that the additional burden involved, and the difficulty of finding the necessary resources to meet it, is one of the reasons why we consider that an essentially different system of pre-trial procedure should be introduced.

7. Incidental Matters

Joining Additional Accused People

7.81 In our view, magistrates should be given the power to "join" additional accused to a committal proceeding which has already commenced. In Victoria,[117] where there is an additional accused person to be joined, he or she receives an outline or a transcript of the evidence already heard, may have witnesses recalled for further examination, and is entitled to an adjournment to seek legal advice. An accused person who is deprived of a fair committal as a result of "joinder" would, of course, be entitled to seek an order for fresh proceedings from the judge at trial. This procedure enables preliminary proceedings to continue without interruption and is likely to result in the trial, if there is one, being heard without the delay which would probably be caused by having to conduct additional committal proceedings. An analogous approach is permitted in committal proceedings in New South Wales involving charges of sexual assault. Section 409A of the Crimes Act is designed to avoid the complainant in a sexual assault case being subjected to repetitious questioning at separate committal proceedings and permits evidence given by the complainant at an earlier hearing to be admitted at a later one.

The Title of the Proceedings

7.82 In some other jurisdictions the term "committal proceedings" is not used. The expression "preliminary hearing" is used in New Zealand and in many parts of the United States. A similar expression, "preliminary examination", is used in Victoria, South Australia and the Australian Capital Territory. In Canada the process is usually known as a

"preliminary inquiry". It seems to us that this last expression, "preliminary inquiry", is not only a more accurate description of the process but also has the advantage of avoiding the pejorative overtones of the term "committal proceedings". This term implies that the purpose of the proceedings is to commit the accused person for trial, not to test whether he or she should be committed for trial. The point is best made by noting that, if this style of terminology were used consistently, a criminal trial would be known as "conviction proceedings". It is the Commission's tentative view that committal proceedings should be formally described as a "preliminary inquiry".

The Presence of the Accused Person

7.83 The accused person must generally be present at the committal hearing. He or she may apply to be excused if there are one or more co-accused and if he or she will be represented by a lawyer during his or her absence.[118] There seems to be no good reason why an accused person who is represented should not be excused from attendance whether or not other accused people are involved in the same proceedings. We would caution, however, that the power to excuse an accused person from attendance at committal proceedings is one which should be used carefully.

B. Waiver of Committal Proceedings

7.84 The second scheme to be considered would permit the waiver of committal proceedings by the accused person. Such a procedure has been introduced in England, Canada, Tasmania and Victoria and also exists in some jurisdictions in the United States. It contemplates that an accused person charged with an indictable offence may elect to go directly to trial in one of the higher courts.

7.85 The advantages to an accused person would be limited but not insignificant. In a case likely to be highly publicised, the waiver of committal proceedings could result in the case receiving less publicity with the result that potential jurors would be less likely to have knowledge of the facts of the case prior to the trial and to have formed a view about an issue in the case. Apart from avoiding cost and prejudicial publicity (a problem which might in any event be effectively solved by implementation of the tentative proposals in Chapter 13), the substantial advantage to an accused person would be the prospect, if not the certainty, that the case will be determined more quickly.

7.86 One objection to this proposal is that the benefits said to flow to the prosecution from the conduct of committal proceedings would not be realised in cases where the accused person elected to waive them. It may be that there will be a committal in some cases which would not otherwise go to trial, and that the prosecution will not have the benefit of the

preparation that the committal proceedings currently provide. In our view, the desirable goal of rapid disposition of criminal proceedings outweighs these possible disadvantages for the prosecution. Alternatively, if the benefit to the prosecution is to be preserved, the accused person's right to waive committal proceedings could be made subject to the prosecution's consent, as it is in Canada.

7.87 Opposition to this proposal based on the undesirability of accused people waiving rights to which they are otherwise entitled may be countered by noting that, under our current system of criminal procedure, an accused person, by pleading guilty at the committal hearing, may completely abandon the right to that hearing.[119] If it is acceptable to allow an accused person to plead guilty in this way at the committal proceedings, it should follow as a matter of logic that it is acceptable to allow an accused person to waive the right to committal proceedings.

7.88 The decision to waive the right to committal proceedings is one which clearly should not be taken lightly. The risk that accused people might unwisely forsake important rights should be averted by procedures which will ensure that such a decision is an informed and voluntary one. The Commission is of the tentative view that, if a procedure allowing for waiver of committal proceedings is to be introduced, it should only be available where the accused person is legally represented or where the presiding magistrate is satisfied, after making

specific inquiry, that the decision to waive committal proceedings is informed and voluntary.[120] The problem of informed consent should not be overstated. At present, a plea of guilty to a criminal charge may be accepted from an accused person without a requirement that he or she is represented, has received adequate legal advice, or otherwise understands the nature of the charge. Therefore, consistently with our proposal with regard to waiver, we propose that a guilty plea at committal proceedings should only be accepted where the presiding magistrate is satisfied that the accused person is informed as to the nature of the charge involved and understands the consequences of a plea of guilty.

C. Abolition of Committal Proceedings

7.89 We consider that perhaps the most significant feature of the current procedure is that the magistrate's decision to commit for trial or sentence is never binding on the agency responsible for making the decision to prosecute in the higher courts. In a significant percentage of cases, the decision made by the magistrate is not followed by the prosecuting authority.[121] The statistical information we have examined reveals that an accused person is rarely discharged at contested committal proceedings. Many of the accused people who are discharged at committal proceedings owe this to the fact that the prosecution decides to offer no evidence. When a prosecution is not pursued, it is far more likely to be due to a decision made by a prosecuting agency, that is where the police decide to withdraw the charges and present no evidence

at committal proceedings, or where there has been a committal order by a magistrate and the prosecuting authority decides that there should be "no bill". In our view, it is logical to require the prosecuting authority to make the decision to prosecute before or in lieu of committal proceedings, provided there is a substituted procedure which ensures that the beneficial aspects of committal proceedings are preserved.

7.90 Another significant shortcoming of committal proceedings which is a cause for serious concern is their failure in many cases to fully inform the accused person of the nature of the prosecution case. This inadequacy has been the subject of criticism by a judge of the High Court of Australia, who expressed the view:

> It would be much better to abandon committal proceedings and to protect an accused by discovery (particulars and notice of evidence and a simpler screening process) than to allow trial by jury to be undermined further.[122]

7.91 The question arises whether the present elaborate, expensive and time-consuming exercise of committal proceedings should be retained. It is possible that the legitimate functions of committal proceedings can be achieved more effectively and more efficiently in other ways. Accordingly, the third and preferred approach which we discuss would abolish the current committal process and replace it with an alternative procedure which is designed to serve the same functions in a more efficient manner. In order to understand the proposal we put forward under this third proposal, it is

necessary to explain various other features of the proposed system of procedure between charge and trial. Where relevant, we have made reference to the other chapters in which these features are discussed.[123] In our view, the procedure outlined in the following paragraphs is a practical alternative to the current procedure.

VII. SUMMARY OF TENTATIVE PROPOSALS

1. The Powers of the Prosecuting Authority

7.92 The functions of the prosecuting authority should include the power to decide whether or not to prosecute, whether to grant indemnity from prosecution, what charge or charges should be tried and to nominate, subject to the consent of the accused person and the court in certain circumstances, the court in which the charge or charges should be heard (the prospective court of trial). The prosecuting authority should also have the power to take charge of any prosecution commenced by a private citizen and either continue or abandon that prosecution. (See Chapter 12.)

2. The Criteria for the Decision to Prosecute

7.93 As a minimum standard, the prosecuting authority should not make a decision to prosecute unless it is of the opinion firstly, that there is evidence capable of being believed and capable of proving each of the elements of the offence charged and, secondly, that the weight which a court acting reasonably could attach to that evidence is sufficient to satisfy it of the guilt of the accused person. (See para 7.70.)

3. Notification of Decision to Prosecute

7.94 Where a person has been arrested and charged, the prosecuting authority should decide whether or not to prosecute within seven days from the time of the charge. If there is a decision to prosecute in one of the higher courts, the prosecuting authority should notify the prospective court of trial, the authority responsible for listing cases in the higher courts (see Chapter 8) and the Local Court. Notification should be in writing and be made within seven days of the date on which the accused person was charged. If there is a decision to prosecute in the Local Court, the Local Court alone need be notified of the decision within the same period of seven days. In each case the accused person should also be notified of the decision to prosecute and the prospective court of trial.

4. Procedure on Appearance Before the Local Court

7.95 If there has been no decision to prosecute within seven days or a decision not to prosecute has been made, the accused person should, on his or her appearance before the Local Court, be immediately released from custody or exempted from any further obligations under a relevant bail undertaking. If there is a decision to prosecute in a higher court, the accused person should be required to appear in the prospective court of trial. In the case of indictable offences capable of being dealt with summarily and offences triable either way, if there is a decision to prosecute in the Local Court then the Local Court should, if the matter is ready to proceed, immediately

conduct a mode of trial hearing. If it is not ready to proceed, the accused person should be required to appear before the Local Court again for a mode of trial hearing. (See Chapter 6.)

5. Proceeding by Summons

7.96 A person who is proceeded against by summons should be summoned to appear in the prospective court of trial. It would normally be expected that, where a summons is issued, the agency responsible for making the decision to prosecute has already made that decision. In that case, the application for the issue of the summons should be accompanied by a notification to the prospective court of trial of the decision to prosecute. In any event, the notification should be given to the court before the date on which the accused person is summoned to appear.

6. Police to Charge and Determine Bail

7.97 The police should retain responsibility for the initial charging of people with indictable offences. Before making a decision to charge, the police should be able to consult with or obtain advice from the prosecuting authority. Following the charging of an accused person, the procedures currently followed should continue to apply. That is, the police should initially determine the question of bail and bring a person held in custody before a Local Court at the earliest reasonable opportunity. The current procedure is explained in greater detail in para 2.19.

7. Police to Notify the Prosecuting Authority

7.98 When a person has been charged with an indictable offence which is not capable of being dealt with summarily, or the charge is one in respect of which the police have not been delegated the power to make the decision to prosecute, the police should immediately notify the prosecuting authority and provide it with all the relevant information and material that is within their knowledge or possession.

8. Abolition of Committal Proceedings

7.99 Committal proceedings as they are currently conducted should be abolished and replaced by the procedure outlined in this and the following paragraphs. If the prosecuting authority decides that there is to be a prosecution in a higher court, it should, as set out in para 7.94, give written notification to the Local Court and the prospective court of trial of the decision. The prosecuting authority should also advise the listing authority (see para 8.46) of the decision to prosecute. The decision to prosecute should by itself be sufficient to bring a prosecution before the courts but in the case of prosecutions in the higher courts, that decision should be subject to challenge and review in the manner described in paras 7.101-7.103. If the prosecuting authority nominates the Local Court as the prospective court of trial for an offence triable either way, and the magistrate determines after a mode of trial hearing that the matter should be heard in a higher court, the Local Court should notify the prospective court of trial and the listing authority of that decision. The

procedure which follows should then be the same as if the prosecuting authority had made a decision to prosecute in one of the higher courts.

9. Complete Disclosure by the Prosecution

7.100 If there is a decision to prosecute in the higher courts, the prosecuting authority should immediately file in the prospective court of trial a copy of the statements of all persons who may be able to give relevant testimony, together with a copy of relevant documentary exhibits and information regarding access to material exhibits and to people who may be able to furnish material information, indicating what is intended to be called in the prosecution case at the trial. Unless the court orders that the statements or the names of witnesses be withheld or that access to exhibits or relevant people be restricted on the ground that it is in the public interest to do so, or unless the accused person makes an informed and deliberate waiver of the right to disclosure, the prospective court of trial should ensure that the accused person is provided with a copy of all the statements which have been filed, together with a copy of intended documentary exhibits and information regarding access to relevant people and material exhibits. This issue is discussed in greater detail in Chapter 4.

10. A Right to Challenge the Decision to Prosecute

7.101 Under the current system of criminal procedure, the prosecution is required to establish at committal proceedings that there is a case for trial in a higher court. An accused person is thus given the opportunity at committal proceedings to demonstrate that he or she should not have to stand trial by revealing the inadequacy of the prosecution case. However, because a committal is not necessarily followed by a trial, and a discharge at committal proceedings is not a bar to subsequent prosecution in the higher courts, this opportunity occurs before the effective decision to prosecute is made. It should be replaced by creating a right in the accused person to challenge the decision to prosecute after it is actually made. The accused person will thereby have a means of "testing" the prosecution case. Depending on he circumstances of the case, this challenge may be combined with a system of pre-trial hearings which we discuss in Chapter 9. If this is to occur, it is desirable that the judge who presides at the pre-trial hearing should also preside at the trial.

11. Grounds for Challenging the Decision to Prosecute

7.102 A person who is to be prosecuted in the higher courts should have a general right to challenge the decision to prosecute by making an application to the prospective court of trial. Where there is such a challenge, there should be an onus on the prosecution to establish the justification for the decision to prosecute but that onus may be discharged by relying on the documentary material that has been filed in

court by the prosecuting authority (see para 7.100). The challenge to the decision to prosecute may be in the nature of a submission of no case to answer based on the material appearing in the relevant papers filed in the court, or it may be in the form of a special plea such as lack of jurisdiction, autrefois convict or autrefois acquit. The court hearing such a challenge should have the power to allow witnesses to be called or produced for cross-examination on their written statements in an appropriate case, although before doing so the court would need to be satisfied that the circumstances of the case warrant such a course being taken.[124]

12. Ground for Upholding a Challenge

7.103 A court hearing a challenge to the decision to prosecute should uphold it if it is of the opinion either that there is a legal bar to the prosecution or that the evidence in the papers, if believed, is insufficient to warrant the accused person being tried in a higher court. Before making a decision of the latter kind, the court should consider, firstly, whether there is evidence capable of proving each of the elements of the offence charged beyond reasonable doubt and, secondly, whether the weight which a jury could reasonably attach to that evidence is sufficient to satisfy it of the guilt of the accused person.

13. Successful Challenge a Bar to Further Prosecution

7.104 If the court upholds a challenge to the decision to prosecute, it should order that the case be dismissed. Subject to the next paragraph, such an order should have the same consequences as the acquittal of the accused person at trial. We invite submissions on the question of whether the prosecuting authority should have the right to appeal against a judgment upholding a challenge to the decision to prosecute on the ground that it is erroneous. This question will also need to be addressed when the Commission examines the subject of appeals under the terms of its reference on criminal procedure.

14. Additional Evidence May Justify Recommencing Prosecution

7.105 The judgment of the court upholding a challenge to the decision to prosecute may be set aside by that court and the prosecution begun again where the prosecuting authority obtains the leave of the court to do so. Leave should only be granted where there is significant new evidence or where the judgment of the court upholding the challenge was obtained by fraud. The existence of additional evidence can be demonstrated by comparing the new evidence with that contained in the papers filed in the court at the time of the original prosecution and the totality of the evidence justifies recommencing the prosecution. The failure to produce the additional evidence in the original proceedings would need to be explained to the satisfaction of the court.

15. Legal Aid to be Available From the Time of Charge

7.106 Since the effectiveness of any procedure before trial is largely dependent upon adequate legal representation being available, a person accused of an offence which is to be dealt with in the higher courts should be entitled, subject to existing guidelines for the availability of legal assistance, to such assistance from the time he or she is charged. Whilst this would probably increase the legal aid budget, it would ensure that legal representation is available when it is required, thereby overcoming one of the most serious problems affecting the current procedure before a criminal trial. It should be borne in mind that the implementation of our proposal to abolish committal proceedings would result in a significant reduction in the overall costs of the administration of justice.

16. The Right to Seek a Directed Acquittal to be Retained

7.107 The right of an accused person to make an application for a directed verdict of acquittal at any stage during the trial proceedings should remain available notwithstanding the fact that a previous challenge to the decision to prosecute has not been upheld.

17. Publicity Reduced by Abolition of Committal Proceedings

7.108 The abolition of committal proceedings should mean that there is less publicity given to the prosecution case before the trial, thereby reducing the possibility that potential jurors will develop a view about the case inconsistent with their obligation to consider the case on the basis of the evidence presented at the trial. Unless the decision to

prosecute is the subject of a pre-trial challenge made by the accused person to the prospective court of trial, there will be little publicity of the case generated by the media reporting proceedings that have occurred in court. (See Chapter 13.)

18. The Power to Find "No Bill"

7.109 The Attorney General should retain the power to direct that a "no bill" be found or that no further proceedings be taken against a person who has been charged with a criminal offence. For present purposes, we use the expression "no bill" to refer to both situations. The power to find "no bill" may be delegated to the prosecuting authority but should not be further delegated. The power to "no bill" may be exercised on the initiative of the Attorney General or the prosecuting authority or it may follow an application made by the accused person. The power to "no bill" should be exercised by filing a formal document in the prospective court of trial. (See Chapter 10.)

19 Order of Proceedings Before Trial

7.110 After the prospective court of trial has been determined by the prosecuting authority, or after a mode of trial hearing in the case of offences triable either way, the accused person should be asked on his or her first appearance before that court to plead to the charge. If there is a plea of guilty, the court may deal with the matter immediately if it is ready to proceed, or arrange for it to be listed on a future date. If there is a plea of not guilty, the matter should be listed for mention on a suitable date. Prior to that date, the

prosecution should be required to file in court all relevant materials necessary to provide complete disclosure, together with a notice of the formal charge. At the mention, the accused person and the prosecution should be asked if there are to be any pre-trial hearings or a challenge to the decision to prosecute. If there are, a date should be fixed for the hearing of these proceedings. If not, the date on which the trial is to commence should be fixed. (See Chapter 9.)

7.111 It may be argued that fundamental changes to traditional forms of procedure are essentially dangerous because such changes are usually accompanied by dramatic and often unacceptable shifts in the established balance which the criminal process strikes between the interests of the accused person and the prosecution. The traditional form of committal proceedings is, so the argument runs, an elementary safeguard against oppressive charges being prosecuted in the higher courts[125] and for this reason alone should be retained as an integral part of the procedure in indictable cases. We are unconvinced at this stage of our examination that committal proceedings in their current form are the most effective means of establishing such a safeguard. Moreover, the complexity of certain criminal cases and their increasing number require that committal proceedings be altered to reflect the practical realities of the contemporary criminal justice system. Since we are now dealing with a different type of case than was envisaged at the time the current form of committal proceedings was developed, we need a different system of preliminary hearings to cope with these cases.

Footnotes

1. Barton v The Queen (1980) 147 CLR 75 at 108. See also para 7.89; Reg v Kent; Ex parte McIntosh (1970) 17 FLR 65; R v Fazzari (Unreported, Court of Criminal Appeal New South Wales, 8 December 1979) where Yeldham J described the absence of committal proceedings as "a serious procedural irregularity" which contributed to causing a miscarriage of justice. See also J Seymour "Committal for Trial: An Analysis of the Australian Law Together with an Outline of British and American Procedures", Australian Institute of Criminology (Canberra 1978).

2. Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182 at 190. See also J Willis "Reflections on Nolles" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1986) 173 at 184. Sir Richard Blackburn, a former Chief Justice of the Supreme Court of the Australian Capital Territory, has described committals as "a total waste of time" in Transcript of Proceedings, 5th South Pacific Judicial Conference (1982, High Court of Australia, Canberra) at 60.

3. Stephen A History of the Criminal Law of England (1883) Vol I at 217-219.

4. Holdsworth A History of English Law (4th ed 1936) vol II at 340.

5. Holdsworth A History of English Law (7th ed 1956) vol I at 295-298.

6. Similar provisions were to be found in the Justices Act 1902 s41 but have since been amended by Justices (Amendment) Act 1985.

7. Administration of Justice (Miscellaneous Provisions) Act 1933 s1.

8. Australian Courts Act 1828 (Imp) 9 Geo IV c 83, ss5 10. See now Crimes Act 1900 s572. See also Clyne v Director of Public Prosecutions (1984) 58 ALJR 493 at 497 per Deane J; J M Bennett "The Establishment of Jury Trial in New South Wales" (1961) 3 Sydney Law Review 463; E F Frohlich "Committal Procedures in England and Australia" (1975) 49 Australian Law Journal 561.

9. The magistrate may excuse an accused person from attendance if he or she appears with a co-accused and is represented: Justices Act 1902 s41(1B)(b).

10. The main exceptions are people charged with murder and attempted murder and those charged with indictable offences capable of being dealt with summarily under Crimes Act 1900 s476.

11. See paras 7.52-7.54.

12. Justices Act 1902 s51A.

13. Justices Act 1902 s51A(1)(e)(i), introduced in 1983.

14. Justices Act 1902 s41(2).

15. R v Mahoney-Smith [1967] 2 NSWR 154.

16. Justices Act 1902 s41(4).

17. Justices Act 1902 s41(6), as amended by legislation which commenced operation in March 1985.

18. Ex parte Dowsett Re Macauly (1943) 60 WN (NSW) 40.

19. Justices (Procedure) Further Amendment Act 1983, Schedule 1.

20. Justices Act 1902 s48A.

21. Justices Act 1902 s48E.

22. Justices Act 1902 s48B, s48C. See also Justices Act (Use of Written Statements) Regulation 1984.

23. Magistrates Courts Administration NSW Courts of Petty Sessions Statistics 1982.

24. Ibid.

25. A R Rickard "Committal Proceedings - A Submission of No Case" 150 Justice of the Peace 293, 10 May 1986.

26. R v Epping and Harlow Justices Ex parte Massaro [1973] 1 QB 433; Barton v The Queen (1980) 147 CLR 75 at 112 per Wilson J; Moss v Brown [1979] 1 NSWLR 114. See also In re Van Beelen (1974) 9 SASR 163 at 244.

27. Maddison v Goldrick [1976] 1 NSWLR 651; Cain v Glass (No 2) (1985) 3 NSWLR 230; Cheng Kui v Quinn and Others (1984) 67 ALR 231.

28. See para 4.16.

29. D Napley "The Case for Preliminary Inquiries" [1966] Criminal Law Review 490.

30. Crimes Act 1900 s409.

31. Moss v Brown [1979] 1 NSWLR 114, and see Barton v The Queen (1980) 147 CLR 75 at 98 per Gibbs ACJ, Mason J.

32. New South Wales Law Reform Commission Criminal Procedure: First Issues Paper General Introduction and Proceedings in Courts of Petty Sessions (1982) at 81.

33. Barton v The Queen (1980) 147 CLR 75 at 112-113 per Wilson J.

34. Justices Act 1902 s41(2), s41(6). See discussion in Report of the Advisory Committee on Committal Proceedings (Melbourne February 1986) at 14-15. This publication is a report to the Attorney General, Mr Jim Kennan, of a consutlative committee under the chairmanship of Mr John Coldrey QC, Director of Public Prosecutions. The recommendation in the report has now been implemented in Crimes (Proceedings) Act 1986 (Vic) s5, amending Magistrates' (Summary Proceedings) Act 1975 s56(1)(a).

35. See generally M Z Forbes "Committal Proceedings Under Justices Act (NSW)" (1986) 7 Petty Sessions Review 3161 for a thorough analysis of the law before the 1985 amendments. See also J Seymour "The Criteria Governing the Decision to Commit for Trial in Australia" (1979) 3 Criminal Law Journal 3; P A Fairall "The Preliminary Examination of Indictable Offences in New South Wales - Part I" (1986) 10 Criminal Law Journal 24.

36. [1984] 2 NSWLR 422.

37. Id at 429 per Glass JA citing R v Rothery (1925) 25 SR (NSW) 451. Compare Mr Justice Glass "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 Australian Law Journal 842.

38. [1984] 2 NSWLR 422 at 429 per Glass JA.

39. Justices Act 1902 s41(6)(b) (until 1985).

40. Wentworth v Rogers [1984] 2 NSWLR 422 at 424, 430, 437. See also Armah v Government of Ghana [1968] AC 192 at 229, 253, 261.

41. Wentworth v Rogers [1984] 2 NSWLR 422 at 430, 437, 440; W H Donnelly "Changing Your Mind in the Magistrates' Court - A Defendant's Prerogative?" (1987) The Law Society's Gazette 246, 28 January 1987.

42. Wentworth v Rogers [1984] 2 NSWLR 422 at 440.

43. For discussion of the legislation see Hansard (NSW) Legislative Assembly, 26 February 1985 at 25-26 per the Hon T W Sheahan Attorney General. See also T Nyman "Criteria for Committal for Trial" 1985 Law Society Journal 372; Victorian Advisory Committee Report, note 34 at 14-15.

44. See para 7.8.

45. See Australian Bureau of Statistics Higher Criminal Courts in NSW (Cat No 4502.1, 1982).

46. Australian Federal Police v Wong and Others (Unreported, 27 March 1985, transcript of decision of Mr J Williams, magistrate, at 5.)

47. Australian Federal Police v Murphy (Unreported, 16 April 1985, transcript of decision of Mr A M Reidel, magistrate, at 9). The magistrate's decision was reviewed by the Federal Court in Murphy (No 2) (1985) 16 A Crim R 203 but this question was not directly considered.

48. Director of Public Prosecutions v Foord (Unreported, 30 April 1985, transcript of the decision of Mr Robert Evans, magistrate, at 6). See also Foord v Whiddett (1985) 60 ALR 269.

49. Carlin v Thawat Chidkhunthod [1985] 4 NSWLR 182. See also M Z Forbes "Committal Proceedings: Further Authority - Carlin's Case" (1986) 7 Petty Sessions Review 3279. See also Statutes Amendment (Jurisdiction of Courts) Act 1981 (SA) s57(e).

50. Wentworth v Rogers [1984] 2 NSWLR 422 at 436 per Samuels JA.

51. Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182 at 193.

52. Id at 197.

53. Id at 201.

54. McAfee v Kearney and Another (Unreported, Supreme Court of New South Wales, Yeldham J, 25 July 1986).

55. Boughey v The Queen (1986) 65 ALR 609; Prevto v Governor Metropolitan Remand Centre (1986) 64 ALR 37 at 60 per Wilcox J, Federal Court of Australia.

56. McAfee v Kearney, note 54 at 6-7.

57. In Barton v Walker (Unreported, Supreme Court of New South Wales, 20 December 1979) O'Brien CJ of Cr D traced the history of the role of the Attorney General in initiating criminal proceedings. See also J Seymour, note 1 at 73ff.

58. (1980) 147 CLR 75.

59. Gibbs ACJ, Mason, Stephen and Aickin JJ; Murphy, Wilson JJ dissenting.

60. Id at 100 per Gibbs ACJ, Mason J (Aickin J concurring).

61. Id per Gibbs ACJ, Mason J at 100. See also R v Maitland [1963] SASR 332.

62. See generally J Seymour, note 1 at 39-72. For an analysis of the position in New South Wales see P A Fairall "Judicial Review of Committal Proceedings" (1986) 10 Criminal Law Journal 63.

63. Clyne v DPP (1984) 58 ALJR 493 at 494. See also Lamb v Moss (1983) 49 ALR 533 at 546 (Federal Court of Australia); Cheng Kui v Quinn and Others (1984) 67 ALR 231.

64. Cain v Glass (No 2) (1983) 3 NSWLR 230 at 235.

65. Ex parte Cousens Re Blackett (1947) 47 SR (NSW) 145; see also Huddart Parker & Co Pty Ltd v Moorehead (1908) 8 CLR 330 at 337. In England see R v Roscommon Justices Ex p Blakeney [1894] 2 IR 158; R v Horseferry Road Magistrates' Court ex p Adams [1978] 1 All ER 373; [1977] 1 WLR 1197; R v Coleshill Justices ex p Davies [1971] 3 All ER 929; [1971] 1 WLR 1684; R v Norfolk Quarter Sessions ex p Brunson [1953] 1 All ER 346; [1953] 1 QB 503; R v Ipswich Justices ex p Edwards (1979) 143 JP 699; R v Wells Street Metropolitan Stipendiary Magistrate ex p Westminster City Council [1986] 3 All ER 4.

66. [1976] 2 NSWLR 570 at 590. In a dissenting judgment his Honour said, "There is an element of unreality in classifying the whole exercise as purely administrative so as to place it beyond the supervisory authority of either this or any other court".

67. Sankey v Whitlam (1978) 142 CLR 1 at 83.

68. Wentworth v Rogers [1984] 2 NSWLR 422 at 434.

69. Id at 426.

70. Fairall, note 62 at 66.

71. Supreme Court Act 1970 s75; Sankey v Whitlam (1978) 142 CLR 1 at 23.

72. Fairall, note 62, citing Sankey v Whitlam (1978) 142 CLR 1.

73. Bacon v Rose [1972] 2 NSWLR 793 at 798 per Street CJ.

74. Spautz v Williams [1983] 2 NSWLR 506 per David Hunt J.

75. Bourke v Hamilton [1977] 1 NSWLR 470 at 480 per Needham J; Gorman and McLaurin v Fitzpatrick and Barrett (1985) 4 NSWLR 286.

76. Conwell v Tapfield [1981] 1 NSWLR 595 at 601 per Street CJ; Acs v Anderson [1975] 1 NSWLR 212; Spautz v Williams [1983] 2 NSWLR 506.

77. Gorman and McLaurin v Fitzpatrick and Barrett (1985) 4 NSWLR 286 at 297. See also Clyne v DPP (1984) 58 ALJR 493; Wentworth v Rogers [1984] 2 NSWLR 422 at 426-427, per Hutley JA; Sankey v Whitlam (1978) 142 CLR 1; Bourke v Hamilton [1977] 1 NSWLR 470 at 443; Coles v Wood [1981] 1 NSWLR 723; Conwell v Tapfield [1981] 1 NSWLR 595.

78. Lamb v Moss (1983) 49 ALR 533; Souter v Webb (1984) 54 ALR 683 at 689-90; Murphy v Director of Public Prosecutions (1985) 60 ALR 299 per Toohey J.

79. Commonwealth Director of Public Prosecutions Annual Report 1984-95 at 35-37; Annual Report 1985-86 at 37-38. Recommendations by the Administrative Review Council that the range of decisions exempted from the operation of the legislation should be extended to include decisions made in the criminal process are yet to be implemented.

80. Barton v The Queen (1980) 147 CLR 75.

81. R v Cordell and Others (Supreme Court of New South Wales, Enderby J, 3 April 1984), now reported as Cordell Porquet and Porquet (1984) 10 A Crim R 475.

82. R v Bailey (Unreported, District Court of New South Wales, his Honour Judge Thorley, 15 March 1984).

83. Wentworth v Rogers [1984] 2 NSWLR 422 at 427, per Hutley JA.

84. Legal Aid Commission of New South Wales "Review of Legal Aid in New South Wales" Report prepared by Mark Richardson, Assistant Director, 1986, para 5.15.

85. Id para 7.3.

86. Compare Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182 at 201 per O'Brien CJ of CrD.

87. New South Wales Law Reform Commission Criminal Procedure: First Issues Paper General Introduction and Proceedings in Courts of Petty Sessions (1982) at 89-93.

88. See part VI below at paras 7.82-8.84.

89. D Wright "Old Style Committals - R.I.P.?" [1986] Crim LR 660.

90. Practice Note [1962] 1 All ER 448.

91. R v Galbraith (1981) 73 Cr App R 124, Court of Appeal (Criminal Division). See also Archbold Criminal Pleading Evidence and Practice (41st ed) para 4-387 at 419.

92. R v Horseferry Road Magistrates' Court ex p Adams [1978] 1 All ER 373.

93. D Wright, note 89 at 662.

94. Criminal Justice Act 1967 (UK); see now Magistrates' Courts Act 1980 (UK) s6(2).

95. See I S Lomax "The Roskill Report and Committal Proceedings" (1986) 150 Justice of the Peace 245. The author cites material from Criminal Statistics for England and Wales: Supplementary Tables 1984 and a study conducted by the Home Office Research and Planning Unit in 1981. In 1984, a total of 98,700 accused people were committed for trial in the Crown Court. On projections from the 1981 figures, 7.6% of these cases was dealt with by way of "full" committal.

96. A V Sheehan Criminal Procedure in Scotland and France (1975) at 137-140.

97. Id at 144. See also Lord Kilbrandon "Scotland: Pre-Trial Procedure" in J A Coutts (ed) The Accused (London 1966) at 67.

98. J A Osborne Delay in the Administration of Justice: Commonwealth Developments and Experience (Commonwealth Secretariat London 1980) at 58-59. See also Scottish Home and Health Department and Crown Office Criminal Procedure in Scotland (Second Report)(HMSO Cmnd 6218 Edinburgh 1975) (the Thomson Committee Report) para 1001; R W Benton and H H Brown Criminal Procedure According to the Law of Scotland (4th ed by G H Gordon) Edinburgh 1972.

99. 22 Corpus Juris Secundum Criminal Law section 303.

100. 22 Corpus Juris Secundum Criminal Law section 345.

101. 38 Corpus Juris Secundum Grand Juries section 42.

102. The Criminal Code (Canada) 1953-54 Part XV. See also R E Salhany Canadian Criminal Procedure (4th ed 1984) Chapter 5 at 143-176.

103. The Criminal Code (Canada) 1953-54 s475(1) See also Doyle v The Queen (1976) 29 CCC (2d) 177; R v Chabot (1980) 55 CCC (2d) 385; Caccamo v The Queen (1975) 21 CCC (2d) 257; Patterson v The Queen (1970) 2 CCC (2d) 123.

104. Law Reform Commission of Canada Study Report: Discovery in Criminal Cases (1974) at 72-73, 166-167 of the Research Report and at 28-29 of the Working Paper.

105. See Queensland Law Reform Commission Working Paper on Legislation to Review the Role of Juries in Criminal Trials QLRC WP 28; Report of the Advisory Committee on Committal Proceedings (February 1986), a report to the Attorney-General of Victoria, Mr Jim Kennan, by a committee chaired by the Director of Public Prosecutions,

John Coldrey QC; Parliament of Victoria, Legal and Constitutional Committee Issues Paper: Delays in Courts: The Preliminary Examination (July 1985). Similar concerns have also been expressed in England. The Report of the Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) (HMSO Cmnd 8092, 1981) at paras 8.27-8.31 recommended the abolition of committal proceedings. See also R Rickard "A Valuable Constitutional Safeguard Three Studies in Committal Proceedings" (1986) 150 Justice of the Peace 52; D Napley "Committal Proceedings: A Case for Retention" (1986) 150 Justice of the Peace 147; Editorial "Reform of Committals" (1986) 136 New Law Journal 429; P Jones et al "The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System" [1985] Criminal Law Review 355; the Report of the Fraud Trials Committee (Chairman: Lord Roskill) (HMSO 1986), recommended the abolition of committals in "commercial crime" trials.

106. See cases noted at paras 7.29-7.33.

107. See eg Bail Act 1978 s32; Listening Devices Act 1984 s13.

108. See eg Mr Justice J R T Wood Report of the Inquiry Held Under Section 475 of the Crimes Act 1900 into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court Sydney on 1st August 1979 (Sydney May 1985); Report of the Royal Commission Concerning the Conviction of Edward Charles Splatt (Royal Commissioner Mr Carl Shannon QC) (South Australia 1984).

109. See Barton v The Queen (1980) 147 CLR 75 per Wilson J at 117.

110. P A Fairall "Judicial Review of Committal Hearings" (1986) 10 Criminal Law Journal 63.

111. Cain v Glass (No 2) (1985) 3 NSWLR 230.

112. Doyle v Commonwealth of Australia (1985) 59 ALJR 665 at 667.

113. See Sankey v Whitlam (1978) 142 CLR 1 at 83-84 per Mason J.

114. Forster v Jododex Pty Ltd (1972) 127 CLR 421 at 435-436 per Gibbs J; Bacon v Rose [1972] 2 NSWLR 793 at 797-798 per Street CJ in Equity as he then was; Willesee v Willesee [1974] 2 NSWLR 275 at 283 per Holland J; Sankey v Whitlam (1978) 142 CLR 1 at 80-81 per Mason J as he then was.

115. See cases noted at para 7.41.

116. Souter v Webb (1984) 54 ALR 683 at 689-690 per Wilcox J. See also Wong v Evans (1985) 60 ALR 629.

117. Magistrates (Summary Proceedings) Act 1975 (Vic) s55.

118. Justices Act 1902 s41(1B)(b). See also Ex parte Coffey Re Evans and Another [1971] 1 NSWLR 434.

119. Justices Act 1902 s51A.

120. A similar procedure is established by Justices Act 1902 s48D and Justices Act (Use of Written Statements) Regulation 1984.

121. See para 7.11.

122. Barton v The Queen (1980) 147 CLR 75 at 109 per Murphy J. See also the observation of Kirby P in Cain v Glass (No 2) (1985) 3 NSWLR 230 at 233. After referring to the role of committal proceedings as a form of protection for the accused person, his Honour said:

> Whether or not committal proceedings are the best way of affording that protection, whilst they remain, their importance for the accused is beyond question. (Emphasis added.)

123. See also New South Wales Law Reform Commission Discussion Paper Procedure from Charge to Trial: A General Proposal for Reform (DP 13, 1986).

124. The majority of the members of the Phillips Commission, note 105, doubted whether such a decision need be based on oral evidence tested by cross-examination Report para 8.31.

125. Lord Devlin The Criminal Prosecution in England (1960) at 92. It is apparent, however, that Lord Devlin later changed his mind about the necessity for committal proceedings. In an address entitled "The Police in a Changing Society" delivered in 1966 and reprinted in Comparative Criminal Procedure (New York University Press, 1969) at 87, he said:

> What emerges at the end of the [committal] ceremony is a bundle of statements which could just as easily have been handed over to the defence at the beginning. In the rare cases where it is contended that there is no case fit for trial, the point could be determined by a judge or magistrate on this written material. So could any question of bail where the strength of the case is not usually the deciding factor. If anyone thinks that this alteration to the law would result in any injustice to the accused, let him ask himself if he knows of a single case of injustice thereby caused in Scotland where there have never been committal proceedings at all.


PROUDLY PRINTED
IN AUSTRALIA

NEW SOUTH WALES
LAW REFORM COMMISSION

CRIMINAL PROCEDURE

PROCEDURE FROM CHARGE TO TRIAL: SPECIFIC PROBLEMS AND PROPOSALS

VOLUME 2

A DISCUSSION PAPER
FOR COMMUNITY CONSULTATION

DP 14/2
1987

NEW SOUTH WALES

LAW REFORM COMMISSION

CRIMINAL PROCEDURE

PROCEDURE FROM CHARGE TO TRIAL: SPECIFIC PROBLEMS AND PROPOSALS

DISCUSSION PAPER

VOLUME 2

DP 14

February 1987

Sydney 1987
ISSN 0818-7924

National Library of Australia
Cataloguing-in-Publication entry

New South Wales. Law Reform Commission.
Criminal procedure: procedure from charge to trial: specific problems and proposals.

Bibliography.
ISBN 0 7305 3133 3.

1. Criminal procedure - New South Wales. 2. Pre-trial procedure - New South Wales. 3. Criminal justice, Administration of - New South Wales. I. Title. (Series: Discussion paper (New South Wales. Law Reform Commission); no 14).

345.944'072

Table of Contents

Chapter 8
Listing Cases in the Higher Courts

I. INTRODUCTION

8.1 Once an accused person has been committed for trial or sentence in one of the higher courts, various agencies become responsible for deciding when the case will be listed for mention and ultimately for hearing before the relevant higher court. The listing process is of great importance because it will not only determine in the first instance when the accused person will appear before the court, but also the judge who will preside and the venue of the proceedings. Whilst listing is essentially an administrative process, it nevertheless has an important role to play in ensuring that justice is done. One submission made to the Commission by a solicitor with long experience of the criminal courts describes the frequent failure to have cases heard on the appointed day as "the most irritating, time-consuming and costly exercise found in the current system" of criminal justice.[1]

8.2 In this Part we set out what we consider to be the objectives of listing procedures. In Part II the present procedures in New South Wales are described. In Part III we examine listing procedures used in other jurisdictions. In Part IV the arguments for and against the present procedure in New South Wales are canvassed. In Part V two alternative approaches to reform are examined. Finally, in Part VI, some tentative proposals for reform are put forward. We should note

at the outset of this discussion that the Attorney General, the Hon Terry Sheahan, has recently announced the Goverment's intention to establish a new system of listing criminal cases in the higher courts.[2] Legislation has been passed which establishes the office of the Criminal Listing Director with the responsibility for the listing of criminal cases to be heard in the Supreme Court and the District Court.[3] The practice and procedure to be followed by that office will be in accordance with regulations which have not yet been made public. The Commission's research on this subject and the present chapter were largely completed prior to the formulation of the new legislation. Whilst some of the issues raised have been resolved by that legislation, we consider it appropriate that this chapter should, notwithstanding recent developments, be included in this Discussion Paper. Several of the matters referred to relate to the principles which should govern the operation of the listing authority, a process which has not been publicly announced at the time of writing.

8.3 The major goals of the listing process, and the principles which should govern it, may be summarised as follows:

* to avoid unnecessary costs and inconvenience to the people involved in the conduct of criminal trials by ensuring that cases proceed on the day on which they are listed for hearing;

* to make efficient use of available courtrooms and judicial time;

* to ensure that trials and pleas of guilty are heard without avoidable delay;

* to prevent the parties from unjustifiably delaying the commencement of cases either through mismanagement or by design;

* to afford the parties adequate time for the proper preparation of the case to be presented in court;

* to accommodate, so far as is practicable and consistent with the other objectives of listing, the desire of the parties to be represented by the lawyers of their choice;

* to ensure that the most competent and efficient judges are assigned to demanding and difficult cases;

* to avoid appeals against conviction and sentence, and trials being aborted, where these arise from a judge's lack of expertise or personal response to a case; and

* to ensure that the courts administer justice fairly so that the interests of the accused are protected and the community is satisfied that justice has been done.[4]

II. THE CURRENT PROCEDURE

A. The Role of the Solicitor for Public Prosecutions

8.4 Once an accused person has been committed by a magistrate for trial or sentence in one of the higher courts, the papers are forwarded to the Solicitor for Public Prosecutions, a sub-department of the Attorney General's Department. The Office, under statute, acts as the Registrar of the District Court in its criminal jurisdiction and, de facto, as Registrar of the Supreme Court in its criminal jurisdiction.[5]

8.5 In addition to its role as Registrar, the Office acts as the solicitor for the prosecution in indictable criminal cases. Once an accused person has been committed for trial or sentence, the Office becomes responsible for preparing the prosecution brief and instructing counsel who appear for the

prosecution. The dual functions of the Office mean that the agency primarily responsible for the conduct of the prosecution also decides when the case is to be added to the court lists, where the case will be heard, and which particular judge will hear it.

1. Selection of Venue

8.6 The venue in which a criminal trial is held can affect the conduct and even the result of the trial. For various reasons it is thought that there are differences between the approach taken by juries in different districts. Furthermore, the choice of venue may have an impact upon the availability of prospective witnesses whose attendance may be difficult to secure if the trial is conducted at an inconvenient location. The cost of the proceedings may be considerably increased if witnesses have to be moved and accommodated far from the place where they live. The determination of venue is normally a matter for the Attorney General,[6] but the Supreme Court has the jurisdiction to order that the venue be changed.[7]

8.7 The Attorney General's policy regarding the determination of venue is effectively exercised by the listing division of the Solicitor for Public Prosecutions. The general rule is that the trial should take place in the geographical area where the offence charged is alleged to have been committed, that is, at the place closest to that area where there are sittings of the appropriate court. This general rule is departed from:

* if holding the proceedings at the nearest court would mean an inordinate delay, either because the lists at this court are unduly congested or because the next sittings of the court are scheduled too far in the future;

* if holding the trial in the district where the offence is alleged to have been committed will cause undue inconvenience to witnesses; or

* if it appears unlikely, because of local publicity or for any other reason, that an unbiased jury can be empanelled.

The Commission regards each of these grounds as legitimate and is satisfied that decisions as to venue properly take into account the interests of both the accused person and the prosecution.

2. Selection of the Judge

8.8 The Commission considers it unrealistic to address the issue of listing criminal cases without acknowledging what is a feature of courts in most jurisdictions. Judges, like any other group of people in the community, hold differing views. The judge in criminal proceedings has a wide discretion to make crucial decisions, ranging from the admissibility of evidence to the assessment of appropriate penalties. It is inevitable that the attitudes of each individual judge to particular questions which may arise in criminal trials and to particular offences become well known to prosecutors and defence lawyers alike. Given that the prosecution has this information and that it can effectively determine which judge is to hear a particular case, the prosecution may be seen to be in a position to influence an aspect of the conduct of the proceedings.

8.9 The Commission acknowledges that it may often be desirable, in order to achieve a just and efficient disposition of a difficult case, that the experience and perceived ability of a particular judge be taken into account when listing cases for trial. The more difficult and demanding cases should ideally be presided over by the more experienced judges. The Solicitor for Public Prosecutions undoubtedly takes this factor into account when listing criminal cases. In addition, there may on occasion be a need to avoid listing the case before a judge who has been associated with one of the parties, for example, as a lawyer prior to being appointed to the Bench. Whilst the Commission considers it legitimate to take these factors into account, we nevertheless consider it inappropriate for the prosecution to be seen to have any improper influence in the selection of the trial judge.

3. The Time of the Trial

8.10 For many years the Solicitor for Public Prosecutions has had a policy of giving priority to the listing of criminal cases to those accused people who are held in custody pending trial. The reasons for this are both humanitarian and economic. On the one hand, the fact that a person presumed to be innocent is held in gaol at all is disturbing and it is naturally desirable that the fate of those in custody should be determined as quickly as practicable. On the other hand, the detention of accused people in custody is expensive. In more recent times, particular priority has also been given to the listing of cases which involve allegations of sexual assault

because of the particular trauma suffered by the victims of offences of this kind. Within the general category of sexual offences, additional priority is given to those cases where the alleged victim is a child.[8]

8.11 In June 1986 a new system of listing was introduced in the Sydney District Court. It envisages that trials will be listed for hearing during a specified week of criminal sittings of the Court and that each trial will be given a priority rating. As judges become available to hear the trials listed, the trials are assigned in order of their priority. The principal benefits of the system are that there will be a substantial reduction in the number of trials which are not heard at the time they are listed for hearing and that the unheard cases will be of minimum priority. At the time a case is listed for mention to fix a trial date, the prosecuting authority advises the judge of the priority which, in its view, the case should be accorded. After hearing the accused person on the question, the judge determines the priority which the case is to be given. The highest priority (category "A") is given to cases involving accused people held in custody and those concerning charges of child sexual assault. In addition, the judge has a general discretion to give any case the highest priority, or any other priority rating, if he or she considers that the circumstances warrant it. The middle range of priority (category "B") is to be given to those cases which have one or more of the following features:

* Cases where the accused person is in custody but not solely in respect of the charge under consideration.

* Cases previously listed for trial and "not reached".

* Cases in which the accused person was arrested more than 18 months prior to the "mention" at which a date for trial is to be fixed.

* Cases in which the accused was committed for trial more than eight months prior to the mention date at which a date for trial is fixed.

* Cases in which interstate or overseas witnesses are to be called by either the prosecution or the defence.

* Cases which involve an allegation of sexual assault other than against a child.

* Cases in which the estimated length of the trial is in excess of five days.

Those cases which have none of the specified features are given the lowest priority (category "C"). Twenty trials are listed for each week of the court sittings. Of these, a maximum of six should be from category "A", 10 from category "B" and four from category "C". This is designed to ensure that there is a greater likelihood that cases of high priority will be heard. Whilst there is an obvious risk that cases with category "C" priority may not be heard on the day initially fixed for the hearing, this should only occur once since on the next occasion they are listed they will qualify as category "B" cases.[9]

B. The Role of the Accused Person

8.12 An accused person who has been committed for trial or sentence has only limited powers to influence the listing of his or her case. Firstly, the accused person has the right to apply for bail or for the conditions of bail to be altered. Since custody cases are given priority, in practice, bail applications give the accused person the opportunity to exert

some influence over the progress of the case. Secondly, there are opportunities to make applications of a kind which may incidentally affect the listing process, most notably the opportunity for the accused person's lawyer to make representations to the Attorney General for "no bill" to be found. Thirdly, there is the right of an accused person to apply to the Court of Appeal for a change of venue. Complaints have been made that accused people effectively manipulate the court lists, in order to obtain an apparent advantage, by changing a plea from guilty to not guilty or by a late change in legal representation, giving the accused person grounds to claim that there has been insufficient time available for adequate preparation of the case and that the hearing of the case should be postponed.

C. The Role of the Courts

8.13 Once a matter has been listed in the prospective court of trial, the parties are usually required to attend the court for a hearing known as a "mention". If, at that time, the accused person indicates an intention to plead guilty, the matter may be completed immediately if both the prosecution and the defence are ready to proceed. More usually, a date for further "plea or mention" is set. If there is no indication of a plea of guilty, a trial date may be fixed. When fixing the trial date, the court may, but need not, take into account any inconvenience caused to the parties. Thus, while the prosecuting authority is responsible for listing the case for mention, the court determines the date the case will be heard.

During the period when the trial is pending, either party may make an application to the court for vacation of the trial date and the court may grant that application if it is satisfied that there are reasonable grounds for taking that course.

8.14 However, this is not the end of the matter. Notwithstanding that a trial has been listed for hearing on a particular day, it is nevertheless open to the prosecution not to present the indictment to the court on the appointed day, thus ensuring that the case will not proceed on that day. The court is presently powerless to force the case to proceed. It is limited to making comment and granting such orders as may alleviate any hardship that may be suffered by the accused person as a result of the prosecution's failure to proceed. On the other hand, an application for an adjournment by an accused person made on the day the trial is due to commence will usually only be granted for good reason. It has been suggested that the court may be able to treat an unwarranted refusal to present an indictment as an abuse of process. However, this suggestion has been criticised on the ground that it fails to take into account the court's lack of subtantive jurisdiction.

8.15 The courts can have a significant, if indirect, role to play in the listing process when an accused person applies for bail prior to the listing of the case. The court may comment that there has been an unjustified delay. Unfavourable comment by the court will invariably result in immediate action being taken to list the matter at as early a date as possible.

III. LISTING IN OTHER JURISDICTIONS

A. Victoria - The Criminal Listing Directorate

8.16 Until 1982, the responsibility for the listing of criminal cases in all jurisdictions was borne by the Criminal Law Branch of the Crown Solicitor's Office of Victoria. This agency performed a similar role to that currently performed by the Solicitor for Public Prosecutions in New South Wales in that it was also responsible for the prosecution of all indictable matters. As in New South Wales, one party in the case was at least seen to have an advantage by being in a position to decide the date of the hearing and to select the trial judge. This situation had been criticised.[10] To avoid this conflict of interest, a Criminal Listing Directorate was established on an experimental basis in January 1982.[11]

8.17 The Directorate's role has gradually expanded so that it now has responsibility for listing all criminal cases in Victoria. Its officers liaise with the Director of Public Prosecutions, the accused person or his or her legal representatives, and the courts. According to the Chief Judge of the County Court, it was intended that the Directorate be a body:

> ... to which both Crown and defence can go, ... in order to determine what cases will be trials, which will be pleas, whether there is any opportunity to reach a compromise.[12]

Such a role is indeed necessary if effective and efficient listing is to be achieved. To make maximum use of available court time, the listing authority must be well informed of the progress of cases and of the outcome of negotiations between the parties.

8.18 The Listing Directorate operates in the following manner. The Director of Public Prosecutions notifies the Listing Directorate when an accused person is committed for trial and a "running record" tracking the progress of the case is begun. The Directorate contacts the accused person and ensures that he or she has a copy of the charge, the depositions and other relevant material. The Directorate also attempts to determine what the accused person's plea is likely to be. The matter is not listed until such a plea is notified. When the necessary preparations for trial are completed, the prosecution sends the Listing Directorate a "listing notice" advising that it is ready to proceed. Only then can the matter be listed for hearing. The Directorate nominates the judge who will preside at the hearing of the matter. The Directorate will in some cases consider the judge's expertise and the possibility of any conflict of interest. Cases set down for hearing can be withdrawn from the lists where both the prosecution and the accused person consent. This is an administrative action performed by the Listing Directorate which does not require the parties to attend court. If one of the parties does not wish to vacate the trial date, the matter is then left in the list and the court is called upon to make a ruling. The Listing Directorate also has the power to list a matter for mention if there is concern about the representation of the accused person or the state of the preparation of his or her case.

8.19 Since the introduction of the Criminal Listing Directorate in Victoria, there has been a substantial reduction in the number of cases awaiting trial.[13] At least part of the credit for this improvement must be given to the efficient operation of the Directorate. Additional features of the Victorian practice of listing have also contributed to the improvement. In particular, the use of staggered changeover periods for judges sitting in the criminal courts ensures that there is always a judge available with some weeks of criminal sittings remaining to be served. Relatively long trials may be listed in any week with certainty that there will be a judge available who has sufficient time to hear the case.

8.20 Further improvements regarding the legal status and substantive powers of the Directorate were recommended by a Committee appointed to examine methods of improving the disposal rate of criminal cases in the County Court. The Committee reiterated the desirability of a truly independent Directorate and rejected the suggestion that the function be performed by the Director of Public Prosecutions or by the courts.[14] It considered that the Directorate should be given a statutory base defining its powers and functions, a view which was strongly supported by the Legal and Constitutional Committee of the Victorian Parliament.[15] The most significant recommendation was that the Directorate be empowered to list matters for trial after a prescribed period of unreasonable delay if no listing notice had been received from the prosecution. The Committee considered that the delay from

committal to trial should be no more than three months where the defendant is in custody and no more than six months where the defendant is on bail. The Committee further recommended that the Directorate be empowered to demand relevant information from the parties. The Directorate currently relies on the co-operation and goodwill of the parties for this information. A draft bill incorporating these recommendations was prepared in 1982 but has not yet been introduced into Parliament.[16]

B. Queensland - Consistency in Listing Procedure

8.21 Early in 1985, concern over the considerable backlog of criminal cases pending trial in the superior courts in Queensland led to the introduction of a new administrative procedure for the management of the criminal lists.[17] The responsibility for listing, previously held by the Director of Public Prosecutions, was given to the courts. A listing judge was appointed and the position of an executive officer for listing purposes created. It was determined that control of the lists would be vested in the listing judge, whilst the day-to-day administration of the lists was to be handled by the executive officer. The main principle of the new listing procedure is to list matters for hearing on a specified week of the criminal sittings and generally to list more cases than the courts could be expected to complete if all cases listed went their expected duration. There is a callover for each sitting and telephone contact with the lawyers involved in the week prior to trial, together with a daily listing conference

involving representatives of the court, the State and Commonwealth Directors of Public Prosecutions, and the Public Defender. The listing conference is presided over by the executive officer of the court. Applications for adjournment are heard by the listing judge, which ensures that a consistent policy is applied in the determination of these applications.

8.22 There is, in addition, a Criminal Justice Review Committee which comprises representatives of all the agencies involved in the criminal justice system. This provides a means of rational discussion and usually resolution of the problems encountered by the participants in the system.[18] At the time these measures were introduced, the backlog of cases in the criminal courts stood at about 1000 and the length of time from committal to trial was anything from nine months to two years. The backlog has now been reduced to approximately 75 and accused people are generally being tried in the sittings to which they are committed.[19]

C. United Kingdom - Crown Court Listing Procedures

8.23 The Crown Court is divided into six circuits throughout England and Wales. It is responsible for hearing all indictable criminal cases as well as appeals from the decisions of courts of summary jurisdiction. The Court staff includes an officer exclusively responsible for listing where the size of the circuit and the Court's case load warrants this.[20] In other cases, listing is performed by the chief clerk.

8.24 The listing officer is required to distribute Crown Court business in accordance with the directions of the Lord Chief Justice.[21] These formal statements, similar to practice notes, currently deal only very generally with the allocation of cases. They provide that certain classes of offences can be dealt with only by judges of a specified seniority. Apart from these directions, the listing officer has significant discretion in the allocation and ordering of cases. The factors to be taken into account are:

* the availability of judges, justices, courtrooms and juries;
* the length of time since committal;
* the priority to be given to persons in custody;
* whether the accused person is likely to plead guilty or not guilty;
* the availability of the parties, witnesses and lawyers;
* the estimated length of the hearing; and
* whether or not a shorthand writer will be needed or available.

8.25 Court lists are prepared in varying degrees of certainty and at various intervals before the trial. Certain cases are given a specific hearing date in advance because they involve complex issues, are likely to be relatively long, involve many witnesses or witnesses who are difficult to obtain, require particular judges for their expertise, or depend on the availability of particular counsel.[22]

8.26 The "Warned List" is a provisional list of cases to be heard at a particular venue in a given week. It is published up to four weeks in advance of the date of hearing. The parties generally have one week in which to object to the hearing time proposed. In determining any objection, the listing officer must ensure that the number of cases currently on the warned list is sufficient to occupy the courts during the week in which those cases may be heard.

8.27 A final list, the "Fixed List", is generally published 10 days in advance of the week in which the case is to be heard,[23] thereby giving the parties 10 days notice of the hearing. Although it has been recommended[24] that a straightforward application for a change to the fixed list could be dealt with by the listing officer, such applications must currently be determined by a judge. During the week in which the case is listed for hearing, further changes are made by the listing officer who notifies the parties involved by telephone.

8.28 Successful listing is said to depend on the listing officer obtaining as much information as possible about the cases to be heard. To this end, the listing officer has routine contact with both prosecution and defence lawyers who are required to complete standard forms requiring information in respect of anticipated plea, expected length of trial, the number of witnesses and any special circumstances.[25] These forms have not proved very successful and the relationship between solicitors and listing officers has been poor.[26]

8.29 Communication between lawyers representing the parties in criminal cases and the courts in which those cases are to be heard is regarded as an important feature of an effective listing system. The listing officer must balance the often conflicting interests of the parties in a way compatible with the interests of justice. At the same time, the cases fixed for trial must be ready to proceed and capable of keeping the courts occupied.[27] This may involve a compromise between the most effective use of court time and the interests of the parties. It has at times been emphasised that continuous occupation of the court must take second place to the reasonable requirements of the parties. However, in those centres where the volume of work is greatest, especially London, the emphasis may have to be on the effective use of court time.

D. Chicago, United States - Random Allocation by the Courts

8.30 The Circuit Court of Cook County serves metropolitan Chicago which has a population of more than five million people. However, quite unlike New South Wales, the Court's jurisdiction covers a geographical area of a mere 950 square miles. The case of a person who is charged with a felony (which is roughly equivalent to what would be described in New South Wales as an "indictable offence") is brought before the Court, and after preliminary proceedings which are heard by an associate judge, the case is assigned to the Criminal Division of the Circuit Court. There are 42 judges in this Division, which sits at three locations within Cook County. The judges hear only criminal cases.[28]

8.31 The listing of cases is handled by the courts and features a number of practices and procedures which are not known in New South Wales. In the first place, each case is assigned to a particular judge who will have the responsibility of ensuring the progress of that case through to final disposition. This means that whenever pre-trial motions are listed before the Court, they will be heard by the judge who is to preside at the trial. The case load carried by an individual judge will vary according to whether that judge sits in the two "suburban" locations of the Court or at its city location. The average case loads carried by a single judge at any one time have been reduced from 300 cases per judge in 1976 to an average of approximately 200 in 1986. For each judge the average number of cases disposed of in a year is about 400. That is, each case remains on the lists for approximately six months.

8.32 A system for the random assignment of cases to judges was implemented in 1978. This system provides for the allotment of cases with the aid of a computer.[29] When a case is received into the Court, it is randomly assigned to a particular judge by the computer. Those judges with the smallest case loads are eligible to receive additional cases. A judge with a greater calendar of cases pending would not receive an additional assignment until his or her case load was reduced to the level of the other judges. By the use of the computer, a maximum 10% variation between the pending case load carried by the individual judges is permitted. This does not

mean of course that all judges have the same rate of disposal of cases in their calendar. The computer allocation is programmed to take account of the fact that one judge may have a particularly long case whereas another may have a large number of relatively straightforward cases.

8.33 In order to avoid the possibility that an inexperienced or "unsuitable" judge may be assigned a case of significant complexity or sensitivity, a list of 12 experienced judges has been drawn up. It is amongst this group that a case of special difficulty will be randomly assigned. The allocation of the case by random distribution ensures that there is no suggestion of favouritism in the selection of the judge to conduct a particular trial. In our view, there is much to be said for making random allocation of cases a feature of the listing procedure. However, it would be necessary to adapt the Chicago approach for use in New South Wales, since judges here do not sit exclusively in the criminal courts. We do not consider it desirable, in the interest of efficient listing procedures, to alter the current practice of the higher courts in New South Wales by which judges preside in both the civil and criminal jurisdictions of the court. One of the major problems that can arise in the allocation of judges is caused by having to take account of the times when judges are rostered to change from the criminal jurisdiction to the civil jurisdiction. We suggest one method of improving this situation in para 8.55.

IV. THE ARGUMENTS FOR AND AGAINST LISTING BY THE PROSECUTION

A. The Arguments Against

1. Conflict of Interest

8.34 There is a fundamental conflict of interest involved in the prosecution acting both as a party to criminal proceedings and as Registrar of the court hearing those proceedings. The present arrangement in New South Wales is, so far as our research has revealed, unique. It means that the prosecution, in exercising its responsibility for listing cases, has the ability to control when, and before whom, a case will be heard. We are disturbed by the appearance of this arrangement and at the potential for unfairness. As was noted in the Commission's First Issues Paper, "the dual function of the Crown is difficult to reconcile with the principle that the court stands impartially between prosecution and defence".[30]

2. Perceived Responsibility for Delays

8.35 An additional advantage of separating the listing and prosecutorial functions is that it clarifies the identity of the person or agency responsible for delays in listing and enables more effective remedies for delay to be designed and implemented.[31] The responsibility for delays associated with current listing procedures has been the subject of close scrutiny in recent years. An inquiry conducted by the Public Service Board[32] followed complaints made by an accused person who had been held in custody for over two years from the date of his arrest (24 December 1981) until the date of trial (2 April 1984).[33] The Board's report contained an analysis of

the operation of the Office of the Solicitor for Public Prosecutions, with particular emphasis on its registry function. The report concluded that the registry function should be removed from the Office of the Solicitor for Public Prosecutions.

3. Administrative Workload on Prosecution

8.36 Under the present arrangement, legal officers employed by the Solicitor for Public Prosecutions may be diverted from their function of preparing and presenting cases to deal with routine administrative tasks appropriate to the registry function. A former holder of the office of Solicitor for Public Prosecutions saw this as a direct cause of delay in bringing matters to trial.[34] This is notwithstanding that the people working within the office perform either a listing or prosecution function.

B. The Arguments in Favour

1. The Public Interest in Expediting Certain Cases

8.37 The prosecuting authority may have legitimate reasons for exercising control over the timing of prosecutions. For example, it may consider that it is in the public interest to have a particular case of general public importance dealt with promptly. Similarly, if there is a government policy to expedite the hearing of a particular class of cases, it cannot be implemented with certainty unless the government has the ultimate control over listing cases for hearing.

2. Prosecution to Proceed Only When Ready

8.38 It is argued that the prosecution should retain control of listing so that it cannot be forced to proceed with a case until it is ready to do so. There is, it is said, a public interest to be served in ensuring that the prosecution of criminal cases is not disadvantaged by inadequate preparation or untimely listing. On the other hand, it is contended that the prosecution should be in the same position as the accused person in seeking the vacation of a trial date or an adjournment of the case on the day it is listed for hearing, that is, that each of the parties should be required to support such an application by establishing that there are legitimate grounds for it.

3. Expense

8.39 It is argued that the separation of the functions of prosecution and listing would require an increase in staff and accommodation and a certain amount of duplication of work. However, the Public Service Board Inquiry Report[35] recommended that, in any case, there should be increases in clerical staff within the office of the Solicitor for Public Prosecutions to undertake work presently performed by legal staff.[36] Furthermore, the separation of functions does not necessitate different locations.

4. The Gaol Delivery System

8.40 It is argued that the "gaol delivery" system is a sufficient independent safeguard against injustice caused by failure to list the cases of people held in custody. This system involves quarterly reports being given to the Supreme Court of New South Wales by the officers-in-charge of all gaols which reveal the names of all people held in custody who are not serving a sentence. A judge of the Supreme Court then inquires into the case of any accused person who is considered to have been in custody for too long. However, the focus of gaol delivery inquiries is on whether the incarceration is lawful rather than whether the delay is improper. Furthermore, the system only surveys the progress of accused people in custody. It provides no review of the cases of people on bail, which are obviously less urgent but are nonetheless significant when considering aggregate delays in the system.

V. OPTIONS FOR REFORM

8.41 It seems to us that there are two options for reform:

* Giving the courts the responsibility for listing cases to be heard before them.
* The establishment of an independent listing authority.

A. Listing by the Courts

8.42 The first option for reform is for the listing function to be controlled by the courts. While the courts exercising criminal jurisdiction in this State, namely the Local Courts, the District Court, the Supreme Court and the Court of Criminal

Appeal remain separate, individual registries would effectively exist. It has been proposed that a single registry be established for the Supreme and District Courts in their criminal jurisdiction, including the Court of Criminal Appeal.[37] The employees of this registry would be drawn from the Attorney General's Department and would be responsible to that Department in administrative matters. However, the Registrar would ultimately be responsible to the heads of jurisdiction for the actual listing of cases. The introduction of such a body would require the enactment of legislation to define its powers and obligations. In our view, the courts are not the most suitable institution for a specialised process of this kind.

B. An Independent Listing Authority

8.43 The second option for reform is to establish one separate agency with the exclusive responsibility for listing criminal cases.[38] This option envisages a registry independent both of the parties and of the courts. In our view, this is the preferable model. Since the listing authority must have the confidence of both the prosecution and the accused person, it is crucial that it not only have, but be seen to have, genuine independence. It is, of course, equally important that the listing authority have an effective working relationship with the courts. Much of the work of the listing authority may involve informal communication with the parties and this may involve the disclosure of confidential information, matters not well suited to the courts, whose role

in the process of listing should be to resolve publicly and in the presence of both parties, issues which cannot be satisfactorily determined by the listing authority. One commentator has summarised the issue this way:

> It is thought that successful court management-based delay-reduction programmes have certain common elements. First, good communications are required between all of the parties involved. Second, realistic time standards have to be set for the progress of cases. Third, those in control of the system have to be aware of the informal non-structural factors that affect delay. Finally, there has to be a judicial commitment to, and judicial control over, the delay-reduction programme.[39]

8.44 Whilst the listing authority should be responsible for making relevant decisions in the first place, we consider that the courts should retain their general discretionary power to change any order made by the listing authority regarding the date of the trial, its venue and to direct that the matter be listed before another judge where this is considered necessary in the interests of justice. The new legislation referred to in para 8.2 expressly preserves the power of the criminal courts to make orders of this kind.[40] In Chapter 3 we put forward various proposals regarding the specification of time limits for the prosecution of criminal offences. The listing authority should be primarily responsible for ensuring that these time limits are observed by ensuring that cases are listed before the courts so that the relevant time limits are met. By giving effect to the provisions regarding time limits, the listing authority will provide an additional impetus to reduce the incidence of delay in the criminal process.

VI. CONCLUSION

8.45 In the Commission's view the present procedures for listing criminal cases in the higher courts are inefficient, inadequate and potentially unfair. The potential for unfairness derives from the fact that one of the parties is responsible for listing and may therefore be seen to have an unfair advantage. In our view, the advantages of the present system cited above are outweighed by its disadvantages. The rights and interests of the prosecution, the accused person and the community can be better served by an independent agency with responsibility for and control over listing. The experience of the Victorian Criminal Listing Directorate demonstrates that such an agency is both feasible and worthwhile. In the following part of this chapter we set out our tentative proposals regarding the manner in which such an agency should function.

VII. SUMMARY OF TENTATIVE PROPOSALS

1. Establishment of an Independent Listing Authority

8.46 The listing of cases for trial and sentence in the higher criminal courts should be the responsibility of a listing authority which is independent of the prosecuting authority and the accused person. It should determine both the date of hearing and the venue of criminal cases. In discharging its functions, the listing authority must necessarily consult closely with the courts.

2. Objectives of the Listing Authority

8.47 Subject to the proviso that its decisions should not be contrary to the interests of justice, the principal objective of the listing process should be to bring criminal cases on for hearing without avoidable delay and to make efficient use of the courtrooms and judges available. The listing authority should have broad and flexible powers to achieve this end, but the exercise of these powers should be subject to review by the prospective court of trial.

3. Cases to be Listed Only When Ready

8.48 In order to avoid inconvenience and waste, cases should only be listed for hearing where there is reasonable certainty, having regard to the need for adequate time for preparation of the case and the availability of witnesses, that they will be ready to proceed on the appointed day. This provision does not prevent a case being listed for mention where either of the parties are not ready to proceed.

4. Disputes Over Listing to be Determined by the Courts

8.49 Where the accused person or the prosecuting authority wishes the venue of the trial or the date of hearing to be altered, this may be done by the listing authority where both parties agree, but not if the listing authority does not consider the change to be warranted. Where the listing authority does not make a change sought by either party, that party should be entitled to request the listing authority to

have the matter listed before the prospective court of trial for the purpose of making an application to change the trial date or the venue.

5. Cases to be Randomly Assigned

8.50 In general, but subject to the next paragraph, the distribution of cases to be heard at the major court centres should be by random assignment of those cases to the judges available to hear them. The listing authority should also be responsible for the listing of criminal cases at country sittings of the higher criminal courts, but it is impractical for such cases to be assigned on a random basis.

6. Special Arrangements for Difficult Cases

8.51 In order to ensure that cases of an exceptionally complicated or difficult nature will be assigned to a judge of sufficient experience, there should be a separate list of such judges prepared by the Chief Justice or the Chief Judge as the case may be, and cases falling into this category may be assigned on a random basis to a judge on that list. Where cases of this kind are listed at country sittings, the selection of the judge to preside at those sittings should be made following consultation between the listing authority and the court.

7. Listing Authority to Communicate with Legal Representatives

8.52 The listing authority should have the power to list a case for mention before the court of trial at any time before the trial begins. The authority would be expected to maintain close and regular contact with the legal representatives of the accused person and with the prosecuting authority in order to keep abreast of any relevant developments in the preparation of the case and to ensure that the optimum use of available court time is made.[41] In particular, the listing authority should seek through this process of consultation to ascertain as early as possible those cases in which a plea of guilty is likely.

8. Prosecuting Authority to Notify Listing Authority

8.53 When there is a decision made by the prosecuting authority to prosecute a case in the higher courts, the prosecuting authority should immediately advise the listing authority of that decision.

9. Consistency in Adjournment Applications

8.54 When a case has been listed for trial at a specified time, that listing should not be altered unless the change is considered necessary in the interests of justice. So far as is practicable, applications for a change in the listing of a trial should be determined initially by the independent listing authority whose decision should be subject to review by the prospective court of trial. In order to achieve a consistent approach to the determination of applications of this kind, comprehensive guidelines setting out the relevant principles should be established.

10. Staggered Changeover for Criminal Sittings

8.55 The periods during which judges are assigned to the criminal sittings of the higher courts should be increased and the times at which they are moved to other judicial duties should be staggered so as to ensure that there will be, during any week of the court term, judges sitting in the criminal jurisdiction who have sufficient time left to serve in that jurisdiction to enable relatively long cases to be allocated to them.

11. Listing Authority to Monitor Time Limits

8.56 If time limits on the prosecution of criminal charges are introduced,[42] the independent listing authority should have the initial responsibility for ensuring that cases where the prosecuting authority is ready to proceed are listed for hearing at a time which will not place those cases in jeopardy of being dismissed for want of compliance with the specified limits.

12. No Priority for Private Representation

8.57 In determining the priority to be given to criminal cases, the independent listing authority should not take into account as a relevant factor the nature of the legal representation of the accused person. That is to say, accused people who are paying for their representation should not be given priority over those who are legally aided nor should those who are legally aided be given any priority.

13. Judge in Major Trials to be Appointed Early

8.58 Where a major prosecution which is likely to occupy a significant amount of court time is to be listed, the listing authority should, after consultation with the Chief Justice or the Chief Judge as the case may be, appoint the judge who is to preside at the trial as far in advance of the likely date for trial as is reasonably practicable. The trial judge should then preside on each occasion the matter is listed before the court.

14. Additional Research on Listing

8.59 There should be further inquiry to discover the most efficient means of operation of the listing authority. The various methods used in other jurisdictions should be studied and their suitability for New South Wales assessed. In particular, the role which the criminal listing authority might usefully play in the pre-trial process should be examined.[43] Regard should also be had to the questions of sanctions to enforce orders made by the listing authority,[44] the use of listing conferences[45] and the use of prescribed forms to be completed by the parties for the assistance of the listing authority.[46]

Footnotes

1. Submission to the Commission by C R Newham, Assistant Director, Legal Aid Commission of New South Wales, 24 May 1985.

2. Press release by the Attorney General, 12 September 1986. See also letter from the Attorney General to the Editor, The Sydney Morning Herald, published 17 December 1986.

3. See now Criminal Procedure Act 1986 Part 3 ss7-12. The legislation provides that the practice and procedure for the listing of criminal cases shall be in accordance with regulations which have not yet been made public.

4. See generally L W King, Chief Justice of South Australia "The Listing of Criminal Cases for Trial", a paper presented to the International Criminal Law Congress Adelaide, South Australia, October 1985. See also A Lovegrove "The Listing of Criminal Cases in the Crown Court as an Administrative Discretion" [1984] Criminal Law Review 738 at 739, 741.

5. Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence (NSW) Interim Report (December 1983) at 38.

6. This power is expressly preserved by the Criminal Procedure Act 1986 s12. R v Holden (1956) 73 WN (NSW)444; R v Dorrington [1969] 1 NSWR 381; R v Rushbrook [1974] 1 NSWLR 699.

7. Crimes Act 1900 s577. See also Lemon v Attorney-General (1932) 50 WN (NSW) 19.

8. Report of the New South Wales Child Sexual Assault Task Force (March 1985) at 171-172. See also Magistrates' (Summary Proceedings) Act 1975 (Vic) s47A.

9. The Commission is grateful to the Solicitor for Public Prosecutions, Mr Brian Roach, for his assistance in providing the information in this paragraph.

10. Report No 2 of the Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne, (the Flanagan Report) (June 1983) at 332 and Legal and Constitutional Committee Preliminary Report on Delays in Courts (March 1984), Evidence of the Chief Judge of the County Court at 105 para 190.

11. Personal communication, Mr Brendan Bateman, office of the Criminal Listing Directorate, Victoria. The Commission gratefully acknowledges the assistance Mr Bateman has given.

12. Legal and Constitutional Committee Preliminary Report on Delays in Criminal Cases (March 1984) at 112 para 204.

13. The Flanagan Report, note 10.

14. Id at 323.

15. Legal and Constitutional Committee, Preliminary Report on Delays in Criminal Cases (March 1984) paras 213-218.

16. Id see Appendix at 347-355. See also proposals for the involvement of the Listing Directorate in the pre-trial process contained in P A Sallmann "Report on Criminal Trials" Shorter Trials Committee, Melbourne, 1985 at 111.

17. Letter of 17 June 1986 to the Commission from E J Davison, Executive Officer, District Court of Queensland. The Commission gratefully acknowledges the assistance given by Mr Davison.

18. Letter of 27 August 1986 to the Commission from the Honourable Mr Justice W J Carter, a judge of the Supreme Court of Queensland. The Commission gratefully acknowledges the assistance given by his Honour.

19. Letter to the Commission from Mr Davison referred to in note 16.

20. Lord Chancellor's Department Management Scrutiny: Listing Officers in the Crown Court (July 1984) at 2 para 4.

21. Supreme Court Act 1981 s75(1).

22. Id at 29 paras 102-106.

23. Lord Chancellor's Department Management Scrutiny: Listing Officers in the Crown Court (July 1984) at 28 paras 81-100.

24. Lord Justice Watkins' Working Party on the Criminal Trial: Report to the Lord Chief Justice (London November 1982, revised November 1983).

25. Lord Chancellor's Department Management Scrutiny: Listing Officers in the Crown Court (London July 1984) at 18-20 para 64-69.

26. Royal Commission on Legal Services Final Report (HMSO Cmnd 7648 London 1979) Vol 1 at 297 para 22.36.

27. P Bucknell "The Listing Officer in the Crown Court" (1984) 148 Justice of the Peace 778.

28. The Commission gratefully acknowledges the assistance of his Honour Judge Richard Fitzgerald, Presiding Judge, Criminal Division, Circuit Court of Cook County, Chicago, Illinois, for the information in paras 8.30-8.33.

29. The "computerisation" of the entire court network in New South Wales has already commenced. Press release by the Attorney General, 3 July 1986. In Victoria, a computerised case management system has been introduced in the office of the Director of Public Prosecutions Law Institute Journal, March 1986 at 153.

30. New South Wales Law Reform Commission First Issues Paper: Criminal Procedure General Introduction and Proceedings in Courts of Petty Sessions (1982) para 6.22.

31. Professor R Misner "Legislatively Mandated Speedy Trials" (1984) 8 Criminal Law Journal 17 at 27.

32. New South Wales Public Service Board "Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence" Interim Report (December 1983) at 12.

33. The chronology of the McHugh case is fully dealt with in the Interim Report referred to in note 32.

34. J Hogan "Problems of Delay in Criminal Proceedings" Proceedings of the Institute of Criminology (No 42, 1980) at 13-14.

35. New South Wales Public Service Board "Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence" Report (June 1984) at 33-35.

36. Id at 33-35.

37. Id at 34-35.

38. New South Wales Public Service Board "Inquiry into the Methods and Procedures for Dealing with Cases Committed for Trial or Sentence" Interim Report (December 1983) at 40-41.

39. I R Scott "Is Court Control the Key to Reduction in Delays?" (1983) 57 Australian Law Journal 16 at 22.

40. Criminal Procedure Act 1986 s12(2).

41. Criminal Procedure Act 1986 s11.

42. See discussion of time limits in Chapter 3.

43. For a detailed discussion of pre-trial hearings, see Chapter 9.

44. C R Newham, note 1.

45. See para 8.21 above and also "criminal listings" practice direction No 2 of 1985 issued by his Honour Senior Judge Brebner of the District Court of South Australia and kindly drawn to the Commission's attention by Mr Graham Harris, Supervising Clerk of Arraigns of the Court.

46. See the report of Lord Justice Watkins, note 24.

Chapter 9

Pre-Trial Hearings

I. INTRODUCTION

9.1 As we have noted in earlier chapters of this Discussion Paper, there is no formal contact between the prosecution and the defence except when the parties are either before the court or participating in the process of police investigation. In this chapter we examine the question of whether a system of pre-trial hearings should be used as a means of resolving certain issues before the trial begins. As a part of this examination, we consider similar procedures in other jurisdictions. The purpose of canvassing this procedural innovation is the possibility that it may ultimately reduce both the number of criminal trials and the scope of the disputes in those trials which do occur. This would in turn simplify and shorten cases, a development which would be particularly beneficial in those cases in which a jury is called upon to make a determination as to guilt.

9.2 The current procedure in criminal prosecutions is based on the principle that an accused person cannot be required to reply to the prosecution's case. It logically follows that he or she should not be obliged to give notice of any proposed defence to the prosecution.[1] On the other hand, the prosecution has a general duty to disclose to the accused person in advance of the trial the nature of the charge and the evidence which it intends to call at the trial.[2]

9.3 As we have already noted in Chapter 4 and Chapter 5, in practice, the parties engage in much informal consultation and disclosure. This may involve matters such as the plea likely to be entered, the anticipated length of the case, the number of witnesses, and the strengths and weaknesses of the respective cases. Where this informal exchange of information takes place, it will, to some extent, reveal the approach that will be taken by either side. In an indictable case, where committal proceedings have been held, the nature of the questions asked of various prosecution witnesses will in most cases reveal the future line of defence. A defence may have been revealed at an earlier stage if the accused person has answered questions asked by the police.

9.4 The limited scope of disclosure before trial by the defence and its informal nature mean that, in many cases, the trial proceedings are much more complicated than they need to be having regard to the real issues in the case, particularly in cases which raise matters of legal or factual complexity or which involve voluminous evidence. There are also advantages to be gained by ensuring in advance of the trial that the prosecution case is ready to proceed. In those cases where there will be a jury, preliminary procedures may be particularly useful to reduce the time during which a jury is required and consequently reduce the inconvenience caused. In our view, the introduction of pre-trial procedures would overcome some of the difficulties currently experienced in trial proceedings where the effects of inadequate preparation

are manifested in delay and inefficiency. The objectives of pre-trial hearings, namely to reduce the length of time taken to hear individual cases consistent with the maintenance of the high standard instinctively sought to be achieved in the administration of justice, are, in our view, equally relevant to proceedings in the higher courts and in the Local Courts.

A. The Benefits of Pre-Trial Procedure

1. Accelerating Procedural Formalities

9.5 His Honour Judge B R Thorley of the District Court of New South Wales has advocated the introduction of procedures

> to ensure that an early trial date be allocated, to ensure that the date so allocated not be frustrated by avoidable last minute applications for adjournment, and to ensure that the trial can be anticipated to proceed and conclude in as little time as is necessary and without the pursuit of unnecessary issues.[3]

In the Commission's view, his Honour has succinctly identified four desirable objectives in the criminal process which are not at present features of the administration of criminal justice. This Discussion Paper has dealt with some aspects of procedure before trial which, in our view, would contribute to achieving these objectives. In particular, our proposals regarding time limits should ensure that an early date is set for trial and our proposals for a new procedure for listing criminal cases may reduce the incidence of adjournment applications.[4] In this chapter we address the last two objectives. Whilst they are directly concerned with trial procedure in court, we believe that procedure before trial will have a significant impact upon what actually occurs in court.

9.6 In many cases, applications of various kinds are made either at the commencement of the trial or during it which could have been determined much more conveniently before the trial. Pre-trial hearings would streamline procedure before trial without disrupting the orderly conduct of a criminal trial. A pre-trial hearing could deal with matters such as:

* questions of jurisdiction;
* challenges to the indictment, provided that the indictment is made available before the trial;
* special pleas such as autrefois acquit, autrefois convict, issue estoppel and res judicata;
* applications for change of venue;
* applications for separate trials of accused people or of counts in the indictment;
* issues regarding the disclosure of the case for the prosecution;
* the question of legal representation;
* whether admissions of fact may be made in respect of issues which are not really contested;
* the admissibility of evidence called in support of an alibi defence;
* the admissibility of evidence of a scientific or technical nature; and
* the admissibility of challenged evidence including, where necessary, the holding of a voir dire hearing (see para 9.45).

Some of these, such as the first three, may result in the termination of the proceedings. Others may resolve issues which would otherwise be dealt with at the trial or are designed to reduce the likelihood of the trial being unnecessarily disrupted.

2. Guidance in the Preparation of Trials

9.7 The most significant advantages of properly and openly conducted pre-trial procedure are that the main issues in the trial may be identified, the form of the indictment determined, common ground between the parties ascertained, formal admissions made, disputes on matters of law and relevant authorities identified, and the length of the trial proceedings more accurately estimated. Because some guidance for the preparation of the case and its presentation in court is given to the parties and the judge, the conduct of trials should be more efficient and the listing of criminal cases should be more effective.

3. Minimal Disruption of the Jury

9.8 None of the matters referred to above involve issues which must be decided by the jury in a criminal trial. When they are raised during the trial, the jury must retire from the court until these issues are resolved. This prolongs the involvement of the jury in the case and results in a frequently interrupted presentation of the evidence. In short, the early identification and resolution of these issues would save much time, effort, inconvenience and, consequently, money.

4. Determination of Evidentiary Requirements

9.9 Disputes over the admissibility of evidence, particularly evidence of admissions and confessions, illegally or improperly obtained evidence and expert evidence, could be identified in advance. Questions of privilege, whether claimed by the prosecution or the defence, could conveniently be raised

at this early stage. If at a pre-trial hearing, whether prior to committal proceedings or the trial itself, the accused person were to indicate that he or she does not intend to challenge particular aspects of the prosecution evidence, preliminary determinations could be made as to whether that evidence need be given at all, whether it can be presented in an edited or simplified form, or whether it may be presented at the trial without requiring the witness to attend court. The fact that the evidence is not to be challenged does not necessarily mean that the accused person would not require its presentation in court. However, the evidentiary requirements of both parties could conveniently be determined in advance by a procedure which does not harm the interests of either party.

B. The Mechanics of Pre-Trial Procedure

9.10 The courts could be vested with the general power to order the prosecution, the accused person and their respective legal representatives to attend a pre-trial hearing in any case where the court considers that such a hearing may either eliminate the need for or reduce the length of the trial or wherever it is considered necessary to ensure that justice is done in the case. Since there are prospects of saving time in indictable matters during both committal proceedings and trials, the power to conduct a pre-trial hearing could be vested in the Local Courts primarily for the purpose of streamlining committal proceedings and in the higher courts for the purpose of reducing the length and avoidable disruption of trials on indictment. Since trial proceedings in the Local

Courts are usually less complex than those conducted in the higher courts, and most importantly because there is no jury in criminal cases in those courts, the benefits of pre-trial hearings will be less significant for the Local Courts. This is not to say, however, that there are not some cases in which proceedings in the Local Court might be more efficiently conducted with the aid of pre-trial hearings. Indeed, simple informal hearings to determine the length of the case are currently held in the Local Courts.

9.11 We should emphasise that we do not propose that pre-trial hearings should occur in every criminal case, but only in those where is is apparent to the parties or the court that some benefit will be derived from them. Although it would probably be necessary to have only one pre-trial hearing where it has been properly planned and conducted, there does not seem to us to be any valid reason why a series of pre-trial hearings should not occur in an appropriate case. Again, the question to be asked is whether there is any benefit to be obtained.

9.12 There is the question of how a court, particularly the Local Court, will be in a position to know whether there is any benefit likely to be derived from a pre-trial hearing. The proposals we have made in Chapter 4 regarding disclosure by the prosecution would, if implemented, be a useful source of information for the purpose of making such a decision. Even if those proposals are not implemented, there is an existing procedure which may be used for this purpose, at least in cases

to be dealt with on indictment. The legislation which introduced a system of "paper committals" in New South Wales provides that the prosecution must, if it chooses to use the system, supply the accused person with copies of the statements of the witnesses it intends to call. The fact that the use of the system is optional means that in those cases where the prosecution does not use it, the defence is prevented from notifying in advance that it does not wish to challenge the evidence at committal. If this procedure were used in all committal proceedings, the accused person and the court would be in a position to know, particularly if the accused person has legal representation for the committal proceedings, whether there was any good reason to have a pre-trial hearing. The need for such a hearing in the prospective court of trial would be based on the material emerging at the committal proceedings or in the course of informal communication between the parties before the trial. In any case which appears likely to be a long one, the potential benefit to be derived from a pre-trial hearing will usually be obvious.

9.13 Attendance at a pre-trial conference could be required as an integral part of the process of listing a case for hearing. At present the accused person or his or her lawyer is required to appear in court when a criminal matter is listed "for mention only" prior to hearing. Attendance at a pre-trial hearing could be regarded as merely an extension of that obligation. If necessary, attendance could be made a condition of bail. A requirement to attend would not in any way offend

the general principle that the prosecution bears the onus of proving its case and that an accused person should not be compelled to reveal his or her defence. Attendance at a pre-trial hearing should not impose any obligation of disclosure beyond that required by the general law. It would merely provide a further opportunity for it. The sole purpose of pre-trial proceedings should be to streamline the criminal process and not to deprive the accused person of presently existing rights.

9.14 We have suggested that the courts should have the power to require that the parties attend court to have certain matters determined at a pre-trial hearing. The District Court already has the power to make rules regarding the procedure which should be followed in criminal matters.[5] We understand that draft rules which provide for the conduct of formal pre-trial hearings have been prepared and that they are awaiting implementation. Appropriate amendment to the relevant legislation could be made to give similar powers to the Supreme Court and the Local Courts. In our view, there is no reason why the powers of the respective courts should be any different. The objectives of pre-trial hearings are the same irrespective of the court in question. We suggest that the powers of the courts in relation to pre-trial hearings should be expressed in general terms which allow sufficient flexibility for the effective conduct of such proceedings.

C. Should Pre-Trial Decisions Bind the Court of Trial?

9.15 Where a case continues after a pre-trial hearing has been conducted, the decisions made by the judge at the pre-trial hearing should not be binding on the court of trial. Although the parties could expect any issue between them which has been resolved at a pre-trial hearing to be decided the same way by the trial judge, and should prepare their respective cases accordingly, we do not think it workable to have an absolute rule that the trial judge is bound by a decision made by the judge presiding at a pre-trial hearing. The relevant circumstances may change so much between the time of the hearing and the trial as to require the earlier decision to be reviewed. In order to reduce the likelihood of this occurring, we think it desirable that the judge who is to preside at the trial should also conduct the pre-trial hearing and that the hearing should be held as close in time to the trial as is reasonably practicable. This should not necessarily prevent a pre-trial hearing being conducted in an appropriate case soon after the terms of the formal charge are known. We reiterate the point we have made earlier in this Discussion Paper that the current procedure whereby the specific terms of the indictment may not be decided until as late as the evening before the trial in some cases, should not continue. If the proposals made in Chapter 3 of this Paper were implemented, the indictment should be presented to the prospective court of trial well in advance of the date of hearing. While on this subject, we should note in passing that the exercise by the

Supreme Court of its power under s567 of the Crimes Act 1900 to prescribe forms of indictment for offences covered by that Act is overdue.

D. Encouragement of Pre-Trial Disclosure

9.16 Since there may well be advantages to the accused person in determining some issues and disputes at an early stage of the proceedings, lawyers who appear for accused people should be prepared to participate constructively in the pre-trial hearing. The resolution of disputes may result in the prosecution being abandoned or in the accused person being given the opportunity to plead guilty to a less serious offence than that charged in the indictment. Only where both parties participate in pre-trial hearings is it likely that any real benefit will flow from the procedure. Whilst we acknowledge that constructive co-operation of the accused person cannot be demanded, the Commission is of the view that it would be forthcoming in a sufficiently large number of cases to make the general availability of pre-trial hearings a worthwhile innovation in criminal procedure. They should be used at the discretion of the court in the individual case as an efficiency measure designed to reduce the length of criminal proceedings and as an additional means of controlling the problem of unacceptable delays in the criminal process. Pre-trial hearings should not be used in a way which will jeopardise the prospects of conducting a fair trial.

II. PRE-TRIAL HEARINGS IN OTHER JURISDICTIONS

A. New South Wales

9.17 As we have noted, pre-trial procedures in New South Wales are generally limited to an informal exchange of information between the parties. The significant exception is when the Supreme Court exercises its summary jurisdiction in criminal cases. The rules enacted under the Supreme Court (Summary Jurisdiction) Act 1967 establish a procedure which is essentially designed to ensure that there is adequate preparation for the trial. The rules provide in part:

> (4) The Judge may, of his own motion or on the application of a party -
>
> (a) make orders and give directions for the just and efficient disposal of the proceedings;
>
> (b) ... make such orders and give such directions as may be appropriate relating to -
>
> (i) the giving by the plaintiff to the defendant of particulars or further and better particulars;
>
> (ii) the giving by the plaintiff to the defendant of a list of persons who it is expected will be called to give evidence at the trial or, if the Judge thinks fit, who have made statements in writing but who it is expected will not be so called;
>
> (iii) the giving by the plaintiff to the defendant of a copy of any statement made in writing by any person whose evidence it is expected will be given at the trial or, if that person has not made a statement in writing or if the Judge thinks fit, of a summary of the evidence which it is expected he will give at the trial;

(iv) the giving by the plaintiff to the defendant of a list of documents or things which it is expected will be tendered in evidence at the trial;

(v) the giving by the plaintiff to the defendant of copies of documents;

(vi) inspection by the defendant of documents or of property;

(vii) evidence, including evidence under section 14CE of the Evidence Act, 1898;

(viii) any admission or consent of the defendant under section 404 of the Crimes Act, 1900; and

(ix) any alibi.

(5) The procedures prescribed by this rule are completed when the Judge certifies that in his opinion the pre-trial procedures prescribed by this rule have been completed.[6]

Much of the material specified in this rule would be covered by the Commission's proposals regarding disclosure by the prosecution. The provision relating to s404 in part (4)(viii) is in a clearly different category since it involves disclosure by the defence not otherwise required by the general law. The section is designed to achieve, as it says, "the just and efficient disposal of the proceedings". The Commission is unaware of any criticism directed towards the concept or operation of these rules.[7] However, as the jurisdiction in question is used infrequently, the application of the rules has not been widely tested.

B. Victoria

9.18 The former Director of Public Prosecutions in Victoria, now Mr Justice Phillips of the Supreme Court, identified pre-trial hearings as one of two[8] procedural reforms urgently required to give the higher courts powers necessary to exercise control over pending criminal proceedings. His Honour said:

> I have become persuaded that we must invest the Judges of the superior courts with jurisdiction to hold pre-trial hearings in criminal cases in order that pleas of guilty can be identified at the earliest possible stage removing the unnecessary time and expense of preparing cases as trials when such cases ultimately turn into pleas at the door of the court. The Judges also should have jurisdiction at these hearings to rule on submissions affecting the presentment and to hear and rule on objections to the admissibility of evidence. If necessary they should be empowered to receive evidence on the voir dire. The Judges also should have the authority to identify pre-trial all circumstances which may lengthen or complicate a subsequent trial if the case is to proceed thus. All of these things can be achieved with pre-trial hearings providing the prosecution makes presentment and disclosure of its case to the accused person as soon as possible after committal.[9]

9.19 In September 1984, rules governing pre-trial review procedures in the Supreme Court and the County Court of Victoria were enacted.[10] Under these rules, the accused person or the Director of Public Prosecutions (who is responsible for all prosecutions in these courts) or the Criminal Listing Directorate (an independent agency responsible for listing criminal trials) may apply to the court of trial for a pre-trial hearing to be conducted where it is considered necessary for the fair and expeditious conduct of the trial. At a pre-trial hearing, the judge may ask such questions of the

parties and give such directions for the preparation or conduct of the trial as the judge thinks proper. The questions asked of the parties may include those in a schedule which is included in the notice of hearing sent to each of the parties. They cover a wide range of matters including representation, disclosure, plea, exhibits and preliminary applications.[11]

9.20 There are two features of the Victorian rules which are worthy of comment. Firstly, the accused person must be present at the hearing and may be legally represented. An "accused person" is defined as "a person in respect of whom an indictment has been presented". In Victoria, there are rules requiring the indictment to be presented before the prospective court of trial within nine months of the date of committal for trial.[12] The trial must commence within nine months of the presentment. The Victorian provisions appear to acknowledge that there is no purpose in conducting a pre-trial hearing until the precise terms of the indictment are known. Consistent with the view that it is desirable for the court to control unconscionable delays in the prosecution of criminal cases, this definition should, for our purposes, be "a person who has been committed for trial". Secondly, nothing said by an accused person at a pre-trial hearing, and no failure by an accused person to answer a question at a pre-trial hearing, can be used in any subsequent trial or made the subject of any comment at that trial. The proceedings must be recorded and a copy of the record filed in court.

9.21 A major report published by the Shorter Trials Committee in Victoria late in 1985 advocated the extension of the system of pre-trial hearings to promote greater efficiency.[13] In particular, the judge conducting a pre-trial hearing should be able to decide questions of admissibility at such a hearing.[14] This will avoid a range of potential problems which may be caused if the trial judge is restricted to making such rulings either at the commencement of the trial or worse, during the trial itself. The Committee stresses the need to create a simple, flexible scheme to fill "the unacceptable gap between committal and trial".[15] It proposes that the decision as to whether a pre-trial hearing is desirable in a given case should be left to the discretion of the judges. An additional feature of the Committee's proposals was the implementation of a system of "pre-trial reports", or forms to be completed by the parties prior to the trial providing a wide range of information about the respective cases.[16]

C. The United Kingdom

9.22 In 1973 a government committee was established under the chairmanship of Lord Justice James to inquire into various aspects of criminal procedure. In its report, the Committee commented favourably on the use of pre-trial procedures as a means of shortening the duration of criminal proceedings.[17] However, the Committee regarded the usefulness of pre-trial procedures as being limited to long criminal cases. The Committee proposed that the court should have the power to invoke such procedures, but emphasised that universal

application would be unlikely to eliminate all delays and would probably result in the creation of a more unwieldy and time-consuming process than the one already existing.

9.23 An experimental system of pre-trial review in criminal trials was instituted at the Old Bailey in London in 1974. The system established a stage in the proceedings between committal and trial at which the lawyers for both sides appear before a judge for the purpose of eliciting the real issues in the case and settling various preliminary matters before the trial starts. The procedure could be initiated by an application from either side once the case has been listed for trial, and the pre-trial hearing would be held within a period of two weeks before the date fixed for the trial. The hearing could be held in the judge's chambers although any orders were to be made in open court. This enabled informal proceedings which did not tie up courtrooms and which could be conducted outside normal court sitting times. At the hearing the lawyers were expected to inform the court as to:

* intended plea;
* the prosecution witnesses whose attendance at court is not required;
* any additional witnesses who may be called;
* formal admissions of fact or exhibits;
* the probable length of the trial;
* issues relating to the mental or medical condition of the defendant or of a witness;
* points of law;
* questions relating to the admissibility of evidence;

* the identity of witnesses the prosecution does not intend to call; and

* any alibi not already disclosed in accordance with the relevant statutory provisions.

This experimental procedure was intended primarily for long and complex cases.

9.24 In the first six months of its operation, the procedure was used in approximately 20 cases and considerably reduced the length of the trials involved.[18] Some important lessons learned from the experimental system at the Old Bailey are relevant to New South Wales:

* The judge who is to preside at the trial should conduct the pre-trial review hearing.

* Because any other counsel cannot be expected to make decisions which will affect the course and conduct of the case, counsel who are to appear at the trial should appear in the pre-trial hearing.

* Such review should take place, at the instigation of the parties or the court, as early as possible and should not be regarded as being confined to one hearing.

* Pre-trial reviews should be adequately recorded so as to avoid subsequent dispute as to any decisions made or undertakings given.

1. The Certificate of Readiness for Trial

9.25 A working party of the Criminal Bar Association of the United Kingdom has suggested a "certificate of readiness" be prepared as part of the pre-trial process.[19] The working party, established to examine the problem of delay in the criminal process, felt that this was the most effective means of reducing delays and avoiding unduly lengthy trials. It proposed a rule providing that, within 28 days of the service

of the indictment upon the defence, counsel for the prosecution and the defence should each complete a certificate stating that the case is ready for trial. In the event of the case not being ready, a certificate stating the reasons why and the steps that are to be taken to make it ready should be prepared.

9.26 It was envisaged that, in order to complete a certificate of readiness for trial, the lawyers should have done the following work:

* advised on evidence and disclosure,
* advised on plea and evidence,
* advised on alibi notice (defence counsel only),
* agreed upon pleas,
* agreed upon admissions and upon witnesses for the prosecution who need not be called,
* notified objections as to admissibility, and
* estimated the length of the trial.

9.27 Lawyers were to be remunerated for this work, payment for which would be part of the briefing fee. The justification for this is that the cost of effective preparation is relatively cheap compared to the cost of the consequences of inefficient preparation which results in unnecessary consumption of court time. The point the Association has made about the cost of court proceedings is equally relevant in Australia. A criminal trial in the Supreme Court of Victoria has been estimated to cost approximately $10,000 a day.[20] There is no reason to think that it would be any less in New South Wales. If pre-trial hearings were responsible for

reducing the length of a trial by even one day, the savings to the State and to an accused person who is paying for legal representation would be significant.

2. Additional Criminal Bar Association Recommendations

9.28 The Working Party of the United Kingdom Criminal Bar Association suggested in its discussion paper, prepared in 1980, that all cases should undergo a form of pre-trial review procedure. The Association recognised that the form of this procedure would vary according to the complexity of the case. The Association suggested further that the efficiency of pre-trial procedure was dependent upon the presiding judge being familiar with the nature and detail of the case to be reviewed. This requires that the judge is given an outline of the case before the pre-trial hearing. One suggestion was that this may be done by having a transcript of the opening speech made by counsel for the prosecution at the committal proceedings and giving it to the judge together with any other relevant documents and exhibits. In this way the judge may be spared the task of going through the full transcript of the committal proceedings.[21]

3. Lord Justice Watkins' Working Party

9.29 A Working Party headed by Lord Justice Watkins was established by the government in 1981 to devise a means of reducing delays in the hearing of cases in the Crown Court. Two major defects in the current system of preparation for trial were noted in the Working Party's report:

* In most cases there is neither the occasion nor the incentive after committal to do any preparatory work for a trial until shortly before the hearing is due.

* The parties are not required at present to communicate with each other about the case, and preparation often takes place without the benefit of knowing what in fact is in issue.[22]

A series of forms, which amounted to checklists able to be completed quickly, was designed to encourage the exchange of information between the parties, thereby avoiding the introduction of a cumbersome and expensive interlocutory procedure. The Working Party's report notes that, in order to complete these forms, both the prosecution and the defence must fully prepare the case. The information required to be given concerns the likely plea in the case, the likely issues at trial, and any matters which could be expected to make a pre-trial hearing necessary or desirable. These forms would be inspected by the court to determine whether a pre-trial hearing should be held. The Working Party considered that in most cases a pre-trial hearing would not be needed. The method was seen as a simple means of identifying those cases where difficulties may occur without imposing on the vast majority of cases the unnecessary burden of an additional hearing. The information in the forms was nevertheless valuable in cases where no pre-trial hearing was held because it helped to establish at an early stage at least some of the common ground between the parties at the trial.

D. Canada

9.30 Various experimental programs of pre-trial review for criminal cases have been tested in the provinces of Canada both before and after the publication of the Canadian Law Reform Commission's Discussion Paper on disclosure before trial.[23] In British Columbia, the formal procedure tested did not provide lawyers with more material than they had previously obtained through the operation of informal procedures.[24] A similar project undertaken in Alberta was regarded as a failure because there was little co-operation from the legal profession.[25]

9.31 The workload in Ottawa, Ontario was manageable during the 1960s and early 1970s because the prosecutor's office had a policy of liberal disclosure. In 1972 increased case loads, the increasing complexity of criminal cases, and the more widespread distribution of legal aid all combined to significantly diminish the prosecution's ability to discuss the disposition of each case and the informal system of disclosure broke down. This led in 1976 to the establishment of a system of judicially supervised disclosure, known as "pro-forma preliminary hearings".

9.32 The procedure is strictly voluntary and requires the consent of both the prosecution and the defence. It is a cross between disclosure and a pre-trial conference between the parties. Where the parties cannot resolve disputes about disclosure after conferring between themselves, their

respective positions may be referred to the court and the presiding judge may, after making relevant inquiries, help resolve the issue. If the defence lawyer is satisfied with the disclosure, he or she states this for the record and the accused person is arraigned in the usual way. The accused person may then waive the preliminary inquiry, demand a preliminary inquiry on the evidence of certain witnesses only, or require a full preliminary inquiry in the usual manner.

9.33 The value of this system was quickly demonstrated. Between 29 June and 30 November 1976, 2141 witnesses who would otherwise have been issued with subpoenas requiring their attendance at court were excused from attendance. In 87% of cases dealt with by the court, the attendance of one or more witnesses was waived by the defence lawyer. Of some 1547 cases dealt with as contested matters at the pre-trial hearing stage, over one-third were finally disposed of either by a guilty plea, including a plea of guilty to a lesser charge, or by withdrawal of the charge by the prosecution.[26] Official approval for the system followed in 1977 when the Attorney General published guidelines designed to reduce the length of preliminary hearings. These guidelines require the prosecution to make informal disclosure to defence lawyers at an early stage so that they can decide whether the attendance of witnesses at the preliminary hearing could be dispensed with and a written statement of the anticipated testimony substituted.[27]

E. The United States

9.34 The Federal Rules of Criminal Procedure for the United States District Court provide that the court may order the parties to participate in a pre-trial conference:

> At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.[28]

We regard the manner in which this rule is formulated as an admirably concise statement of the principles which should be applied in procedure before trial. The only qualification which we would make is that the last rule regarding representation should be modified to take account of exceptional circumstances, such as where the accused person makes an informed waiver of his or her right to be represented by counsel.

9.35 In formulating its model code of pre-trial procedure, the American Law Institute proposed that a "screening conference" be conducted between the parties with a view to encouraging the early disposition of criminal cases.[29] The important features of the proposed pre-trial conference include:

* The conference should be established as a regularly scheduled part of pre-trial procedure by regulations. An informal disposition of the case would not then be restricted to those accused people and lawyers who "know the ropes" or have good relations with the prosecuting authority.

* The conference requires an early exchange of information between the parties to ensure that any agreement made between the parties is the result of an informed decision by the prosecuting authority and the accused person.

* It is provided that there should be judicial supervision of the negotiations and any agreement reached in order to protect the interests of both the public and the accused person.

* The fact that the screening conference is purely voluntary does not detract from its value. Whilst there is pressure applied to achieve early disposition, any decision made will be informed and supervised.[30]

F. The Watson Draft Criminal Code for the Commonwealth

9.36 In July 1986 the Hon Mr Justice Raymond Watson, a senior judge of the Family Court of Australia, submitted to the Federal Attorney-General a preliminary report[31] containing a draft Criminal Code for the Commonwealth. The proposals for reform contained in the Code are described as being "tentative". A final report is to be published after discussion of the proposals in the draft. Included amongst the provisions of the draft Code is a section designed to enable the accused person to seek clarification of issues upon which a judge's ruling is required before a jury is empanelled. The relevant section provides:

> (1) Where a person charged with an offence is to be tried on indictment before a jury, the prosecutor shall file with the court the indictment charging such offence and serve a copy thereof on the person charged not less than 21 days before the date listed for the trial.
>
> (2) Thereafter the person charged may -
>
> (a) apply that the indictment be quashed;
>
> (b) seek a ruling on a point of law;

(c) seek to challenge the admissibility of any evidence that the prosecutor proposes to lead;

(d) enter a special plea of double jeopardy, justification or pardon;

and the court may give such ruling or order, including a verdict of acquittal, as it thinks just.

(3) Unless the court otherwise decides, an application under sub-section (2) may be made -

(a) only to the court listed for the trial;

(b) although no jury has been empanelled for the trial of the indictment.

(4) An order made on an application under sub-section (2) shall be deemed for all purposes to have been made during the course of the trial on the indictment.[32]

The Commission generally approves the terms of this provision with the reservation that it should be made clear that the court would have a discretion to refuse to hear or decide upon an application of the kind proposed where the court considers that that decision is best left to the court of trial. In addition, we consider that the legislation needs to recognise that it is desirable that such a pre-trial hearing be conducted by the judge who is to preside at the trial and to clarify the position where the judge at trial considers that the question determined in the pre-trial hearing has been wrongly decided or should be decided differently because of a change in circumstances.

III. ISSUES ASSOCIATED WITH PRE-TRIAL PROCEDURE

A. Costs and Limitations of Pre-Trial Procedure

9.37 Pre-trial procedure will involve some expense. Apart from judicial and administrative costs, it is contemplated that the parties will be represented by lawyers who will require payment. We agree with suggestions that the procedure will be of little value in cases which are likely to be relatively short and should therefore be limited to cases which are likely to occupy a substantial amount of court time. The identification of lengthy or complex cases should not be difficult. It should be open to the prosecution or the defence to make application, or for the court itself to order that a pre-trial hearing be held, as is done in Victoria.

B. Legal Representation

9.38 Chief among the difficulties which may be associated with the use of a pre-trial hearing procedure is the prospect that the accused person may change his or her approach to the case, particularly where there has been a change of legal representation. There appears little that can or should be done to limit the right of an accused person to alter his or her legal representation. A "lawyer on the record" system which provides that the court has some control over legal representatives withdrawing from the case at a late stage may avoid the possibility that changes in legal representation resulting from non-payment will frustrate the progress of the case. The lawyer's fee for attendance at the pre-trial hearing would be a part of the overall brief fee. This would promote

continuity of representation and reduce the likelihood of changes in approach between the pre-trial hearing and the trial itself.

9.39 In order for the pre-trial procedures to achieve their objective, the lawyers will need to be briefed sufficiently far in advance of the date of the trial, firstly, to determine whether an application for such a procedure should be made, and, secondly, to make an effective contribution if the procedure does take place. Similarly, the judge who is to hear the matter should be provided with the papers at an early stage.[33]

C. Who Should Conduct Pre-Trial Hearings?

9.40 If this procedure is limited to substantial cases only, the judge who is to preside at the trial should conduct the pre-trial review. Whilst this is desirable, it is not essential. If various directions and determinations have been made by one judge, those rulings, being rulings of the court, may be relied on by another judge who is called upon to preside at the trial unexpectedly. Alternatively, it has been suggested that pre-trial hearings could be performed by a person holding a less senior office.[34] In England a system of "Crown Court Masters" has been proposed to deal with interlocutory applications in criminal cases.[35] This may be a solution where the pre-trial review procedure does not involve determinations on matters of law. It is, however, unlikely to

be of great benefit where the issue raised at the pre-trial hearing will inevitably be traversed again before the trial judge.

D. Should Pre-Trial Undertakings Be Binding?

9.41 Because the relevant circumstances may have changed significantly since the pre-trial hearing, particularly where there is a change in legal representation, we consider that the accused person or the prosecution should generally be entitled to change any undertaking made at a pre-trial hearing regarding the conduct of the case. The decision as to the permissibility of the change should be a matter for the discretion of the judge to whom the application is made.

9.42 A rule, such as that in Victoria, which provides that nothing said or done by the accused person or by his or her lawyer at a pre-trial hearing can be later used at the trial, may provide a means to manipulate the system by frequent changes of legal representation or by deliberate deception. In order to encourage the parties to participate, we are of the opinion that the approach taken at a pre-trial hearing should not be binding upon the parties and that they should be at liberty to change their approach unless the court is of the view that the proposed change represents an abuse of the court's process. The court would have a discretion to control manipulation and prevent abuse, whilst at the same time ensuring that there is a fair trial of the issues between the parties.

E. Pre-Trial Hearings in Local Courts

9.43 Whilst much of this chapter has been concerned with the stage of the criminal process between committal and trial, there are benefits to be obtained by the implementation of effective procedures which may be conducted both prior to committal proceedings and in cases to be heard summarily in the magistrates' courts. Although it is of significant proportions, the incidence and magnitude of delay in the hearing of contested cases in the magistrates' courts is not as great as that experienced in the higher courts.[36] Nevertheless, the use of pre-trial hearings could should reduce the wastage of court time and would make summary court proceedings fairer.[37]

9.44 Various studies conducted in Magistrates' Court in the United Kingdom in recent years have found that pre-trial review procedures were not immediately successful when used for summary trial matters.[38] However, it was felt that there was scope for the use of such a procedure and that a more refined system operating amongst practitioners who were accustomed to it and relaxed in dealing with it, would probably produce much better results. A more firm conclusion was reached on the question of the contribution made by the pre-trial review system in achieving an improvement in the quality of justice dispensed by the magistrates' courts. The predominant view of those who had participated in the scheme was that pre-trial review had an important and positive role to play in achieving that end.[39]

IV. PROCEEDINGS ON THE VOIR DIRE

9.45 Where a dispute arises in criminal proceedings over the admissibility of evidence sought to be introduced by one of the parties, the resolution of that dispute is often effected by conducting a "trial within a trial", a procedure known as the "voir dire". This is presided over by a judge or magistrate sitting alone who decides whether the disputed evidence should be admitted. The voir dire procedure is often used where the voluntary nature of a confession or admission made by the accused is called into question, where evidence is said to be illegally or unfairly obtained, or where one party seeks to introduce expert evidence. Each of these areas is a common source of dispute in criminal trials. If such a dispute occurs during a trial on indictment, the jury must leave the court during the voir dire.

9.46 The resolution before trial of disputes which would otherwise be determined on the voir dire would save time and money and allow for the more effective presentation of cases in court. There is the further advantage that the jury would be presented with a less interrupted flow of evidence. This should make it easier for the jury to follow the case and reduce the overall time which it is required to spend at court.

9.47 The Victorian Parliament enacted legislation in 1983 which empowers a judge to deal with issues relating to evidence and the course of the trial prior to the empanelling of the jury.[40] The relevant provision is in the following terms:

> Where an accused person is arraigned on indictment or presentment before the Supreme Court or the County Court, the Court before which the arraignment takes place, if the Court thinks fit, may before the impanelling [sic] of a jury for the trial hear and determine any question with respect to the trial of the accused person which the Court considers necessary to ensure that the trial will be conducted fairly and expeditiously and the hearing and determination of any such question shall be conducted and have the same effect and consequences in all respects as such a hearing and determination would have had before the enactment of this section if the hearing and determination had occurred after the jury had been impanelled [sic].

9.48 One problem which has been encountered in the operation of the provision is whether the accused person should be required to plead to the charge before this procedure is commenced. It would appear preferable that the person charged should be required to plead, so that the court is then engaged in a contested trial and is not conducting a procedure which may amount to nothing more than providing advice on evidence. It may be said that this provision does no more than affirm the discretionary power which already exists in the courts. Some judges in New South Wales have been prepared to conduct the voir dire hearing at the beginning of the trial but this is by no means a general practice. The important objective which this section achieves is that the voir dire hearing can be conducted without inconveniencing a jury.

9.49 The impact which the use of the voir dire procedure has on the smooth progress of criminal proceedings is at times catastrophic. Frequently, the questioning that has occurred on the voir dire is repeated in the presence of the jury as a part of general cross-examination. The voir dire hearing is usually

a source of inconvenience and disruption since the jury must be absent from court while the hearing of evidence and argument on the voir dire takes place. In some cases this has resulted in the exclusion of the jury for periods of time which are measured in days or weeks rather than minutes.[41] It is an expensive and inefficient practice to have a jury waiting while a matter which does not concern them is debated. More seriously, the disputed evidence may not be called by the prosecution until after what may be a large body of undisputed evidence has already been called. The fate of the prosecution case may be entirely dependent upon the court's ruling. If the disputed evidence is excluded by the judge, the prosecution case may fail and the time spent calling the earlier evidence will have been wasted. If that evidence is held to be admissible, the attitude of the defence in contesting the charge may well change.

V. VOIR DIRE HEARINGS IN COMMITTAL PROCEEDINGS

9.50 An examination on the voir dire may also be conducted in committal proceedings. This practice is, in the Commission's view, generally undesirable and unnecessary. It occurs with sufficient frequency as to make it a problem requiring attention. There are two major difficulties associated with the use of the voir dire at committal.

9.51 Firstly, the magistrate's decision on the question of admissibility is not binding on the prosecution, nor on the judge at the court of trial. Therefore, evidence rejected in the magistrate's court may still be admitted at trial. Even

where the rejection of the evidence results in the disintegration of the prosecution case and the discharge of the accused person at committal, the Crown is not precluded from issuing an ex-officio indictment which requires the accused person to stand trial.[42] Secondly, the magistrate is required to act both as judge of the law and as judge of the facts. Material he has heard in one capacity is not supposed to affect his decision in another. Whilst this objection may be overcome in practice, the well established principle that justice should not only be done, it should also be seen to be done, is not fulfilled.[43]

9.52 In extreme cases a week of court time has been required to hear evidence and argument so that a determination of little consequence can be made. If the case does go to trial, it is not unusual for the voir dire procedure to be repeated in the trial proceedings. We do not imply any criticism of the magistrates who are bound to hear the cases which come before them in accordance with the law. We do however, criticise the current state of the law which allows a practice of such dubious utility to continue. The only justification for maintaining the practice is to enable the accused person to question witnesses on the voir dire so that their evidence can be tested in relation to its admissibility. We are doubtful whether this practice should be permitted at committal proceedings. In particuar, there is an argument that magistrates conducting committal proceedings do not have the same discretion as a judge to reject admissible evidence. The

question of admissibility may be adequately tested, without risk of prejudice to the accused, on the voir dire to be conducted by the trial judge.

9.53 The Commission tentatively proposes that if committal proceedings are to be retained in their current form, and that in such proceedings a voir dire hearing of some duration is likely to take place, the magistrate may refer the case to the prospective court of trial so that the matter can be heard and determined by a judge of that court. The case should be heard, ideally, by the judge who is to hear the trial, although the Commission is not convinced that a binding determination could not be made by another judge of the same court. Such a procedure would eliminate the wastage of court time which is currently caused by lengthy voir dire hearings in committal proceedings. There would necessarily be an increase in the workload of the higher courts. A number of cases would be resolved without the need for a trial by the higher court's decision on the voir dire issue.

VI. SUMMARY OF TENTATIVE PROPOSALS

1. Jurisdiction

9.54 From the time that the prospective court of trial is notified of the decision to prosecute, the court should have jurisdiction in the matter and the power to make such preliminary orders as are necessary for the convenient disposal of the case. We suggest, consistent with current initiatives

being taken by the judges of the District Court, that all courts hearing criminal cases should establish rules for the conduct of pre-trial hearings.

2. Order of Proceedings Before Trial

9.55 After the prospective court of trial has been determined, the accused person should be asked on his or her first appearance before that court to plead to the charge. If there is a plea of guilty, the court may deal with the matter immediately if it is ready to proceed, or arrange for it to be listed on a future date. If there is a plea of not guilty or a special plea or a preliminary question raised, the matter should be listed for mention on a suitable date. Prior to that date, the prosecution should be required to file in court all relevant materials necessary to provide complete disclosure, together with a notice of the formal charge. At the mention, the accused person and the prosecution should be asked if there are to be any pre-trial hearings or a challenge to the decision to prosecute. If there are, a date should be fixed for the hearing of these proceedings. If not, the date on which the trial is to commence should be fixed.

3. Notification of Formal Charge

9.56 For prosecutions conducted in the higher courts, a notice of the formal charge (in current terminology the indictment) which the prosecution proposes to present against the accused person at trial should be filed in the prospective court of trial at a time fixed by the court. The formal charge

should disclose with sufficient particularity the specific allegation made against the accused person and any intended co-accused. Subsequent amendments to the formal charge should only be permitted if they are approved by the court. The early filing of the formal charge will enable the court to deal before trial with applications based on the terms and nature of the formal charge. The archaic form of indictments should be abandoned and new forms prescribed by the Supreme Court.

4. Pre-Trial Hearings to be Heard by Trial Judge or Magistrate

9.57 All courts exercising criminal jurisdiction should have the power, established by legislation or rules of court, to order the attendance of the legal representatives of the accused person and the prosecution at pre-trial hearings. Such hearings should be conducted wherever there is a prospect that they may reduce the duration of the pending proceedings and should, if possible, be heard by the judge or magistrate who is to preside at the trial. That person should have the ultimate responsibility for deciding whether a pre-trial hearing should be conducted. Pre-trial hearings should be used to determine whether certain witnesses are required to be called, and to decide matters of law which can be conveniently determined in advance of the trial. Whilst the accused person and his or her lawyer may be compelled to attend a pre-trial hearing, there should be no power, subject to the tentative proposals in paras 5.65 and 5.66 regarding the titles of defences, alibi defences and scientific or technical evidence, to compel the accused person to make positive disclosures regarding evidence which

will be called by the defence. However, the court should be entitled to compel the accused person to call any evidence relevant to a question of admissibility of evidence dealt with at a pre-trial hearing.

5. Court to Control Conduct of Pre-Trial Hearings

9.58 Pre-trial hearings may be ordered by the court of its own initiative or on the application of the parties. Although we would expect their use to be of greatest benefit in long or complex cases, in order to assist the orderly conduct of pre-trial proceedings, the prospective court of trial should have a general discretionary power to specify a time on or before which pre-trial applications and motions must be made by the parties. An application made after the time specified should only be heard if the leave of the court is first obtained. Pre-trial hearings should be recorded and a copy of the record should be filed in the court.

6. Retraction of Undertakings Made at Pre-Trial Hearings

9.59 Any undertaking made by the accused person or the prosecuting authority at a pre-trial hearing should be able to be withdrawn at trial unless, in the view of the majority of the Commission, the trial judge or magistrate is of the view that the intended withdrawal amounts to an abuse of the court's process. The Commission raises for consideration the question whether any specific restrictions should be imposed upon the parties to prevent the retraction of undertakings made at a pre-trial hearing.

7. Admissibility of Evidence from Pre-Trial Hearing

9.60 The Commission raises for consideration the question of whether any evidence given or statement made at a pre-trial hearing should be admissible in the trial proceedings. We note the Victorian legislation provides that nothing said by the accused person at a pre-trial hearing may be used in the trial or made the subject of any comment at the trial.[44]

8. The Need for Adequate Preparation

9.61 The defence and prosecution lawyers who are to appear in the trial will need to be briefed sufficiently far in advance of the date of hearing to ensure that pre-trial proceedings are of benefit. Advance briefing must occur in order to allow adequate preparation firstly for the purpose of determining whether there should be a pre-trial hearing and secondly to enable an effective contribution to be made at such a hearing. It is nevertheless desirable that a pre-trial hearing should occur at a time which is reasonably proximate to the date on which the trial is listed.

9. Pre-Trial Proceedings Before Court Officials

9.62 The Commission raises for consideration the question of whether preliminary proceedings in the higher criminal courts, such as first appearances by accused people, mentions to list or confirm a date for trial and pre-trial hearings, should be capable of being conducted by an officer of the court of subordinate ranking to a judge. This officer could deal with various matters of a relatively routine nature but should have

the power to refer to a judge for determination any matter of sufficient importance or difficulty. The Commission is presently divided in its views on this question and would welcome submissions as to the desirability and practicality of the proposal.

10. Pre-Trial Decisions Not Binding on Trial Court

9.63 Decisions made by a judge at a pre-trial hearing should not be binding upon the judge presiding at the trial, since the relevant circumstances may have changed. In order to reduce the likelihood of this occurring and the possibility of conflicting decisions, pre-trial hearings should be held as close as is reasonably practicable to the date of the trial and should ideally be conducted by the judge or magistrate who is to preside at the trial. We raise for consideration the question whether a decision made at a pre-trial hearing to reject evidence should be effectively binding on the court of trial by providing that the party seeking to tender that evidence should, because of the pre-trial decision, be prohibited from doing so.

11. Pre-Trial Decisions May be Reviewed on Appeal

9.64 The Commission raises for consideration the question whether, where a court conducting a pre-trial hearing makes a decision or order which substantially affects the presentation of the case for the prosecution or the defence, the party disadvantaged by the decision or order should have the right to have it reviewed by a court of appropriate jurisdiction.[45]

12. Voir Dire Hearings at Committal Proceedings

9.65 The Commission raises for consideration the question whether, if committal proceedings are to be continued in their current form, there is any justification for the conduct of voir dire hearings in such proceedings.

13. Reference of Voir Dire to Prospective Court of Trial

9.66 The Commission raises for consideration the question whether a magistrate conducting committal proceedings where there is likely to be a lengthy voir dire hearing should have the power to refer the matter to the prospective court of trial, the District Court or the Supreme Court as the case may be. That court should then hear the matter, make a ruling on the question of admissibility, and refer the matter back to the Local Court so that the committal proceedings may continue. The decision made by the higher court on the question of admissibility would bind the lower court. The higher court's decision should be generally binding also on the court of trial so that the problem of litigating the same issue twice in the same court is avoided. We emphasise that this unwieldy procedure would generally only be of value where a voir dire is likely to be a lengthy matter.

Footnotes

1. Legislation which requires the disclosure before trial of a defence based on alibi is an exception to the general rule. Crimes Act 1900 s405A. For a further discussion, see Chapter 5.

2. For further discussion of disclosure by the prosecution, see Chapter 4.

3. From a submission to the Joint Courts Committee on Rules in Criminal Courts. The Commission gratefully acknowledges his Honour's assistance in providing us with this and other materials on the subject of pre-trial procedure in various jurisdictions both in Australia and overseas.

4. For further discussion of time limits for the prosecution of criminal offences, see Chapter 3 and for listing procedures, see Chapter 8.

5. District Court (Procedure) Amendment Act 1984 s171.

6. Supreme Court Rules Part 75, Rule 11(4) and (5)

7. In Adams v Anthony Bryant & Co Pty Ltd and Others (1986) 67 ALR 616 at 622, Wilcox J (Federal Court of Australia) said that experience under the Supreme Court (Summary Jurisdiction) Act 1967 shows the benefit of providing witnesses' statements before trial.

8. The other was the introduction of time limits. The Victorian rules are discussed at paras 3.30-3.32.

9. J H Phillips QC (as he then was) "The Role of the Director of Public Prosecutions", a paper presented to the Conference of the Australian Society of Labor Lawyers, Brisbane, 2 July 1983 at 809.

10. Supreme Court (Pre-Trial Criminal Procedure) Rules 1984 and County Court (Pre-Trial Criminal Procedure) Rules 1984.

11. The schedule is reproduced in the Appendix to this chapter.

12. See detailed discussion in paras 3.30-3.32.

13. P A Sallmann for Shorter Trials Committee Report on Criminal Trials (Melbourne, September 1985).

14. See Crimes Act 1958 (Vic) s391A.

15. P A Sallmann, note 13 at 115.

16. Id at 111-114. This system is an adaption of that put forward by a working party in England headed by Lord Justice Watkins, see para 9.29. See also powers of the Supreme Court of New South Wales under Crimes Act 1900 s567.

17. Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates Court (James Committee) (HMSO Cmnd 6323, 1975) at paras 266-268.

18. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat 1980) at 45-46.

19. UK Criminal Bar Association Discussion Papers on the Shortening of Criminal Trials in the Crown Court (1980) at 18ff.

20. P A Sallmann, note 13.

21. R v Simmonds [1969] 1 QB 685 at 691-692. See generally UK Criminal Bar Association "Reform of the Trial Process" (1981) 145 Justice of the Peace 34; A Samuels "Pre-Trial Review in the Crown Court" (1982) 146 Justice of the Peace 677; "Pre-Trial Conferences" (1982) 120 Law Society Journal 132.

22. Lord Justice Watkins' Working Party on the Criminal Trial: Report to the Lord Chief Justice (November 1982 revised November 1983) at 2 para 5.

23. Law Reform Commission of Canada Working Paper Discovery (WP No 4 1974). See also R Werbicki "The Pre-Trial Conference in the Supreme Court of Ontario" (1981) 59 Canadian Bar Review 485.

24. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat 1980) at 45-46.

25. Id at 47.

26. Id at 48-49.

27. Ibid.

28. Federal Rules of Criminal Procedure Rule 17(1).

29. The American Law Institute "A Model Code of Pre-Arraignment Procedure" proposed official draft, text and commentary (1975) Article 320.

30. Id commentary on Article 320 at 584.

31. The Hon R S Watson "Review of the Criminal Law of the Commonwealth" (July 1986). His Honour is also the author of the standard text Australian Criminal Law: Federal Offences (Law Book Company, Sydney 1985).

32. Draft Criminal Code for the Commonwealth contained in Watson, note 31, s283.

33. R v Simmonds [1969] 1 QB 685.

34. A Samuels "Shortening Jury Trials" (1976) 126 New Law Journal 988. The suggestion is made that this task be done by a senior court administrator or a retired lawyer.

35. UK Criminal Bar Association, note 13 at 40.

36. See "Local Court Hearing Delays" Hansard (NSW), Legislative Assembly, 3 December 1986, at 7993-7994.

37. See articles cited in A Desbruslais "Pre-Trial Disclosure in Magistrates' Courts: Why Wait?" (1982) 146 Justice of the Peace 384; G M Barnatt "Section 48 - A Viable Alternative?" (1983) 147 Justice of the Peace 117; S Hill "Pre-Trial Reviews" (1984) 148 Justice of the Peace 39; S Hill "A Study of Pre-Trial Reviews in Wolverhampton Magistrates' Courts" (1984) 148 Justice of the Peace 680; J Baldwin "Research on Advance Disclosure in Magistrates' Courts" (1986) 149 Justice of the Peace 179. See also J Baldwin "Defence Disclosure in the Magistrates' Courts" (1986) 49 Modern Law Review 593.

38. L J Connor "Pre-Trial Reviews: The Curate's Egg" (1985) 149 Justice of the Peace 185.

39. J Baldwin "Pre-Trial Justice: A Study of Case Settlement in Magistrates' Courts" (1985). See also book review by S Uglow [1985] Criminal Law Review 755.

40. Crimes (Procedure) Act 1983 (Vic) s5, inserting Crimes Act s391A.

41. New South Wales Law Reform Commission Research Report The Jury in a Criminal Trial: Empirical Studies (RR 1, 1986) paras 5.21, 5.22 6.45.

42. See generally discussion at paras 7.39-7.40.

43. See eg Furnell v Betts (1978) 20 SASR 300 at 302 per Wells J; Egan v Bott (Unreported, Supreme Court of Victoria, Beach J, 15 February 1985) noted in Victorian Bar News, Winter 1985 at 30.

44. See also Justices Act 1902 s51A which provides that where an accused person pleads guilty at committal proceedings this fact is not admissible at a later trial.

45. See R v Olsen [1982] 1 NZLR 578.

Appendix

Schedule to Supreme Court and County Court (Pre-Trial Criminal Procedure) Rules 1984

The judge presiding at a pre-trial hearing may ask the parties the following questions:

1. Has the presentment been filed?

2. Has a copy of the presentment been received by the accused or his representatives?

3. Is any amendment of the presentment likely to be sought by the prosecution?

4. Are further particulars of the presentment likely to be sought by the accused?

5. Is there to be any application to sever the presentment and, if so, what is the application likely to be?

6. Is there to be an application for a separate trial by any and which accused?

7. Does the accused presently intend to plead Guilty or Not Guilty to any and which count(s) in the presentment?

8. Is there any possibility of a change of plea?

9. Is it intended there will be a conference between counsel for the Director of Public Prosecutions and counsel for the accused?

10. Does the prosecution propose to call any additional evidence?

11. Has the prosecution notified the accused and/or his representatives of any additional evidence and if it intends to do so when is it proposed to furnish a proof of evidence?

12. What is the probable length of the trial?

    (a) Prosecution estimate.

    (b) Accused estimate.

13. Is any point of law or of admissibility of evidence likely to be raised before the trial commences? If yes, of what duration are the matters to be raised likely to take?

14. Does the accused or the prosecution intend to raise a special issue? e.g., unfitness to plead, change of venue.

15. Does the accused intend to raise a special plea? e.g. lack of jurisdiction; autrefois convict; autrefois acquit; etc.

16. Does the accused intend to rely upon an alibi not yet disclosed in conformity with the Crimes Act?

17. Do the parties anticipate any problems as to the availability of witnesses? If yes, give details.

18. (a) What admissions of fact are sought by the prosecution?

    (b) Is the accused prepared to make the admissions sought or any of them?

    (c) What admissions of fact are sought by the accused?

    (d) Is the prosecution prepared to make the admissions sought or any of them?

19. Does any difficulty arise about photographs or plans and formal proof of them?

20. Is any order sought for the inspection of prosecution exhibits or other evidentiary material in the possession of the prosecution as to which a question may arise in the course of the trial?

21. Is any order sought for the preservation or detention of any document or thing relating to the trial?

22. Is any order sought for the production before the court of any document, tape recording or thing relating to the trial?

23. Does any party propose to deliver to the other party a notice to admit in respect of anything not covered by question No.18?

24. What arrangements have been made for Counsel to hear any tape recordings in the custody of the prosecution and to be provided with any transcript thereof?

25. Does any party intend to apply for a view, and if so, where and at what stage of the trial?

26. Will an interpreter be required during the trial?

27. Are there any other significant matters which might affect the proper and convenient trial of the issues?

Chapter 10

Finding "No Bill"

I. INTRODUCTION

10.1 The procedure for directing that "no bill" be found in criminal cases has become a question of considerable public interest in recent years. In Part II of this chapter we explain the manner in which this procedure operates in practice. In Part III we identify some of the problems associated with that procedure. In Part IV we examine possible changes to th "no bill" procedure and in Part V we make some tentative proposals for reform. At the outset we should make the point that the "no bill" procedure is essentially concerned with the exercise of the discretion to prosecute. The power of the prosecuting authority to find "no bill", or some equivalent power, is a well established feature of every jurisdiction which has a criminal justice system resembling our own. Since the "no bill" procedure has no application to criminal prosecutions which are finalised in the Local Courts, this chapter of the Discussion Paper is exclusively concerned with indictable offences dealt with by the higher courts. We should note that in cases prosecuted by the police in the Local Court, legal advice may be furnished to the Commissioner which results in the informant either seeking leave to withdraw the prosecution or offering no evidence to the Local Court. As a matter of principle we consider that the same general approach as we outline in this chapter should be made to terminating the prosecution of offences in courts of summary jurisdiction.

II. THE CURRENT PRACTICE IN NEW SOUTH WALES

A. The Procedure Followed in Finding a Bill

10.2 Once an accused person has been committed by a Local Court for trial in either the District Court or the Supreme Court, the role of the Police Prosecuting Branch ceases. The Solicitor for Public Prosecutions assumes the responsibility for preparing the case for trial. When the transcripts of the committal proceedings become available, the matter is assigned to a legal officer in the office of the Solicitor for Public Prosecutions who prepares a summary of the case. This summary is then forwarded together with the "committal papers" (the transcript and the statements of any prospective witnesses not called at the committal hearing) to a Crown Prosecutor. Crown Prosecutors are appointed by the Governor to bring prosecutions on behalf of the Crown in respect of offences which may be tried in the higher courts.[1] The Crown Prosecutor has two distinct roles: the first is as an advocate for the Crown in the higher courts, the second is as an "officer of the Crown's impartial justice".[2]

10.3 An accused person is brought to trial by means of an indictment prepared by the Crown Prosecutor. On presentation, this document vests jurisdiction to hear the matter in the court of trial. It is the Crown Prosecutor, in the role of an "officer of the Crown's impartial justice", who must decide whether an indictment is to be filed and what charges or "counts" are to be included in any indictment. In the usual case, these decisions are made on the basis of the transcript

of the committal proceedings (known as "the depositions") and any other evidence which may have become available. Other factors such as the desirability of putting the accused person on trial may be taken into account. In framing the indictment, the Crown Prosecutor is not limited to the charges upon which the accused person has actually been committed for trial.

10.4 In New South Wales the process described in the previous paragraph is commonly known as "finding a bill". At present only a Crown Prosecutor, the Attorney General or the Solicitor-General has the power to "find a bill" although this power will also be exercised in future by the Director of Public Prosecutions. Once a bill has been found, the matter is ready to be listed for trial. In some matters where a person has been committed for trial, the Crown Prosecutor, after reviewing the evidence, forms the opinion that no indictment should be filed. In such cases the Crown Prosecutor recommends to the Attorney General that "no bill" be found. In other cases, where a bill has been "found", there may be a later decision to take no further proceedings. We use the expression "no bill" in its common usage, that is to refer to both situations. In other jurisdictions, the Attorney General's decision to take no further proceedings is described as "entering a nolle prosequi". Strictly, this is a formal document filed in court to terminate proceedings which have already been instituted.

10.5 The indictment is not presented to the court of trial until the accused person is actually called into court by a court officer. When the accused person appears, the Crown Prosecutor says "Your Honour, I present an indictment against the accused". The formulation of the indictment and the decision to present it to the court are the exclusive concern of the prosecuting authority. The court has no role to play in this aspect of the criminal process.

B. Where "No Bill" is Recommended by the Crown Prosecutor

10.6 If "no bill" is recommended by the Crown Prosecutor, he or she marks the papers to this effect and prepares a report giving reasons for this opinion. This report and the relevant papers are then sent to the most senior of the Crown law officers, the Solicitor-General and the Crown Advocate. Depending on the nature of the case, one or both of the senior Crown law officers will consider it. Whether they agree or disagree with the recommendation made by the Crown Prosecutor, their advice as to what course should be taken is given to the Attorney General. It is ultimately a matter for the Attorney General personally to decide whether a prosecution will proceed. This is a direct consequence of the fact that prosecutions in the higher courts are brought in the name of the Queen. The Attorney General, as the Minister of the Crown responsible for legal matters, represents the Crown. Again depending on the nature of the case, but frequently where there is a recommendation for "no bill" or where there is disagreement between the senior Crown law officer and the Crown

Prosecutor, the senior Crown law officer may present a detailed advising to the Attorney General. Whilst the ultimate decision is always a matter for the Attorney General personally, it is extremely rare for the Attorney General not to accept the advice of the Solicitor General or the Crown Advocate as to whether a matter should be proceeded with or abandoned.

C. Applications Made by or on Behalf of the Accused Person

10.7 At any stage after the accused person has been committed for trial until (theoretically at least) the verdict is given on the question of guilt, the accused person is entitled to make an application to the Attorney General requesting that a direction be made that no further proceedings be taken, that some charges be discontinued, that the prosecution should be brought on a different charge or that a particular prosecution be abandoned entirely. This is commonly, if imprecisely, referred to as a "no bill" application. Whilst the legal character of such an application is not entirely clear, they are nevertheless made frequently. There is (again theoretically) no limit to the number of "no bill" applications which can be made.

10.8 In the normal course of events, a "no bill" application is a letter prepared by the accused person's lawyer setting out the grounds upon which the application is based and the supporting arguments. However, the application may simply be a formal request expressed in a single sentence.

10.9 Applications of this kind are not limited to contested cases. Where an accused person pleads guilty before a magistrate and is committed to a higher court for sentence, an application that no further proceedings be taken may be made before the case is heard by the higher court.[3] The grounds on which such an application might be based are naturally limited since, of the several grounds for "no bill" applications listed in para 10.13, only some apply where the guilt of the accused person is admitted.

10.10 Whenever a "no bill" application is made by or on behalf of the accused person, a Crown Prosecutor will be requested to consider it and make a recommendation as to the action which should be taken. In a procedure which is the same as that described in para 10.6, this recommendation is considered by the senior Crown law officers who then advise the Attorney General whether the application should be acted upon or rejected. Where the senior Crown law officer agrees with the Crown Prosecutor's recommendation that the matter go to trial, this advising may be expressed in very brief terms. If there is a decision that no further proceedings be taken, this is again commonly though perhaps incorrectly referred to as a "no bill" decision.

10.11 The fact that an application of this kind can be made at any time has already been noted. At one time, it was not unusual for accused people or their lawyers to make "no bill" applications shortly before the date upon which the case was listed for trial. In complicated cases, and in particular

where substantial arguments were set out in the application, a late application was a tactic available to delay the hearing of the case. Since the application would take some time to process, it could not always be considered in the brief time available before the trial was due to commence. The prosecuting authorities had no alternative but to vacate the trial date and await the Attorney General's decision as to whether the trial should proceed or not. We shall say more about this practice later.

D. Other Circumstances Where "No Bill" is an Issue

10.12 The circumstances in which the Attorney General is called upon to make such a decision are usually those described above, that is, where a Crown Prosecutor recommends that "no bill" be found or where an application is made by or on behalf of an accused person that no further proceedings be taken. It may occur, however, that a witness involved in a case may wish the proceedings to be terminated. That person is also entitled to make a "no bill" application as indeed is any member of the community.

E. The Grounds Upon Which a Recommendation for "No Bill" May be Made

10.13 The reasons why cases are "no billed" are various and cannot be comprehensively stated. Nevertheless, it is possible to identify some of the more common grounds by way of example:

* The magistrate was in error in deciding that there is evidence capable of supporting a conviction. This may be because an essential ingredient in the prosecution case cannot, by relying on the evidence given at the committal proceedings, be proved.

* The magistrate was in error in not deciding that, on all of the evidence given at the committal proceedings, a jury would be unlikely to convict.

* Even though evidence in addition to that given at the committal proceedings is available, it would still be insufficient to prove an essential ingredient in the prosecution case.

* Even though there is evidence upon which a jury may convict, it would be contrary to the public interest to proceed with the prosecution because there is no certainty of conviction and the expense involved does not justify the continued prosecution.

* There are extenuating and exceptional circumstances relating to the accused person which make it contrary to the interests of justice to continue with a prosecution, for example, the accused person is either very old, very young or in particularly poor health.

* The conduct of the trial would result in disproportionate harm being suffered by a witness or other innocent person.

* It would be contrary to the interests of justice to prosecute the accused person. Decisions based on grounds of this kind will often reflect government policy on a particular social or moral issue.

* The accused person should be granted immunity from prosecution in exchange for giving evidence against people accused of more serious crimes.

* Evidence which is crucial to the prosecution case cannot be presented to the court of trial, for example, where a prosecution witness disappears between the time of committal and trial, or is unwilling to give evidence at the trial.

* The interests of the community would not be served by continuing the prosecution because a considerable time has elapsed since the alleged offence was committed, or the prosecution may be lengthy and therefore expensive.

* After the order committing the accused for trial, fresh evidence has come to the notice of the prosecuting authority suggesting that prosecution would be inappropriate.

* The accused person is already serving a substantial term of imprisonment and it is unlikely that his conviction on an outstanding charge would result in that term of imprisonment being increased. This approach will normally be limited to outstanding matters of relative insignificance. For example, a person may be charged with associated offences of armed robbery and car stealing. If the accused person pleads guilty to the charge of armed robbery and receives a long term of imprisonment, prosecution for the car stealing may not proceed if it is to be contested.

* At the first trial of the accused person, the jury failed to agree on a verdict, and a retrial would be unlikely to result in a verdict of guilty. Where two successive trials have both resulted in a failure to agree, it is almost certain that a third trial would not be held.

Although in some cases the grounds may be obvious, the basis upon which the Attorney General decides to prosecute or to discontinue a prosecution is not usually made public, nor is it communicated to the accused person.

F. The Consequences of Finding "No Bill"

10.14 In practice a "no bill" usually operates as if the accused person had been discharged by the court. A person held in custody awaiting trial will be discharged in respect of an offence which is "no billed".[4] Although a matter which has been "no billed" can be reactivated, this is virtually never done. The circumstances in which it would be likely to occur are limited. Firstly, where additional and incriminating evidence comes to light after "no bill" has been found, the decision may be reversed. Secondly, it is doubtful whether a decision to "no bill" a case is binding on successive Attorneys General. An incumbent Attorney General may take a different view from a predecessor as to the propriety of the decision not to prosecute a particular case.

G. Statistical Information

10.15 The most recent statistics available to the Commission are those from 1982.[5] The statistics reveal the outcome following committal for trial or sentence. In that year 5693 people were committed for trial in the higher criminal courts of New South Wales. Of those, 869 did not proceed to trial or sentence. This represents 15.3% of those committed to a higher court Of the 869 cases not proceeded with, 372 cases or 6.5% (of 5693) did not proceed "for various reasons" including the fact that "no bill" was found. From the statistical data available, the Commission cannot specify how many cases among the 372 were not proceeded with because the Attorney General decided that a "no bill" should be found.

10.16 The Commission understands that a large percentage of "no bills" follow from applications by accused people. The remainder are cases where the initiative to abandon proceedings is taken by the Crown. The absence of comprehensive information regarding the role played by the "no bill" procedure leaves a significant gap in public knowledge of the administration of criminal justice.

III. PROBLEMS ASSOCIATED WITH "NO BILL" PROCEDURE

10.17 The operation of the "no bill" procedure in New South Wales raises a number of issues:

* the efficiency of the committal system and the workload in processing "no bill" applications;
* the secrecy surrounding "no bill" decisions in that reasons for such a decision are never given;
* the use of late "no bill" applications as a delaying tactic;

* the inability of the Attorney General to intervene until the accused person has been committed for trial;

* the possible ignorance on the part of the accused person of his or her right to make a "no bill" application;

* the indeterminate nature of a "no bill" decision; and

* the fact that there is no possibility of judicial review of a "no bill" application.

A. The Efficiency of the Committal System

10.18 The sheer number of cases which result in "no bill" being found after committal for trial suggests that the committal system is ineffective, at least in one aspect of its operation. This is not to be taken as a reflection upon the magistrates who conduct committal proceedings. Some of the grounds which form the basis of a "no bill" are not directly connected with the basis for committal. However, there are a large number of cases which magistrates decide are suitable for trial and which Crown law officers ultimately decide to abandon. The anxiety suffered by an individual who is committed for trial but not finally tried is a cause for concern. In addition, there is an enormous administrative workload involved in determining whether to "find a bill". The prosecution resources now devoted to reviewing decisions to commit for trial are substantial. Where there is a decision not to proceed, in many cases the committal proceedings may have proved to be expensive and unnecessary litigation. On the other hand, the decision to "no bill" may be based on a factor which is revealed by the committal proceedings.[6]

B. The Failure to Give Reasons for a "No Bill" Decision

10.19 Where a "no bill" application is rejected or where a "no bill" is found, the absence of reasons for the decision is a frequent source of complaint. This practice runs counter to the general principle that openness should be a feature of the criminal justice system. The "secret" operation of the "no bill" procedure adds to the mystique surrounding it. Where reasons are not given, an unnecessary and unhealthy suspicion arises as to the manner in which the system operates.[7]

10.20 An article published in a Sydney newspaper illustrates the impact of the failure to give reasons. The article, one of a series, examined a number of fatal car accidents, and related that a motorist, apparently responsible for a fatal accident, was not prosecuted.[8] Because no explanation was given, unwarranted speculation as to the quality of the administration of justice generally could have arisen. In fact, the grounds for the decision were reasonable and uncontroversial, namely, that the law as it was then expressed meant that the prosecution could not prove, in the particular circumstances of the case, that the accused person had committed an offence of the type with which he was initially charged.[9] The unfortunate impression which the article made on the public could have been avoided if the reasons for the decision not to prosecute had been available for publication.

10.21 For those people directly affected by the decision, the failure to give reasons may be a source of concern and dismay. There may be witnesses, particularly the alleged victim, who wish to know why the prosecution was abandoned. The police, who were initially responsible for charging the accused person, may feel resentful that a prosecution was abandoned for undisclosed reasons. As a result they receive little guidance for dealing with similar situations which may occur in the future. The Commission's view is that there is, in general, no need to maintain this policy of secrecy and the resulting aura of mystery which it creates.[10]

C. The Use of Late Applications as a Delaying Tactic

10.22 In the past it has been possible for an accused person to frustrate the progress of trial proceedings by making a late "no bill" application. Since resources are currently adequate to deal with late applications, this tactic is not used as frequently as it was some years ago and in practice the problem does not present itself. Nevertheless, in exceptional cases, the accused person may use the procedure in an attempt to ensure that the case will not proceed on the day it is listed for trial. The right to make an application for "no bill" should never be available as a delaying tactic. This is not to say, however, that all late applications are without merit.[11]

D. Ignorance on the Part of the Accused Person of the Right to Make a "No Bill" Application

10.23 The vast majority of applications for "no bill" are made by lawyers acting on behalf of accused people. There is no formal means by which an accused person is informed of the right he or she has to make such an application. For practical purposes, recourse to this right is dependent upon the accused person being legally represented and upon the standard of that representation.

E. The Indeterminate Nature of a "No Bill" Decision

10.24 It might be argued that it is unfair to leave an accused person uncertain of his or her position after "no bill" is found. If a court had heard the matter, the accused person may well have been acquitted if the ground for finding "no bill" was the belief that the evidence was insufficient to support a conviction. The acquittal would be effective for all time and the accused person could not be tried for the same offence again. It is clearly desirable that criminal prosecutions be brought to a conclusion and that this occur within a reasonable time so as to avoid prolonging the consequences of pending criminal litigation.

10.25 The uncertainty as to whether a "no bill" decision may be altered by the Attorney General or is binding upon successive Attorneys General may result in injustice.[12] We repeat the example of a person charged with associated offences of armed robbery and car stealing.[13] Theoretically the car stealing charge that is "no billed" can be revived at any time

subject to the court's power to stay proceedings on the ground that they are an abuse of process. In practice a "no bill" decision invariably results in no further proceedings ever being taken. However, because the charge is "no billed", the accused person is not formally acquitted and the future of the matter remains uncertain. After serving the sentence for armed robbery, the accused person could be proceeded against on the car stealing charge. In the Commission's view, this would be manifestly unfair. A greater protection is required than that provided by the court's inherent power to stay proceedings which are regarded as an abuse of the court's process.

F. Judicial Review of a "No Bill" Decision

10.26 The decision to "no bill" a case is not presently reviewable by a court. It might be argued that such administrative decisions should always be open to public scrutiny although such review would add to the delay and expense involved in resolving prosecutions. This argument is given greater force by the practice of not disclosing reasons, which allows for suspicion to develop that the decision is not based on legitimate grounds.

VI. REFORMING THE "NO BILL" PROCEDURE

10.27 A significant number of cases result in "no bill" being found. The decision made by a magistrate to commit an accused person for trial is therefore not acted upon by the prosecuting agency in a significant number of cases. This situation prompts the following suggestions for change:

* The decision as to whether a prosecution in an indictable case will proceed could be made before the commencement of committal proceedings.

* The criteria for committal for trial could be the same as those used by the prosecuting agency in determining whether or not to launch a prosecution.

Each of these suggestions deserves thorough examination.

A. The Time for Making a Decision to "No Bill"

10.28 The issue of the time for deciding whether to direct that "no bill" be found involves an examination of the fundamental features of pre-trial procedure. In the following paragraphs we consider the advantages of this decision being made prior to the committal proceedings. We emphasise, however, that our tentative view, explained in Chapter 7, is that one of the means of improving procedure in that part of the criminal process between charge and trial is to replace committal proceedings with an alternative procedure. The discussion in these paragraphs should be read in that light.

10.29 There would be a number of advantages in a "no bill" decision being made before committal proceedings. Firstly, the number of cases requiring committal proceedings could be significantly reduced. An accused person should not have to face committal proceedings where this is unwarranted. Many prosecutions which are not destined to proceed beyond the committal stage could be abandoned before committal proceedings even commenced. Quite apart from saving time and money, a reduction in the number of committal proceedings would provide some relief from the congestion which currently exists in the Local Courts. This should mean that the time it takes for committal proceedings to be listed for hearing will be shortened.

10.30 Secondly, any further "no bill" procedure which may occur after committal for trial would, in most cases, be a mere formality. All that would be required would be a review of the earlier decision made in the light of the committal proceedings. This should ultimately reduce delays occurring between the committal for trial and the trial itself.

10.31 One argument which could be raised against this proposal is that the magistrate conducting the committal proceedings would be less inclined to subject the case presented by the prosecution to adequate and independent scrutiny. There might be a tendency for the committing magistrate to "rubber stamp" the prosecutor's decision that there is a case suitable for trial. On the other hand, the current practice of some magistrates is criticised on the ground that they are inclined to commit cases for trial too readily in the anticipation of a thorough examination of the case being made by the prosecuting authority before a decision to proceed to trial is made.

10.32 The implementation of such a system has much wider ramifications than its effect on the "no bill" procedure. It would represent a significant departure from the current practice of the prosecuting authorities. In serious cases, those in which committal proceedings are to be conducted, the agency responsible for prosecuting the case in the higher courts would have to become involved at a much earlier stage than at present. It would be necessary to examine the available evidence after a person is charged and then decide

whether to commence committal proceedings. The issues raised here are fundamental to the organisation and function of the prosecuting agency. The recent decision to establish the office of the Director of Public Prosecutions, which is discussed generally in Chapter 12, clearly permits a much more decisive role to be played by the prosecuting authority during the early stages of the criminal process.

B. The Criteria for Committal

10.33 Problems are inevitably encountered when there is a significant divergence between the criteria for committal applied by the magistrate to determine whether to commit for trial and the criteria applied by the prosecution in deciding whether or not to prosecute. The respective criteria can never be identical since the role of a magistrate in deciding whether to commit for trial is different from that performed by the prosecuting authority in deciding whether to prosecute a particular case. It would be clearly inappropriate for a magistrate who conducts committal proceedings to consider some of the grounds listed at para 10.13 which may result in "no bill" being found.[14] Moreover, the times at which the two decisions are made are usually separated by a long period during which the relevant circumstances may have changed. Ironically, the very length of the time between committal and the decision whether or not to prosecute may itself be a ground for making a decision to "no bill".

10.34 The discretion to prosecute should always reside with the prosecuting agencies and not with the courts. However, it does not seem to us improper that the courts should have some influence over the decision to prosecute. The magistrate who hears committal proceedings has a unique opportunity to assess the evidence and to consider the wisdom of persevering with a prosecution in the higher courts. If committal proceedings are regarded as being administrative rather than judicial in nature,[15] then part of that administrative function should be to filter out those cases where a trial would be inappropriate because there is not sufficient likelihood of conviction. Whilst we do not suggest that the courts should be responsible for making the ultimate decision as to whether a case should be brought to trial, it does seem that magistrates could play a more significant role in ensuring that the prosecution arrive at an informed decision. One commentator has criticised the situation in the following words:

> The structure of prosecution thus creates two tiers of evidentiary adequacy: sufficiency of evidence, and reasonable prospect of conviction ...
>
> If cases are to be removed before trial, it is desirable that as far as possible this is done at an open hearing rather than by secret administrative decision. There is a strong case for re-examining the criteria presently established for committal. More basically, it would appear that in too many cases persons are committed for trial for offences when there is very little evidence. The structure of the system with final responsibility for the decision whether or not to file an indictment resting after committal with prosecution authorities must provide a real temptation to magistrates and justices to simply commit and leave the decision to the prosecution.[16]

10.35 Since the policy of the prosecution authority is such an important aspect of the process of criminal justice, we think it desirable that it should be published. This has been done by the Office of the Commonwealth Director of Public Prosecutions in a valuable document which explains the functions of the office and reveals in general terms the grounds for making decisions in the prosecution process.[17] Such a publication is likely to increase the level of public understanding of the operation of the system of criminal prosecution. It may also be useful where a magistrate hearing committal proceedings makes a decision to commit for trial but is satisfied from the evidence presented in court that a particular state of affairs exists which the prosecuting authority has publicly acknowledged is a matter to be taken into account in making the decision to prosecute. It is not for the magistrate to decide on matters of prosecution policy, but the magistrate may draw attention to factors which are relevant to the implementation of that policy.

C. Giving Reasons for a "No Bill" Decision

1. Where "No Bill" is Found

10.36 Although it has been the conventional practice for centuries, it is not immediately clear why reasons are not given for "no bill" decisions. Whilst there are clearly some cases where the publication of reasons would be contrary to the public interest, in most cases there does not appear to be a pressing need for confidentiality or secrecy. In a recent case the Commonwealth Director of Public Prosecutions made a public statement explaining the reasons why a case which had attracted widespread publicity was "no billed". In our view, this public

explanation not only enhanced community understanding of the criminal justice system, but also was probably in the best interests of the accused person.[18] The practice of giving reasons for a decision to "no bill" need not involve disclosure of delicate or sensitive information where harm may be done by such disclosure.

10.37 The Commission's tentative view is that reasons for "no bill" decisions should be given. A general rule could be established requiring the reasons to be "made public" in the sense that they are communicated to the following:

* the accused person;
* the investigating police;
* the victim (if any) and civilian witnesses; and
* the court to which the accused person has been committed for trial.

The general rule might be made subject to the exception that reasons need not be disclosed where disclosure would be contrary to the public interest. The circumstances in which disclosure should not be made would include:

* where the reasons involve an adverse reflection on the credibility or reputation of particular witnesses;
* where there are related civil or criminal proceedings either pending or proposed and the disclosure may prejudice those proceedings;
* where there is a possibility that the prosecution will proceed if additional evidence becomes available;
* where disclosure would lead to the identification of an informant;
* where the disclosure would threaten national security;

* where disclosure would result in an unjustifiable invasion of the privacy of any person;

* where disclosure might result in violence or intimidation being directed towards any person.

10.38 We also consider that the prosecuting authority should be required to publish the number of "no bill" applications that have been made, the number of applications that have been granted and the number of cases in which an accused person has not been brought to trial because of a decision made at the instigation of the prosecuting authority. It is the practice of the Commonwealth Director of Public Prosecutions to report this information.[19] Whilst the recent New South Wales legislation establishing the office of Director of Public Prosecutions provides that the occasions on which the Attorney General directs that no further proceedings be taken must be publicly disclosed,[20] there is no equivalent provision when the same action is taken by the Director of Public Prosecutions. We consider that this information should be disclosed in the Director's Annual Report to the Attorney General.[21]

2. Where There is a Decision to Proceed to Trial

10.39 The Commission is of the tentative view that an accused person should be given the reasons for a decision to proceed with a trial after the accused person has lodged an application for a direction that no further proceedings be taken. We believe that reasons should be given in these circumstances in order to preserve openness as a feature of the criminal justice

process. We acknowledge that the workload of the prosecuting agency may be increased by this requirement, but we do not envisage that the reasons need be lengthy. The publication of the policy of the prosecution authority in determining "no bill" applications may be sufficient to deal with most cases. The Commission also acknowledges that the decision in question is an administrative one made by the Attorney General on the advice of a senior Crown law officer. The confidentiality of the advice given by the senior Crown law officer may need to be maintained in some cases. Therefore, we suggest that the general rule requiring that reasons be given may be avoided in any case where disclosure may be harmful to an individual or contrary to the public interest.

10.40 One of the arguments against giving reasons is that the practice may ultimately lead to increased delay and expense. It would be undesirable if providing reasons gave rise to a rash of interlocutory proceedings. According to the terms of our general proposal, the decision to prosecute should be open to challenge, but only in the court of trial and by way of the normal appeal process which is available after a trial.[22] An accused person has an inherent right to challenge the propriety of a prosecution in the court of trial.[23] However, such a challenge will have little prospect of success where the appropriate pre-trial procedures have been followed and the decision to prosecute has been made by a person with lawful authority.

10.41 There is a further argument in favour of publishing reasons. Most applications for "no bill" are made by lawyers acting on behalf of the accused person, and it is likely that it will be lawyers who will make such applications in future cases. If they are informed as to why an application was rejected, then the number of frivolous or groundless applications may be significantly reduced. The Commission is of the view that the criminal justice system has an educational role to perform. Reasoned decisions contribute towards fulfilment of this role for the benefit of the public generally and the legal profession in particular.

10.42 The giving of reasons is also consistent with the general principles of freedom of information.[24] If such a course is considered desirable, and the Commission thinks that it is, then accused people or others with a legitimate interest should have enforceable rights to obtain this information. An appropriate precedent is to be found in the Commonwealth Social Security legislation which provides that reasons should be given on request by people who have been refused benefits under the social security system.[25] We readily acknowledge that circumstances may exist which make the publication of reasons undesirable, but we would regard this as an exception to the general rule.

D. The Use of Late Applications as a Delaying Tactic

10.43 The simple solution to the problem of late "no bill" applications is to make resources available which can quickly deal with such applications. The current arrangements are in fact adequate. More staff have been deployed to deal with applications lodged "at the eleventh hour" and the level of administrative efficiency has increased. For the first time in many years, there is no backlog of cases awaiting consideration by the senior Crown law officers. Because the filing of a late application is no longer effective as a delaying tactic, the number of applications arriving only a short time before the day listed for trial has declined.

10.44 Even though the present workload is manageable, we recognsie that the practice of giving reasons would probably increase the workload so the question remains whether it should be possible to make such late applications in any event. An unreasonable burden is placed on the senior Crown law officers who are required to process late applications under pressure and sometimes with haste. One option would be to introduce a rule which provides that applications for "no bill" shall not be made later than a specified time before the day listed for trial.

10.45 The Commission's tentative view is that there is no present need for the introduction of a rule such as that described in the previous paragraph. We would emphasise the importance of maintaining resources at a level which provides for the efficient processing of applications. The Commission acknowledges that some late applications are meritorious and

are not motivated by a desire to delay the case. Events may occur in the last few days before trial which may give rise to legitimate grounds for an application. Late applications may also reflect the late stage at which the real preparation for trial was commenced or the fact that legal aid was obtained or a lawyer engaged at the last minute.

10.46 One further option is that, where applications are made within a prescribed time before the day listed for the trial, the prosecution should be entitled to reject the application without being required to give reasons for its decision. This would enable the application to be dealt with more quickly. The Commission does not favour this option. In line with the principles of openness and fairness, reasons for such decisions should be given.

E. Ignorance on the Part of the Accused Person of the Right to Make a "No Bill" Application

10.47 The problem of the accused person being ignorant of the right to make a "no bill" application could be cured by providing that, upon committal, an accused person should be formally advised of the right to make a "no bill" application and of the appropriate time to lodge the application. In a similar way, accused people are currently advised of their right to apply for legal aid and of their obligations regarding notice of an alibi defence. Alternatively, the provision of this information could be made a prescribed part of the pre-trial procedures which we have suggested elsewhere.

Indeed, some of those procedures may avoid the need to resort to a "no bill" application. If the "no bill" procedure is better understood, there may be fewer unmeritorious applications made.

F. The Indeterminate Nature of a Decision to "No Bill"

10.48 In our view, there are four alternative approaches to the status of a "no bill" decision. Each approach contemplates that the court to which the accused person has been committed for trial shall formally discharge the accused person. This approach is consistent with the Commission's tentative proposal in para 7.75 that the effect of an order committing an accused person for trial in a particular court is to give that court jurisdiction. The four options all require that a certificate of "no bill" be signed by the prosecuting agency and filed in the prospective court of trial:[26]

* Once a "no bill" decision has been certified and filed in the court, the "no bill" decision shall be regarded for all relevant purposes as being equivalent to an acquittal. The effect of such an order is that the accused person could not be prosecuted for that offence in the future. The court would need additional powers to acquit without empanelling a jury.[27]

* Once a "no bill" decision has been certified and filed, this should have the same effect as an acquittal at trial subject to the proviso that the case may be recommenced if significant additional evidence becomes available after the decision to "no bill" has been made or where the "no bill" decision has been obtained by fraudulent means.

* Once a "no bill" decision has been certified and filed, the court shall order that the "no bill" decision is equivalent to a discharge at committal proceedings. The effect of such an order would be that the prosecution could be revived at some future time. The procedure would be similar to the dismissal "without prejudice" procedure which is used in many American jurisdictions.

* Once a "no bill" decision has been certified and filed, the court may make orders in such terms and to have such effect as the court thinks appropriate in the circumstances. The court would hear submissions from the prosecution and the accused person as to the nature of the orders which should be made.

10.49 The Commission's tentative view is that a decision to "no bill" a charge should generally be a final determination of the matter. We have formulated the terms of our preferred option, which is essentially the second of those described above, in the summary of tentative proposals at paras 10.54-10.55. In para 10.56 we have proposed a specific rule in the case of "no bill" decisions made in respect of people who agree to give evidence for the prosecution. The latter rule may be regarded as a specific application of the general rule that where a "no bill" is obtained by fraud, the prosecution may be recommenced.

G. Conclusion

10.50 In order for "no bill" applications to be properly processed a great deal of work is required. The "no bill" procedure has been subjected to continuing criticism because of the terms in which the application is made and because the reasons for decisions are not made public. The procedure is, as Sallmann and Willis have written:

> ... a very important power; it is used frequently; it is discretionary, virtually invisible and very few people, even within the legal system are aware of it, and, in particular, of its implications. The scope for misuse is clear; it is an act of faith that the power is used in the public interest ...[28]

We believe that the power to "no bill" is used in the public interest. Because it is a procedure about which little is publicly known, in relatively recent times an unjustified mystique has developed to surround its operation. Expanding the information available about the operation of the procedure would be to the benefit of the public. We consider that the "no bill" procedure should be given greater exposure in order that the public may understand and appreciate the useful and legitimate role which it plays in the administration of criminal justice.

V. SUMMARY OF TENTATIVE PROPOSALS

1. The Power to Find "No Bill"

10.51 The Attorney General should retain the power to direct that a "no bill" be found or that no further proceedings be taken against a person who has been charged with a criminal offence. For present purposes, we use the expression "no bill" to refer to both situations. The power to find "no bill" may be delegated to the prosecuting authority but should not be further delegated. The power to "no bill" may be exercised on the initiative of the Attorney General or the prosecuting authority or it may follow an application made by the accused person.

2. "No Bill" Procedure to be More Public

10.52 As a general proposition, there should be more information disclosed to the public about the operation of the "no bill" procedure. In particular, the policy of the

prosecuting authority for making decisions in the prosecution process should be made public[29] and should include reference to the "no bill" procedure.

3. Number of "No Bill" Applications and Orders to be Disclosed

10.53 The prosecuting authority should publish in an annual report to the Parliament information regarding the number of applications for "no bill" made on behalf of accused people, the number of occasions on which "no bill" has been found and give some general guidance as to the reasons for those decisions. We make specific recommendations regarding the publication of reasons in individual cases below.[30]

4. "No Bill" Certificate to be Filed in Court

10.54 If a decision to "no bill" is made, it should be reduced to writing, signed by the Attorney General or the prosecuting authority and filed with the relevant papers as a matter of record in the prospective court of trial. The accused person should be informed of the decision which should have, subject to para 10.55, the same effect as an acquittal at trial.

5. "No Bill" to be a Bar to Further Prosecution

10.55 The filing in court of a "no bill" certificate should act as a bar to any further prosecution unless the court grants leave to recommence the prosecution upon being satisfied by the prosecuting authority either that there is additional evidence available which justifies recommencing the prosecution or that the decision to "no bill" was obtained by fraudulent means.[31]

6. "No Bill" and Immunity from Prosecution

10.56 Where an accused person has been granted immunity from prosecution on the condition that he or she undertake to follow an agreed course of action, and a "no bill" has been filed in consequence of that agreement, the prosecution may be commenced again if the person granted such a conditional "no bill" does not comply with the terms of the agreement. The accused person would retain the general right to challenge the propriety of the prosecution as a pre-trial motion.

7. The Publication of Reasons for "No Bill"

10.57 The reasons for a decision to enter a "no bill" should be made public unless it is contrary to the public interest to do so. The publication of reasons should be a matter for the discretion of the Attorney General and the prosecuting authority. If, for example, the publication of specific reasons would jeopardise a major current police investigation or create the risk of prejudice in a pending trial or cause unreasonable distress to a member of the public, it would be expected that they would not be published.

8. Notification of Reasons to Victims and Investigating Police

10.58 Where there is a person who can be regarded as the victim of an incident which results in a criminal charge being laid, and there is a subsequent decision to file a "no bill", each person who may be regarded as a victim should be advised of the reasons for the decision unless there is a compelling reason not to disclose this information. The investigating

police should also be advised of the reasons for a decision to "no bill" in order to assist them in the investigation and prosecution of similar cases in the future.

9. Reasons for Refusing "No Bill" Application

10.59 The decision of the prosecuting authority or of the Attorney General that a prosecution should proceed to trial is one which should be made in accordance with the current policy of the prosecuting authority. If that policy is made public, in accordance with the proposal in para 10.52 there should generally be no need to publish the reasons for the decision to prosecute in an individual case, particularly where the publication before trial of the reasons for prosecuting a particular case would be likely to cause prejudice to the accused person.

10. Accused Person to be Informed of "No Bill" Procedure

10.60 We raise for consideration the question of whether, when an accused person first appears before the prospective court of trial after the decision to prosecute has been made, he or she should be informed by the court of the right to make an application to the prosecuting authority for a direction that no further proceedings be taken.

11. "No Bill" Applications Not to be a Delaying Tactic

10.61 The mere fact that there has been an application for "no bill" made by the accused person to the Attorney General and no reply has been received should not of itself preclude the trial from proceeding on the day on which it is listed for hearing in

a higher court. The court of trial should be entitled to adjourn the hearing of the case on the ground that a "no bill" application has been made by the accused person. In deciding whether or not to adjourn the case, the court should determine whether the application is made in good faith or is an attempt to delay the commencement of the trial.

Footnotes

1. Crimes Act 1900 (District Court) s572; Australian Courts Act (Imp) 9 Geo IV ch 83 s5; R v Woolcott Forbes (1944) 44 SR (NSW) 333; 61 WN 219.

2. R Kidston "The Office of Crown Prosecutor" (1958) 32 Australian Law Journal 148.

3. Justices Act 1902 s51A(4).

4. Crimes Act 1900 s358; Justices Act 1902 s51A(4).

5. Australian Bureau of Statistics Higher Criminal Courts in New South Wales (1982). An article in The Sydney Morning Herald of 8 April 1986 at 14 claimed that there were 702 "no bills" in 1984 and 290 in 1985 but the source of this information is not revealed.

6. For a detailed discussion of committal proceedings, see Chapter 7.

7. See eg Annual Report of the Ombudsman (New South Wales) quoted in G Zdenkowski "No Bills in New South Wales" (1986) 11 Legal Service Bulletin 37, see also The Sydney Morning Herald, 18 November 1985 at 11.

8. A series of articles under the general title "Death on the Roads" and written by Lyndsay Simpson was published in The Sydney Morning Herald during January 1986.

9. See now Crimes Act 1900 s52A as amended in 1983.

10. R Ackland "Temby's Two Years" in Australian Society, October 1986 13 at 15. See also The Sydney Morning Herald 21 November 1985 at 14; 25 November 1985 at 2.

11. See para 10.45.

12. See A T H Smith "Immunity from Prosecution" (1982) 42 Cambridge Law Journal 299 at 304. The author contends that a decision not to prosecute taken by one Attorney General cannot bind his or her successor and points to the fact that the original decision not to prosecute Anthony Blunt on offences under the Official Secrets Act 1911 was ratified by three subsequent Attorneys General any one of whom could theoretically have altered his predecessor's decision.

13. See para 10.13, penultimate asterisk.

14. See Wentworth v Rogers [1984] 2 NSWLR 422 at 435 per Samuels JA; Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182 at 184 per O'Brien CJ of CrD.

15. See Chapter 7 of this Discussion Paper.

16. J Willis "Reflections on Nolles" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985) at 183.

17. Office of the Commonwealth Director of Public Prosecutions Prosecution Policy of the Commonwealth: Guidelines for the Making of Decision in the Prosecution Process (AGPS Canberra, 1986).

18. See "Temby Gives Reasons for Ryan No Bill" The Australian, 13 January 1987 at 3; "Temby Explains Ryan No Bill" The Sydney Morning Herald, 13 January 1987 at 1.

19. Commonwealth Director of Public Prosecutions Annual Report 1985-86 at 10.

20. Director of Public Prosecutions Act 1986 s27.

21. Director of Public Prosecutions Act 1986 s34.

22. See generally Chapter 7 and specifically paras 7.101-7.103.

23. See generally paras 7.41-7.48; Barton v The Queen (1980) 147 CLR 75.

24. See eg Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 (Court of Appeal, Supreme Court of New South Wales); (1986) 60 ALJR 209 (High Court of Australia).

25. Social Services Act 1947 s14; Administrative Appeals Tribunal Act 1975 Part XXIV A; Gee v Director-General of Social Services (1981) 58 FLR 347.

26. For procedure in England, see A Sanders "An Independent Crown Prosecution Service" [1986] Criminal Law Review 16 at 20-21 referring to Dyson v Attorney-General [1911] 1 KB 410; Gouriet v Union of Post Office Workers [1978] AC 435; R v Turner (1979) 68 Cr App R 70. See also "Nolle Prosequi" [1958] Criminal Law Review 573, an anonymous article.

27. See generally New South Wales Law Reform Commission The Jury in a Criminal Trial (LRC 48, 1986) para 8.21. See recommendation 74.

28. P Sallmann and J Willis Criminal Justice in Australia (1984) at 63. See also Willis, note 16 at 186.

29. See para 12.68.

30. See paras 10.57-10.59.

31. See now Director of Public Prosecutions Act 1986 s28(2).

Chapter 11

Plea Bargaining

I. THE PLEA BARGAINING PROCESS

A. Scope of the Chapter

11.1 In this chapter we examine the process commonly referred to as "plea bargaining". In Part I we explain the meaning of the term as well as the associated concepts of "charge bargaining" and "sentence indication". In Part II we deal with the position in New South Wales and other parts of Australia. In Part III we examine the practice in England, the United States and Canada. In Part IV we discuss the problems associated with "plea bargaining" as well as arguments for and against the process. In Part V we make some tentative proposals for reform of the law and practice in this area.

B. The Meaning of "Plea Bargaining"

1. Definition

11.2 The recently appointed Chief Justice of the United States of America has said:

> The process of plea bargaining is not one which any student of the subject regards as an ornament to our system of justice.[1]

However, the expression "plea bargaining" is used to describe a variety of practices. For the purposes of this discussion, we adopt the general definition of the Canadian Law Reform Commission. Plea bargaining is:

> ... any agreement by the accused to plead guilty in return for the promise of some benefit.[2]

We emphasise that although there are various different forms o. plea bargaining which we will seek to distinguish in the discussion which follows, they are all controversial practices.

11.3 Under the system of criminal procedure in New South Wales, the prosecuting authorities, including the police, have a discretion as to whether a charge is to be laid, what the charge is to be, the charge or charges on which the accused person is ultimately brought before the court and whether a plea of guilty to a less serious charge will be accepted. The accused person naturally has a right to plead guilty to any charge. This situation creates the environment for plea bargaining. In some jurisdictions, and in New South Wales in particular, the prosecution has a statutory discretion, which is not subject to the approval of the court, to elect to accept a plea of guilty to an offence charged in the indictment, or to an offence not expressly charged, so long as the accused person could lawfully be convicted of that offence on the existing indictment.[3] We use the expression "a lesser included offence" to describe such an offence.

2. The Range of the Bargain

11.4 In our experience, there is a wide range of bargains that may be struck between the prosecution and the defence regarding the charge and the ultimate disposition of the case against the accused person. Some arrangements are formal, others informal. Some of these involve only the police, others may involve a combination of the police and the prosecuting

authority whilst other arrangements are a matter for the prosecuting authority alone. The following list[4] gives an indication of the types of bargains that may be reached:

* a reduction in the charge to a lesser included offence;

* a withdrawal of other outstanding charges;

* a promise not to institute or proceed on other possible charges;

* an undertaking to agree to list other offences on a schedule to be taken into account on sentence;[5]

* a reduction or withdrawal of charges in exchange for either testimony by the accused person against co-accused or information which would assist in the arrest or prosecution of other offenders;

* a promise not to charge another person, particularly a friend or family member who might be involved in the offence;

* a promise to proceed summarily rather than on indictment where the prosecution has such a choice;

* an undertaking by the prosecution that it will not make submissions contrary to those put by the accused person in support of a particular type of penalty. Similarly, in some cases this may involve the prosecution expressly supporting submissions made by the accused person as to the appropriate penalty;

* an undertaking to have the matter listed at a time and place convenient to the accused person;

* a promise that if a certain penalty is imposed the prosecution will not recommend that there should be an appeal against the inadequacy of the sentence;

* a promise to delete references to aggravating factual circumstances of the offence; and

* a promise not to oppose release on bail pending the determination of the case.

The incidence of agreements of this kind is difficult to determine. Because the operation of plea bargaining is frequently informal there is, not surprisingly, no relevant statistical information available. Clearly, in many cases there is no such agreement. This is particularly so where the prosecution case is a strong one and the offence in question is serious.

11.5 For the prosecution, and those responsible for the administration of justice, and ultimately for the community in general, a negotiated plea of guilty may result in certain advantages:

* time and labour are saved;

* in serious cases, the expense of a jury trial is averted;

* the result is certain and may be preferable to the possibility of the accused person being acquitted of a number of charges or a more serious charge;

* the higher the ratio of guilty pleas to contested cases, the less strain is imposed on court time. Put simply, guilty pleas reduce the congestion of the criminal lists, thus allowing contested cases to be heard earlier than they otherwise might be;

* in some cases, it may allow the investigating and prosecuting authorities to obtain information about other, often more serious offenders;

* it may be used to avoid unjustifiably harsh provisions of the substantive criminal law;

* witnesses, and particularly the victims of criminal offences, are not subjected to the ordeal and inconvenience of giving evidence.

It is true that these advantages flow from pleas of guilty generally, not merely "negotiated" pleas of guilty. It must be recognised, however, that where there is no negotiation, in some cases there would not be a plea of guilty.

11.6 For the accused person, the advantages of a negotiated plea will vary but may include the following:

* the likely penalty is less than if the accused person were convicted of all charges or of a more serious charge;

* the case will be disposed of relatively quickly without the need to suffer the personal ordeal of a trial;

* the speedy disposition of the case by a guilty plea will probably make it less likely that the case will attract publicity;

* the accused person will not suffer the stigma of having a conviction recorded for the more serious offence or for a greater number of offences;

* where the accused person is paying for his or her legal representation, the costs incurred by proceedings where there is a plea of guilty are considerably less.

These perceived advantages must be weighed in the balance against the fact that the terms of the agreement are usually unenforceable. In Part IV we expand on these points and also consider the disadvantages of plea bargaining.

3. Charge Negotiation

11.7 "Charge negotiation" or "charge bargaining" is a separate form of plea bargaining. It is apparently a relatively common practice in most jurisdictions.[6] It is done either on an informal basis between the prosecution and the accused person's lawyer or with some form of legislative recognition.[7] The objective of such negotiations is usually for the prosecution to either reduce the charge to a lesser included offence, or withdraw some charges in exchange for a plea of guilty to a particular charge. The advantages to the respective parties are broadly the same as those mentioned in para 11.5.

11.8 The prosecution case on the more serious offence may be weak, or the prosecution may feel that the resources required to secure a conviction by a contested trial are not justified if the accused person is willing to plead guilty to the less serious offence. Sometimes the prosecution may "overcharge" as a means of pressuring the accused person into pleading guilty to a lesser charge. This abhorrent practice involves the prosecution deliberately charging a more serious offence or a greater number of offences than it considers it can prove against the accused person. For example, the prosecution may charge an accused person with murder in circumstances where a charge of manslaughter is more appropriate in the expectation that there will be a plea of guilty to manslaughter. Some argue that the practice of "overcharging" is a common means of generating guilty pleas.[8]

4. "Sentence Indication"

11.9 "Sentence indication" is a more contentious form of plea bargaining. It necessarily involves a degree of participation by the trial judge. The judge is asked to express his or her views on the sentence to be imposed for the offence. Depending on the indication made, the accused person may wish to plead guilty. Although some judges used to give "sentence indications", we are informed that judges and magistrates in New South Wales no longer engage in this practice. This form of plea bargaining raises questions of the proper role of the trial judge, the openness of criminal proceedings, whether there is improper pressure on the defendant to plead guilty and the propriety of "sentence discounts" for pleading guilty.

5. Sentencing Discounts for a Plea of Guilty

11.10 Closely connected with, but distinguishable from, plea bargaining practices is the issue of sentencing discounts. It is a well-established principle of sentencing that the accused person is given "credit" for a plea of guilty which is traditionally reflected in a reduction in penalty from that which would otherwise be pronounced for the specific offence.[9] The grounds on which a plea of guilty may justify a reduced penalty include:

* the guilty plea saves the State considerable time, effort and expense;
* by pleading guilty the accused person has expressed remorse for the crime;
* there is a demonstrated willingness to make restitution to the State;
* a plea of guilty indicates that the rehabilitation process has already commenced; and
* the plea of guilty spares prosecution witnesses the trauma and inconvenience of giving evidence and being subjected to cross-examination.[10]

11.11 In direct conflict with the notion of sentencing discounts for guilty pleas is the fundamental principle of sentencing that a person should never be liable to a more severe penalty because he or she has exercised the right to require the prosecution to prove its case. Furthermore, the fact that a lesser sentence is to be imposed because the accused person has pleaded guilty represents a clear incentive for such a plea.[11] Another fundamental principle, namely that the choice of plea should be voluntary and free of inducement or intimidation, would be infringed if the sentencing discount

for a plea of guilty were formally recognised. Many would argue that to institutionalise a discount system is wrong and has no place in the criminal justice system. Nevertheless, in England the "sentencing discount" has become virtually automatic where there is a plea of guilty.[12] Several Australian courts have also recognised that a plea of guilty is a factor to be taken into account when determining sentence.[13]

11.12 The alternative argument is that if a discount system is operating then it may be better to recognise that fact openly and regulate the process by way of published rules or guidelines. This approach appears to be strongly advocated by the Chief Justice of South Australia, Mr Justice King. In Shannon a court of five judges was specially convened to consider the question of the weight which a sentencing judge should give to the fact that the accused person has pleaded guilty. The Chief Justice set down the following propositions as to the manner in which a plea of guilty may be taken into account on sentencing:

> The effects of lack of incentive for guilty persons to confess their guilt is seen more clearly as each year passes, in the strain on the resources available for legal aid and the congestion of the criminal lists. I think that there are strong practical reasons for repudiating the proposition that a plea of guilty, apart from remorse, cannot be treated as a mitigating factor. If Reg. v. Rowland decided that, we should, in the light of those practical reasons, be prepared to depart from it.
>
> In my opinion this Court should now lay down the following propositions:
>
> (1) A plea of guilty may be taken into account in mitigation of sentence where -

(a) it results from genuine remorse, repentance or contrition, or,

(b) it results from a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from some other consideration which is in the public interest; notwithstanding that the motive, or one of the motives, for such co-operation may be a desire to earn leniency,

and where to allow the plea a mitigatory effect would be conductive to the public purposes which the sentencing judge is seeking to achieve.

(2) A plea of guilty is not of itself a matter of mitigation where it does not result from any of the above motives, but only from a recognition of the inevitable, or is entered as the means of inducing the prosecution not to proceed with a more serious charge.

(3) In cases falling within (1), the judge is not bound to make a reduction, but should consider the plea with all the other relevant factors in arriving at a proper sentence.

(4) In assessing the weight to be attached to a plea of guilty as a factor making for leniency, it is proper for the judge to bear in mind that it is important to the administration of justice that guilty persons should not cause expense to the public and delay to other cases by putting forward false stories and on the basis of such false stories contesting the charges against them.

(5) The above propositions are not to be taken as weakening in any way the principle that there must be no increase in the sentence which is appropriate to the crime because the offender has contested the charge.[14]

The Commission believes that a similar approach should be taken by judges and magistrates in New South Wales. However, we would add to the propositions set out above the qualification that the time at which the plea of guilty is indicated by the accused person is a relevant factor in determining the weight

which should be given in sentencing. The determination of the appropriate "discount" must of course depend on the circumstances of each individual case and should, accordingly, remain a matter for the discretion of the court.

6. Inducements to Plead Guilty

11.13 One study in England has identified a variety of inducements, other than the truly guilty person's motivation to make an admission of guilt, which may result in a plea of guilty. The authors of the book which reports on the study cite the following inducements:

* the risks of repeated adjournments before a contested case is tried, especially for those remanded in custody;
* the advice of the defence lawyer that it would be risky to attack the credibility of the police because the sentence will be increased where this has been done[15];
* the advice of the defence lawyer not to waste the court's time on an unarguable defence, because of the risk of antagonising the judge;
* an indication from the defence lawyer that the judge had offered a reduced sentence for a guilty plea;
* pressure from defence counsel who are unenthusiastic about defending a difficult or unrewarding case;
* the prosecution's offer to accept a guilty plea to a lesser offence or to drop some charges in return for a plea of guilty to others; and
* a feeling of helplessness and a belief that the system is loaded against the accused person.[16]

The inducement to plead guilty is of concern whether or not the accused is in fact guilty. By way of comparison, the rules governing the admissibility of confessional evidence hold that a confession which is not voluntary in the sense that it has

been induced by a person in authority is inadmissible as evidence notwithstanding that it is a truthful confession.[17] It seems inconsistent that the law should exclude such evidence as unreliable but permit much more damaging material where similar inducements may have influenced the accused person.[18] A plea of guilty resembles a confession but is in effect a waiver of the right to require the prosecution to prove its case.

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.[19]

It has been said that the encouragement of guilty pleas and their timely indication must be "more subtle than coercive".[20] To this we would add that any form of encouragement to plead guilty must be very carefully brought to bear so as to avoid the possibility that an accused person who is in fact innocent may plead guilty for reasons of expediency.

II. PLEA BARGAINING IN AUSTRALIA

11.14 There is a dearth of empirical information on the existence and extent of plea bargaining in Australia.[21] However, the Australian Law Reform Commission, after describing plea bargaining as being "shrouded in obscurity and secrecy"[22] said in its Report Sentencing of Federal Offenders:

> there is no point in continuing to pretend that plea bargaining does not exist in Australia. Though the evidence is incomplete, it is sufficient to establish that the practice is well entrenched and enduring.[23]

Since the negotiations which may result in a plea of guilty in return for a promise of some kind by the prosecution are almost always conducted between lawyers, the general increase of legal representation in criminal cases through the availability of legal aid for accused people has probably generated increased plea bargaining.[24] Although a plea of guilty may be forthcoming without plea bargaining, the fact that approximately 80% of people charged with indictable offences in New South Wales plead guilty to the charge suggests at least that there is considerable scope for the operation of a system of plea bargaining.[25]

1. Charge Bargaining

11.15 Charge bargaining of a restricted sort is effectively permitted in New South Wales and other Australian States.[26] Section 394A of the Crimes Act provides:

> Where a prisoner is arraigned on an indictment for any offence and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence, and the Crown may elect to accept such pleas of guilty or may require the trial to proceed upon the charge upon which the prisoner is arraigned.

This means that the Crown Prosecutor generally has the absolute right to accept a plea to a lesser count so long as it is a true alternative verdict. The approval of the judge is not required. The only circumstance in which the prosecutor's discretion may be limited is where the Attorney General has directed that the trial proceed on a particular charge.[27]

11.16 Charge negotiation between the prosecution and the defence lawyer has been approved by the Victorian Court of Criminal Appeal.[28] The practice in Victoria has been described as being governed by "strict procedures" which involve in most cases obtaining the authorisation of the Solicitor General before a plea of guilty will be accepted.[29] In 1975 a South Australian Law Reform Committee also concluded that the practice of charge negotiation was proper:

> An accused who is charged with several offences may quite properly bargain with the Crown to accept a plea of guilty to one and withdraw the other charges; or an accused may bargain with the Crown to accept a plea to a lesser crime than that charged.[30]

In 1980 the Australian Law Reform Commission published results of a survey of Federal prosecutors in the Deputy Crown Solicitor's Office[31] which demonstrated that there was "a general consensus that charge bargaining or negotiations occurred in between 5 to 10% of the cases dealt with by the prosecutors".[32]

2. Sentence Indication

11.17 However, it seems that any form of plea bargaining which involves the judge has declined dramatically in Australia in recent years and is strongly discouraged. Australian courts have rejected the English decisions permitting judges to indicate the probable sentence before trial.[33] The Federal Court of Australia held[34] that the private communication to the judge of information likely to affect the sentence was irregular. The Full Court of the Supreme Court of Victoria has held that as a general rule, a trial judge should not indicate

the probable sentence he or she is likely to pronounce.[35] The Court said that plea bargaining discussions involving the lawyer for the accused person, the Crown Prosecutor and the judge in the judge's private chambers should not take place. The reasons to be extracted from the judgment are as follows:

> Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice ...
>
> Nothing would be more likely to undermine public confidence in the administration of justice than the knowledge that it was possible to 'negotiate' with the court in private as to the sentence to be imposed. It would be worse still if the public came to believe that a lesser sentence would be imposed merely because a plea of guilty was entered rather than upon conviction after a plea of not guilty ...
>
> Not only might such negotiations be thought to be inconsistent with the integrity of the court; they would be thoroughly unseemly in the administration of justice ... The integrity of the court is of the greatest importance to public confidence in the administration of justice. In the end, the successful administration of justice depends to a considerable extent upon public confidence in it and it is thus vital that that confidence be maintained.[36]

11.18 In 1976, the Chief Justice of Australia, Sir Garfield Barwick described the involvement of judges in plea bargaining as "absolutely undesirable".[37] The Australian Law Reform Commission attributes the decline in judicial involvement in plea bargaining to the Chief Justice's statement.[38] The Commission's surveys of judicial officers and federal

prosecutors revealed that sentence bargaining involving the judge now almost never occurs.[39] The position is apparently the same in Victoria.[40]

3. Taking Outstanding Offences into Account

11.19 Section 447B of the Crimes Act 1900 enables a person who has either been found guilty of or pleaded guilty to an offence and is liable for sentence, to request the court to take into consideration other offences which have been charged. There is no limit to the number of offences which may be disposed of in this way. The maximum sentence available to the court is limited to that which would have been available for the specific charge of which the person has been convicted. It is noteworthy that the accused person's consent to the outstanding charges being taken into account must be given personally and not through counsel. Any list or schedule of offences prepared must be signed by the accused person.[41]

4. Commonwealth Director of Public Prosecutions

11.20 The Commonwealth Director of Public Prosecutions has prepared and published guidelines for the making of decisions in the prosecution process.[42] An important part of these published guidelines is that which deals with the practice of charge bargaining. The guidelines generally approve the practice of arrangements being made between the prosecution and the accused person which result in a plea of guilty being entered in exchange for some concession on the part of the prosecutor. Some important constraints are imposed upon the operation of this system:

* a charge-bargaining proposal should not be initiated by the prosecution;

* such a proposal should not be entertained by the prosecution unless the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused person;

* a charge-bargaining proposal should not be entertained if the accused person maintains his or her innocence with respect to a charge or charges to which he or she has offered to plead guilty;

* any decision made in consequence of charge-bargaining discussions should be cleared by a senior lawyer in the office of the Director of Public Prosecutions;

* where these discussions take place following a committal for trial, the accused person is to be informed in writing that any agreement which may be reached is subject to the approval of the Director.

11.21 The guidelines set out in detail the matters that are to be taken into account in reaching a decision whether or not to agree to a charge-bargaining proposal advanced by the accused person or his or her lawyer. They are:

(a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) the likelihood of adverse consequences to witnesses;

(g) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;

(h) the need to avoid delay in the despatch of other pending cases; and

(i) the time and expense involved in a trial and any appeal proceedings.[43]

III. PLEA BARGAINING IN OTHER JURISDICTIONS

A. England

1. Charge Negotiation

11.22 English courts retain relatively strong controls over attempts to reduce the charge where the reduction is the result of negotiated agreement between the prosecution and the defence.[44] The courts can compel the prosecutor to proceed with the offence charged in the indictment when there is nothing in the evidence in the case which appears to justify reducing the charge to a less serious one.[45] Thus prosecutors in England are prevented "from precipitating a plea bargain by means of an undue reduction in the charge".[46] This fact is reflected in the statistics taken from a study conducted over a 15 month period at a particular Crown Court which indicate that less than 20% of accused persons who pleaded guilty did so after an explicit offer by the prosecution or the judge. Another 13% assumed a bargain had been struck. Nearly 30% of accused people pleaded guilty believing themselves to be so. Nearly 40% pleaded guilty under pressure from their own lawyers, a significant minority still protesting innocence.[47] These figures, while indicating that bargains are not the principal cause of guilty pleas, nevertheless suggest that they

do occur, despite the court's powers to review the prosecutor's decision to accept a plea of guilty to a lesser charge. It has been said that the courts in England should exercise effective control and supervision over criminal proceedings formally before them "in the full glare of publicity".[48]

2. Sentence Indication

11.23 The current judicial attitude in England to plea bargaining and, in particular, to sentence indication originated with the English Court of Appeal's decision in Turner's case[49] where the Court said:

* The accused person must have complete freedom to choose his or her plea.

* There must be free access between the lawyer and the judge, but any discussion must be between the judge and the lawyers on both sides. The discussion should be in private.

* Whilst the judge may indicate that the sentence will or will not be of a particular kind, such as probation or imprisonment, he or she should never indicate that the sentence will be more severe if the accused goes to trial. This would amount to undue pressure on the accused person, depriving him or her of a free choice.

* The defence lawyer should disclose to his or her client any discussion on sentence which has taken place with the judge.

The guidelines laid down in Turner have been affirmed in recent decisions.[50]

11.24 In England, there is a debate over the issue whether or not there should be a sentencing differential in favour of the defendant who pleads guilty. The basic principle enunciated by English courts is that an offender's remorse, reflected by the

guilty plea, is properly recognised as a mitigating factor. However, the accused person's insistence on his or her right to stand trial can never justify a heavier sentence than that warranted by the facts of the offence.[51] Notwithstanding this statement of principle, many would argue that the reality is different. From the study cited in para 11.13, it certainly appears that accused people may fear that to insist on the right to stand trial is to risk a heavier sentence. It is often argued that, apart from reasons based on expediency, credit should be given for a guilty plea where, for example, victims of sexual assault are spared the ordeal of testifying. On the other hand, it has been argued that a guilty plea is rarely an indicator of contrition and that discounts for a guilty plea should accordingly be abandoned.[52]

11.25 In addressing the issue of sentence indication, the English Court of Appeal recently held that on occasions it is proper for a judge to indicate the difference in sentence that an accused person can secure by pleading guilty:[53]

> But in this sensitive area, the appearance of justice is part of the substance of justice and it will not do if a prisoner or the general public derive the impression that it is possible, either openly in a pre-trial review, as in this case, or by private discussion between counsel and judge, to achieve a bargain with the court.
>
> ...
>
> It is not possible to lay down, neither would we think it is desirable to lay down, any general rule that there must never be communication outside trial, either openly or privately, between judge and those representing the Crown and the accused ...

The Court went on to endorse the principles previously established in Turner's[54] case and summarised in para 11.23. In later cases, the courts have made it clear that sentencing discussions should be conducted in open court (in the absence of the jury) and a proper record kept for the purpose of any appeal against the judge's decision.[55]

3. Outstanding Charges

11.26 There is another form of plea bargaining which has developed in England. This is the practice of "taking other offences into account" on sentence.[56] The prosecutor offers the accused person who is already facing trial for one offence the promise that all outstanding offences will be taken into account for the purpose of sentence,[57] thereby resulting in a potentially reduced aggregate sentence in exchange for a guilty plea to the particular offence. The defendant, who serves his or her sentence will come out of prison with a "clean slate". It should be stressed that offences are only taken into account where the accused person admits his or her guilt in respect of those offences. A formal plea of guilty is not required.

B. United States of America

11.27 Plea bargaining is widespread in most jurisdictions of the United States. Although the National Advisory Commission of Criminal Justice Standards and Goals recommended its abolition some time ago,[58] it has been approved by the Supreme Court and the American Bar Association. As long as plea bargaining is governed by formal rules which require that

the process be visible and recorded, it is currently considered by many to be an acceptable and indispensable part of the American criminal justice system. The eminent commentator Norval Morris has written:

> Plea bargaining is, of course, the main dispositive technique in our urban courts. It is the leading and distinctive characteristic of the American criminal justice system.[59]

11.28 Approximately 90% of accused people in America who are convicted of criminal offences before both the State and Federal courts either plead guilty or "nolo contendere", a plea of no contest to the prosecution case.[60] The available research indicates that most guilty pleas are a result of informal negotiations between the prosecution and the defence.[61] Unlike the practice in New South Wales and in other parts of Australia, it is apparent that it is not uncommon for the judge to be involved in plea negotiations.[62]

11.29 The proponents of plea bargaining in the United States cite the critical lack of resources in court facilities and personnel as justification for the practice. The courts are continually congested and there is a heavy backlog of cases. In addition to pragmatic justification for the practice, there are other differences between the American and English criminal justice system which may explain why plea bargaining is an entrenched part of the administration of justice:[63]

> * The public prosecutor's office is generally an elected office. Holders of that office often cultivate a publicly impressive record of performance for the purpose of re-election or election to a higher office.[64]

* Numerous offences in many jurisdictions carry mandatory minimum sentences. The court's discretion as to sentence is often severely restricted by legislation. The prosecutor can therefore effectively determine sentence by use of the discretion as to charges. Plea bargaining is seen as a means of avoiding the impact of legislation whose application may be considered inappropriate to the facts of the case.

* The prosecutor can promise the defence that it will recommend a particular sentence with some certainty that the recommendation will be accepted by the court.[65]

* The prosecutor has a largely unfettered discretion when it comes to charging. Overcharging is apparently a common practice.[66]

* The rules of evidence whose strict application operates to exclude evidence engender an attitude of "any conviction is better than no conviction" in the prosecutor's mind.[67]

11.30 The response of the United States Supreme Court has been to promulgate rules of court designed to bring plea agreements into the open.[68] Plea bargaining has received judicial approval in the following terms:

> Disposition of charges after plea discussions is not only an essential and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.[69]

11.31 The Federal Rules of Criminal Procedure provide methods by which the court can approve plea agreements and prevent abuses. A sentencing judge must examine the factual basis for the plea, for example, by having the accused person describe the conduct that gave rise to the charge. The judge must ascertain that the plea is voluntary. The Rules provide that:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.[70]

11.32 The rule lists and limits the permissible bargains. The bargain must be disclosed in open court and the court may accept or reject the agreement. If the court approves the agreement, it limits its own sentencing discretion because the rules require the ultimate sentence to be either as agreed or more favourable to the accused person. Thus the maximum sentence is in fact determined by the prosecutor. Where the court rejects the agreement, the accused person must be informed that the case may be disposed of in a less favourable way and must be given an opportunity to withdraw his or her plea of guilty. This result has been criticised on two grounds. First, the power to sentence belongs by right to the judiciary under the separation of powers doctrine. Second, the

prosecutor is faced with a conflict of interest when considering the appropriate sentence in that the prosecutor would be unlikely to consider the sentencing goals of rehabilitation and deterrence.[71]

11.33 The court has the power to fix a time for notification of plea bargains so as to avoid disruption of trial schedules. The Federal Rules of Criminal Procedure also provide that evidence of a withdrawn guilty plea is inadmissible in subsequent judicial proceedings.[72] It reads as follows:

> (1) **In general.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussion with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offence or to a lesser or related offence, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.
>
> (2) **Notice of such agreement.** If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.
>
> (3) **Acceptance of plea.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favourable to the defendant than that provided for in the plea agreement.

(4) **Rejection of plea.** If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favourable to the defendant than that contemplated by the plea agreement.

(5) **Time of plea agreement procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Opponents of this rule naturally argue that any voluntary statement admitting guilt by an accused person should be admissible and capable of being used in subsequent proceedings to enable proof of prior inconsistent statements. However, since the statement could almost certainly be characterised as one following an inducement made by a person in authority, it would, according to the law in New South Wales, be held involuntary and therefore inadmissible.

11.34 Expanding upon the procedure contemplated in part (5) of the rules cited above, one American commentator[73] has advocated reform of the procedure associated with plea bargaining in order to motivate the participants in a criminal trial to seek a speedier disposition of the case. He proposes

that plea discussions should be conducted at an early point in the judicial process at a relatively informal conference between the lawyer acting for the prosecution and the defence lawyer and that if there is no agreement at this early stage, later guilty pleas will not be "rewarded" by concessions made by the prosecutor. The objective of this proposal is to concentrate all plea bargaining into a single stage of the judicial process. By compressing plea negotiations into an earlier period, the reduction in delay will be greater. In addition, since those cases which are not resolved at the plea bargaining conference will be more likely to result in a contested trial, criminal cases can be listed for trial with greater assurance that the court's lists will not be disrupted by a plea of guilty negotiated on the morning the case is listed for trial.[74]

C. Canada

11.35 The practice of plea bargaining frequently occurs in the superior courts of Ontario.[75] There are certain outstanding features of the practice which distinguish it from the approach taken elsewhere. Where there is an agreement reached between the prosecution and the defence, the terms of that agreement may be reduced to writing and signed by counsel for both the prosecution and the defence. The courts are not involved in this bargaining procedure and are not bound by the terms of the agreement made between the parties. The only time a court may have occasion to examine the agreement is where it is alleged

in appeal proceedings that there has been such a departure from the terms of the agreement that the proceedings of the court of first instance have resulted in a miscarriage of justice.

11.36 The sentencing court, not being a party to the plea negotiations and not being bound by the terms of any agreement, may impose such penalty as it thinks justified by the circumstances of the case. A plea of guilty has been expressly acknowledged as a factor justifying a lenient sentence.[76]

11.37 The terms of the agreement may involve the accused person pleading guilty to a lesser offence in return for the prosecution agreeing to make a submission to the court that it considers an appropriate penalty should fall within a nominated range previously agreed with the defence. Under the conventional form of agreement, the defence should not make submissions on penalty which are inconsistent with the agreement it has reached with the prosecution. In some cases the prosecution will undertake not to present to the court evidence of facts which aggravate the seriousness of the offence or details of an accused person's prior criminal history which would, if proved in court, expose that person to the risk of a more severe penalty. This aspect of plea negotiations is seen by some to illustrate one of the dangers of the whole process.

11.38 The court may be involved in the plea negotiation process to the extent that it will give a sentence indication at a pre-trial conference conducted in accordance with the provisions of the Canadian Criminal Code.[77] This procedure may be conducted in open court and recorded by a court reporter. The judge may inquire of the prosecution at such a hearing whether a particular penalty would be challenged by a prosecution appeal. A court of appeal may permit one of the parties to tender an affidavit setting out the details of the plea negotiation where the court is of the view that the sentence imposed is outside the legitimate range for the nature of the offence.

11.39 The operation of the system of plea bargaining in Ontario is best illustrated by the following example. The accused person was one of five young people charged with murder following a fatal attack made during the robbery of a man at a public place known to be frequented by homosexuals. Following negotiations between the prosecution and the lawyers for the accused person, it was agreed that if a plea of guilty were entered to "second degree murder" (that is murder which is not premeditated) the prosecution would not call evidence to prove that the accused people had gone to the scene of the crime on a prior occasion but had not then carried out their plan to perform a similar robbery to that involved in this offence. The proof of these facts in sentence proceedings would have naturally resulted in the offence being regarded more seriously by the court at first instance. In addition, the prosecution

agreed to make a submission to the court that a sentencing falling within the range of nine to 15 years imprisonment would be appropriate. The judge imposed sentences of nine years' imprisonment on each of the five accused people. The undertakings made in the plea agreement had been honoured by both the prosecution and counsel for the accused person.

11.40 It was argued on appeal that since the involvement of one of the accused was demonstrably less than those who might be regarded as the ringleaders, the judge erred in not reflecting this lesser degree of culpability in the sentences imposed and that the sentence was accordingly excessive. At the appeal proceedings the Crown sought to tender an affidavit setting out the terms of the plea agreement. This contained references to the suppression before the court of trial of the aggravating evidence and to the agreed range of an appropriate penalty. The tender was objected to by the appellant. The court held that, since the penalty was within the legitimate range open on the relevant objective facts and circumstances, it would not allow the tender of the plea agreement. The appeal was dismissed. However, during the course of argument, the court observed that such an affidavit may be admitted and read:

> 1. where it is alleged by one of the parties that the terms of the plea agreement have been breached; and
>
> 2. where the sentence imposed by the court is outside the legitimate range for the offence concerned.[78]

IV. ARGUMENTS FOR AND AGAINST PLEA BARGAINING

A. Merits of Plea Bargaining

11.41 It is acknowledged that plea bargaining has a number of advantages:

* Plea bargaining disposes of criminal cases quickly and at reduced cost.
* It reduces the overall problem of delay in the criminal justice system by alleviating congestion in court lists and allowing for the speedier disposition of other cases.
* It relieves both the accused person and the prosecution from the risks and uncertainties of trial.
* It can mitigate the harshness of mandatory sentencing provisions and can result in a sentence which more accurately reflects the specific circumstances of the case.
* It can serve important law enforcement needs by encouraging disclosure of information and testimony about other serious offences and offenders.

11.42 The Criminal Law and Penal Methods Reform Committee of South Australia recommended that

> ... plea bargaining be an acceptable practice provided that the accused is not intimidated into pleading guilty to an offence and provided that he is not induced to plead guilty by the promise of a particular sentence or type of sentence.[79]

The Committee did not approve of the involvement of judges in plea bargaining.[80] The Australian Law Reform Commission also favoured the continuation of plea bargaining and proposed that the practice "should be made a far more visible and principled practice than it is at present".[81] Other Australian commentators have generally supported the continuation of charge bargaining in particular, although this support has usually been qualified and often guarded in its nature.[82]

B. Objections to Plea Bargaining

1. Derogation from Principle

11.43 The Law Reform Commission of Canada, in contrast, has recommended the abolition of the practice of plea bargaining.[83] The Commission noted its practical dangers and concluded that plea bargaining involved a derogation from principle. The Commission was of the opinion that the existence of the practice leads to parties adopting tactics which maximise their bargaining strength.

> The Crown will be tempted to overcharge, or to exaggerate the strength of its case. The defence may use delaying tactics, elect a jury trial to obtain a bargaining advantage, exaggerate the strength of the defence, or refuse to plead guilty even where there is no hope of an acquittal. The entire pre-plea process thus becomes a ritual bearing no relationship to the realities of the case.[84]

It was further of the opinion that the secrecy of negotiations magnifies the dangers and provides the opportunity for abuse. Finally, the Commission considered that

> justice should not be, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system.[85]

11.44 One Canadian commentator[86] has given the following reasons why plea bargaining is improper as a matter of principle:

* It encourages negotiation over the issue of guilt, and is therefore contrary to one of the primary aims of criminal procedure, to provide an accurate and fair means of the determination of guilt.

* The objective of the criminal law to express society's disapproval of certain conduct is defeated because the interest of society is not given priority in the agreement.

* It allows the accused person to use the fundamental safeguards established to avoid the wrongful conviction of the innocent as tools in a bargaining process.

* It results, to a dangerous degree, in the usurping of a judge's primary function of formulating and imposing a suitable and rational sentence. Factors which are not relevant to sentence, such as evidentiary weaknesses in the case and skill in bargaining will influence the penalty ultimately imposed.

The fact that the practice of plea bargaining has developed in the United States for reasons of expedience rather than principle has also been recognised:

> The present state of affairs was brought about by willingness to reduce standards of justice to conform to the resources made available for its administration. I suggest the time has come for the judiciary to start moving in the other direction, and to insist on a return to first principles as quickly as possible.[87]

2. Secrecy and Lack of Accountability for Plea Negotiations

11.45 Plea bargaining is a secret process which is largely beyond the control of the courts. It is highly unusual for the terms of any agreement between the prosecution and the defence to be made public. This is contrary to the general principle that the administration of justice should not be conducted behind closed doors. The Chief Justice of New South Wales, Sir Laurence Street, has said:

> ... with all its defects, the judicial process is that which is best calculated to protect the rights of the individual. A public hearing in which all of the relevant ingredients are canvassed, analysed and evaluated in open court, in which the evidence is critically examined, a proceeding involving the presiding judge stating the reasons for the sentence, and above all, the unrestricted publicity of the sentencing process and the sentencing act all combine as a significant protection against the exercise of arbitrary power.[88]

11.46 In a recent New South Wales decision, the New South Wales Supreme Court held that it could not interfere with the exercise of the prosecutor's discretion to accept a guilty plea to a lesser included offence.[89] At the same time, the court determined that the it has the power, in the public interest, to refuse to record a conviction on the agreed plea of guilty and to direct that the trial should proceed. In that particular case the accused person had pleaded guilty to manslaughter on an indictment for murder. Psychiatric reports, if accepted, might have established to the satisfaction of the jury that the accused person was insane at the time of the killing and therefore entitled to an acquittal. It is perhaps open to argument whether the court could refuse to accept a guilty plea if it believed the accused person should be convicted of the more serious offence. The position in England is quite different with respect to the prosecutor's discretion as to charge.[90] There the Court of Appeal has said:

> Where nothing appears on the depositions which can be said to reduce the offence charged in the indictment to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown is to present the offence charged in the indictment.[91]

3. Potential for Abuse

11.47 The secrecy of plea negotiation and the general lack of accountability for decisions makes abuse of the process possible. Improper pressures and inducements can be imposed on an accused person to plead guilty. Because these will not generally come to light when the court hears the case, there is little or no judicial or public scrutiny of these practices.

For example, it has been said that "it is apparently not uncommon for the prosecution to over-charge in the expectation of generating a plea or pleas of guilty to lesser offences".[92] There is a wide range of pressures and inducements potentially available to encourage an accused person to plead guilty, ranging from realistic offers by the prosecution reflecting the evidence available and the strength of the prosecution case through to threats and false statements emanating even from the accused person's own counsel.[93] Such inducements impinge on the accused person's right to choose freely how to plead and to require that the prosecution prove its case beyond reasonable doubt. Because the negotiation between the prosecution and the defence could involve an agreement as to what the police will say in their evidence about the defendant's behaviour, character, demeanour and prior convictions, the negotiation becomes "a special form of adversary hearing conducted privately outside the court-room where the key professional participants work out and rehearse the public script which is later presented in open court".[94] Moreover, the central character, the accused person, is denied the procedural safeguards which would be available in open court, and the court has only a limited means of ensuring that the process has been fair. For these reasons, the Victorian Supreme Court characterised plea bargaining as "doing justice behind closed doors" and condemned the practice as securing convictions at too high a price.[95] The question arises for consideration whether, if some form of plea bargaining is to be permitted, the courts should have any specific control over the practice.

4. The Interests of the Victim

11.48 Critics of plea bargaining believe that the interest of victims of crime are largely ignored in the plea bargaining process.[96] The victim is consulted only where failure to do so could "cause trouble" politically or result in adverse publicity, or where the victim is seen as particularly vulnerable and reluctant to go through with the trial process.[97] Sallmann has argued[98] that victims should have the opportunity to be involved in the process of plea bargaining for the following reasons:

* The victim deserves this level of recognition as an interested party in the criminal justice system.

* Failure to keep the victim informed and involved risks the alienation of the victim from the criminal justice system;

* Failure to keep the victim informed and involved risks harming a victim, for example, where a lesser charges involves an unfair imputation as to the victim's behaviour relative to the offence.

* The victim's prospects of receiving compensation could be compromised.

A field experiment in Miami, Florida involved conducting pre-trial conferences for the purpose of plea negotiations in the presence of the judge, the prosecutor, the accused person, the victim and the investigating police.[99] A report of the experiment concluded that there was

> ... some evidence that police and, to some extent, victims who attended the sessions obtained more information and had more positive attitudes about the way their cases were handled.[100]

11.49 The Commission considers that in those cases where there is an identifiable victim there is a greater need to take into account their interests. This may take the form of direct consultation by the prosecuting authority on matters related to plea negotiations or at least the provision of information and explanation regarding negotiations of this kind. As Norval Morris has written:

> If the criminal process is the taking over by the State of the vengeful instincts of the injured person - buttressed by the recognition that the harm to the victim is also harm to the State - then it would seem, at first blush, that the victim at least has a right to be informed of, and where appropriate involved in, the processes that have led to whatever is the State settlement of the harm that has been done to him. In that respect one would hardly need to make an affirmative argument; it is a matter of courtesy and respect to the dignity of the individual victim.[101]

5. Involvement of Judges in Plea Bargaining

11.50 We have noted the position in various jurisdictions. The arguments against permitting the judge to be involved in plea bargaining include:[102]

* an accused person may be afraid to turn down a judicial bargain for fear the judge will not give him a fair trial if he refuses the judge's bargain;

* plea bargaining impairs a judge's impartiality to determine whether a guilty plea based on the judge's bargain is in fact voluntary;

* a trial judge who partakes in unsuccessful negotiations with the accused and then proceeds to try the case may thereby have negated, at least unconsciously, the presumption of innocence a judge is supposed to have at the beginning of every trial;

* judicial plea bargaining is destructive of our concept of the judge as an impartial arbiter instead of an advocate actively encouraging the defendant to admit his guilt;[103] and

* if plea bargaining is essential to the continued flow of criminal cases through the system, there is no reason to believe that prosecutorial bargaining needs the help of judicial bargaining to handle the job.

11.51 On the other hand, Mr Justice Hampel of the Supreme Court of Victoria has publicly advocated a system which would enable sentence indications to be given in open court in appropriate circumstances.[104] His Honour acknowledged his belief that this proposal is probably "out of step with the views of many practitioners and most judges in Australia". It should be emphasised, as his Honour does, that this practice would not be expected to be used in every case, nor even the majority of cases. That is not to say, however, that its use in a proper case will not benefit the administration of justice and enhance the integrity and reputation of the criminal justice system. Accepting that the likely sentence is a crucial matter to be considered, such a procedure would be fairer because it would allow an accused person to make a more informed decision as to plea. It would probably also reduce the number of appeals in criminal cases. The Commission is currently divided on this question, but some of us strongly support the proposal put forward by Mr Justice Hampel.

C. Conclusion

11.52 The concept of plea bargaining has for the general public become a term synonymous with an unmeritorious feature of the criminal justice system. However, charge bargaining, which is a form of plea bargaining, but not the form which the term is commonly used to describe, is in the Commission's view, a desirable and useful practice since it saves unnecessary public expense and inconvenience and aids in the efficient disposal of criminal cases.[105] At this stage of our research on this subject, the Commission tentatively favours the implementation of a visible and controlled charge bargaining process - a procedure modelled along the lines of the provisions in the Federal Rules of Criminal Procedure in the United States, but with significant amendments to incorporate the principles established by the English courts. As one commentator has said:

> At the very least the plea must be taken in open court, the bargain exposed and certified, and a record of the proceedings must be made and preserved. The negotiations should be freed from their present irregular status so that the participants can frankly acknowledge the negotiations and their agreement can be reviewed by the judge and made a matter of record. Upon the plea of guilty in open court the terms of the agreement should be fully stated on the record and, at least in serious or complicated cases, reduced to writing.[106]

We consider that the real benefit of plea bargaining is to be derived from the increased standard of efficiency and ultimately fairness which it may, if it is used properly, introduce to the criminal justice system. We would stress, however, that there are considerable dangers inherent in the practice and that these may materialise where either the

prosecuting authority or the accused person use the system as an end rather than as a means of doing justice. The difficulties faced in coping with the workload of the criminal courts should not be overcome by measures which convert the role of the courts to that of an institution whose primary concern is with economic efficiency rather than the administration of justice.

V. SUMMARY OF TENTATIVE PROPOSALS

1. The Scope of Plea Negotiations

11.53 It should be legitimate for the accused person and the prosecuting authority to reach agreement as to the charge or charges which the accused person is to face in the event that he or she pleads guilty. Any such agreement might also legitimately include an undertaking by the prosecution that it will make a submission nominating a particular court as the appropriate court of trial. It should not be legitimate for the accused person and the prosecuting authority to reach any agreement that a particular penalty should be imposed, since the assessment of penalty should always be a matter for the court (see paras 11.56 and 11.60).

2. No Initiation of Plea Negotiations by the Crown

11.54 The initiation of "plea negotiations" should always be a matter for the accused person or his or her legal representatives. If negotiations of this kind were to be commenced by the prosecuting authority, the prosecution might be encouraged to charge the accused person with a more serious

offence than may be warranted by the evidence available. The charges against an accused person should not be laid with the intention of providing scope for subsequent "plea bargaining".

3. Compulsory Disclosure to Encourage Plea Negotiation

11.55 The system of compulsory disclosure by the prosecution which we have recommended in Chapter 4, and the proposals regarding disclosure by the defence in Chapter 5, should create an atmosphere in which the probable plea to be made by the accused person is indicated at an early stage of the proceedings. This should enable plea negotiations to be made in a more informed manner and enable fairer agreements to be reached between the prosecution and the accused person.

4. The Courts Not to be Involved in Plea Negotiation

11.56 The court should not participate in negotiations regarding the accused person's plea to a charge and any agreement reached between the parties should not bind or be seen to bind the court in the assessment of the penalty for the offence to which the accused person has pleaded guilty. This should be subject to the qualification that the court is limited in the imposition of penalty by the terms of any relevant statutory provision.

5. Agreements to be in Writing

11.57 Where, following negotiation between the defence and the prosecuting authority, there is a concluded agreement which results in the accused person pleading guilty to a certain charge or charges on the understanding that the prosecution

will take a certain course, that agreement should be recorded in writing. As is the current practice, a written record should also be made of the terms of any agreement to grant an accused person immunity from prosecution.

6. General Inadmissibility of the Terms of the Agreement

11.58 The record of any plea negotiation agreement reached between the accused person and the prosecuting authority should not be admissible in any subsequent proceedings unless it is alleged by either of the parties that the terms of the agreement have not been honoured, in which case the record may be admitted at the discretion of the court.

7. The Victim's Role in Plea Negotiations

11.59 Where one of the factors taken into account by the prosecuting authority in the course of plea negotiations is the likely impact of contested court proceedings on the victim of the crime, the prosecuting authority should contact the victim or a person who is representing the interests of the victim and determine the victim's attitude to participating in a contested case. The prosecuting authority should adopt a general policy of advising the victim of the course of plea negotiations and should generally inform the victim of the terms of any agreement reached with the accused person.

8. "Sentence Indication" by the Prospective Court of Trial

11.60 We raise for consideration the question whether, upon the parties requesting from the prospective court of trial an indication as to the likely nature of the penalty to be imposed upon conviction after trial, the court should, as a matter of discretion for the individual judge or magistrate in the particular circumstances of the case, be entitled to give such an indication. If such a proposal were accepted, this may be done at a formal hearing or conference attended by the legal representatives of both the prosecution and the accused person but it should never occur in the presence of potential jurors. We would envisage that the court would be bound by the indication given unless the facts of the case prove to be materially different from those given to the court for the purpose of obtaining an indication as to sentence. If this occurs, the judge or magistrate should cease to hear the matter and arrange for it to be relisted. Whilst an accurate record of any such proceedings should be made, their publication should be strictly prohibited until the case has been finally disposed of. We should emphasise that the Commission is currently divided on this question and would welcome submissions as to the desirability of this proposal.

9. Prosecutor's Discretion to Accept Plea Retained

11.61 Section 394A of the Crimes Act, which provides that the prosecution has an unfettered discretion to accept a plea of guilty to a lesser offence which is a true alternative verdict in full discharge of an indictment on a more serious charge, should be retained. This provision ensures that the courts do

not become involved in the process of plea negotiations between the prosecution and the defence. However, since the court is not compelled to accept a plea of guilty, it should be entitled to enquire generally into the circumstances in which the plea of guilty is made. If the court considers that the plea has not been made voluntarily, it may reject the plea of guilty and order that the accused person stand trial on the charge to which he or she has pleaded guilty. Since the plea of not guilty to the more serious charge has been accepted by the prosecution, then a verdict of not guilty on that charge should be entered by the court. This would involve giving the court a power in the terms of a specific recommendation made in our Report The Jury in a Criminal Trial.[107]

10. Sentence Discounts for a Plea of Guilty

11.62 The current law and practice of sentencing, by which it is recognised that a plea of guilty by an accused person should, in all but the most exceptional circumstances, be taken into account by the court as a mitigating factor in the determination of penalty, should be preserved. We do not consider that there should be any precise formula by which the amount of the discount should be assessed. Since, in our view, this will vary according to the circumstances of the case, we consider that it should be a matter to be determined by the sentencing judge or magistrate in each individual case.

11. Maintenance of Ethical Standards

11.63 There is a significant risk that some lawyers may regard a negotiated plea of guilty as a satisfactory conclusion to a criminal case for improper reasons. In conducting plea negotiations, lawyers acting for the prosecution or the defence should be bound by the ethical standards of their profession not to consider the personal advantage they may derive from a negotiated plea of guilty. In each case, the best interests of the party whom they represent should be the paramount consideration in concluding the terms of such an agreement.

12. Charge Bargaining Guidelines to be Made Public

11.64 If the prosecuting authority publishes guidelines for the making of decisions in the prosecution process in accordance with the proposal we have put forward in para 12.68, those guidelines should include some reference to the role of the prosecution in the process of charge bargaining and the policy to be applied in making decisions in this process. We also propose that the use of the term "plea bargaining" be clarified and explained in a public document.

Footnotes

1. Justice William H Rehnquist (1973) quoted in A W Alschuler "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" (1983) 50 University of Chicago Law Review 931 at 931.

2. Law Reform Commission of Canada Criminal Procedure: Control of the Process (Working Paper 15 1975) at 45. This definition was also adopted by the Australian Law Reform Commission Sentencing of Federal Offenders (Interim Report 15 1980) at 72.

3. Crimes Act 1900 s394A.

4. See his Honour Judge F M McGuire "Plea Bargaining: Its Significance in the Australian Judicial System" (1980) 6 Queensland Lawyer 1 at 2-3; P Clark "The Public Prosecutor and Plea Bargaining" (1986) 60 Australian Law Journal 199 at 200.

5. Crimes Act 1900 s447B provides that where additional offences are taken into account on a schedule the maximum sentence cannot be increased beyond that available for the charge to which the plea of guilty is entered.

6. P A Sallmann and J Willis Criminal Justice in Australia (Melbourne, 1984) at 76.

7. Crimes Act 1900 s394A.

8. P A Sallmann and J Willis, note 6 at 97-98.

9. See generally D A Thomas Principles of Sentencing (2nd ed London 1979) at 51-52; P A Sallmann for Shorter Trials Committee Report on Criminal Trials, Melbourne 1985 at 121-133; P A Sallmann "The Guilty Plea as an Element in Sentencing" (1980) 54 Law Institute Journal 105 (Part I) and 1985 (Part II). For England see A Samuels "Discount for Guilty Pleas in Crown Court and in Magistrates' Court" (1985) 149 Justice of the Peace 696, suggesting that the discount principle is not apparently applied in the Magistrates' Courts in the same manner as it is in the Crown Court.

10. See judgment of Cross J in R v Nicholls and Bushby (Unreported, Court of Criminal Appeal, New South Wales, 21 September 1978); comments on sentence by Moffitt P in R v Lawrence (Unreported, Court of Criminal Appeal, New South Wales, 17 April 1980).

11. P A Sallmann Report on Criminal Trials, note 9 at 131, has described the phrase "a moderate encouragement to plead", used by Sir Rupert Cross as an acceptable and appropriate concept. See now Penalties and Sentences Act 1984 (Vic) s4 and discussion in D Ross "Discount for a Plea of Guilty" Victorian Bar News, Spring 1986 at 35-36.

12. See D A Thomas Principles of Sentencing (2nd ed, London 1979) at 52 and cases noted there; R v Ross [1984] Crim LR 53; R v Meade (1982) 4 Cr App R(S) 193; R v Skilton (1982) 4 Cr App R(S) 339.

13. Shannon v The Queen (1980) 21 SASR 442; R v Gray [1977] VR 225; R v Perry [1969] Qd R 34; R v Cox [1972] Qd R 125; R v Schumacher (1981) 3 A Crim R 441.

14. Shannon v The Queen (1980) 21 SASR 442 at 452-453; see also address "Is the Existing Legal System Wasting Legal Aid Money?" delivered by the Chief Justice at the University of New South Wales, 26 May 1984 and quoted in Sallmann, Report on Criminal Trials, note 9 at 125-126; (1984) 58 Australian Law Journal 481.

15. See D A Thomas, note 12 at 50-51.

16. J Baldwin and M McConville Negotiated Justice: Pressures to Plead Guilty (1977) at 59-60.

17. Crimes Act 1900 s410.

18. R v Coote (1873) LR 4 PC 599. See generally, Watson and Purnell Criminal Law in New South Wales vol I Indictable Offences Part A para [1182] and following.

19. Boykin v Alabama 395 US 238 (1968) at 242.

20. J A Osborne Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (Commonwealth Secretariat London 1980) at 71.

21. There is, however, a growing body of articles on the subject. See his Honour Judge F M McGuire "Plea Bargaining: Its Significance in the Australian Criminal Justice System" (1980) 6 Queensland Lawyer 1 and Postscript (1981) 7 Queensland Lawyer 71; Shorter Trials Committee Report on Criminal Trials (Melbourne, 1985) Chapter 6; R D Seifman "Plea Bargaining in Victoria - Getting the Judges' Views" (1982) 6 Criminal Law Journal 69; Mr Justice G Hampel "Plea Bargaining - Judges' Involvement" a paper presented at the International Criminal Law Congress, Adelaide, 7 October 1985 now published in (1985) 59 Law Institute Journal 1305; P Clark "The Public Prosecutor and Plea Bargaining" (1986) 60 Australian Law Journal 199; K Borick "Plea Bargaining" and J Coldrey QC "Plea Negotiations - Policies and Practices", papers presented at the International Criminal Law Congress, Adelaide, 7 October 1985.

22. See generally, Australian Law Reform Commission Sentencing Federal Offenders ALRC 15, AGPS 1980 at 72-84.

23. Id at 83.

24. Mr Daryl Dawson QC (Solicitor-General of Victoria as he then was, now Mr Justice Dawson of the High Court of Australia) has noted that "The number of offers (by accused people) to plead guilty has markedly declined in recent years. This may be the result of increased legal aid; it certainly coincides with it" "Plea Bargaining" Victorian Bar News, Summer 1981 at 19.

25. W Westling "Plea Bargaining: A Forecast for the Future" (1973-76) 7 Sydney Law Review 424.

26. For example, s598(1) of the Criminal Code Act 1899 (Qld) similarly provides that where an accused person pleads to the indictment he may plead "that he is guilty of the offence charged ... or, with the consent of the Crown, if any other offence which he may be convicted upon the indictment". Crimes Act 1958 (Vic) s353, Criminal Code Act (NT) s342(2)(a) and Criminal Code (WA) s616(1) are to the same effect.

27. See J L Glissan "Limitations and Controls on the Exercise by Prosecutors of Their Discretion" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985).

28. R v Marshall [1981] VR 725.

29. See Mr Daryl Dawson QC, note 24.

30. Criminal Law and Penal Methods Reform Committee of South Australia Court Procedure and Evidence (Third Report 1975) at 117.

31. The functions of this Office are now the responsibility of the Commonwealth Director of Public Prosecutions.

32. Australian Law Reform Commission Sentencing of Federal Offenders (Interim Report 15 1980) at 77.

33. R v Turner [1970] 2 QB 321; R v Plimmer [1975] Crim LR 730; R v Cain [1976] Crim LR 464; Practice Direction [1976] Crim LR 561.

34. R v Tait and Bartley (1979) 24 ALR 473.

35. R v Marshall [1981] VR 725.

36. R v Marshall [1981] VR 725 at 732-734.

37. Bruce v The Queen, (Unreported, High Court of Australia, 21 May 1976, transcript of argument at 27).

38. Australian Law Reform Commission Sentencing of Federal Offenders (Interim Report 15 1980) at 76.

39. Id at 76-77.

40. R D Seifman "Plea Bargaining in Victoria - Getting the Judges' Views" (1982) 6 Criminal Law Journal 69.

41. See generally, Watson and Purnell Criminal Law in New South Wales Vol 1 Indictable Offences Part A para [1241].

42. Office of the Director of Public Prosecutions Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process (AGPS Canberra January 1986).

43. Id at 92.

44. Criminal Law Act 1967 (UK) s6(1)(b) permits an accused person to plead guilty to a lesser included offence but provides that the judge may refuse to allow the plea.

45. R v Soanes (1948) 32 Cr App R 136. This rule of procedure was illustrated in the case of Sutcliffe (the "Yorkshire Ripper") where Boreham J refused to permit pleas of guilty to manslaughter although they were acceptable to the prosecution. The accused person was convicted of murder at his trial, although on a majority verdict of 10 jurors.

46. J Baldwin and M McConville Negotiated Justice: Pressures to Plead Guilty (1977) at 22.

47. Id at 28. The authors relate the findings of a study conducted at the Birmingham Crown Court; R D Seifman "Plea Bargaining in England" in W F McDonald and J A Cramer Plea Bargaining (Lexington Books, 1980); M M Feeley "Plea Bargaining and the Structure of the Criminal Process" (1982) 7 The Justice System Journal 338; C May "Maintaining the Good Face of Justice: the Case of Plea Bargaining" in Z Bankowski and G Mungham (eds) Essays in Law and Society (London 1980).

48. R v Hall (1968) 52 Cr App R 528 at 530.

49. R v Turner (1970) 54 Cr App R 352; [1970] 2 KB 321. See also R D Seifman "The Plea Bargaining Process: Trial by Error?" (1977) 127 New Law Journal 551.

50. R v Plimmer [1975] Crim LR 730; R v Ryan (1977) 67 Cr App R 177; R v Atkinson (1978) 67 Cr App R 200; [1978] 1 WLR 425; R v Llewellyn (1978) 67 Cr App R 149; R v Winterflood (1979) 68 Cr App R 291; R v Coward [1980] Crim LR 117.

51. See discussion at para 6.50 and cases cited therein.

52. J Baldwin and M McConville, note 16 at 106-109.

53. R v Atkinson [1978] 1 WLR 425.

54. R v Turner (1970) 54 Cr App R 352; [1970] 2 KB 321.

55. R v Llewellyn (1978) 67 Cr App R 149; R v Winterflood (1979) 68 Cr App R 291.

56. S Mitchell Archbold: Pleading, Evidence and Practice in Criminal Cases 41st ed para 4-476 to 4-479.

57. For New South Wales, see s447B Crimes Act and Ninth Schedule to the Act. This procedure is not available to courts exercising summary jurisdiction. See also discussion in paras 6.35, 6.69.

58. United States of America, National Advisory Commission on Criminal Justice Standards and Goals Courts (US Govt Printing Office Washington DC 1973) at 46-49.

59. N Morris "Are Courts Too Soft on Criminals?" (1973) 53 Judicature 231.

60. United States of America, President's Commission on Law Enforcement and the Administration of Justice Task Force Report: The Courts (1967) at 9.

61. J Baldwin and M McConville Negotiated Justice: Pressures to Plead Guilty (1977) at 19.

62. See generally G Ferguson "A Profile on Plea Bargaining", unpublished study paper prepared for the Law Reform Commission of Canada, 17 April 1973 and kindly made available to us by the Commission.

63. J Morton "Plea Bargaining" (1985) 135 New Law Journal 457, 515, 564. See also articles by A Alschuler "Plea Bargaining and Its History" (1979) 79 Columbia Law Review 1; "The Prosecutor's Role in Plea Bargaining" (1968) 36 University of Chicago Law Review 50; "The Defense Attorney's Role in Plea Bargaining" (1975) 84 Yale Law Journal 1179; "The Trial Judge's Role in Plea Bargaining" (1976) 76 Columbia Law Review 1059; "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" (1983) 50 University of Chicago Law Review 931.

64. See generally M Heumann Plea Bargaining: The Experiences of Prosecutors, Judges and the Defense Attorneys (Chicago 1977).

65. J Baldwin and M McConville "Conviction by Consent: The Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978) 7 Anglo-American Law Review 271 at 272-274.

66. W F McDonald et al "Prosecutorial Bluffing and the Case Against Plea Bargaining" in W F McDonald and J A Cramer Plea Bargaining (1980).

67. Miranda v Arizona 384 US 436 (1963); Escobedo v Illinois 378 US 478 (1965).

68. S Miller "Proposed Amendments to the Federal Rules of Criminal Procedure" (1975) 14 Washburn Law Journal 76.

69. In Santobello v New York 404 US 257 (1971) where Burger CJ said at 260 that plea bargaining was in effect "... an essential component of the administration of justice". See also Bordernkircher v Hayes 434 US 357 (1978) in which the majority opinion appears to endorse the right of the prosecutor to engage in charge bargaining.

70. Federal Rules of Criminal Procedure, Rule 11.

71. S Miller "Proposed Amendments to the Federal Rules of Criminal Procedure" (1975) 14 Washburn Law Journal 76 at 83-85.

72. Federal Rules of Criminal Procedure, Rule 11(e)(5). S Miller "Proposed Amendments to the Federal Rules of Criminal Procedure" (1975) 14 Washburn Law Journal 76 at 82-86.

73. R T Nimmer "A Mandatory reform - Plea Bargaining Conferences" in "The Nature of System Change - Reform Impact in the Criminal Courts" (American Bar Association, 1978).

74. In Australia, a survey of pleas in the County Court of Victoria found that 42% of cases listed as trials resulted in pleas of guilty - J Willis and P Sallmann "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities" (1977) 51 Law Institute Journal 498 at 504.

75. The Commission wishes to record its gratitude to Mr J Casey QC, Criminal Appeal and Special Prosecutions Branch, Attorney General's Department, Ontario for his assistance on this subject. See also G A Ferguson and D W Roberts "Plea Bargainng: Directions for Canadian Reform" (1974) 52 Canadian Bar Review 497.

76. R v Johnson and Tremayne [1970] 4 CCC 64; R v Shanower [1972] 8 CCC (2d) 527.

77. The Criminal Code (Canada) s553.1.

78. See R v Dubien (1982) 67 CCC (2d) 341.

79. Criminal Law and Penal Methods Reform Committee of South Australia Court Procedure and Evidence (Third Report 1975) at 119.

80. Id at 118.

81. Sentencing of Federal Offenders (Interim Report 15 1980) at 81.

82. See P Clark and his Honour Judge F M McGuire at note 21.

83. Law Reform Commission of Canada Criminal Procedure: Control of the Process (Working Paper 15 1975) at 48.

84. Id at 45-46.

85. Id at 46.

86. Ferguson, note 62 at 12-14.

87. Justice Charles L Levin quoted in A W Alschuler, note 1 at 931.

88. R v Page [1977] 2 NSWLR 173 at 174-175. See also R v Warby (1983) 9 A Crim R 349.

89. R v Robert John Booth, (Unreported, Supreme Court of New South Wales, Criminal Division, 21 April 1983). See the detailed discussion of this case in J L Glissan "Limitations and Controls on the Exercise by Prosecutors of Their Discretion" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985) at 110-114.

90. J L Glissan, note 89 at 114.

91. R v Soanes (1948) 32 Cr App R 136. See also note 45.

92. P Sallmann and J Willis Criminal Justice in Australia (1984) at 97-98.

93. J Baldwin and M McConville, note 16 at 59-60.

94. P Sallmann and J Willis, note 92 at 98.

95. R v Marshall [1981] VR 725.

96. P A Sallmann "The Role of the Victim in Plea Negotiations" in P N Grabosky (ed) National Symposium on Victimology (Australian Institute of Criminology 1982) 17 at 23.

97. Id at 20.

98. Id at 28-30.

99. W A Kerstetter and A M Heinz Pre-Trial Settlement Conference: An Evaluation (United States Department of Justice, August 1979). A Report of an experiment conducted in the felony courts of Dade County, Forida.

110: Id at xvii.

101. N Morris The Future of Imprisonment (Chicago, 1974) at 56.

102. G Ferguson, note 62 at 4-5.

103. W Westling, note 25 at 431-432.

104. The Hon Mr Justice G Hampel "Plea Bargaining - A Judge's Involvement" (1985) 59 Law Institute Journal 1304. See also J Morton "Plea Bargaining" (1985) 135 New Law Journal 457, 515, 564 at 566; United Kingdom Criminal Bar Association discussion papers on the Shortening of Criminal Trials in the Crown Court (1980) at 54-55.

105. The words used paraphrase those used by Dawson QC, as he then was, in "Plea Bargaining" Victorian Bar News, Summer 1981 at 20.

106. W Westling "Plea Bargaining: A Forecast for the Future" (1973-1976) 7 Sydney Law Review 424 at 432.

107. See New South Wales Law Reform Commission Report The Jury in a Criminal Trial (LRC 48, 1986) para 8.21.

Chapter 12
The Function of the Prosecuting Authority

I. INTRODUCTION

12.1 A number of matters which the Commission has examined in relation to pre-trial procedure also raise issues which concern the nature and organisation of the agencies responsible for the prosecution of criminal offences. The current law and practice regarding the role played by the various agencies currently having this responsibility are explained in Chapter 2. Our proposals regarding committal proceedings, in particular, would necessitate significant changes in the manner of operation of those agencies.

12.2 The frequency with which the question of the function of the prosecuting authority arises has led us to undertake an examination of prosecuting authorities in other jurisdictions. This is intended to provide a useful background against which to consider the more fundamental issue with which we are concerned, namely, whether the agencies responsible for the prosecution of criminal offences in New South Wales should be reorganised and, if so, in what way. In particular, is it either necessary or desirable to transfer the responsibility for the prosecution of criminal offences to an agency specifically established to perform that function? If so, and presuming that such an agency should be subject to government control of some kind, what form should that control take?

12.3 Since the material in Chapter 2 and much of the content of this chapter was written, legislation has been passed in New South Wales establishing the office of the Director of Public Prosecutions.[1] The legislation has not been proclaimed as of February 1987, the time of the completion of this Discussion Paper. Although recent events have to some extent overtaken the Commission's work on this aspect of criminal procedure, we nevertheless think it appropriate to include this chapter in the Discussion Paper since the issues raised in it go beyond the establishment of a new prosecuting authority and the definition of its powers to include the manner of its operation. The legislation establishing the Office of Director of Public Prosecutions is in all but certain relatively minor respects in terms which the Commission approves. The research that we have done was directed towards the establishment of an authority with similar powers to those provided by the new legislation. This, in our view, makes it desirable that the material in this chapter be publicly released.

12.4 In Part II we examine the organisation of prosecuting agencies in other jurisdictions in order to identify features of those systems which may be suitable for implementation in New South Wales. In Part III we examine the right of a private citizen to launch a criminal prosecution. In Part IV we explain the important features of the new legislation referred to in para 12.3. Finally, in Part V we put forward some tentative proposals for reform.

II. THE POSITION IN OTHER JURISDICTIONS

A. The Commonwealth Director of Public Prosecutions

1. Introduction

12.5 The office of the Commonwealth Director of Public Prosecutions (the DPP) was established by legislation[2] which came into force on 5 March 1984. The office is controlled by the Director of Public Prosecutions (the Director) who is appointed by the Governor-General for a term of up to seven years. The Director is eligible for reappointment at the expiry of his or her term of office and may only be dismissed by the Governor-General on specific grounds.[3] The Director and, by delegation, the lawyers employed in the office of the DPP, are responsible for the conduct of all Commonwealth prosecutions and consequently for a wide range of decisions in the prosecution process. Because of the vast number of Commonwealth prosecutions, the Director is personally responsible for only a fraction of these decisions, presumably those which involve issues of the greatest importance and sensitivity. The DPP has prepared and published a document which sets out the prosecution policy of the Commonwealth.[4] The Director has also personally and publicly on various occasions explained the manner in which the DPP operates.[5]

12.6 The range of functions for which the Director is responsible is best illustrated by reference to the terms of the legislation and to the publication referred to. These functions include:

* to provide legal advice or policy guidance to those responsible for the investigation of suspected offences;

* to delegate the power to conduct the prosecution of certain offences;

* to direct the police to make further investigation of a suspected offence;

* to exercise the rights of appeal available to the prosecution;

* to grant indemnity against prosecution to people required to give evidence in criminal cases;[6]

* to furnish guidelines on prosecution policy for the benefit of the officers of the DPP;

* to establish criteria for the decision to prosecute;

* to make the decision whether or not to prosecute;

* to make the decision whether or not to continue a prosecution which has been commenced by another person;[7] and

* to determine the charge which will be prosecuted and, to this end, to engage in charge bargaining where this is initiated by the accused person and where any agreement reached is consistent with the requirements of justice.[8]

2. Relationship with the Police

12.7 Although the investigation of suspected criminal offences may be initiated by the government department which is responsible for administering the relevant act or regulation,[9] investigations are generally conducted by the Australian Federal Police. Where an investigation is particularly complex, the DPP may become involved in it at an early stage for the purpose of providing legal advice or guidance on matters of policy.[10] In some cases the police will forward a brief of evidence to the DPP for consideration

as to whether a prosecution should be initiated. Generally, however, the police or a Government department commence a prosecution by charging an accused person or corporation and then hand the matter over to the DPP to be continued.[11] The power of the Director to intervene in the prosecution of any offence under Commonwealth law and, once having taken over the proceedings, to either continue or terminate them applies equally to a case where the prosecution has been initiated by the Australian Federal Police as it does to prosecutions.[12] This discretion also applies where the prosecution has been commenced by a State police officer.[13]

12.8 One important feature of the legislation establishing the DPP is that it empowers the Director to direct the police to conduct further investigation. This may be done either in general terms or in respect of a particular case.[14] The relationship between the police and the Director may be summarised by saying that the police are effectively subordinate to the Director in the initiation and prosecution of Commonwealth offences. Decisions to prosecute made by the police are subject to review by the Director and the Director has the power to control the course of the police investigation.

3. The Independence of the Director

12.9 The Commonwealth Attorney-General has the ultimate authority over decisions made by the Director. The Attorney-General can effectively overrule a decision made by the Director by furnishing guidelines or giving directions

either generally or in regard to a particular case.[15] Any such guidelines and directions may only be given after consultation with the Director and they must be published in the Government Gazette and tabled in both Houses of Parliament.[16] As of February 1987, this power had not been exercised by the Attorney-General.

12.10 In assessing the level of independence enjoyed by the Director, the terms of appointment and the terms by which he or she may be removed from office are also important. The Director's appointment may be terminated by the Governor-General if the Director becomes bankrupt, is absent from duty, engages in legal practice outside the duties of his or her office, engages in paid employment outside the duties of his or her office without the Attorney-General's consent or fails without reasonable excuse to comply with his or her obligations under the Act.[17] It is noteworthy, however, that the Director is appointed for a seven-year term. This may be contrasted with the equivalent office in Victoria, for example, where the Director has tenure equivalent to a judge of the Supreme Court.[18]

4. Review of Decision to Prosecute

12.11 In the case of a decision to institute or carry on proceedings, the current Director has said that he does not consider it is appropriate to give reasons for his decisions[19] although in the case of a decision not to proceed he has acknowledged that it may sometimes be necessary in the interests of the public.[20] In his view, giving reasons may be

unfair to the accused person and would represent an attempt on the part of the DPP to justify its actions. Where no reasons are given for a decision, external review is less likely to arise. On the other hand, the existence of guidelines prepared by the DPP and presented to Parliament by the Attorney-General establishes certain standards which must be complied with in exercising the discretion to prosecute and probably facilitates internal review.

12.12 The prosecuting authority has a wide discretion in the making of decisions in the prosecution process.[21] While the courts have virtually no control over cases where there is no prosecution, they can exercise limited control over the decision to prosecute where the court is of the view that the prosecution represents an abuse of the court's process. By this means, the courts have the power to restrain unfair or irregular prosecutions. The role of the court in this regard is essentially to ensure that the appropriate procedures in the prosecution process have been observed, not to judge the merits of the decision to prosecute. The impact of the Administrative Decisions (Judicial Review) Act 1977 on the review of prosecutorial discretion is uncertain. It is clear that the provisions of the legislation can be relied on to review the decision of a magistrate to commit an accused person for trial.[22] However, although they would appear to be covered by its terms, we are not aware of any case in which the decision of a police officer to charge a person with an offence under

the law of the Commonwealth, or the decision of the Director to prosecute a person on such a charge, has been challenged under the provisions of this legislation.[23]

B. The Victorian Director of Public Prosecutions

1. Introduction

12.13 The powers of the Victorian Director of Public Prosecutions are established by the Director of Public Prosecutions Act 1982. The primary function of the office is described in the legislation as being to prepare and conduct criminal proceedings on behalf of the Crown. This duty is not confined to the trial of indictable offences but may include committal proceedings and summary proceedings. The objectives of the Victorian Government in creating the Office of the Director of Public Prosecutions were said to be, firstly, the removal of the process of criminal prosecution from the political arena and, secondly, the creation of a more efficient system for the preparation and conduct of prosecutions in the higher courts.[24]

12.14 The discretion to prosecute is vested absolutely in the Director. It can be delegated to staff members in routine matters. The Director has the power to grant indemnities, to enter a nolle prosequi (giving effect to a decision not to pursue a prosecution) and to direct the police to refer offences to the Director. The Director may also issue guidelines to the police and officers of his own Department on

prosecution policy.[25] The Director also has the power to exercise the right to appeal against the inadequacy of sentence in both summary and indictable cases.[26]

2. Relationship With the Police

12.15 The Director has the power to request assistance from the Chief Commissioner of Police where a matter requires further investigation as well as the obligation to advise the Chief Commissioner of Police when so requested.[27] As in the Commonwealth legislation, the police are essentially subordinate to the Director, who can require them to refer specific offences to him and can also furnish the police with rules of conduct in the form of guidelines.[28] The previous Director has noted the desirability of being able to provide the police with "operational advice" during an investigation in order that they may know, for example, whether the methods of obtaining evidence they have used are likely to result in the evidence being excluded in the exercise of judicial discretion.[29]

12.16 There is also a consultative aspect to the relationship between the police and the Director. Apart from specific legislative duties, the Director fulfils a role as the motivating force behind the reform of criminal procedure and the facilitation of more efficient prosecution. The present Director and his predecessor have both chaired committees to discuss procedural matters requiring reform or clarification.[30]

3. The Independence of the Director

12.17 The implementation of the stated policy of separating the prosecution process from the political arena was achieved by vesting the discretion to prosecute, in the vast majority of cases, in the Director. An important aspect of the notion of independence is reflected in provisions which give the Director the same security of tenure as that enjoyed by a Supreme Court judge. The Director can only be removed from office by the Governor-in-Council with the approval of both Houses of Parliament.[31]

12.18 Although the Director is accountable to the Attorney General for the daily running of the Department, the Attorney General cannot influence the Director's decisions regarding the preparation, institution and conduct of criminal proceedings.[32] The Director is required to report to the Attorney General annually[33] and this report is to be tabled before Parliament. In this way, the Director's actions are open to the scrutiny of Parliament and are, to that extent, made public. The Director is thereby also given the opportunity to publicise the problems associated with the office.[34]

4. Review of Decisions to Prosecute

12.19 Although there is provision in the Victorian Act for the Director to issue guidelines on prosecution policy[35] the previous Director has said that guidelines are inappropriate

for such an "inherently intuitive" matter.[36] The guidelines issued by the English Director of Public Prosecutions were considered to be too rigid to justify complete adoption.

12.20 Without a set policy or guidelines, effective internal review is unlikely although, as with the Commonwealth DPP, the hierarchical departmental structure of the office allows for a certain degree of internal review. However, unless review is carried out consistently by reference to a stated policy, little redress will be available to those who are adversely affected by decisions made in the prosecutorial process. In this respect the Victorian system may be less consistent than that of the Commonwealth where the Attorney-General has issued guidelines for use by those involved in making prosecution decisions. As is the case with the Commonwealth, there is little potential for judicial review. The general rule that decisions made in the prosecution process are not reviewable by the courts is applied consistently throughout Australia.[37] The only qualification appears to be the court's power to stay criminal proceedings on the ground that they are an abuse of process.[38]

C. The Director of Public Prosecutions in England

1. Introduction

12.21 The office of Director of Public Prosecutions was established in England in 1879[39] following substantial criticism of the system of private prosecutions which had flourished until that time. The Director's functions have been gradually redefined, most recently by legislation enacted in

1985 implementing a Crown prosecution service to be controlled by the Director of Public Prosecutions[40] under the Ministerial responsibility of the Attorney General. It is the duty of the Director to take over the conduct of all criminal proceedings instituted on behalf of the police force[41] other than "specified proceedings". It is anticipated that these "specified proceedings" will include minor offences which can be dealt with in the magistrates' courts in a manner which permits the accused person to submit a written plea of guilty without having to attend the court in person.[42]

12.22 The primary aims of the current structure for the prosecution of criminal offences have been identified as being:

* to achieve greater coherence of prosecution policy, consistency and fairness;
* to increase efficiency and cost effectiveness;
* to provide for review by qualified lawyers of all prosecution cases before their presentation in court;
* to preserve the primary role of the police as being that of law enforcement; and
* to establish the independence of Crown Prosecutors from the police.[43]

The 1985 legislation generally followed the terms of recommendations made by the Royal Commission on Criminal Procedure which cited three main objectives for its proposals:[44] firstly, to reduce the number of cases in which the prosecution evidence presented in court would not be sufficient to secure a conviction; secondly, to promote greater consistency in prosecution policy and procedure; and thirdly,

to act as a counterbalance to the recommendations for extended police powers made by the Royal Commission's report,[45] many of which had been implemented by earlier legislation.[46]

2. Relationship With the Police

12.23 As has been noted, one of the main reasons for the introduction of the new system was to relieve the police of the responsibility for the conduct of all but the most minor prosecutions and transfer that function to an independent service. Previously, the practice of the police varied greatly. Some police forces employed a prosecuting solicitor whilst others instructed private firms of solicitors to act on behalf of the police.[47] The relationship was theoretically the same as between a lawyer and his or her client but there was a concern, based on the experience of some prosecutors pressing hopeless cases on behalf of the police, that the lawyers acting for the police were not always truly independent[48] in the sense that they were not always prepared to make their own professional judgment of the prosecution case.

12.24 The new system provides that Crown Prosecutors will be responsible for the conduct of all police cases except specified minor matters. The prosecutors will therefore be able to terminate any case without reference to the police.[49] The police, however, retain virtually exclusive responsibility for the initiation of charges. This is consistent with the recommendation made in the report of the Phillips Commission that the investigative and prosecution functions should be

divided at the stage of charge.[50] The need to distinguish the functions of conducting the investigation and making the decision to prosecute is said to be based on two considerations, one functional, the other psychological:

> The investigator's function is to ferret out the truth; while that of the prosecutor is to assess the evidence, consider the legal position, decide whether the case will stand up in court, and coolly weigh relevant policy considerations. The qualifications and qualities needed are not the same; and are not necessarily found in the same person.
>
> The psychological argument is that the investigator becomes wedded to his investigation. If it convinces him of the suspect's guilt, he may become emotionally committed to securing a conviction. Objectivity suffers, and the investigator may unconsciously shut his mind to arguments telling against the institution of proceedings.[51]

It has been suggested that the new system is unlikely to produce a radical change in the relationship between the police and prosecutors. Whilst Crown Prosecutors will have a clearly defined power to terminate, in accordance with guidelines established by the Government, prosecutions commenced by the police, it is suggested that the need to retain a cordial relationship with the police will give the Crown Prosecutors little incentive to exercise this power.[52]

12.25 The final matter of importance regarding the relationship of the Director of Public Prosecutions, and hence the Crown Prosecutors in England, and the police is the extent to which the police can be directed to conduct an investigation and charge a person with a criminal offence. In accordance with the recommendations of the Phillips Commission, there is a

strict division between the investigative and prosecutorial functions. The official position has been expressed by the Attorney-General, Sir Michael Havers, in these terms:

> ... it is not part of the functions of the Director of Public Prosecutions to investigate alleged or suspected criminal offences, nor does he have the facilities to do so. That is the province of the police. If and when a Chief Officer of Police refers a particular case to the Director of Public Prosecutions for consideration whether to institute, or authorise the institution of, criminal proceedings, the Director of Public Prosecutions may be in a position to advise as to any further evidence that may be needed, or would be helpful, before he can take his decision or at a later stage of the contemplated proceedings. But it is not his business to direct the police as to how such evidence should be obtained or to require them to obtain it. Still less is it in the power of the Director of Public Prosecutions to require a Chief Officer of Police to mount an investigation into a case which has not been referred to him but where it is alleged or suspected by others that a crime may have been committed.[53]

There is evidence, however, which suggests that the Director of Public Prosecutions does in practice give the police orders to conduct specific investigations.[54]

12.26 It has been said that the new arrangements in England will not make it any easier for Crown Prosecutors or the Director of Public Prosecutions to order police investigations where they consider it necessary. Bearing in mind that this is apparently the unofficial practice, it is suggested[55] that this is one area where the sharp distinction between the investigative and prosecutorial functions should become blurred in order to permit the prosecuting authority to order the

police to investigate. Accordingly, the new legislation has been criticised for its failure to recognise and regularise a function which it is said is clearly in the public interest.[56]

3. Independence of the Director

12.27 The decisions of the Director of Public Prosecutions and the Crown Prosecutors are based on guidelines for prosecution issued by the Attorney-General.[57] These guidelines provide that there must be, firstly, "a reasonable likelihood of conviction" and, secondly, various public policy factors satisfied before a decision to prosecute can be made. The new legislation requires the Director to issue a Code for Crown Prosecutors giving guidance on the exercise of the following functions:

* In determining, in any case, whether proceedings for an offence should be instituted, and if so what charges should be preferred.

* In determining, where proceedings have already been instituted, whether they should be discontinued.

* In considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.[58]

The Code is to be made public by its inclusion in the Director's annual report to the Attorney-General.[59]

12.28 The present Director of Public Prosecutions has publicly acknowledged that the Director is expected to perform the functions of the office in accordance with the policy determined by the Attorney-General of the day.[60] A former

Director of Public Prosecutions has explained the relationship between the holder of that office and the Government in the following terms:

> [The Director] must in the last analysis take instructions from the Attorney, should he seek to give them. This does not in practice mean that the Director is in any real way inhibited in his ability to make decisions. I cannot conceive of circumstances, for example, where the Attorney would seek to interfere with the day-to-day operations of the Department, although he would from time to time consult with us about matters that might conceivably require his response in Parliament.[61]

4. Review of the Prosecutor's Decision

12.29 The English courts have retained the general discretion to refuse to allow a prosecutor other than the Attorney-General or the Director of Public Prosecutions to terminate criminal proceedings once they have been instituted in a court. This is undoubtedly the case once a prosecution has commenced in the Crown Court.[62] The position in Magistrates' Courts when hearing committal proceedings is uncertain[63] but the better view appears to be that there is judicial control over all cases.[64] However, where the prosecution is conducted by the Attorney-General or the Director of Public Prosecutions, the position is different. The courts will not generally interfere with a decision to terminate such a case[65] unless the decision was not "honestly and reasonably arrived at".[66] The question of whether the courts will review the exercise of prosecutorial discretion in a case where there is a decision not to prosecute seems to have been left open. There is, however, a clear indication that the courts would interfere in an appropriate case.[67]

12.30 The powers under the new legislation of the Director, and hence the Crown Prosecutors, to terminate proceedings once they are before a court have been described as being uncertain,[68] at least so far as prosecutions in the Crown Court are concerned. The position in the Magistrates' Courts was clarified by a late change in the provisions of the legislation[69] so that it is now clear that any proceedings in the Magistrates' Courts may be discontinued without the permission of the Court, but only before the first witness for the prosecution is called.[70] It has been suggested that the legislation must be much more specific if it is to give prosecutors the statutory right to terminate prosecutions once they have commenced in the Crown Court.[71] The issue is an important one. Since it is suggested that under the new system the police will effectively determine which cases enter the courts in the first place, the prosecutors' lack of independence from the court will also undermine the prosecutors' independence from the police.[72]

D. The Procurator Fiscal of Scotland

1. Introduction

12.31 In Scotland, the Procurator Fiscal is responsible for conducting prosecutions in the higher courts. Originally appointed by the Sheriff, a judicial officer, to collect taxes and fines, it was not until the nineteenth century, in a move directed towards separating the prosecutorial and judicial functions, that the Procurator Fiscal was given the responsibility for supervising the prosecution of criminal cases. There are now 48 district Fiscal offices throughout

Scotland and approximately 230 people who hold the office of Procurator Fiscal, each of them assigned to a particular district.[73] The Procurator Fiscal is subordinate to the Lord Advocate in much the same way as the Director of Public Prosecutions in England is supervised by the Attorney General. The Lord Advocate issues general guidelines to all Procurators Fiscal which are designed to achieve consistency in the implementation of the Government's policy on criminal prosecutions.[74]

12.32 The discretion to prosecute is vested in the Procurator Fiscal. Although this discretion is theoretically very wide, there are an increasing number of factors which must be taken into account in exercising that discretion.[75] The Procurator Fiscal's powers and duties include giving legal advice to the police and government officials, conducting prosecutions in the Sheriff's Court and the Magistrates' Courts, and acting as instructing solicitor to Crown counsel who conduct prosecutions in the High Court. The Procurator Fiscal may also examine any witness and must do so in all cases tried on indictment.[76] In addition, it is the Fiscal's task to decide whether an appeal should be brought against a decision at first instance. The Procurator Fiscal also has a wide discretion to determine the mode of trial since most offences can be prosecuted either summarily or by way of "solemn procedure", roughly equivalent to trial on indictment. This decision involves making an assessment of the appropriate sentence in the event of a conviction. In practice, the vast majority of cases are heard

in courts of summary jurisdiction.[77] Since the accused person does not have any right to choose the court of trial, the Procurator Fiscal effectively has the right to determine the availability of trial by jury.

2. Relationship With the Police

12.33 The Police are subordinate to the Procurator Fiscal at law. The Fiscal has the responsibility of deciding whether to prosecute and also the ultimate responsibility for the conduct of the investigation.[78] In practice there is a close working relationship between the police and the Fiscal.[79] The police carry out the investigation and usually charge a person whom they suspect of having committed an offence. The police then forward the matter to the Procurator Fiscal who decides whether a prosecution will be launched and what the charge will be. The Phillips Royal Commission Report on Criminal Procedure considered that in most cases the police decide on the prosecution whilst the Fiscal performs the "formal and routine task" of endorsing the police decision.[80] The police have a limited discretion as to which cases they report to the Procurator Fiscal. Although the Fiscal can direct the police to make certain investigations, this rarely occurs. Both the police and the Procurator Fiscal interview witnesses and take their statements. This places the Procurator Fiscal in a good position to judge the strength of the prosecution case and the prospect of conviction at trial.[81]

3. The Independence of the Procurator Fiscal

12.34 The Procurator Fiscal has the tenure of a judge, that is "for life during good behaviour".[82] Despite the fact that the Procurator Fiscal is answerable to the Lord Advocate, who can instruct them as to how to conduct a specific case, each is described as having a considerable degree of autonomy within any particular area of prosecution.[83] Because of his involvement in all cases that are prosecuted, the Procurator Fiscal is able to control the prosecution function and maintain a consistent approach to the prosecution of particular crimes in accordance with the guidelines issued by the Lord Advocate. In considering whether to prosecute, the Fiscal takes into account the evidence available in the case and whether it is in the public interest to prosecute.[84] For various reasons, up to 20% of cases handled by the Fiscals are not brought before the courts.[85]

4. The Review of Decisions to Prosecute

12.35 There is no judicial review of the decision to prosecute since the Procurator Fiscal's role is completely separate to that of the court. As we explained at paras 7.60-7.61, the initial decision to prosecute is not subject to any significant scrutiny by the courts. The public are not entitled to know the reasons for the Procurator Fiscal's decisions.[86] They are not normally stated, thus lessening the likelihood of external review. There are, however, a list of general criteria or guidelines for prosecution comprised of Crown Office circulars issued by the Lord Advocate. For example, decisions made by

Crown counsel or a Fiscal relating to charges of murder and sexual assault must be referred to the Lord Advocate.[87] Internal review by the Crown Office is more likely to occur because the maintenance of consistency in prosecution policy is regarded as a high priority.

E. Public Prosecution in France

1. Introduction

12.36 During the fourteenth century, the King's interests were protected in the courts by "procureurs". Initially responsible for the collection of taxes and fines, these prosecuting attorneys were, as the French inquisitorial system developed, given powers to investigate criminal offences and institute proceedings.[88] Today the French prosecuting service or "Ministere public" is headed by the Procureur de la Republique who is appointed by and directly responsible to the Minister of Justice. The Minister controls the service and issues written instructions concerning the initiation and conduct of court proceedings including the conduct of individual prosecutions. Generally, however, the Minister will act on the advice of the procureur.[89]

12.37 Both the judiciary and public prosecutors are part of the "magistrature". The general role of "magistrates" is said to be that of performing a duty to the public, being independent and impartial in both investigation and court proceedings.[90] Just as the Code penale (CP) is the main source of criminal law in France, the Code de procedure penale

(CPP) regulates a wide range of procedural matters including the powers and duties of the Procureur de la Republique. The procureur receives complaints concerning alleged offences from the police or public,[91] investigates the offences[92] and in most cases makes the decision whether to prosecute and in what form. Where court proceedings are commenced, the procureur has the conduct of those proceedings, may give his or her view as to appropriate sentence, has the responsibility of enforcing the sentence, the discretion to appeal and many other duties not connected with criminal law.

12.38 Classification of offences is governed by the Code penal. Offences carrying penalties greater than five years imprisonment, which includes capital punishment, are known as "crimes". Lesser offences are known as "delits". Although the procureur's powers include the ability to classify a crime as a "delit", to be dealt with in a court of subordinate jurisdiction, once classified as a crime, the matter must be referred to an examining magistrate or juge d'instruction to conduct an investigation.[93] The juge d'instruction is independent from the procureur, the police and the court, although his or her decisions are subject to appeal.[94].

2. Relationship Between the Procureur and the Police

12.39 The police force in France is divided into different groups, independent of each other and responsible to different Ministers or local authorities. Within each group are two classes of police: the "police judiciare" and the "police administrative". The task of the police judiciare is to

discover breaches of the law, to collect evidence and to establish the identity of offenders.[95] They are subject to the control of the Procureur de la Republique unless the pre-trial inquiries are being conducted by the juge d'instruction. Although the powers of the Procureur de la Republique are restricted to advising and directing the police, failure to follow orders could lead to disciplinary action against the officer concerned. The procureur has a supervisory role over the police and receives information on all criminal offences, thus controlling the decision to investigate further.[96] The police are also subject to the control of the responsible government Minister through their superior officers.

3. The Independence of the Procureur

12.40 Although the Procureur de la Republique receives direct instruction both specific and general from the Minister of Justice, he or she cannot be compelled to prosecute or to refrain from prosecuting a particular individual. A prosecution commenced against the Minister's orders would still be valid, but the prosecutor could then be the subject of disciplinary proceedings brought by the Minister. Theoretically all prosecutors may express their own contrary views orally in court, without fear of proceedings being taken against them. It has been suggested, however, that no procureur mindful of his or her career would disobey a written Ministerial instruction.[97]

4. Review of the Decision to Prosecute

12.41 The decision of the Procureur de la Republique not to prosecute a criminal offence does not appear to be subject to formal review. Where the offence is serious, that is, a "crime", the decision to prosecute is effectively removed to a juge d'instruction who conducts a preliminary hearing. Whilst the hearing before the juge d'instruction is not structured as a means of review of the decision of the police or the procureur, it does serve this purpose in practice. Any decision made at this level can be appealed against. However, apart from receiving direct instructions from the Minister of Justice, the Procureur retains a wide discretion over the investigation and prosecution of lesser offences. Where disciplinary proceedings are brought against the procureur for misconduct or wilful disobedience, he or she may be dismissed or demoted. It would seem that the general public do not have the right to have decisions of the procureur reviewed by means of any formal procedure. The public are limited to making representations to the relevant Minister.

F. The District Attorney in the United States of America

1. Introduction

12.42 Since each of the 50 states has its own system of courts, the system of prosecuting in the United States differs considerably from state to state.[98] The following material sets out the principles on which the system generally operates. The responsibility for the prosecution of criminal offences is borne by the office of the District Attorney.

Whilst the primary duty of the District Attorney is to enforce the laws of the state and initiate criminal proceedings on behalf of the state, the basic function of the office is to bridge the gap between the police and the courts by exercising an independent judgment concerning the need to institute criminal proceedings.

12.43 The functions of the District Attorney are in practice performed by lawyers attached to the office. In practice the District Attorney has an almost unlimited discretion to prosecute, and is not obliged to prosecute a person who has been charged with an offence unless he or she feels there is sufficient evidence to support a conviction. Neither is there any obligation to charge a person with all the offences of which he or she could be found guilty.[99] This is demonstrated by the frequent use of plea bargaining in most American jurisdictions.[100] It would seem that this discretion is also vested in the prosecuting attorney responsible for a particular case. However, in more serious or contentious crimes the responsibility remains fully with the District Attorney who is not supposed to engage in selective enforcement.[101]

2. Relationship Between the District Attorney and the Police

12.44 The District Attorney generally has very little influence over the investigative function and usually examines a case after the police have substantially completed their investigation. There has been a trend in some jurisdictions towards increasing use by prosecutors of the grand jury as an investigative tool. This means that the prosecutor becomes

involved in the case before a charge is laid and in some cases before a suspect has been identified. This development has been criticised on the ground that the protections established to preserve the rights of the individual against police misconduct do not assist a person who is the subject of an investigation by a prosecutor.[102] There is generally a consultative relationship between the police and prosecuting attorneys. The police can refer cases to the District Attorney for advice on legal matters and opinions as to whether more evidence will be needed.

12.45 In cases that come to trial, the police and the District Attorney function as a team. The attorney conducts the case while the police officer organises the presentation of the evidence and often appears as an expert witness. Whilst the District Attorney has the power, by deciding not to prosecute, to negate a police decision to charge a person, the police have a discretion as to whether a case is referred to the District Attorney in the first place. The District Attorney's work is limited to those cases referred to the office by the police force. There is generally no power in the District Attorney to direct that a prosecution or an investigation be initiated by the police.

3. The Independence of the District Attorney

12.46 The American tradition is for the prosecuting agency to be independent of the courts and the police.[103] In deciding what proceedings are brought before the courts, the agency is regarded as performing an adjudicative function. With respect

to plea negotiations, there has been a move towards a requirement of judicial approval for the acceptance of a negotiated plea of guilty.[104] However, such a safeguard will depend on whether the District Attorney acknowledges the fact of negotiation having occurred. This development is an exception to the general proposition that the District Attorney's decisions are made independently of the courts.

12.47 The office of District Attorney is filled in the manner prescribed by the relevant constitutional or statutory provisions. As a rule, the District Attorney is elected by the qualified voters of the district. Whilst some states provide for the selection of the District Attorney by appointment, this is the exception. However, the positions of Special Prosecutor and Deputy and Assistant District Attorneys, who will be required to make important decisions in the prosecution process, are filled by appointment.[105] The District Attorney holds office for a specified term and is eligible for re-election or re-appointment. He or she may only be removed from office on grounds and in a manner provided for by constitutional or statutory provisions. The Attorney General, a political office in the United States, is responsible for initiating proceedings of this kind.

4. The Review of the Decision to Prosecute

12.48 Judicial review is almost non-existent as it is an established principle that the prosecuting authority is not accountable to the courts.[106] The courts have constantly reiterated that the Constitution has given this power to the

government and not to the courts.[107] Even when a statute gives the courts a right to review a decision of nolle prosequi, that is, to abandon a prosecution, they are very reluctant to do so. At the Federal level, guidelines for the conduct of the prosecution have been issued[108] which indicate the willingness of the Department of Justice to allow prosecutors to assess matters of culpability and deterrence rather than leave such matters solely to the courts. The guidelines imply a readiness on the part of the government to examine the decisions of prosecuting attorneys. However, there are problems caused by the fact that the Department of Justice has limited remedies to alter a decision made by the prosecutor. The most effective means of achieving this is by placing political pressure on the Attorney General to overrule a disputed decision in the prosecution process.

III. UNOFFICIAL PROSECUTIONS

12.49 Whilst the overwhelming majority of criminal prosecutions are brought by agencies subject to the control of the government, in most jurisdictions the right to launch a prosecution is more widely available. There are generally four types of criminal prosecution in New South Wales: firstly, prosecutions which are the ultimate responsibility of the Attorney General; secondly, prosecutions by the police; thirdly, prosecutions, usually of regulatory offences, by statutory bodies; and, fourthly, prosecutions by private citizens, which may be brought on behalf of a corporation. The fourth category is popularly known as "private prosecutions".

However, Sir Patrick Devlin considered the term "private prosecutions" to be misleading. Prosecutions in the second and third categories may also be considered "private prosecutions" in that they are brought in the name of the police officer or officer of a statutory body who is the informant, that is, the person who swears the information to initiate the prosecution. For these reasons Sir Patrick Devlin distinguished prosecutions as either "official" or "unofficial".[109]

12.50 The right of an individual citizen to prosecute a person on a criminal charge is regarded as a fundamental right safeguarding society against incompetence, bias or corruption on the part of the public prosecuting authorities.[110] Before the advent of public police forces and later public authorities with the responsibility for conducting prosecutions, all criminal prosecutions were private in their nature. The individual's right to prosecute is therefore a long established one. However, in recent years there have been serious questions raised about the value of the private citizen's right to bring a prosecution. In England, the Royal Commission on Criminal Procedure recommended its abolition or, failing this, making the right to bring such a prosecution subject to the leave of the court.[111] On the other hand, the Law Reform Commission of Canada has generally recommended that the right of a private citizen to launch a criminal prosecution should be made, so far as is practicable, equivalent to the rights of a public prosecuting authority.[112]

12.51 In New South Wales a task force established in 1984 by the Government to examine the operation of the criminal law and procedure in the area of child sexual assault canvassed the desirability of preserving the right of a private individual to prosecute.[113] In other areas, the right has been restricted by legislative provisions which require that before any prosecution for an offence of a specific kind may be initiated, the consent of a particular person or authority is required.[114]

12.52 The effective rights of the private prosecutor in relation to indictable offences are also limited by the fact that a private citizen can only institute committal proceedings.[115] If the accused person is committed for trial, it is a matter for the Attorney General to decide whether to proceed in the higher court. Whilst there is a right to apply to obtain leave to proceed on indictment from the Supreme Court, this will only rarely be granted.[116] It is suggested that the only grounds on which leave might be granted is where the Attorney General's failure to proceed to trial is an abuse of the discretionary powers of that office. The Supreme Court has, so far as we are aware, never granted such an application. In England, the courts have been prepared to grant leave to a private prosecutor to proceed on indictment.[117] In a recent case in Scotland a private prosecution brought following the refusal of Crown counsel to prosecute in a sexual assault case resulted in a conviction and a subsequent reappraisal of the practice of Crown counsel in such cases.[118]

12.53 Whilst the power of the private citizen to launch criminal prosecutions has been under threat, it has generally survived, if only in a somewhat modified form.[119] The importance of the power as a safeguard against abuse is illustrated from time to time.[120] On the other hand, the fact that the power may be exercised improperly or maliciously has also been demonstrated in recent times.[121]

12.54 As with many aspects of the administration of criminal justice, this is an area where there needs to be a balance struck between the right of the individual to have access to justice and the interest of the community in ensuring that its institutions are not used as instruments of oppression. In our view, this balance will be achieved by the preservation of the traditional right to launch a private prosecution, complemented by the establishment of powers in the public prosecuting authority which will enable it to monitor, supervise and in some cases, control, the exercise of the power. Ultimately, the courts will have control over the use of the power to launch an unofficial prosecution and a person wrongly accused may have a remedy in a civil action for malicious prosecution.[122] There will be some cases, however, where serious harm may be done by bringing the matter before the court in the first place. The prosecuting authority should have the power to prevent the harm caused by abuses of this kind.

12.55 The new legislation governing the prosecution of criminal offences in England and the legislation which defines the practice in Commonwealth prosecutions in Australia have both qualified the right of private prosecution by giving the Director of Public Prosecutions the power to take over a case which has been commenced by a private prosecutor at any time.[123] A similar provision appears in the legislation recently passed in New South Wales,[124] with the important distinction that this power will not apply to prosecutions for summary offences that are not prescribed in the regulations. There will therefore be a range of summary offences in which the right of the private citizen to prosecute is subject only to any express requirement of consent for such prosecutions and the general power of the courts to prevent abuse by a vexatious or malicious litigant. The Commission's view is that the power of the prosecuting authority should not be restricted in this way and should be able to be applied to all criminal prosecutions.

IV. THE DIRECTOR OF PUBLIC PROSECUTIONS ACT 1986

A. Introduction

12.56 The Director of Public Prosecutions Act 1986 was passed by the Parliament of New South Wales on 3 December 1986. At the time of writing it has yet to be proclaimed. The main features of the legislation, having regard to the issues canvassed in the discussion of prosecuting authorities in other jurisdictions above, are:

* The office of Director of Public Prosecutions (the Director) is established. The Director, who must be a Queen's Counsel, may only be removed from office on specified grounds.

* The principal function of the Director is to institute and conduct prosecutions for indictable offences and appeals in respect of such prosecutions.

* In exercising that function, the Director is required to determine whether a bill should or should not be found for an indictable offence and may direct that no further proceedings be taken against accused people who have been committed for trial or sentence.

* The Director may institute proceedings related to summary offences where those offences are of a kind prescribed by the regulations.

* The Director is authorised to take over prosecutions or other proceedings commenced by other people and may either continue or terminate those proceedings.

* Where, under the law of the State, the consent of a person is required before a prosecution may be initiated, that other person may authorise the Director to give that consent instead.

* The Director may furnish guidelines to Crown Prosecutors for the exercise of specific functions but not in relation to a particular case.

* The Director may give guidelines to police with respect to the prosecution of indictable offences and prescribed summary offences but not in relation to a particular case.

* The Director may request the Attorney General to grant an indemnity from prosecution.

* The Director is subject to guidelines furnished by the Attorney General but not in relation to particular cases. Any such guidelines must be published in the Government Gazette and laid before Parliament.

* The Director must prepare an annual report to the Attorney General which is to be laid before both Houses of Parliament as soon as practicable after it has been received by the Attorney General.

* The functions of the Attorney General cannot be overruled by the Director.

* Where the Attorney General exercises the power to find a bill, to determine that "no bill" be found, to direct that no further proceedings be taken against an accused person or to appeal against a sentence, the Attorney General must notify the Director, and a report of these notifications must be included in the Director's annual report.

12.57 There is provision for the guidelines given to Crown Prosecutors and police to be made public by their inclusion in the Director's Annual Report to the Parliament.[125] We consider that this move towards opening the prosecution process to public scrutiny should be extended.[126] In our view, the general policy of the prosecuting authority regarding the criteria to be applied by the Director in making a decision to prosecute and in respect of other decisions to be made in the prosecution process should, once it is formulated, be made public. There is a valuable precedent available in the document prepared by the Commonwealth Director of Public Prosecutions.[127]

B. Relationship with the Police

12.58 The powers of the Director which are likely to define the nature of the relationship between the police and the prosecuting authority are the following:

* the power to institute and conduct committal proceedings, proceedings for offences triable either way and summary proceedings in respect of prescribed summary offences;

* the power to take over any proceedings, other than for summary offences not prescribed, and either continue or terminate them;

* the power to furnish guidelines to the police regarding the prosecution of indictable offences or prescribed summary offences;

* the power to assume responsibility for the prosecution of any offence or class of offences otherwise prosecuted by the police or another person; and

* the power to request the police to conduct investigations associated with the alleged commission of an offence.

12.59 Many of these provisions overcome certain of the difficulties recognised in the operations of prosecuting authorities in other jurisdictions. In particular, the power to direct that investigations be made and the power to initiate proceedings give the Director the clear authority to pursue an inquiry where there is dissatisfaction with the manner in which it has been conducted by another prosecuting authority or investigative agency. We also consider it desirable that the police should be able to consult the prosecuting authority during the investigative process for the purpose of obtaining advice regarding the acquisition of evidence or the decision to charge a person with a criminal offence.

12.60 The role of the police prosecutors has for some time been the subject of debate in New South Wales. A major report tabled in 1977 recommended the gradual phasing out of police prosecutors.[128] The new Act gives the Director the power to take over the role currently played by police prosecutors but the Attorney General, in his second reading speech, made it clear that there was an expectation that this power would only be rarely exercised:

> This does not mean that the role of the police, or the police prosecutors, in the institution and conduct of criminal prosecutions will be substantially affected. At present, the Solicitor for Public Prosecutions is involved in prosecutions in the Local Courts in certain classes of offences, and in more complex and lengthy cases. For example, offences involving police officers, and offences of child sexual assault, are routinely referred to the Solicitor for Public Prosecutions for that office to conduct proceedings.
>
> Although these matters may be dealt with by the Director of Public Prosecutions, in the overwhelming number of criminal prosecutions before magistrates, the director will not be involved. In relation to summary prosecutions, the director will have powers not available to the Attorney General or any other person in this State. However, by the exercise of these powers, either by direct intervention or by the issuing of guidelines, the director can bring about a more uniform prosecution policy throughout the various prosecuting agencies in this State.[129]

In practice, the role of the police prosecutors will not be significantly changed by the new legislation. In Chapter 7, however, the Commission proposed that committal proceedings should be replaced by a procedure which would require the prosecuting authority to determine whether there should be a prosecution within seven days of the time the accused person has been charged and to notify the prospective court of trial accordingly.[130] During this period, the prosecuting authority will have to review the charge and the evidence available in the case. In cases where there has been a long investigation before a charge is laid, this should not, in our view, present an insurmountable difficulty since it will be likely that the police will have consulted the prosecuting authority during the investigation. Likewise, for the vast majority of charges which are laid shortly after an offence has been committed, the

case against the accused person should be clear. It is important that people who have been charged with offences should know at an early stage whether they will be prosecuted. Whilst our proposal will probably require an increase in prosecutorial resources, we consider this desirable to ensure that the prosecution process is commenced without delay.

C. Independence of the Director

12.61 One of the important issues that we examined in our discussion of procedures in other places was the extent to which the prosecuting authority is independent of control by the Government of the day. It may be recalled that in each of those jurisdictions, the Government had a varying degree of supervision of the decisions made by the prosecuting authority. This is also a feature of the new legislation in New South Wales. In his second reading speech at the time of the introduction of the bill into the Parliament, the Attorney General said:

> The measures in the Director of Public Prosecutions Bill will preserve the Attorney General's traditional role and the powers that go with it, but at the same time create an important new office to share responsibility for criminal prosecutions. It would defy the principles of responsible, democratic government if the Attorney General were to abdicate totally his responsibility for such an important area of government, in favour of a person who is not elected, and thus not answerable to Parliament or the community.
>
> However, it is proper, in order to facilitate a more efficient and consistent prosecution policy, and to provide for what is perceived as a more independent decision-making process, that the Government should give authority to a person to exercise these powers on a day-to-day basis. This is what is done by the provisions of the Director of Public Prosecutions Bill. In other

> jurisdictions, which have legislated to establish the office of Director of Public Prosecutions, the situation is more or less the same. The Attorney General retains some measure of control, and immediate responsibility, for the prosecution of serious criminal offences. Although the bill does not take away any of the Attorney General's functions or powers, it does ensure that the Attorney General is accountable to Parliament if, and when, he exercises them.[131]

The form of accountability referred to is established by provisions which require the Attorney General to notify the Director whenever the Attorney General exercises the power to find a bill, determine that "no bill" be found, direct that no further proceedings be taken against an accused person or to appeal against the inadequacy of a sentence.[132] Any such notifications given to the Director must be included in the Director's annual report to Parliament.[133]

12.62 There is a further issue relating to controls over the Director's authority to make decisions in the prosecution process. Under various statutes the consent of a nominated person or authority is required before certain criminal proceedings may be initiated. For example, a prosecution for the crime of incest may not be initiated without the consent of the Attorney General.[134] The independence of the Director is restricted to the extent that consent is required. The new legislation provides that the person who is authorised to give consent may delegate that power to the Director.[135] It is desirable that there should be some consistency in the decision making policy of the prosecuting authority. This will be difficult to achieve if there is a wide range of people to whom the Director must defer in the decision making process. It is,

in our view, a matter of some concern that the legislation does not go further toward ensuring that the policy of the Director regarding the institution of prosecutions is made paramount.

D. Review of the Decision to Prosecute

12.63 The establishment of the Director of Public Prosecutions is unlikely to have any effect on the general law regarding the power available to the courts to review the exercise of the decision to prosecute. There is, however, one aspect of the legislation which is worthy of comment. The power of the Director of Public Prosecutions regarding the initiation and conduct of criminal proceedings, and generally in regard to the making of decisions in the prosecution process, will only apply to those summary offences which are prescribed in the regulations as being offences in respect of which the Director can exercise the various powers established under the legislation. In our view, it would be preferable in the interests of establishing a consistent prosecution policy, that the Director should have the ultimate responsibility for the prosecution of all criminal offences but be empowered to delegate that responsibility in respect of prescribed offences. Where the Director does not have the responsibility for making decisions in the prosecution process relating to certain summary offences, it seems that there will be no review made of individual decisions to prosecute nor any authoritative policy established in relation to that decision making process. We consider it preferable that this form of guidance and capability for review be available for all criminal offences.

V. SUMMARY OF TENTATIVE PROPOSALS

1. An Independent Prosecuting Authority

12.64 The decision to prosecute a person who has been charged with a criminal offence should, for all criminal cases, be the responsibility of a single independent prosecuting authority, which should in turn be ultimately responsible to the Attorney General as the Minister responsible for the administration of justice in an elected government. Recent legislation has provided for the establishment of an independent prosecuting authority, the Director of Public Prosecutions. The Commission considers that the Director of Public Prosecutions should have responsibility for the prosecution of all criminal offences rather than for nominated categories of criminal offences.

2. Relationship Between Prosecuting Authority and Police

12.65 The investigation and charging of people with criminal offences should continue to be the responsibility of the police who should be able to consult the prosecuting authority before discharging those functions. The prosecuting authority should be able to direct the police whether or not to charge a person with any criminal offence.

3. The Powers of the Prosecuting Authority

12.66 The functions of the prosecuting authority should include the power to decide whether or not to prosecute, whether to grant indemnity from prosecution, what charge or charges should be tried and to nominate, subject to the consent of the accused person and the court in certain circumstances,

the court in which the charge or charges should be heard (the prospective court of trial). The prosecuting authority should also have the power to take charge of any prosecution commenced by a private citizen and either continue or terminate that prosecution.

4. The Criteria for the Decision to Prosecute

12.67 As a minimum standard, the prosecuting authority should not make a decision to prosecute unless it is of the opinion firstly, that there is evidence capable of proving each of the elements of the offence charged and, secondly, that the weight which a court acting reasonably could attach to that evidence is sufficient to satisfy it of the guilt of the accused person.

5. Policy of the Prosecuting Authority to be Made Public

12.68 The prosecuting authority should, subject to the minimum standard set out in para 12.67, establish the criteria which are to govern the decision to prosecute, together with guidelines for the making of other decisions in the prosecution process. The policy of the prosecuting authority thus formulated should be set out in a public document. It should be periodically reviewed and any changes which follow such a review should also be made public.

6. Delegation of the Powers of the Prosecuting Authority

12.69 The prosecuting authority should be able to delegate its power to make the decision to prosecute in the case of summary offences, indictable offences which are capable of being dealt with summarily and offences which are triable either way, but

not in the case of offences triable only on indictment. It would be expected that the delegation of the power to make decisions regarding such prosecutions would be made to the police and to certain public authorities currently responsible for the prosecution of offences of a regulatory kind. The exercise of any delegated power should be subject to review by the prosecuting authority.

7. Cases Where Consent for Prosecution is Required

12.70 The range of offences for which the prosecuting authority has the responsibility for making the decision to prosecute should not be restricted by the need to obtain the official consent of some other person or organisation. Where the law currently requires such consent, it should be modified to provide that the prosecuting authority is obliged to consult the relevant person or organisation before making a decision to prosecute, but is not required to obtain consent for the prosecution. For prosecutions by private citizens, the current requirements for consent should continue to apply.

8. Prosecutions by Private Citizens

12.71 Subject to the powers of the prosecuting authority in para 12.66 above, and subject to current requirements of official consent for the prosecution of certain offences, a private citizen should retain the right to prosecute a charge which may be heard by the Local Courts. In respect of cases to be dealt with by the higher courts, the right of the private citizen to prosecute should effectively remain as it is now and

be limited to making representations to the prosecuting authority that a prosecution should be instituted in a particular case. Applications of this kind should be determined in accordance with the guidelines for decision making published by the prosecuting authority.

9. Police to Charge and Determine Bail

12.72 As proposed in para 12.66, the police should retain responsibility for charging people with indictable offences but, prior to making a decision to charge, the police should be able to consult with or obtain advice from the prosecuting authority. Immediately following the charging of an accused person, the current procedures should apply, that is, the police should initially determine the question of bail and bring a person held in custody before a Local Court at the earliest reasonable opportunity.

10. Police to Notify the Prosecuting Authority

12.73 When a person has been charged with an indictable offence which is not capable of being dealt with summarily, or the charge is one in respect of which the police have not been delegated the power to make the decision to prosecute, the police should immediately notify the prosecuting authority and provide it with all the relevant information and material that is within their knowledge or possession.

11. Notification of Decision to Prosecute

12.74 Where a person has been arrested and charged, the prosecuting authority or its delegate should decide whether or not to prosecute within seven days of the time of the charge. If there is a decision to prosecute in one of the higher courts, the prosecuting authority should notify the prospective court of trial and the Local Court in writing of the decision to prosecute within seven days of the date on which the accused person was charged. If there is a decision to prosecute in the Local Court, the Local Court alone need be notified of the decision within the same period of seven days.

12. Procedure on Appearance Before the Local Court

12.75 If there has been no decision to prosecute within seven days or a decision not to prosecute, the accused person should, on his or her appearance before the Local Court, be immediately released from custody or exempted from any further obligations under a relevant bail undertaking. If there is a decision to prosecute in a higher court, the accused person should be required to appear in the prospective court of trial. In the case of indictable offences capable of being dealt with summarily and offences triable either way, if there is a decision to prosecute in the Local Court then the Local Court should, if the matter is ready to proceed, immediately conduct a mode of trial hearing.[136] If it is not ready to proceed, the accused person should be required to appear before the Local Court at a later date for the purpose of a mode of trial hearing. In the case of summary offences, once the Local Court

has been notified of the decision to prosecute, it may proceed to hear the matter immediately or require the accused person to appear before the Local Court at a date in the future. Where the case is to be disposed of by the Local Court, the successive procedures, namely the appearance of the accused person before the court, the notification of the decision to prosecute, the mode of trial hearing and the determination of the case, can all occur immediately following one another. This would be expected to occur where there is a plea of guilty to a straightforward charge of an indictable offence capable of being dealt with summarily.

Footnotes

1. Director of Public Prosecutions Act 1986. See also Hansard (NSW) Legislative Assembly, 1 December 1986 at 7339-7356 and 2 December 1986 at 7727-7751 for Parliamentary debates.

2. Director of Public Prosecutions Act 1983 (Cth).

3. Director of Public Prosecutions Act 1983 (Cth) ss18 and 23. See also para 12.10.

4. Office of the Director of Public Prosecutions Prosecution Policy of the Commonwealth, Guidelines for the making of decisions in the prosecution process (AGPS, Canberra 1986).

5. I Temby QC "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985) 59 Australian Law Journal 197, and I Temby "Prosecution discretions: Director of Public Prosecutions Act 1983" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1984) at 53. See also Director of Public Prosecutions Annual Report 1984-85. Details of major speeches and addresses given by the Director are listed at 48-49. See also Annual Report 1985-86 at 45-46; R Ackland "Temby's Two Years" Australian Society, October 1986 at 13.

6. Director of Public Prosecutions Act 1983 (Cth) s6(1)-(3). Guidelines, note 4 at 13-15. See also I Temby QC "Immunity from Prosecution and the Provision of Witness Indemnities" (1985) 59 Australian Law Journal 501.

7. Director of Public Prosecutions Act 1983 (Cth) s9(5).

8. Guidelines, note 4 at 11-13.

9. Id at 2-3.

10. Id at 2 para 2.3.

11. Id at 2 para 2.8.

12. Director of Public Prosecutions Act 1983 (Cth) s9(5).

13. Guidelines, note 4 at 2 para 2.9.

14. Director of Public Prosecutions Act 1983 (Cth) ss10-13.

15. Director of Public Prosecutions Act 1983 (Cth) s8.

16. Director of Public Prosecutions Act 1983 (Cth) s8(1) and (3). Guidelines, note 4 at 1 para 1.2.

17. Director of Public Prosecutions Act 1983 (Cth) s18(1)-(4), ss23, 24.

18. See para 12.17.

19. See generally, materials cited at note 5.

20. In a recent case which attracted widespread publicity, the Director announced the reasons for his decision not to proceed with a prosecution. See "Temby Gives Reasons for Ryan No Bill" The Australian, 13 January 1987 at 3; "Temby Explains Ryan No Bill" The Sydney Morning Herald, 13 January 1987 at 1.

21. See P Bayne "Prosecutorial Discretion and Administrative Law" in I Potas (ed) Prosecutorial Discretion Proceedings of the Australian Institute of Criminology (Canberra 1985) at 69.

22. Para 7.44; Administrative Decisions (Judicial Review) Act 1977 (Cth) ss3(2) and (3), 5.

23. Administrative Decisions (Judicial Review) Act 1977 (Cth) s19 provides for regulations to be declared which exempt a class or classes of decisions. However, there are no regulations in force that are applicable to criminal prosecutions. See also I Temby QC "Immunity from Prosecution and the Provision of Witness Indemnities" (1985) 59 Australian Law Journal 501 at 512 citing Clyne v Scott (1984) 52 ALR 405 and Murchinson v Keating (No 2) (1984) 54 ALR 386.

24. J H Phillips QC (as he then was, now Mr Justice Phillips of the Supreme Court of Victoria) "The Role of the Director of Public Prosecutions", a paper presented to the Annual Conference of the Australian Society of Labor Lawyers, Brisbane, 2 July 1983.

25. Director of Public Prosecutions Act 1982 (Vic) ss10-14.

26. Crimes Act 1958 (Vic) s567A .

27. Director of Public Prosecutions Act 1982 (Vic) ss11-13.

28. Director of Public Prosecutions Act 1982 (Vic) ss10-13.

29. Phillips note 24 at 10.

30. "Conversation with John Phillips QC" (1984) 58 Law Institute Journal 777; "Land rights champion is Director of Public Prosecutions" (1984) 58 Law Institute Journal 1387. See eg "Report on Committal Proceedings" (February 1986), a report of an advisory committee chaired by John Coldrey QC; Custody and Investigation: Report on Section 460 of the Crimes Act 1958 (April 1986), a report of a consultative committee on police powers of investigation chaired by John Coldrey QC.

31. Director of Public Prosecutions Act 1982 (Vic) ss4-6.

32. Director of Public Prosecutions Act 1982 (Vic) s9(2).

33. Director of Public Prosecutions Act 1982 (Vic) s16

34. See eg J Baker "Prosecutor Critical of Long Delays in Courts System" The Age, 22 November 1985 at 17. See also note 30.

35. Director of Public Prosecutions Act 1982 (Vic) s10.

36. J Phillips, note 30 at 779.

37. See P Bayne, note 21. See also Barton v The Queen (1980) 147 CLR 75.

38. Barton v The Queen (1980) 147 CLR 75 at 95 per Gibbs CJ and Mason J.

39. Prosecution of Offences Act 1879 (UK).

40. Prosecution of Offences Act 1985 (UK). This new service was introduced into metropolitan areas outside London in April 1986, and to London and all other counties in October 1986. See [1986] Criminal Law Review 1.

41. Prosecution of Offences Act 1985 (UK) s3(2)(a). The organisation of police forces in England is generally at a local level.

42. F Bennion "The New Prosecution Arrangements: The Crown Prosecution Service" [1986] Criminal Law Review 3 at 12.

43. Editorial "The Crown Prosecution Service" [1986] Criminal Law Review 1. See also White Paper: An Independent Prosecution Service for England and Wales HMSO Cmnd 9074, 1982); G McFarlane "The Proposals for a National Prosecution Service" (1983) 127 Solicitor's Journal 847.

44. Report of the Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) (HMSO Cmnd 8092, 1981).

45. Note 44 at paras 9.9-9.12, 10.9-10.11. See also A Sanders "The Uncertain Powers of Crown Prosecutors" (1985) 135 New Law Journal 313, 29 March 1985.

46. Police and Criminal Evidence Act 1984 (UK).

47. Editorial "The Crown Prosecution Service Cometh" 136 New Law Journal 573, 20 June 1986.

48. Ibid. See also Alec Samuels in Institute of Judicial Administration: Edited Transcript of the Proceedings of a Conference on the Prosecution Process held at the University of Birmingham in April 1975 at 74-78, referred to by Bennion, note 4 above, as a "remarkable attack" accusing prosecuting solicitors of not observing the fairness requirements.

49. A Sanders "An Independent Crown Prosecution Service?" [1986] Criminal Law Review 16 at 17.

50. Royal Commission Report, note 44 at para 1.13.

51. F Bennion, note 42 at 9.

52. A Sanders, note 49 at 27. See also editorial "Public Prosecutors - a Flawed Bill" (1985) Legal Action, January.

53. Extract from a letter from the Attorney-General to Mr Francis Bennion and quoted in his article cited at note 42 at 15.

54. F Bennion, note 42 at 15.

55. Ibid.

56. Ibid. See also A Sanders "The Uncertain Powers of Crown Prosecutors - II" (1985) 135 New Law Journal 352, 5 April 1985.

57. Criteria for Prosecution (1982) explained and discussed in "Attorney-General's Criteria for Prosecutions" (1983) 80(8) Law Society Gazette 450, 23 February 1983; A Sanders "Prosecution Decisions and the Attorney General's Guidelines" [1985] Criminal Law Review 4.

58. Prosecution of Offences Act 1985 (UK) s10.

59. Prosecution of Offences Act 1985 (UK) ss9, 10.

60. Sir Thomas Hetherington, cited in F Bennion, note 42 at 12.

61. Sir Norman Skelhorn, Director of Public Prosecutions from 1964 to 1977 quoted in F Bennion, note 42 at 11.

62. R v Broad (1979) 68 Cr App R 281.

63. R v Canterbury and St Augustine Justices ex parte Klisiak [1982] QB 398 held the court's permission was not required to discontinue committal proceedings. In R v Redbridge Justices ex parte Sainty [1981] RTR 13, it was held that the withdrawal of charges is a discretionary matter for the court.

64. See A Sanders, note 49 at 19 citing Hill v Anderton [1982] 2 All ER 963.

65. Turner v DPP (1978) 68 Cr App R 70; Gouriet v Union of Post Office Workers [1978] AC 435.

66. Raymond v Attorney-General [1982] QB 839; see also Dyson v Attorney-General [1911] 1 KB 410.

67. R v Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118; [1973] 1 QB 241. See P Bayne, note 21 at 86-88.

68. A Sanders, note 42 at 19-22.

69. Compare A Sanders, note 45, and A Sanders, note 56.

70. Prosecution of Offences Act 1985 (UK) s23.

71. A Sanders, note 45 at 314.

72. A Sanders, note 49 at 17.

73. J Tombs "Prosecution: In the Public Interest?", a paper delivered at Seminar on Prosecutorial Discretion, Australian Institute of Criminology, Canberra, November 1984 published in I Potas (ed) "Prosecutorial Discretion", see note 21 above at 15. See also F Gibb "The Law in Scotland", a series of three articles published in The Times, 11, 12, 13 March 1985.

74. A V Sheehan Criminal Procedure in Scotland and France (1975) at 112.

75. J Tombs, note 73 at 15, 19. See also S Moody and J Tombs Prosecution in the Public Interest (1982).

76. A V Sheehan Criminal Procedure in Scotland and France (1975) at 112-113.

77. J Tombs, note 73 at 16.

78. A V Sheehan Criminal Procedure in Scotland and France (1975) at 113.

79. Id at 115.

80. Note 44 at para 6.36.

81. P Cavadino "Inquisitorial Systems of Justice" (1980) 144 Justice of the Peace 689 at 691.

82. A V Sheehan Criminal Procedure in Scotland and France (1975) at 112.

83. J Tombs, note 73 at 15.

84. J Tombs, note 73 at 20-21.

85. See Gibb, note 73. Other forms of disposition include prosecutions that are "marked off" with or without the accused person being given a warning and offences where a fixed penalty fine can be paid without a court appearance.

86. J Tombs, note 73 at 12.

87. This followed a highly publicised sexual assault case in which a successful private prosecution was brought. See R Harper and A McWhinnie "The Glasgow Rape Case" (London, 1984). Before this case there had not been a successful private prosecution since 1909: J and P Coats Ltd v Brown (1909) SC(J) 29 - see A Sheehan, note 74 at 116.

88. A V Sheehan Criminal Procedure in Scotland and France (1975) at 16.

89. Ibid.

90. Id at 17.

91. Code de procedure penale 1957 Article 40.

92. Id Article 41.

93. Note 81 at 691.

94. A V Sheehan Criminal Procedure in Scotland and France (1975) at 43.

95. CCP Article 14. See also G E P Brouwer "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981) 55 Australian Law Journal 247 at 211.

96. A V Sheehan Criminal Procedure in Scotland and France (1975) at 20.

97. Id at 17.

98. F Kaufman "Comparison between the UK and the US Prosecuting Systems" (1980) 49 Fordham Law Review at 26.

99. American Bar Association Project Ministerial Standards for Criminal Justice relating to the Prosecution and Defence Function, 1971.

100. See para 11.27ff.

101. Oyler v Boles 368 US 448 (1962).

102. J Lawless and Q K North "Prosecutorial Misconduct: A Battleground in Criminal Law" (1984) 20 Trial 26, October.

103. See generally 27 Corpus Juris Secundum District and Prosecuting Attorneys section 1ff.

104. Federal Rules of Criminal Procedure, Rule 11, cited in part at para 11.31.

105. 27 Corpus Juris Secundum District and Prosecuting Attorneys section 2.

106. Pugach v Klein 193 F Supp 630 (1961).

107. Inmates of Attica Correction Facility v Rockefeller 477 F 2d 375 (1973).

108. US Department of Justice Principles of Federal Prosecution (Federal Principles) 1980.

109. Lord Devlin The Criminal Prosecution in England (1960) at 16 referred to in A Samuels "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals" [1986] Criminal Law Review 33.

110. Ibid. See also Australian Law Reform Commission "Private Prosecutions" in Standing in Public Interest Litigation (ALRC 27, 1985) at 182-209; G Williams "The Power to Prosecute" [1955] Criminal Law Review 596; Comment "Private Prosecution: A Remedy for District Attorneys' Unwarrranted Inaction" (1955) 65 Yale Law Journal 209.

111. Paras 7.46-7.51. See also Royal Commission on Criminal Procedure Prosecutions by Private Individuals and Non-Police Agencies (Research Study No 10 HMSO London 1980).

112. Law Reform Commission of Canada "Private Prosecutions" (Working Paper 52, 1986) at 29-31. See also Australian Law Reform Commission Standing in Public Interest Litigation (ALRC 27, 1985) at para 392.

113. New South Wales Government Child Sexual Assault Task Force Community Consultation Paper (September 1984) at 28-29; New South Wales Government Child Sexual Assault Task Force Report (March 1985) at 168-169.

114. See eg Crimes Act 1900 s78F (incest); Crimes Act 1900 s78T(2) (homosexual offences where the accused person is under the age of 18 years); Listening Devices Act 1984 s28 (all offences under the Act).

115. J B Bishop Prosecution Without Trial (forthcoming publication) draft materials at 391-399.

116. R v McKaye and Others (1885) 6 LR (NSW) 123; Gouldham v Sharrett [1966] WAR 129.

117. R v George Maxwell (Developments) Ltd (1980) 71 Cr App R 83. See also note 120.

118. R Harper and A McWhinnie, note 87.

119. See para 12.51 and cases cited at note 114.

120. See the Canberra Times, 23 February 1986 at 1 report of an English case described as "the first this century" in which a private prosecution has been brought to trial.

121. Wentworth v Rogers reported at [1984] 2 NSWLR 422 but not on the question of private prosecutions; R v Brooks [1985] Crim LR 385.

122. The prosecution in Wentworth v Rogers was initiated as a private prosecution. After the accused person was acquitted, he launched a civil action for malicious prosecution. The court awarded him damages in excess of $500,000.

123. Prosecution of Offences Act 1985 (UK) s23; Director of Public Prosecutions Act 1983 (Cth) s9(5).

124. Director of Public Prosecutions Act 1986 s9.

125. Director of Public Prosecutions Act 1986 s15.

126. F Bennion, note 42 at 14.

127. Guidelines, note 4.

128. Report of the Commission to Inquire into New South Wales Police Administration (Commissioner: Mr Justice Lusher) (Sydney 1981) at 238-258. See also Report of the Royal Commission to Inquire into Certain Committal Proceedings Against K E Humphreys, (Commissioner: Sir Laurence Street KCMG, Chief Justice of New South Wales) (Sydney 1983), Appendix 14 at 99.

129. Hansard (NSW) Legislative Assembly, 1 December 1986 at 7342.

130. See para 7.94.

131. Hansard (NSW) Legislative Assembly, 1 December 1986 at 7340.

132. Director of Public Prosecutions Act 1986 s27(1).

133. Director of Public Prosecutions Act 1986 s27(2).

134. See examples in note 114.

135. Director of Public Prosecutions Act 1986 s11.

136. See generally the discussion in Chapter 6.

Chapter 13

Pre-Trial Publicity

I. INTRODUCTION

13.1 It is a fundamental principle of the criminal justice system that an accused person should receive a fair trial. Inherent in the concept of a fair trial is the idea that the court which must make a determination as to the guilt of the accused person should reach its decision by applying the relevant law to the evidence properly admitted at the trial. Accordingly, it may be said that an accused person has not received a fair trial if the court has based its decision on material which does not form part of the evidence admitted at the trial. The problem has been recognised by Mr Justice Deane:

> Again, the pervasiveness of the influence of organs of media and their concern, for whatever motive, to stimulate and satisfy the public interest in the news which they purvey has inevitably led to problems involving the extent to which freedom of public discussion should or effectively can be restricted to protect and preserve the impartiality and public anonymity of the members of criminal juries and the confidentiality of their deliberative processes.[1]

13.2 It is generally accepted that the publicity of certain material before or during the trial of an accused person may undermine or even defeat the objective of conducting a fair trial. For this reason, various legal principles have been developed to regulate the nature of pre-trial publicity. The formulation of suitable measures to control such publicity is notoriously difficult. Foremost among these difficulties is

the need to consider the right, of both the accused person and the prosecution, to a fair trial in the light of other important and often competing principles. The right to freedom of speech is fundamental to a democratic society, but the exercise of this right may conflict with the objective of conducting a fair trial. Similarly, the principle that the administration of justice should be open to public scrutiny and discussion may give rise to the publicity of issues which adversely affect the prospect of conducting a fair trial. It is by no means an easy task to balance and accommodate these competing rights and interests.

13.3 The purpose of this chapter is to discuss the regulation of publicity which may adversely affect the prospect of conducting a fair trial. Since the scope of this Discussion Paper is restricted to the period between charge and trial, our primary concern is pre-trial publicity which may prejudice a jury and hence divert it from a proper consideration of the issues to be determined at the trial. In Part II of this chapter, we discuss the relevant law in New South Wales. In Part III, we examine the law and practice in other jurisdictions. In Part IV, we consider certain proposals made by the Australian Law Reform Commission. In Part V some specific problems are discussed and in Part VI we put forward some tentative proposals for reform in New South Wales.

13.4 Before embarking on our discussion, we acknowledge the considerable assistance which we have derived from the Australian Law Reform Commission's Discussion Paper Contempt and the Media[2] which was published in March 1986. This Paper draws on a considerable volume of research to produce a very valuable outline of the relevant law and the important questions at issue in this area. We should draw attention to the fact that, at the time of writing, the final recommendations of the Australian Law Reform Commission in its reference on contempt of court have not been published. The tentative proposals for reform we have made in this area will need to be carefully assessed in the light of those recommendations. This would occur as a matter of course, but, in the area of contempt, the task is more important than usual. If the Australian Law Reform Commission's recommendations are implemented, they would apply to State courts exercising federal jurisdiction. Any recommendations made by this Commission are limited in their application to New South Wales courts exercising jurisdiction conferred by the laws of New South Wales. We would be most anxious to avoid the prospect that different laws of contempt would apply in the same court depending on the jurisdiction which that court is exercising.

II. THE LAW IN NEW SOUTH WALES

A. Introduction

13.5 A number of approaches have been adopted to deal with the issue of undesirable pre-trial publicity. The principal approach is embodied in the law of contempt of court. Criminal contempt is conduct which does, or tends to, obstruct the proper administration of justice.[3] Such contempt includes publications which are or may be prejudicial to a jury's deliberations in a criminal trial and those which "prejudge" the issues to be determined at the trial and therefore "embarrass" the court. The law of contempt seeks to deter such conduct by imposing criminal sanctions. A second approach is to be found in the powers of the courts to conduct certain proceedings in camera (that is, in the absence of the public) and to suppress or postpone publicity of the proceedings before them, thereby precluding at least some undesirable pre-trial publicity. Breach of any orders made by the courts in the exercise of these powers will again be treated as contempt or some other form of criminal offence. Finally, the courts have powers to take certain steps in relation to the conduct of the trial itself which are designed to eliminate or diminish the effects of any improper pre-trial publicity which has, in fact, occurred. These approaches are not mutually exclusive and, indeed, may all be useful and complementary methods of tackling the problems posed by pre-trial publicity.

B. Contempt of Court

1. The Sub Judice Doctrine

13.6 The principal method by which the courts control pre-trial publicity in criminal cases is by reliance on the law of contempt of court. Contempt of court has been defined in the following terms:

> Contempt is a legal concept peculiar to the English common law tradition. It comprises conduct which impairs, or threatens to impair, the proper administration of justice by the courts, and which therefore attracts punitive or coercive sanctions.[4]

It should be emphasised, however, that in the context of pre-trial publicity, the law of contempt cannot prevent prejudice occurring, it can only act as a deterrent. Since it involves the protection of the right to a fair trial before a jury, it is that category of contempt which prohibits publication of material which may influence the conduct of a current or forthcoming trial which is our principal concern. Also known as the sub judice doctrine, this branch of the law of contempt:

> ... is based on the propositions that jurors are susceptible to influence from publicity relating to the trial in which they are empanelled and that such publicity should accordingly be curbed in order to minimise the risk that they may be diverted from their task of deciding solely in accordance with the law and the evidence presented to them in the courtroom.[5]

13.7 There are a number of issues which need to be dealt with before the complete scope and meaning of the concept of contempt can be understood:

* What constitutes a "publication" for the purposes of the doctrine?

* For what period of time during the criminal process does the sub judice rule apply?

* What is the appropriate degree of "prejudice" required to render a publication liable to a charge of contempt?

* What, if any, should the state of mind of the publisher be to establish liability for contempt?

* Are there any "defences" available to deny liability for what would otherwise constitute contempt?

2. The Meaning of Publication

13.8 The question of whether a particular communication amounts to a "publication" for the purposes of the law of contempt must be considered. Material contained in a newspaper or in a radio or television broadcast is generally considered to be a "publication". However, the issue arises as to whether, for example, a newspaper published outside New South Wales which contains material pertinent to the trial of an accused person in this State can be regarded as a relevant publication for the purposes of contempt law. Similarly, although a conversation between two people or a letter from one person to another would not be seen as a publication, a speech to a small group of people or a letter to a select number of people might well be considered to be a "publication", even though, as in the case of the newspaper cited above, the impact of the communication is highly unlikely to have the potential to prejudice a prospective jury. We are inclined to agree with the Australian Law Reform Commission's provisional view on the issue of what should constitute a "publication":

> ... both in determining what is a publication and in ascertaining the range of publication, it is essential to consider the aims sought to be achieved by the particular rule of contempt law involved. In particular, if it is alleged that a so-called "publication" is likely to influence a jury in a current or forthcoming trial, there must be a sufficient degree of dissemination within the community from which the jurors are to be drawn to create a substantial risk that one or more of the jurors will be familiar with the publication at the time of the trial.[6]

3. The Time During Which the Sub Judice Doctrine Applies

13.9 The sub judice doctrine applies from the time the criminal process has commenced, that is

> if a person has been arrested or charged, if a warrant has been issued for his or her arrest, or if any other act, such as the issue of a summons, information or notice of intention to prefer a presentment, has occurred.[7]

It is not sufficient that proceedings, although not formally initiated, are nevertheless "imminent".[8] In England, at least until the enactment of the Contempt of Court Act 1981 (UK), liability for contempt could be established in circumstances where, although the formal criminal proceedings had not been initiated, it was "obvious" that a suspect was about to be arrested for the crime.[9] The sub judice doctrine continues until a verdict of not guilty has been delivered, or in the case of a verdict of guilty, until sentence has been passed. It again becomes applicable if and when a retrial is ordered.[10] We shall discuss later whether the various stages at which the law of contempt applies in criminal proceedings are sufficient to make the contempt law an effective means of diminishing the prejudicial impact of pre-trial publicity.

4. The Standard of Prejudicial Tendency

13.10 The test to be applied to determine whether a publication is in contempt is whether, as a "matter of practical reality", it has a "real and definite tendency to prejudice or embarrass" a forthcoming trial. A "remote possibility" of prejudice is insufficient to constitute a contempt.[11] The precise subject matter of the publication is of particular significance, but other circumstances of the publication must be taken into account:

> It is relevant, for example, to consider the probable lapse of time between a pre-trial publication and the commencement of the trial, the extent of circulation of the publication amongst the section of the public from which the jurors are likely to be drawn, and the degree to which the material contained in the publication has already been ventilated in discussion within the community itself.[12]

5. The Intention of the Publisher

13.11 Perhaps the most controversial aspect of the sub judice doctrine, as a matter of both law and principle, is whether it is or should be necessary for the prosecution to establish not only that the publication in question had the relevant prejudicial tendency, but that the person responsible for the publication intended that the publication should have that character. The Court of Appeal in a recent case[13] considered the question in some detail. The majority concluded that intention to interfere with the administration of justice was not a necessary element in the crime of contempt. However, its presence or absence was a relevant factor in determining

whether a contempt had taken place. We shall return in para 13.54 to the question of whether "strict liability" for contempt of court is appropriate.

6. Defences to a Charge of Contempt

13.12 Since contempt of court is a criminal offence, the onus of proving the guilt of a person accused of contempt lies on the prosecution. There are, however, a number of "defences" to a charge of contempt:[14]

* A fair, accurate and reasonably contemporaneous report of trial proceedings, committal proceedings or proceedings before a coroner or a Royal Commission, does not constitute contempt, even if the report is otherwise prejudicial to the trial of an accused person.

* Fair and accurate reports of parliamentary proceedings cannot be a contempt of court provided that they are reasonably contemporaneous and not deliberately intended to influence potential jurors in a forthcoming trial.

* A published discussion of matters of general public concern which, whilst likely to have a prejudicial influence on the conduct of the trial, bears only indirectly and unintentionally upon the issues at a pending trial, will not constitute contempt.[15]

* It is not contempt to publish information as to the "bare facts" of an event giving rise to a criminal charge. The notion of "bare facts" is broadly intended to cover descriptive material rather than matters which may be in issue at trial.[16]

C. The Power to Close Courts and to Restrict Publicity

13.13 As previously noted, the law of contempt seeks to deter the publication before trial of prejudicial material through the imposition of criminal sanctions. However, there are other means available to meet and avoid the problem of prejudicial

publications. The two principal methods by which this is effected are through the power of the courts to restrict publicity of the proceedings and their power to close the proceedings to the public.[17] In New South Wales these are essentially specific applications of the general law of contempt.

13.14 Whilst the courts have an inherent power to order that a court be closed to the public,[18] it is uncertain whether the exercise of this power can be based merely on the ground that public disclosure of the proceedings might prejudice a forthcoming trial. Further, the courts have no power at common law to prohibit the publication of material presented in open court on the ground of prejudice.[19]

13.15 Certain statutory provisions in New South Wales confer powers on courts conducting criminal proceedings to order that those proceedings be held in a closed court or to restrict publicity. However, these powers are neither general in nature nor necessarily directed to the question of prejudicial publicity. Courts hearing criminal charges brought against people under 18 years of age are, for example, closed and the names of the accused people generally may not be published.[20] Section 77A of the Crimes Act empowers the court to direct that the court be closed or any part of proceedings in respect of certain sexual offences be held in a closed court. It is noteworthy that this power is only available in respect of sexual offences. This suggests that the power is designed to prevent embarrassment or hardship to the victim of the alleged offence or to the person accused of the offence.

13.16 The Crimes Act also enables the judge presiding at the trial of certain offences to make an order forbidding publication of the evidence at the trial or any report or account of all or part of such evidence.[21] A number of observations may be made about this provision. Firstly, the application of the power is confined to the trials of only some offences. Secondly, the section contemplates that the order will be made at the trial by the presiding judge. Both of these features demonstrate that the purpose of the power is primarily concerned with the subject matter of the offences in question rather than with pre-trial publicity. Finally, the exercise of the power is severely restricted by the express provision that, if the accused person or counsel for the prosecution indicates that any particular matter given in evidence should be available for publication, no order suppressing publication of that matter can be made by the presiding judge.

13.17 There is no express provision for dealing with breaches of an order of this kind. It is apparent that a breach would be dealt with under the general law of contempt of court.[22] Since the offence of contempt of court is a common law misdemeanour, the penalty which may be imposed on a person convicted of the offence is theoretically unlimited, that is, under the current law, a sentence of life imprisonment could lawfully be imposed. We should emphasise that this is the position in theory. In recent years there have been three contempt cases which have attracted widespread publicity. In

Gallagher's case the accused person was sentenced to three months imprisonment.[23] In Fraser a sentence of four months imprisonment was imposed, but the conviction was later quashed on appeal.[24] In the case of Hinch a sentence of six weeks imprisonment, together with a fine of $25,000, was imposed[25] by the judge at first instance.

D. Remedial Strategies

13.18 This discussion would not be complete without noting the "remedial" powers available to a court. If prejudicial material has been published before a trial, there are various steps which the trial court may take in order to remedy the adverse effect of the publicity.[26] These steps include the following:

* The trial judge may consider that, because of the publicity, it is contrary to the interests of justice to let the trial proceed and may order that a jury panel, or the jury itself if it has been empanelled, be discharged.

* The judge may, in appropriate circumstances, give the jury a specific warning about any prejudicial publicity that is likely to have come to their notice and direct them not to take account of it when conducting their deliberations. This remedy carries with it the danger that a warning will serve only to exaggerate and aggravate the prejudicial impact of the offending publication.

* Counsel for a party who claims to have been adversely affected by prejudicial publicity may ask that the trial be adjourned for a sufficient period to allow the effects of the publicity to diminish or disappear. If it is the prosecuting authority which has been adversely affected, it may decide not to present the indictment on the day on which the trial is listed to begin.

* A trial judge generally has power by statute to order a change of the venue of the trial from that originally selected by the prosecuting authority.[27]

In addition, a verdict of guilty given by a jury which has been exposed to inadmissible material that is significantly prejudicial (whether through publicity or otherwise) may be set aside on appeal.[28] There are additional powers available to courts to deal with contempts of court arising from unlawful publication, but these are not directly concerned with the problem of publications made before trial.

III. THE POSITION IN OTHER JURISDICTIONS

A. The Position in Certain Other Australian States

13.19 The law of contempt, insofar as it is based on the development of the common law principles, is the same throughout Australia. However, a number of statutory provisions have been enacted in other Australian jurisdictions which modify or supplement the law of contempt.[29]

1. Victoria

13.20 Victoria has enacted legislation to enable courts to control pre-trial publicity arising from preliminary examinations, the Victorian equivalent of committal proceedings.[30] The legislation prohibits the publication of a report of any admission or confession until the accused person has been discharged or, if the accused person has been directed to be tried, until after the trial. It also expressly prohibits the publication of any opening statement made by the prosecution at the preliminary examination. The legislation also confers certain discretionary powers on the magistrate to prohibit the publication of any statement or document whose

admissibility as evidence is objected to, provided the magistrate is satisfied that the objection is made in good faith. More generally, the legislation permits the magistrate to prohibit reports of the proceedings or part thereof if satisfied that such reports "would be likely to prejudice the fair trial of any person".[31] Copies of any order made by the magistrate must be displayed at the court. Finally, the legislation provides that a person who breaches an order of this kind shall be liable to a maximum penalty of four months imprisonment or a fine of $1000 or both.[32]

13.21 In Victoria, the Chief Justice's Law Reform Committee has examined the position in the Supreme Court and the County Court.[33] Judges of the County Court have a broad power to order that there be no publication or report of proceedings before the Court.[34] On the other hand, judges of the Supreme Court may only make orders prohibiting publication or reports of proceedings before them if they consider that this should not be done "on the grounds of public decency or morality".[35] The Committee recommended that the power of the Supreme Court, and also the County Court and the Magistrates' Courts, be expanded to allow orders to be made either closing the court or prohibiting the publication of the whole or any part of the evidence or any information derived from the proceedings. The Committee suggested that these orders should be limited to situations where the publication would:

* endanger national security;

* prejudice the administration of justice;

* endanger the physical safety of any person; or

* offend public decency or morality.

Although these go much further than meeting the problem of prejudicial publicity, the Commission considers these recommendations to be a sensible solution to the problem.[36]

2. Western Australia

13.22 In Western Australia the position is fundamentally different from New South Wales because the room or place where the preliminary hearing of an indictable charge is conducted is not deemed to be an open court.[37] There is, however, express provision to enable the justice or magistrate hearing the matter to order that members of the public may be excluded where the interests of justice require it.[38] Legislation also provides that the presiding officer may prohibit publication of evidence given or tendered at the hearing if he or she considers that publication is undesirable in the interests of justice.[39] A person who makes a publication contrary to a prohibition commits a contempt of the Supreme Court and is liable to "punishment accordingly,"[40] that is, the question of punishment is at large.

13.23 Another notable feature of the Western Australian legislation is that it provides that where a "paper committal" hearing is conducted at the election of the accused person, disclosure and, a fortiori, publication of the contents of the statements tendered at such a preliminary hearing is prohibited and punishable as a contempt of the Supreme Court.[41] The

"paper committal" procedure in New South Wales does not contain an equivalent section providing for the suppression of the contents of witnesses' statements.[42]

3. South Australia

13.24 In South Australia, the Evidence Act enables a court to direct that nominated people, or all people other than nominated individuals, absent themselves from the court during the whole or any specified part of the proceedings.[43] There is in addition a power to prohibit, either absolutely or conditionally, the publication of evidence given including the name of any person referred to in the proceedings.[44] This general discretionary power applies to courts conducting preliminary proceedings in criminal cases and is not limited to cases in which a jury is likely to be involved. The operation of the section has been controversial and the practice of magistrates and judges in applying this section apparently varies.[45]

B. England

13.25 In England, the law of contempt of court was, until relatively recently, governed largely by common law principles. The Contempt of Court Act 1981 was designed to clarify and amend the law of contempt. Under the Act, only a publication which "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced"[46] is capable of constituting a contempt of court.[47] Furthermore, the proceedings must be "active"[48] at the time of publication, that is to say, initiated by any one of the following:

* arrest without warrant;
* the issue of a warrant for arrest;
* the issue of a summons to appear;
* the service of an indictment or other document specifying the charge; or
* oral charge.

The proceedings will only be concluded by:

* acquittal;
* the imposition of sentence after conviction; or
* any other verdict, finding, order or decision which puts an end to the proceedings.

13.26 The Act preserves "the strict liability rule" for contempt by publication but abolishes it for other forms of contempt.[49] Accordingly, any speech, writing or broadcast which is addressed to the public at large or to any section of the public and which has the requisite tendency to interfere with the course of justice in particular legal proceedings will be a contempt of court regardless of the intention of the person making the publication. However, a publisher or distributor of a publication is not guilty of contempt if at the time of publication or distribution, having taken all reasonable care, he or she did not know or had no reason to suspect either that relevant proceedings were active or that the publication contained the offending matter as the case may be.[50] The burden of proof in relation to either of these defences lies upon the person seeking to rely on the defence.[51]

13.27 The Contempt of Court Act also makes provision for suppression orders. Section 4(2) provides:

> In any [legal] proceedings [held in public] the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

This provision is of interest for two reasons. In the first place, it covers "proceedings" that are "imminent" as distinct from "active". Secondly, it applies a lesser standard of potential interference with the course of justice, namely "a substantial risk of prejudice" as distinct from a "substantial risk of serious prejudice". The reasons for these differences from the provisions relating to contempt by publication are not explained and not readily apparent.

13.28 Apart from the Contempt of Court Act, there are significant restrictions on the publication before trial of reports of committal proceedings contained in the Magistrates' Courts Act 1980.[52] It is unlawful to publish a report of committal proceedings which contains matters other than the following details:

(a) identity of the court and the names of the examining justices;

(b) names, addresses and occupations of parties and witnesses, and ages of accused people and witnesses;

(c) offences charged;

(d) names of counsel and solicitors;

(e) any decision to commit for trial, and any decision on the disposal of the case against accused people who are not committed;

(f) charges on which the accused people are committed and the court to which they are committed;

(g) date and place to which the committal proceedings may be adjourned;

(h) any arrangements as to bail on committal or adjournment; and

(i) whether legal aid was granted to the accused people.

The legislation has the effect of preventing publication of the evidence tendered at the committal proceedings. If the accused person applies for an order lifting the restrictions on publicity, the application must be granted,[53] even where it is made before the commencement of the committal proceedings.[54]

13.29 In order to assess the practical importance of this provision, it should be noted that in England the vast majority of committals are conducted by way of the "paper committal" system.[55] Although the legislation appears primarily designed to prevent undesirable pre-trial publicity flowing from a conventional committal hearing at which witnesses give evidence in person, there seems to be no reason why its provisions would not apply equally to proceedings conducted by the tender of written statements.

C. Canada

13.30 In Canada, the law of contempt of court derives from two sources. The first is the Criminal Code which defines a number of offences "against the administration of law and justice".[56] The second is the common law of contempt of court which, far from being codified, is preserved by virtue of the

Criminal Code.[57] As with the law in Australia and England, it is the common law which deals with the issue of undesirable pre-trial publicity.

13.31 It appears that the Canadian version of the sub judice doctrine prohibits publications which, broadly speaking, are designed to affect the impartial nature of criminal proceedings.[58] More specifically, a publication cannot "make comments that might influence the outcome of a trial, create a bias against one of the parties or affect the evidence to be preserved".[59] While there is a right to publish an accurate and objective report of court proceedings, this right is subject to the requirement that the report must not contain comments prejudicial to the interests of the parties or to the administration of justice.[60] Furthermore, it is a contempt of court to publish material, the publication of which has been prohibited by virtue of a court order, specific legislation or by a court order requiring that the proceedings be closed to the public.[61] Liability for contempt is strict in the sense that it need not be shown that the publisher of the offending material intended to prejudice the case or influence the outcome of the trial.[62]

13.32 In addition to preserving the common law rules of contempt of court, the Criminal Code contains a number of specific provisions governing the publicity of proceedings at a preliminary inquiry, the Canadian equivalent of committal proceedings. The presiding magistrate has a discretion to order that the evidence taken at the preliminary inquiry not be

published. The magistrate is obliged to make such an order if the application for suppression is made by the accused person.[63] If the accused person is not represented by counsel, the magistrate is required to inform him or her of the right to make such an application.[64] There is, in addition, an express prohibition against the publication of any confession or admission given in evidence at a preliminary inquiry.[65]

13.33 In March 1982 the Canadian Law Reform Commission published a report on the subject of contempt of court.[66] It recommended that the common law of contempt be replaced by a series of statutory offences to be incorporated into the Canadian Criminal Code. The Commission proposed that an indictable offence subject to a maximum penalty of two years imprisonment be enacted in the following terms:

> 4. (1) Every one commits an offence who, while judicial proceedings are pending,
>
> ...
>
> (b) publishes or causes to be published anything he knows or ought to know may interfere with such proceedings.
>
> (2) This section does not apply to accurate and impartial reports of judicial proceedings published in good faith except where a court has made a lawful order for a hearing in camera or for non-publication of such proceedings.
>
> (3) For the purposes of this section, judicial proceedings are pending,
>
> ...
>
> (b) in criminal matters, from the time an information is laid or an indictment preferred, until a verdict, order, or sentence, as the case may be, is pronounced thereon.

A Bill introduced into the Canadian Parliament with a view to implementing the Law Reform Commission's proposal lapsed and was not subsequently enacted.[67]

13.34 The Canadian Law Reform Commission has recommended the abolition of the preliminary hearing and its replacement by a procedure similar to that proposed by this Commission in Chapter 7.[68] The absence of a preliminary inquiry would necessarily involve eliminating much of the publicity which has a tendency to prejudice the trial of the accused person.

D. United States of America

13.35 The position in the United States of America is fundamentally affected by the provisions of the Bill of Rights in the Constitution.[69] The First Amendment guarantees freedom of speech and, in particular, freedom of the press, while the Sixth Amendment guarantees an accused person the right to a public trial by an "impartial jury". The American courts have not adopted a comprehensive formula to deal with the accommodation of these rights, but have tended to deal with each case on its merits, adopting whatever measures are necessary or appropriate in the circumstances of the case to preserve the right to a fair trial.[70] However, it is fair to say that the media have been largely unfettered in their freedom to publish material which may prejudice the fair trial of an accused person, and that the courts have relied largely on remedial measures, such as orders for a change of venue, adjournment, voir dire examination of potential jurors, instructions to the jury and retrial, rather than on the law of contempt or on orders closing courts or restricting publicity.

E. Scotland

13.36 In Scotland, the sub judice doctrine of contempt of court has been given a wide interpretation in order to protect the interests of the accused person.[71] One commentator has remarked of the Scottish law that

> The publication of any information relating to a projected criminal trial other than the bare fact of an accused's arrest and committal on a particular charge may well be treated as contempt of court.[72]

The public officials responsible for prosecutions, the Procurators Fiscal, are expressly forbidden to give information to the media other than the fact of the accused person's committal, factual information which does not affect the progress of the investigation or prejudice the trial of the accused person, and information which is strictly necessary to trace a suspected person or a potential witness.[73] It should also be remembered that committal proceedings such as those which take place in New South Wales do not occur in Scotland, thereby reducing the opportunity for prejudicial pre-trial publicity.[74]

IV. AUSTRALIAN PROPOSALS FOR REFORM

A. Australian Law Reform Commission

13.37 The Australian Law Reform Commission recently released its Discussion Paper Contempt and the Media[75] in which it considers the question of pre-trial publicity. It is noteworthy that the Commission suggests that the clarification of the relevant principles in this area should not be left to the common law but that there should be a legislative enactment to comprehensively define the law of contempt by publication.

The Commission also proposes that there should be certain restrictions on publicity before trials which are likely to be heard by a jury. These restrictions would operate from the initiation of criminal proceedings, that is, from the time of arrest, warrant for arrest, charge, issue of summons or an order for retrial[76] and would cease to apply upon delivery of the jury's verdict, a plea of guilty or discontinuance of the case.[77]

13.38 Whether or not a publication would attract criminal liability would depend upon four conditions. The publication would have to fall within one or more prescribed categories of publication defined as being capable of creating "a substantial risk of serious prejudice".[78] These categories would be:

* A statement to the effect that the accused person is innocent or is guilty, or that the jury should acquit or should convict.

* An allegation, whether true or false, that the accused person has one or more prior criminal convictions.

* An allegation, whether true or false, that the accused person has in the past been or is about to be charged with one or more other offences to be tried separately from the jury trial in question, or that he or she has committed one or more other offences, or has been involved in incidents of a similar nature to the offence charged.

* An allegation, whether true or false, that the accused person has confessed to the offence, or any of the offences, to be dealt with at the relevant trial.

* An allegation directly relevant to the question whether the accused person, or any prospective witness (whether for the prosecution or the defence) is or is not likely to be a truthful and reliable witness (such allegations to include allegations as to the proclivities or

associations or racial or cultural attributes of the person in question, where these bear directly on the truthfulness or untruthfulness of the person).

* An allegation tending to establish or deny involvement of the accused person with the facts of the offence charged (as opposed to accounts of the "bare facts" of the offence or particulars of the identity of a person who has been charged).[79]

13.39 Over and above this, the publication would have in fact to create a substantial risk of serious prejudice to the trial in the particular circumstances of the case.[80] The publication would not attract liability if it fell within any of the following exceptions:

* Fair, accurate and contemporaneous reports of legal proceedings (subject to the effect of any valid order restricting publication) or of parliamentary proceedings.

* Publications necessary to facilitate the arrest of a suspect or to protect public safety.

* Publications falling within a "public interest" defence, namely, that the publication constitutes a discussion of general issues of public interest and importance, the value of the discussion would be substantially impaired if the material creating a substantial risk of serious prejudice to the relevant trial were omitted, and the value of the discussion would be seriously impaired if the publication were delayed until the end of the relevant sub judice period.[81]

It is further provided that the person responsible for the publication would not be guilty of contempt if he or she could prove on the balance of probabilities that there was no intended or careless wrongdoing. This is the so called "defence of innocent publication".[82]

13.40 For proceedings before judges or magistrates sitting without a jury, the Commission proposes that from "the commencement of trial" until sentence there should be a prohibition on publications expressing an opinion as to the sentence to be passed on the accused person. This prohibition would be subject to the defences and exceptions outlined in para 13.39.[83] This proposal is somewhat uncertain in its application. The phrase "commencement of trial" does not appear to take account of the need to guard against this form of publication where the accused person has pleaded guilty. We should note once again that the vast majority of people charged with criminal offences do in fact plead guilty. We return to discuss this issue in para 13.71.

13.41 The Commission also proposes that in limited circumstances the courts should be able to make orders prohibiting publication for the purpose of avoiding prejudice before trial. For courts conducting trial or committal proceedings, the reporting of the conviction or committal order may be postponed where the accused person or another is shortly to be tried for some other offence. For courts conducting committal proceedings, the reporting of the evidence may be postponed where there are reasonable grounds for believing that evidence tendered at committal may not be admitted at a trial before a jury. These orders should be made only where there is a substantial risk of serious prejudice.[84]

13.42 The Commission also makes certain recommendations regarding the publication of "identification" evidence. At any time before a verdict, plea of guilty or discontinuance of the case, there should be a prohibition on the publication of a photograph of a person in circumstances suggesting that he or she is suspected of or charged with a criminal offence, where at the time of publication there is a reasonable likelihood that identification will be in issue at the forthcoming trial and any process of identification which may occur would be seriously prejudiced by the publication.[85] This would be subject to the defence that publication was reasonably justifiable in order to assist in the arrest of the person depicted in the photograph or on grounds of public safety.[86]

13.43 At this stage, we should note that we have certain reservations regarding some of the provisional proposals made by the Australian Law Reform Commission. These reservations generally concern the following categories:

* the time at which the prohibition against publication of prejudicial material should commence;
* the reversal of the traditional onus of proof where people have been accused of offences in the nature of contempt;
* the proposal to restrict publication in cases which will not involve a jury; and
* the "defence" of "public interest" which may be raised to justify the publication of prejudicial material.

We will deal with these matters in greater detail in Part V of this chapter.

B. The Watson Draft Criminal Code for the Commonwealth

13.44 Following a comprehensive review of the criminal law of the Commonwealth, Mr Justice Watson has recently released a draft Criminal Code for the Commonwealth which contains certain provisions relating to the issue of pre-trial publicity.[87] The Code provides that in any case it is an offence for a person to publish before the trial of an accused person, any of the following:

* the photograph of a person who has been charged with an offence;
* any information as to whether a named person charged with an offence has been convicted of other offences;
* any material likely to influence the testimony of any person in any proceedings for an offence; or
* any material reflecting upon the truthfulness or reliability of the person charged or any relevant witness.[88]

Mr Justice Watson has remarked of this provision that it is "most tentative" and is inserted in consequence of the provisional proposals made by the Australian Law Reform Commission in its Discussion Paper Contempt and the Media.[89]

13.45 So far as trials involving a jury are concerned, the Draft Code makes it an offence to publish a report of pre-trial proceedings conducted under s282 of the Draft Code and also provides that it is an offence to publish the fact that any admission or confession was tendered in evidence at any committal proceedings or at a preliminary inquiry unless the person making the admission or confession is no longer charged with a relevant offence or the trial of the offence has concluded.[90] An accused person would not be guilty of either

of these charges if he or she can show on the balance of probabilities that the court expressly authorised the publication or both the prosecutor and the person charged gave written authority for the publication. These proposals also achieve the desirable objective of specifying determinate maximum penalties for offences in the nature of contempt of court. As his Honour has noted, the proposals are provisional and designed to stimulate discussion. They will inevitably be reassessed in the light of the final recommendations of the Australian Law Reform Commission in its reference on contempt.

V. ISSUES FOR CONSIDERATION

A. Codification of the Law

13.46 In the Commission's view, it is desirable that there should be legislation which defines the law relevant to pre-trial publicity with clarity and with greater certainty than the current law. A number of arguments may be raised in support of this proposal. As a matter of general principle, it is important that the law, particularly the criminal law, should be accessible and comprehensible. Since the law regarding pre-trial publicity must be considered frequently by people in the newspaper and broadcasting industries, it is important that they be in a position to distinguish, so far as this is practicable, legitimate from unlawful publication. The nature of the current uncertainty is vividly demonstrated by the disagreement amongst judges called upon to determine this question in well publicised cases.[91] If the law itself is vague and uncertain, its application will be equally

unpredictable. Wherever the criminal law perpetuates the likelihood of selective enforcement, the potential for injustice is clear.[92]

13.47 The position is made more serious by the fact that the law of contempt of court derives principally from the common law, that is, the relevant legal principles are to be found in case law and not in legislation. This makes the law of contempt especially difficult to discover and apply. Notwithstanding the existence of text books and manuals on the law of contempt of court,[93] there is clearly serious difficulty in stating and applying the existing principles. It would also be helpful if, as well as the law of contempt, the various measures devised to deal with pre-trial publicity were clarified and articulated in legislation.

B. Unlawful Publications

1. The Nature of Material Prohibited from Publication

13.48 The present law requires that in order to constitute contempt of court, a publication, as a "matter of practical reality", should have a "real and definite tendency to prejudice or embarrass" the trial.[94] The English law, on the other hand, adopts a more stringent criterion in that the publication must be one which "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[95] As we have noted, the English standard has been tentatively proposed by the Australian Law Reform Commission as being appropriate to distinguish between permissible and prohibited publication. We

should say at the outset that we do not support the proposal that there should be a "defence" of "public interest" which would make it permissible to publish otherwise prohibited material. We consider that the notion of "public interest" is in this context vague, uncertain and capable of such vastly differing interpretations that it could render the general prohibition ineffective.

13.49 In our view, the current law in New South Wales is unsatisfactory. The notion of the "tendency" of a publication to "embarrass" is ambiguous and does not adequately convey the concept of a prospect of prejudice, even when qualified by words such as "real and definite". On the other hand, we believe that the English formulation adopted by the Australian Law Reform Commission pitches the degree of prejudice required at too high a level. While the words "substantial risk" are adequate to convey the notion of a real possibility of prejudice, the further formulation of "serious prejudice" is, in our view, too stringent. It permits the deliberate publication of material which is prejudicial but not seriously prejudicial. In our opinion, the law should attempt to preclude any prejudice to the proceedings, not only the more extreme forms of prejudice. On the other hand, it should not extend to cover publications where the risk of prejudice is insignificant. Accordingly, the standard which we consider best reflects the proper balance between the right to freedom of speech and the right to a fair trial is that of "a real risk of prejudice".

13.50 A further question to be considered is whether legislation regulating the publication of prejudicial material should simply state that standard as the determinant of permitted and prohibited publications or whether it should specify particular types of publicity which are to be prohibited because they are clearly identifiable categories of prejudicial material. For a number of reasons it would seem desirable to give some definite guidance as to what is prohibited from publication. Firstly, there may be legitimately differing views about whether the publication of certain material would create "a real risk of prejudice" in the circumstances of a particular case. Legislation in precise terms would do much to eliminate any doubts about the propriety of a particular publication. Secondly, it is important that those responsible for publication should have, so far as is practicable, a clear understanding of the forms of publicity that are prohibited, particularly where criminal sanctions are to be applied for breaches of the law. Finally, and perhaps most importantly, a fair trial should not be prejudiced simply because a journalist or broadcaster does not understand the application of the law in a particular case. We do not believe, however, that the categories of publicity which should always be prohibited can be exhaustively stated. Much will depend on the particular circumstances. For this reason, the broad standard of liability should also be stated in the legislation, not simply reflected in a number of specific examples of prohibited publicity.

13.51 In our view, the following matters should be specifically listed as material which should not be publicised before the trial on the basis that the publication of such matters may prejudice the fair trial of the accused person:

* reports of evidence given at preliminary proceedings which is reasonably likely to be the subject of dispute at a subsequent trial;

* allegations, whether true or false, regarding the prior criminal record or the character or reputation of the accused person;[97]

* the existence or the contents of any confession or statement made by the accused person or the refusal or failure of the accused person to make any statement;

* the results of any examination or test or the fact the accused person refused to submit to any examination or test; and

* speculation as to the credibility of any prospective witnesses.

In particular, lawyers for either the prosecution or the defence should be prevented from releasing information or opinions as to the above matters or, more generally, material which is prejudicial in the relevant sense.

2. Times During Which Restrictions Should Apply

13.52 The period during which controls over pre-trial publicity should begin and cease to have effect must be considered. Generally speaking, the existing law of contempt of court stipulates that contempt is only possible once the criminal process has actually been initiated.[98] The Australian Law Reform Commission's proposals would maintain this position.[99] However, in our view, the formal initiation of the criminal process should not necessarily be the stage at which controls over publicity become operative. It would be

artificial and unfair that prejudicial material could be published prior to the initiation of the criminal process even though it is clear that a criminal charge will be or, at least, is reasonably likely to be, brought against a known suspect.[100] We propose that the present legal position should be modified accordingly. As an English court has made the point in eloquent terms:

> It is possible very effectually to poison the fountain of justice before it begins to flow.[101]

13.53 Controls over pre-trial publicity should not cease to have effect until the case has been concluded by the verdict of a jury or it becomes apparent that the case will not be heard by a jury. If an accused person appeals from his or her conviction and a re-trial is ordered by the appellate court, the restrictions on publicity before trial should apply from the time of that order in the same way that they would apply to any other pending trial. We do not consider it necessary to make any specific rules to cover the situation where a convicted person appeals. There are, in our view, two important reasons for taking this approach. In the first place, retrials are rare.[102] Secondly, the length of the appeal process, if it is taken as far as it can be, may be measured in terms of years.[103]

3. State of Mind of the Publisher

13.54 One of the major issues to be addressed in a project directed toward reform of the law of contempt is whether an intention to interfere with the administration of justice should be an element of the law of contempt. The principal argument for such a requirement is that this would be in conformity with the general requirement of the criminal law that mens rea (a "guilty mind") is an essential element of criminal liability. The contrary argument is that it is the effect of the publicity in question which is the gravamen of the offence and that, in those circumstances, the existence of an intention on the part of the publisher to interfere with the administration of justice is not critical to liability. In our opinion, a proper compromise between these two arguments can be reached by stipulating that there should be criminal liability for contempt if the publisher either knew or ought to have known that there was a real risk that the publication would prejudice the fair administration of justice. Such a requirement would mean that there would be no criminal liability imposed upon an innocent publisher, but that one who published with the intention of interfering with the administration of justice or who did not take reasonable steps to ensure that the publication was not in breach of the relevant prohibition would be guilty of an offence. In accordance with the accepted principles of criminal liability, we believe the onus of proving the requisite intention or degree of recklessness on the part of the publisher should be borne by the prosecution.[104]

4. Criminal History of the Accused Person

13.55 It is generally accepted that the publication of the criminal history of the accused person before the trial is potentially prejudicial to the conduct of a fair trial. The serious impact which this information may have on the fairness of the trial is the reason why an accused person's prior criminal record is generally inadmissible as evidence.[105] We consider the rationale for this rule, namely, that the disclosure of a prior criminal history is generally unfairly prejudicial because it may lead the jury to conclude that the accused person is guilty merely because of his or her criminal record, to be sound.[106] Accordingly, we consider that, in cases where the trial is or may be before a jury, there should be a general prohibition on the publication of material which simultaneously identifies a person as being charged with a criminal offence and as having a prior criminal history.[107] A jury, however, may well give improper weight to an accused person's criminal record in reaching a verdict on the accused person's guilt in the particular case. Where there is no jury involved, it is proper to assume that a judge or magistrate will be able to disregard publicity of the accused person's criminal record in reaching a determination as to guilt.[108] Where the case is not to be heard by a jury, either because it is to be dealt with in a court of summary jurisdiction or because the accused person intends to plead guilty, there would usually be no need to suppress the publication. This should not be taken to mean that there will not be any such cases where it is undesirable to publish the criminal history of the

accused person. We consider that the general powers we propose that the courts should have would be sufficient to control undesirable publication of criminal records in summary prosecutions and cases where there is a plea of guilty.

5. Identification

13.56 Cases in which the "identification" of the accused person is, or is likely to be, in issue, also pose particular problems. The publication of a photograph, sketch or other likeness or description of a person in circumstances suggesting that he or she is suspected of or charged with a criminal offence is the very thing which may render the evidence of witnesses who are to give evidence as to the identity of the accused person unreliable. The fact that wrongful convictions have been obtained as a result of mistaken evidence of identification is well documented.[109] One of the significant potential causes of mistakes of this kind is the risk that a witness may substitute the recollection which they have of the actual events in question with the image of the published photograph or other material.[110] Accordingly, we propose that the publication of such material should, generally speaking, be prohibited.

6. Exceptions to General Prohibitions

13.57 The need for effective law enforcement may justify some departure from the general prohibitions on publicity of prejudicial material we have put forward in the two preceding paragraphs. Firstly, publication of admittedly prejudicial information may be necessary to assist in the apprehension of a

suspected offender. Secondly, the protection of the general community from the potential danger posed by a particular suspect may justify the publication of material which is prejudicial to the conduct of a fair trial.

C. Particular Problems

1. The Requirement that Reports of the Court Proceedings be Contemporaneous

13.58 One of the particular problems in this area of the law is the manner in which the publicity given to court proceedings prior to the trial may be regulated, if at all. As mentioned earlier, it is a fundamental principle that the proceedings of the courts should be open to the public. The public nature of the proceedings carries with it the consequence that matters emerging from the proceedings may be publicised through the media. The question then is to accommodate the interests not only of free speech generally and the need for a fair trial, but also the requirement that the procedure of the administration of justice be public. We think it reasonable to require at least that the published reports of court proceedings present a fair and accurate report of those proceedings. At present, the law of contempt requires that the report also be "contemporaneous".[111] This requirement cannot be interpreted literally but, even if given a more sensible and realistic interpretation, may ignore the difficulties which would be encountered by a newspaper or magazine which is not published daily but rather on a weekly or monthly basis. Similarly, problems may be faced by television and radio reports which are contained in a program which is broadcast

weekly. Accordingly, the requirement of "contemporaneity" in the reporting of court proceedings should, in our view, be modified by a qualification that the publication be published within a reasonably short period after the proceedings in question, and that the assessment of the period in question as reasonable or otherwise should be made by reference to the nature of the publication.

2. Publicity of Completed Proceedings

13.59 It may also be necessary in exceptional circumstances to impose certain restrictions on the publicity of completed court proceedings. For example, publicity of matters canvassed in the completed trial of one accused person may pose a threat to the prospect of conducting a fair trial in a forthcoming case.[112] This potential risk may exist, for example, where there has been an order made by a court for separate trials to be held on the ground that this may avoid the introduction of unfairly prejudicial material. Accordingly, we point out that the general rule imposing no restriction on publicity after the completion of the trial may need to be set aside where there are matters arising from earlier and completed court proceedings which pose a real risk of prejudice to an accused person in later and as yet uncompleted criminal proceedings. We do not consider it necessary to make any specific rule to achieve this result. It can be left to the discretion of the judge or magistrate to make an order which seems appropriate given the particula circumstances.

3. Arrest and Committal Proceedings

13.60 There are two stages of the criminal process as presently constituted which often give rise to prejudicial publicity. One is the arrest and initial appearance in court of an accused person which generally encompasses a hearing as to the accused person's entitlement to bail. The second is the committal hearing where the presiding magistrate must determine whether a person who has been charged with an indictable offence should be committed for trial before a jury.

13.61 So far as publicity of the arrest is concerned, we propose that publicity be confined to reporting the circumstances of the arrest and a brief description of the offence which the accused person is alleged to have committed. In other words, publication of factual matters relating to the arrest would be permissible, but comment which would create a real risk of prejudice to a fair trial would be prohibited.

13.62 At committal proceedings the prosecution case is usually given particular emphasis. This is partly because the prosecution presents its case first but also because the accused person rarely gives evidence. The fact that the prosecution may present evidence which is inadmissible at the trial and the formula by which a magistrate makes a determination to commit, particularly where there is reference to the likelihood of a conviction by a jury, may also be seen as prejudicial influences upon a subsequent trial.[113]

13.63 If our proposal that committal proceedings be abolished and replaced by a right to review the decision to prosecute were adopted, these problems would be eliminated or diminished.[114] Less publicity would be given before trial to the prosecution case. The court hearing the challenge to the decision to prosecute would have the power, exercisable of its own motion or on the application of either party, to restrict or postpone publicity of all or any part of the hearing on the ground that such publicity would be prejudicial to the fair trial of the accused person. We propose that such a general power should be available to the court in criminal cases irrespective of the nature of the proceedings. The court would then be able to make appropriate orders in all relevant circumstances.

13.64 If committal proceedings were to be retained, the publication of prejudicial material could be controlled by giving the court a general discretionary power to restrict publicity of committal proceedings,[115] irrespective of the nature of the charge. We would not favour the general prohibition of publicity such as exists in Scotland and Victoria, nor the partial controls contained in English legislation.

4. The Penalty for Unlawful Publication

13.65 The Australian Law Reform Commission has proposed, without specifying any figure, that maximum penalties should be prescribed for both sentences of imprisonment and fines imposed upon people convicted of contempt of court.[116] Mr Justice

Watson has also included maximum penalties for offences in the nature of contempt in his draft Criminal Code for the Commonwealth.[117] We consider that the current law, which does not specify a maximum penalty for contempt by the publication of prejudicial material before trial, is unsatisfactory. In our view, the range of sanctions available to the courts should include;

* imprisonment;
* fines including orders to pay the costs of any proceedings abandoned because of the offending publication; and
* orders to make public retraction of offending publications or to publish the results of proceedings for contempt.

D. Powers to Close the Court to the Public

13.66 We have already observed that one of the fundamental features of the administration of justice is that it should be open to the public, in the sense not only that court proceedings can be attended by the public but also that they be subject to public scrutiny and criticism. Accordingly, the justification for the closure of a court to the public must itself advance the administration of justice or be based on considerations of such public importance as outweigh the general public interest in justice being open. Where public knowledge of matters emerging in the court proceedings would or might create the risk that a fair trial will be undermined, the closure of a court may be justified. We would regard this justification as one rarely likely to arise. It appears to us that the preferable measure for precluding undesirable pre-trial publicity is not the closure of the court but rather

appropriate controls over the publication of court proceedings. It is the effect of publicity on potential jurors, rather than the openness of the court's proceedings, which threatens to jeopardise the conduct of a fair trial.[118]

13.67 In our view, whilst it is desirable that all courts should have a discretionary power to sit as a closed court in order to avoid undesirable pre-trial publicity, this discretion should only be exercised where it is necessary in the interests of the administration of justice and where the other measures available to control publicity are inadequate to secure this goal. This should mean that the courts would only be closed in exceptional circumstances. The court should be able to exercise this power either of its own motion or on the application of any party and should be obliged to hear submissions on the appropriate exercise of the power in the circumstances of the particular case.

13.68 The implementation of such a proposal should also aim towards the clarification of the present uncertainty as to whether the publication of material presented in closed court proceedings should constitute contempt. In our view, the publication of material which emerges in closed court proceedings should be a contempt unless the court makes a specific order that publication is either generally or conditionally permitted. In practice, it would be extremely difficult for the publisher to escape liability for contempt on

the basis that there was no intentional or negligent breach of the rule generally prohibiting the publication of closed court proceedings.

13.69 Although the courts currently have certain powers to regulate publicity of the proceedings before them, these powers are neither comprehensive in scope nor necessarily designed to deal with the problem of undesirable pre-trial publicity. In order to remedy this inadequacy, we propose that any court conducting criminal proceedings should have a broad discretionary power, again exercisable of its own motion or on the application of any of the parties, to restrict publicity of the proceedings where that is necessary for the administration of justice and, specifically, in order to preclude a risk of prejudice to the fair trial of the case before the court. The court would be expected to take into account other restrictions on pre-trial publicity available before exercising this discretionary power. Accordingly, bearing in mind the general undesirability of restricting the publication of court proceedings, the power of the courts to suppress publicity would only be exercised in exceptional circumstances.

E. Remedial Measures

13.70 It must be recognised that publicity may well occur which breaches the restrictions and, although punishable accordingly, has also, in fact, the potential to prejudice the fair trial of an accused person. We consider it important that the courts be given appropriate powers, exercisable of their

own motion or on the application of either of the parties, to take remedial steps to diminish or eliminate any prejudice. Such steps should include, as at present, the postponement of the trial or a change in the trial venue. The present law in New South Wales does not permit the questioning of jurors as to the nature and degree of their exposure to prejudicial material. In our Report The Jury in a Criminal Trial, we made various recommendations designed to overcome the likelihood that jurors may be affected by exposure to prejudicial material.[119]

F. Publicity as to Penalty

13.71 The restrictions on publicity outlined above, and the remedial steps available to counter the effects of prejudicial publicity, all proceed on the basis that it is a jury, and not a judge or magistrate, that is susceptible to improper influence by pre-trial publicity.[120] However, there is one restriction on publicity which some members of the Commission tentatively support which is concerned with a decision which is not by a jury but by a judge or magistrate, namely, the question of the penalty to be imposed on an accused person in the event of his or her conviction. All the members of the Commission consider that there should be no improper influence, real or perceived, on the court's capacity to make an appropriate determination on penalty but they are currently divided as to the means which should be adopted to ensure this.

13.72 Some members of the Commission tentatively propose that from the time of arrest or a decision to prosecute (whichever first occurs) until the final disposition of any prosecution, and irrespective of whether the accused person has pleaded guilty or indicated an intention so to plead, there should be a general prohibition against public statements as to the nature or quantum of the penalty which should be imposed on the accused person. Those members of the Commission who do not support this proposal believe that it is inappropriate to suggest changes in procedure which are based on a presumption that judges and magistrates are susceptible to the influence of prejudicial publicity.[121] The point has been well made in the Supreme Court of South Australia:

> Magistrates are, by the nature of their qualifications, training, and experience, both competent and entitled to listen to information or evidence that, for reasons subsequently found to be valid, ought to be and is discarded, and thereafter to dismiss it from their minds and to decide a case or make an adjudication as if that information or evidence had never come to their notice.[122]

VI. SUMMARY OF TENTATIVE PROPOSALS

1. Restatement of the Law of Contempt

13.73 That part of the law of contempt of court which relates to the publication of material which may prejudice the conduct of a forthcoming trial should be clarified and redefined by a comprehensive legislative enactment. This should repeal the current common law rules but so much of them as is considered appropriate may be preserved by their inclusion in the new legislation.

2. General Restrictions on Publication of Prejudicial Material

13.74 There should be a general prohibition on publication before trial of information which may prejudice the fair trial of the case. The right of the media to publish or broadcast material relating to the investigation, the arrest and the decision to prosecute an accused person should be restricted from the time it becomes obvious that a particular person is likely to be charged with an offence. From this time until it becomes apparent that the matter will not be heard by a jury, information concerning the following should be prohibited from publication:

* the prior criminal record or the character or reputation of the accused person;
* the existence or the contents of any confession or statement made by the accused person or the refusal or failure of the accused person to make any statement;
* the results of any examinations or test or the fact that the accused person refused to submit to any examination or test;
* the credibility of any prospective witnesses;
* any opinion or conjecture suggesting that the accused person is guilty;
* views as to the penalty to be imposed.

3. Emphasis on Prejudice as to Guilt

13.75 Since the purpose of a criminal trial is to establish whether the accused person is guilty or not, it follows that the law should seek to avoid the publication before trial of material which is likely to prejudice a court in determining the question of guilt. On the other hand, since a criminal

trial is not primarily an inquiry to determine whether the accused person is innocent, the publication before trial of material which tends to suggest that the accused person is innocent should not be seen to prejudice the conduct of a criminal trial. Putting this another way, an accused person is entitled to seek to establish his or her innocence by any means. In order to establish the guilt of an accused person, it is necessary to obtain the judgment of a court in which guilt has been established according to law. One aspect of the law which must be observed is the necessity to ensure that the judgment is not the result, or is not seen to be the result, of prejudicial influences.

4. The Standard of Prejudice

13.76 The law relating to the publication of prejudicial material before trial should attempt to preclude any prejudice to the forthcoming proceedings, not only the more extreme forms of prejudice. On the other hand, it should not extend to cover publications where the risk of prejudice is insignificant or trifling. Accordingly, the standard which we consider should be adopted to distinguish between prohibited and permissible publications is that of "a real risk of prejudice".

5. No "Public Interest" Defence

13.77 The Commission raises for consideration the question whether there should be a "defence" of "public interest" which would make it permissible to publish otherwise prohibited material. Some of the members of the Commission consider that

the notion of "public interest" is, in this context, so vague and uncertain and capable of such vastly differing interpretations that it could render the general prohibition against the publication of prejudicial material before trial ineffective. Rather than permit a "defence" of "public interest", those members think it preferable that this is a matter which should be taken into account by the prosecuting authority in determining whether a prosecution for contempt by unlawful publication should be instituted. The perceived existence by the publisher of a "public interest" would also be relevant in the event of a conviction to the question of the appropriate penalty.

6. No Restriction on Reporting of Court Proceedings

13.78 As a general rule, all proceedings in criminal cases should be conducted in open court and there should be no restriction upon the media publishing reports of those proceedings provided that the publication is a fair and accurate report and is published within a reasonably short period (having regard to the nature of the publication) after those proceedings have taken place. So far as the publication of completed court proceedings is concerned, the only restriction should be on the publication of material which carries with it the risk of prejudicing the conduct of a forthcoming or current trial.

7. Courts to have General Power to Prohibit Publication

13.79 A court conducting a hearing of any kind before the trial of a criminal case should have the discretionary power, exercisable of its own motion or on the application of a party, to make an order prohibiting the publication of all or any part of the proceedings where it considers that there is a real risk that the publication of the proceedings will prejudice the fair trial of any criminal case. An order of this kind may be made subject to such conditions, or varied or revoked, as the court thinks fit.

8. Courts to have General Power to Order Court Closed

13.80 A court conducting a hearing of any kind before the trial of a criminal case should have the discretionary power, exercisable of its own motion or on the application of a party, to make an order that the proceedings be heard in closed court. An order of this kind may be made subject to such conditions, or varied or revoked, as the court thinks fit.

9. Criminal History of an Accused Person Not to be Published

13.81 The publication before trial of material which simultaneously identifies a person as being charged with an offence and as having a prior criminal history should, subject to the exception noted in para 13.83, be prohibited where the hearing of the offence charged is or may be before a jury. This proposal was the subject of a formal recommendation in our Report The Jury in a Criminal Trial.[123]

10. No Photographs in Identification Cases

13.82 In any criminal case in which the identification of the accused person is likely to be in issue, the media should, subject to the exception noted in para 13.83, be prohibited from publishing a photograph, sketch or any other likeness or description of a person in circumstances suggesting that he or she is either suspected of or charged with a criminal offence.

11. Special Circumstances Justifying Prejudicial Publicity

13.83 The prosecuting authority or the police may publish so called identikit pictures of a suspected person or a photograph or information disclosing the criminal history of an accused or suspected person where it is necessary to obtain assistance in the apprehension of a suspect, for the purpose of warning the public of any perceived danger or otherwise to assist in the investigative process. Publications of this kind should be permitted notwithstanding the fact that the publication of the information may prejudice a forthcoming trial.

12. General Prohibition on Publication of Disputed Evidence

13.84 A court conducting pre-trial proceedings in a criminal case should generally make an order prohibiting the publication of any material presented during those proceedings where there is, or is likely to be, any issue or dispute as to the admissibility of that material in evidence at the trial. The court should attempt to determine the likely issues at trial before making an order of this kind and an order should not be made where the accused person expressly requests that publication be permitted.

13. Prosecuting Authority and Defence to Limit Media Contact

13.85 The police, the prosecuting authority and a lawyer appearing for an accused person should not release for the purpose of publication any information or opinion relating to a pending or current criminal trial if there is a real risk that the publication of that material will prejudice the conduct of a fair trial or otherwise interfere with the administration of justice.

14. No Public Comment Regarding Appropriate Penalty

13.86 From the time a person has been arrested or a decision to prosecute has been made (whichever occurs first) and until the disposition of the case, irrespective of whether there has been an indication during that period that the accused person intends to plead guilty, there should be a general prohibition against any person making a statement intended to be published to the general public which contains an opinion as to the sentence or penalty which should be imposed on the accused person. If this provision is implemented, it should not restrict publication of the penalties which are capable of being imposed upon conviction for a given offence.

15. Publicity Reduced by Abolition of Committal Proceedings

13.87 The abolition of committal proceedings should mean that there is less publicity given to the prosecution case before the trial, thereby reducing the possibility that potential jurors will develop a view about the case inconsistent with their obligation to consider the case on the basis of the evidence presented at the trial. Unless the decision to

prosecute is the subject of a pre-trial challenge made by the accused person to the prospective court of trial, there will be little publicity of the case generated by the media reporting proceedings that have occurred in court.

16. Powers of Trial Court to Ensure Fair Trial

13.88 Where the publication of prejudicial material has jeopardised the prospect of conducting a fair trial, the prospective court of trial should have the power, exercisable of its own motion or on the application of a party, to do any of the following if it considers that it will increase the likelihood of a fair trial:

* change the venue of the trial;
* postpone the trial for such period as will diminish or eliminate the influence of the prejudicial publicity;
* in the case of trials to be heard by a jury, invite potential jurors to disqualify themselves if they have been subjected to material which they consider makes them either unable or unlikely to approach the case impartially;[124]
* require an appropriate remedial statement to be published.

17. Specific Penalties for Contempt

13.89 The maximum penalties capable of being imposed upon a person convicted of contempt of court should be specified by legislation. The court should have the power to impose a sentence of imprisonment or a fine or both, to make an order that costs of proceedings be paid by the offending publisher and to order that a retraction be published. We make no

proposal as to the maximum penalty to be available other than to say that the Justices Act s152, which provides that a person convicted of contempt of a Local Court should be liable to a maximum fine of four dollars ($4), should be repealed.

Footnotes

1. Kingswell v The Queen (1985) 60 ALJ 17 at 32; (1985) 159 CLR 264 at 303. See also the Hon Justice M D Kirby CMG "Free Trial and Free Press", a paper presented to the International Criminal Law Congress, Adelaide, 9 October 1985.

2. Australian Law Reform Commission Contempt and the Media (DP 26, March 1986).

3. Halsbury's Laws of England (4th ed) Vol 9 "Contempt of Court" at para 2.

4. Id at para 2.

5. Id at para 38.

6. Id at para 25.

7. M Armstrong, M Blakeney and R Watterson Media Law in Australia (Melbourne 1983) at 119. See also James v Robinson (1963) 109 CLR 593.

8. James v Robinson (1963) 109 CLR 593.

9. Halsbury's Laws of England (4th ed) Vol 9 "Contempt of Court" para 14 citing R v Beaverbrook Newspapers Ltd and Associated Newspapers Ltd [1962] NI 15; R v Savundranayagan and Walker [1968] 3 All ER 439; R v Parke [1903] 2 KB 432.

10. See eg Director of Public Prosecutions (Cth) v Wran (Unreported, Court of Appeal, Supreme Court of New South Wales, 8 December 1986).

11. Australian Law Reform Commission, note 2 at 38. John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351; The State of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25; Attorney General for New South Wales v Willesee [1980] 2 NSWLR 143.

12. Australian Law Reform Commission, note 2 at 39 citing Attorney General for New South Wales v John Fairfax & Sons Ltd (Unreported, Court of Appeal, New South Wales, 20 December 1985).

13. Registrar of the Court of Appeal v Willesee [1985] 3 NSWLR 650.

14. Australian Law Reform Commission, note 2 at 39.

15. Re Truth & Sportsman Ltd Ex parte Bread Manufacturers Ltd (1937) 37 SR (NSW) 242 at 249.

16. Packer v Peacock (1912) 13 CLR 577 at 588.

17. See the general power established under Supreme Court Act 1970 s80 discussed in P v P [1985] 2 NSWLR 401.

18. Scott v Scott [1913] AC 417 at 442; Raybos Australia Pty Ltd v Jones [1985] 2 NSWLR 46; cf R v Tait and Bartley (1979) 24 ALR 473 at 479.

19. K Mason "The Inherent Jurisdiction of the Court" (1983) 57 Australian Law Journal 449 at 452. Mirror Newspapers v Waller [1985] 1 NSWLR 1; see also Taylor v Attorney General [1975] 2 NZLR 675; Attorney-General v Leveller Magazine [1979] AC 440.

20. Child Welfare Act 1939 s16.

21. Crimes Act 1900 s578.

22. For provisions relating to contempt of the Magistrates' Court, see s32 (committal proceedings) and s67 (proceedings on information or complaint). Section 152 provides that any person guilty of contempt in relation to proceedings before a Local Court shall be liable to a maximum fine of four dollars ($4) or imprisonment for a maximum of 14 days.

23. Gallagher v Durack (1983) 45 ALR 53.

24. Fraser v The Queen, Meredith v The Queen [1984] 3 NSWLR 212.

25. Attorney-General (Victoria) v Hinch and Another (Unreported, Supreme Court of Victoria, Murphy J, 22 May 1986). See also Hinch and Another v Attorney-General (Victoria) (Unreported, Full Court, Supreme Court of Victoria, 11 December 1986); D Bowman "Journalists and Judges" (August 1986) Australian Society 9.

26. Australian Law Reform Commission, note 2 at 43.

27. See paras 8.6-8.7; R v Dorrington [1969] 1 NSWR 381; R v Rushbrook [1974] 1 NSWLR 699.

28. R v Scriva (No 2) [1951] VLR 298; R v McKeon [1961] 78 WN (NSW) 798.

29. See eg Justices Act 1959 (Tas) s37A; Federal Court of Australia Act 1976 (Cth) ss17, 50. See also G Nettheim "Open Justice Versus Justice" (1985) 9 Adelaide Law Review 488 at 502 fn 66.

30. Magistrates (Summary Proceedings) Act 1975 (Vic) s44.

31. Magistrates (Summary Proceedings) Act 1975 (Vic) s44(4).

32. Magistrates (Summary Proceedings) Act 1975 (Vic) s44(5). For a corporation, the maximum fine is $2000.

33. Victoria - Chief Justice's Law Reform Committee Prohibition of Publication of Reports of Proceedings in the Supreme Court and County Court (Melbourne 1985).

34. County Court Act 1958 (Vic) s80.

35. Supreme Court Act 1958 (Vic) s29. See also Magistrates' Court Act 1971 (Vic) s48.

36. See now Supreme Court Act 1986 (Vic) ss18, 19 (assented to 16 December 1986) which substantially implements these recommendations and provides a maximum penalty of three months imprisonment or a fine of 1000 penalty units for contravening an order made under the sections.

37. Compare Justices Act 1902 s32.

38. Justices Act 1902 (WA) ss66, 67.

39. Justices Act 1902 (WA) s101D.

40. Justices Act 1902 (WA) s101D.

41. Justices Act 1902 (WA) s101C(c). See also Law Reform Commission of Western Australia Discussion Paper Courts of Petty Sessions (1984) at 57-58.

42. Justices Act 1902 s48-s48I.

43. Evidence Act 1929 (SA) s69.

44. Evidence Act 1929 (SA) s69(1)(e).

45. See also the recommendations in Criminal Law and Penal Methods Reform Committee of South Australia: Third Report (the Mitchell Report) Court Procedure and Evidence (Adelaide July 1975) at 79; C M Branson s69 of the Evidence Act 1929-1982 (Background Paper, Attorney-General's Department South Australia 1982) cited in Australian Law Reform Commission, note 2 at 42. See also N Manos CSM "The Role of the Media", a paper presented to the International Criminal Law Congress, Adelaide, 9 October 1985.

46. Contempt of Court Act 1981 (UK) s2(2).

47. The Australian Law Reform Commission has made the provisional proposal that the same standard be applied by Federal courts, the courts of the Territories and State courts exercising federal jurisdiction. See Australian Law Reform Commission, note 2 at 52-59.

48. Contempt of Court Act 1981 (UK) s2(3), 2(4) incorporating Schedule 1.

49. Contempt of Court Act 1981 (UK) ss1, 2.

50. Contempt of Court Act 1981 (UK) ss3(1), (2).

51. Contempt of Court Act 1981 (UK) s3(3).

52. Magistrates' Courts Act 1980 (UK) s8. This provision is substantially a re-enactment of the Criminal Justice Act 1967 s3.

53. Magistrates' Courts Act 1980 (UK) s8(2). Section 8(5) of the Act provides a maximum fine of 500 pounds for a breach of this section.

54. R v Bow Street Magistrate Ex parte Kray [1969] 1 QB 473; R v Coughlan (1976) 63 Cr App R 33. See also Editorial "Closed Doors" (1986) 136 New Law Journal 789.

55. Magistrates' Courts Act 1980 (UK) s102.

56. Criminal Code (Canada), Part III "Offences Against the Administration of Laws and Justice" ss107-137.

57. Criminal Code (Canada) s8.

58 Law Reform Commission of Canada Contempt of Court (Working Paper 20, 1977) at 37.

59. Id at 41.

60. Id at 39.

61. Id at 39.

62. Id at 40.

63. Criminal Code (Canada) s467(1).

64. Criminal Code (Canada) s467(2). See generally R E Salhany Canadian Criminal Procedure (4th ed 1984) at 156.

65. Criminal Code (Canada) s470(2).

66. Law Reform Commission of Canada Contempt of Court (Report 17, 1982).

67. Australian Law Reform Commission, note 2 at 35-36.

68. Law Reform Commission of Canada Disclosure by the Prosecution (Report 22, 1984).

69. L Denniston "The Struggle between the First and Sixth Amendments" (1982) 2 California Lawyer No 10 at 43; A S Feber "Beating Bad Press; Protecting the California Criminal Defendant from Adverse Publicity" (1976) 10 University of San Francisco Law Review 391; J M Hassett "The Distinction between Pre-Trial Information and Prejudicial Publicity" (1980) 43 Law and Contemporary Problems 155.

70. See eg D Grier Stephenson Jr "Fair Trial - Free Press: Rights in Continuing Conflict" (1979) 46 Brooklyn Law Review 39.

71. A V Sheehan Criminal Procedure in Scotland and France (HMSO Edinburgh 1972) at 124.

72. G H Gordon The Criminal Law of Scotland at 1020 cited in A V Sheehan Criminal Procedure in Scotland and France (HMSO Edinburgh 1972) at 124.

73. A V Sheehan, note 71 at 124.

74. See Chapter 7 of this Discussion Paper at paras 7.58-7.61.

75. Australian Law Reform Commission Contempt and the Media (DP 26, March 1986).

76. Id at 4.

77. Id at 5.

78. Id at 4.

79. Id at 9, 10: Proposal 10.

80. Id at 4.

81. Id at 10, 11: Proposals 11, 13-15.

82. Id at 7: Proposals 3-5.

83. Id at 13: Proposal 19.

84. Id at 10: Proposal 11.

85. Id at 5, 14: Proposal 22.

86. Id at 5.

87. The Hon Mr Justice R S Watson Review of the Criminal Law of the Commonwealth (July 1986).

88. Draft Criminal Code s107.

89. The Hon Mr Justice R S Watson, note 87 at 118.

90. See Draft Criminal Code s286. Proceedings under s282 are explained in greater detail in paras 4.80, 5.63.

91. See eg Fraser v The Queen, Meredith v The Queen [1984] 3 NSWLR 212; Attorney-General (Victoria) v Hinch and Another (Unreported, Full Court, Supreme Court of Victoria, 11 December 1986).

92. P Byrne "Codification of the Criminal Law in New South Wales" unpublished Background Paper for the New South Wales Law Reform Commission (September 1986).

93. N V Lowe (ed) Borrie and Lowe on Contempt (2nd ed London 1983); M Armstrong, M Blakeney and R Watterson Media Law in Australia (Melbourne 1983).

94. John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351 at 370-372.

95. Contempt of Court Act 1981 (UK) s3(2). See also Law Reform Commission of Canada Contempt of Court (Report No 17, 1982) at 43-44.

96. See paras 13.37-13.43.

97. The Queen v Sherrin (1978) 20 SASR 164 per Legoe J.

98. James v Robinson (1963) 109 CLR 593.

99. See para 13.37.

100. See R v Parke [1903] 2 KB 432 at 437-438; R v Daily Mirror [1927] 1 KB 845 at 851.

101. R v Parke [1903] 2 KB 432 at 438.

102. See Australian Law Reform Commission, note 75 at 64.

103. Ibid.

104. See generally Parliament of the Commonwealth of Australia, Senate Standing Committee on Constitutional and Legal Affairs The Burden of Proof in Criminal Proceedings (AGPS Canberra 1982); Parliament of Victoria, Legal and Constitutional Committee Report on the Burden of Proof in Criminal Cases (November 1985).

105. New South Wales Law Reform Commission Working Paper Evidence of Disposition (1978).

106. See eg R v Attwood (1960) 102 CLR 353 at 359.

107. New South Wales Law Reform Commission The Jury in a Criminal Trial (LRC 48) para 7.17.

108. See para 13.72.

109. Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (Chairman: The Right Honourable Lord Devlin) (HMSO London 26 April 1976); R Brandon and C Davis Wrongful Imprisonment (London 1973); P Hain Mistaken Identity: The Wrong Face of the Law (London 1976); P Cole and P Pringle Can You Positively Identify This Man? (the George Ince case) (London 1975); L Kennedy A Presumption of Innocence (the Patrick Meehan case) (London 1978).

110. See generally Alexander v The Queen (1981) 145 CLR 395; Craig v The Queen (1933) 49 CLR 429 at 443 ff.

111. Australian Law Reform Commission, note 75 at 39.

112. R v Kray (1969) 53 Cr App R 412.

113. Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182.

114. See paras 7.99 and 7.101.

115. Miller v Samuels (1979) 22 SASR 271; R v Horsham Justices Ex parte Farquharson [1982] 2 All ER 269; R v Leeds Justices [1983] 1 All ER 460. See also E F Frohlich (1975) 49 Australian Law Journal 561 at 567-569.

116. Australian Law Reform Commission, note 75 at 153-154.

117. The Hon R S Watson, note 87 s286. The maximum penalty proposed is imprisonment for 12 months. For unlawful publications under s107, the maximum penalty is six months imprisonment.

118. Para 13.18.

119. New South Wales Law Reform Commission The Jury in a Criminal Trial (LRC 48 1986) Chapter 7 and in particular paras 7.23-7.29.

120. See Ex parte Attorney-General Re Truth & Sportsman Ltd (1961) 61 SR (NSW) 484 at 496.

121. See discussion in Australian Law Reform Commission, note 75 at 93.

122. Furnell v Betts (1978) 20 SASR 300 at 302 per Wells J.

123. See note 107.

124. See generally discussion in New South Wales Law Reform Commission Report The Jury in a Criminal Trial (LRC 48, 1986) at paras 7.23-7.29. In the same work it was recommended at para 4.54 that the United States procedure of conducting a voir dire examination of prospective jurors should not be adopted.

Select Bibliography

I. BOOKS AND REPORTS

Archbold Criminal Pleading Evidence and Practice (41st ed Sweet and Maxwell, London 1982).

Armstrong M, Blakeney M and Watterson R Media Law in Australia (Melbourne 1983).

Australian Law Reform Commission Contempt and the Media (Discussion Paper No 26) (AGPS Canberra March 1986).

Australian Law Reform Commission Evidence (ALRC 26 "Interim") (AGPS Canberra 1985).

Australian Law Reform Commission Sentencing of Federal Offenders (ALRC 15) (AGPS Canberra 1980).

Australian Law Reform Commission Sentencing of Federal Offenders (Interim Report 15 1980).

Australian Law Reform Commission Standing in Public Interest Litigation (ALRC 27) (AGPS Canberra 1985).

Baldwin J and McConville M Negotiated Justice: Pressures to Plead Guilty (1977).

Basten J, Richardson M, Ronalds C and Zdenkowski G (eds) The Criminal Injustice System (Australian Legal Workers Group (NSW) and Legal Service Bulletin 1982).

Benton R W and Brown H H Criminal Procedure According to the Law of Scotland (4th ed by G H Gordon, Edinburgh 1972).

Brandon R and Davis C Wrongful Imprisonment (London 1973).

Byrne P Codification of the Criminal Law in New South Wales (Unpublished Commission document, September 1986).

Byrne P Long Criminal Cases (Unpublished Commission document, January 1985).

Campbell E and Whitmore H Freedom in Australia (Sydney University Press 1973).

Cole P and Pringle P Can You Positively Identify This Man? (the George Ince case) (London 1975).

Commonwealth Director of Public Prosecutions Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process (AGPS 1986).

Commonwealth of Australia, Senate Standing Committee on Constitutional and Legal Affairs The Burden of Proof in Criminal Proceedings (AGPS Canberra 1982).

Criminal Law and Penal Methods Reform Committee of South Australia Court Procedure and Evidence (Third Report, Adelaide 1975).

Criminal Law and Penal Methods Reform Committee of South Australia: Third Report Court Procedure and Evidence (Adelaide July 1975).

Criminal Law Revision Committee Eleventh Report: Evidence (General) (HMSO Cmnd 4991 London 1972).

Devlin (Lord) The Criminal Prosecution in England (1960).

Hain P Mistaken Identity: The Wrong Face of the Law (London 1976).

Halsbury's Laws of England (4th ed Butterworths London Vol 9).

Heumann M Plea Bargaining: The Experiences of Prosecutors, Judges and the Defense Attorneys (Chicago 1977).

Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and the Magistrates Courts (Chairman: Lord Justice James) Report (HMSO Cmnd 6323 London 1975).

Kennedy L A Presumption of Innocence (the Patrick Meehan case) (London 1978).

Kerstetter W A and Heinz A M Pre-Trial Settlement Conference: An Evaluation (United States Department of Justice, August 1979).

Law Reform Commission of Canada Contempt of Court (Report 17, 1982).

Law Reform Commission of Canada Contempt of Court (Working Paper 20, 1977).

Law Reform Commission of Canada Criminal Procedure: Control of the Process (Working Paper 15 1975).

Law Reform Commission of Canada Disclosure by the Prosecution (Report No 22 1984).

Law Reform Commission of Canada Discovery in Criminal Cases (Study Report 1974).

Law Reform Commission of Canada Private Prosecutions (Working Paper 52, 1986).

Law Reform Commission of Western Australia Discussion Paper Courts of Petty Sessions (Project 55 Part 2, June 1984).

Legal Aid Commission of New South Wales Review of Legal Aid in New South Wales (prepared by Mark Richardson, Assistant Director, 1986).

Lord Chancellor's Department Management Scrutiny: Listing Officers in the Crown Court (July 1984).

Lord Justice Watkins' Working Party on the Criminal Trial: Report to the Lord Chief Justice (London November 1982, revised November 1983).

Lowe N V (ed) Borrie and Lowe on Contempt (2nd ed London 1983).

Mathews C J and Chunn D E Congestion and Delay in the Criminal Courts: A Selected Bibliography (Centre of Criminology, University of Toronto 1979).

Misner R L Legislatively Mandated Speedy Trials (Unpublished Commission document, 1982).

Moody S and Tombs J Prosecution in the Public Interest (Scottish Academic Press 1982).

Morris N The Future of Imprisonment (Chicago 1974).

New South Wales Department of the Attorney General A Proposed System of Electronically Recording Police Interviews with Suspected Persons (Criminal Law Review Division: R Howie et al, October 1986).

New South Wales Department of the Attorney General Tape Recording Police Interviews: Summary of Findings and Recommendations (Criminal Law Review Division: P Byrne et al, June 1984).

New South Wales Government Child Sexual Assault Task Force Report (March 1985).

New South Wales Law Reform Commission Discussion Paper Procedure from Charge to Trial: A General Proposal for Reform (DP 13, 1986).

New South Wales Law Reform Commission Discussion Paper The Jury in a Criminal Trial (DP 12, 1985).

New South Wales Law Reform Commission First Issues Paper: Criminal Procedure: General Introduction and Proceedings in Courts of Petty Sessions (1982).

New South Wales Law Reform Commission Report The Jury in a Criminal Trial (LRC 48, 1986).

New South Wales Law Reform Commission Research Report The Jury in a Criminal Trial: Empirical Studies (RR 1, 1986).

New South Wales Law Reform Commission Working Paper Evidence of Disposition (1978).

New South Wales Law Reform Commission Working Paper: Illegally and Improperly Obtained Evidence (WP 21 1979).

Osborne J A Delay in the Administration of Justice: Commonwealth Developments and Experience (Commonwealth Secretariat November 1980).

Queensland Law Reform Commission Working Paper on Legislation to Review the Role of Juries in Criminal Trials (QLRC WP 28).

Rees N, Ronalds C and West R (eds) Lawyers Practice Manual (NSW) (Redfern Legal Centre and Law Book Co.)

Report No 2 of the Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne (the Flanagan Report) (June 1983).

Report of Board of Inquiry into Allegations Against Members of the Victorian Police Force ("The Beach Report") (Melbourne 1978) Vol 1.

Report of the Commission to Inquire into New South Wales Police Administration (Commissioner: Mr Justice Lusher) (Sydney 1981).

Report of the Royal Commission Concerning the Conviction of Edward Charles Splatt (Royal Commissioner Mr Carl Shannon QC) (South Australia 1984).

Report of the Royal Commission to Inquire into Certain Committal Proceedings Against K E Humphreys, (Commissioner: Sir Laurence Street KCMG, Chief Justice of New South Wales) (Sydney 1983).

Report on the Interdepartmental Committee on the Distribution of Criminal Business Between the Crown and the Magistrates Courts (Chairman: Lord Justice James) (HMSO Cmnd 6323 London 1975).

Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (Chairman: The Right Honourable Lord Devlin) (HMSO London 26 April 1976).

Richardson M Disclosure by the Prosecution in Indictable Criminal Proceedings (Unpublished Commission document, 1985).

Rizzo C A Collection of Statistical Information on the Administration of Criminal Justice in New South Wales (Unpublished Commission document, 1984).

Roskill Lord Report of the Fraud Trials Committee (HMSO London 1986).

Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (HMSO Cmnd 8092 London 1981).

Royal Commission on Criminal Procedure Prosecutions by Private Individuals and Non-Police Agencies (Research Study No 10 HMSO London 1980).

Royal Commission on Legal Services Final Report (HMSO Cmnd 7648 London 1979).

Salhany R E Canadian Criminal Procedure (4th ed Toronto, Canada Law Book Co 1984).

Sallmann P A for Shorter Trials Committee Report on Criminal Trials (Victorian Bar and Australian Institute of Judicial Administration, Melbourne 1985).

Sallmann P and Willis J Criminal Justice in Australia (Oxford University Press 1984).

Scottish Home and Health Department and Crown Office Criminal Procedure in Scotland (Second Report) (the Thomson Committee Report) (HMSO Cmnd 6218 Edinburgh 1975).

Seymour J Committal for Trial: An Analysis of the Australian Law Together with an Outline of British and American Procedures (Australian Institute of Criminology Canberra 1978).

Sheehan A V Criminal Procedure in Scotland and France (HMSO Edinburgh 1975).

Stubbs J Bail Reform in NSW (Bureau of Crime Statistics, 1984).

Thomas D A Principles of Sentencing: the Sentencing Policy of the Court of Appeal Criminal Division (2nd ed 1979).

United States of America, President's Commission on Law Enforcement and the Administration of Justice Task Force Report: The Courts (1967).

Victoria - Chief Justice's Law Reform Committee Prohibition of Publication of Reports of Proceedings in the Supreme Court and County Court (Melbourne 1985).

Victorian Legal and Constitutional Committee Issues Paper: Delays in Courts: The Preliminary Examination (July 1985).

Victorian Legal and Constitutional Committee Report on Overseas Court Delays and Remedies (November 1984).

Victorian Legal and Constitutional Committee Report on the Burden of Proof in Criminal Cases (November 1985).

Watson R S (The Hon Mr Justice) Review of the Criminal Law of the Commonwealth (Unpublished Report to the Commonwealth Attorney-General, July 1986).

Watson R and Purnell H Criminal Law in New South Wales Vol I(A) Indictable Offences (Law Book Co).

Willis C The Tape-Recording of Police Interviews with Suspects: an interim report (Home Office Research Study No 82 1984).

Wood J R T (Mr Justice) Report of the Inquiry Held Under Section 475 of the Crimes Act 1900 into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court Sydney on 1st August 1979 (Sydney May 1985).

Wozniak E The Tape-Recording of Police Interviews with Suspected Persons in Scotland (Central Research Unit, Scottish Home and Health Department 1985).

II. ARTICLES AND CONFERENCE PAPERS

Ackland R "Temby's Two Years" (1986) Australian Society (Vol 5 No 10).

Alschuler A "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" (1983) 50 University of Chicago Law Review 931.

Alschuler A "Plea Bargaining and Its History" (1979) 79 Columbia Law Review 1.

Alschuler A "The Defense Attorney's Role in Plea Bargaining" (1975) 84 Yale Law Journal 1179.

Alschuler A "The Prosecutor's Role in Plea Bargaining" (1968) 36 University of Chicago Law Review 50.

Alschuler A "The Trial Judge's Role in Plea Bargaining" (1976) 76 Columbia Law Review 1059.

Armstrong C J "Mode of Trial - A Sacred Cow?" (1986) 150 Justice of the Peace 488.

Baggott S D "Reconsidering Mode of Trial Decisions - An Alternative View" (1986) The Law Society's Gazette 1389.

Baldwin J "Pre-Trial Justice: A Study of Case Settlement in Magistrates' Courts" (1985).

Baldwin J "Research on Advance Disclosure in Magistrates' Courts" (1985) 149 Justice of the Peace 179.

Baldwin J and Feeney F "Defence Disclosure in Magistrates' Courts" (1986) 49 Modern Law Review 593.

Baldwin J and McConville M "Conviction by Consent: The Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978) 7 Anglo-American Law Review 271.

Barnatt G M "Section 48 - A Viable Alternative?" (1983) 147 Justice of the Peace 117.

Bayne P "Prosecutorial Discretion and Administrative Law" in I Potas (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Bennett J M "The Establishment of Jury Trial in New South Wales" (1961) 3 Sydney Law Review 463.

Bennion F "The New Prosecution Arrangements: The Crown Prosecution Service" [1986] Criminal Law Review 3.

Birch D J "Powers of Arrest and Detention" [1985] Criminal Law Review 545.

Bishop K R "The Self-Incrimination Privilege: Barrier to Criminal Discovery?" (1963) 51 California Law Review 135.

Borick K "Plea Bargaining", paper presented at the International Criminal Law Congress (Adelaide 7 October 1985).

Bowman D "Journalists and Judges" (August 1986) Australian Society 9.

Branson C M S69 of the Evidence Act 1929-1982 (Background Paper, Attorney-General's Department South Australia 1982).

Brayne H "Detention Under the Police and Criminal Evidence Act 1984" [1987] The Law Society's Gazette 28.

Brouwer G E P "Inquisitorial and Adversary Procedures - a Comparative Analysis" (1981) 55 Australian Law Journal 247.

Buchanan D "Appearing for the Defendant in Committal Proceedings" in Lawyers' Practice Manual (NSW) (Australian Legal Workers Group (NSW) and Legal Service Bulletin).

Bucknell P "The Listing Officer in the Crown Court" (1984) 148 Justice of the Peace 778.

Byrne P "Granting Immunity from Prosecution" in I Potas (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Campbell I G "Discovery in Criminal Trials": Prosecutorial Duties and Judicial Remedies" (1984) 13 University of Queensland Law Journal 154.

Cavadino P "Inquisitorial Systems of Justice" (1980) 144 Justice of the Peace 689.

Clark P "The Public Prosecutor and Plea Bargaining" (1986) 60 Australian Law Journal 199.

Coldrey J (QC) "Plea Negotiations - Policies and Practices", paper presented at the International Criminal Law Congress (Adelaide 7 October 1985).

Connor L J "Pre-Trial Reviews: The Curate's Egg" (1985) 149 Justice of the Peace 185.

Dean I "Speedy Trials: The Scottish 110-Day Rule" [1985] Criminal Law Review 459.

Denniston L "The Struggle between the First and Sixth Amendments" (1982) 2 California Lawyer No 10.

Desbruslais A "Pre-Trial Disclosure in Magistrates' Courts: Why Wait?" (1982) 146 Justice of the Peace 384.

Donnelly W H "Changing Your Mind in the Magistrate's Court - A Defendant's Prerogative?" (1987) The Law Society's Gazette 246.

Doyle M W "Criminal Discovery in New Zealand" (1976) 7 New Zealand University Law Review 23.

Dyer S W "Prosecutorial Discovery: How far may the prosecution go?" (1973) 7 University of San Francisco Law Review 261.

Editorial "The Crown Prosecution Service" [1986] Criminal Law Review 1.

Elkington G B "Discovery Upon Indictment in New South Wales" (1980) 4 Criminal Law Journal 4.

Fairall P A "Judicial Review of Committal Proceedings" (1986) 10 Criminal Law Journal 63.

Fairall P A "The Preliminary Examination of Indictable Offences in New South Wales - Part I" (1986) 10 Criminal Law Journal 24.

Faraway M J "Election for Trial" (1986) 150 Justice of the Peace 171.

Feber A S "Beating Bad Press; Protecting the California Criminal Defendant from Adverse Publicity" (1976) 10 University of San Francisco Law Review 391.

Feeley M M "Plea Bargaining and the Structure of the Criminal Process" (1982) 7 The Justice System Journal 338.

Ferguson G "A Profile on Plea Bargaining", unpublished study paper prepared for the Law Reform Commission of Canada, 17 April 1973.

Ferguson G A and Roberts D W "Plea Bargainng: Directions for Canadian Reform" (1974) 52 Canadian Bar Review 497.

Forbes M Z "Committal Proceedings: Further Authority - Carlin's Case" (1986) 7 Petty Sessions Review 3279.

Forbes M Z "Committal Proceedings Under Justices Act (NSW)" (1986) 7 Petty Sessions Review 3161.

France S "Exclusion of Improperly Obtained Evidence" (1985) 11 New Zealand Universities Law Review 334.

Frase R S "The Speedy Trial Act of 1974" (1976) 43 University of Chicago Law Review 667.

Frohlich E F "Committal Procedures in England and Australia" (1975) 49 Australian Law Journal 561.

Gibbons T "The Conditions of Detention and Questioning by the Police" [1985] Criminal Law Review 558.

Gibson B "Assault and Jury Trial - Ex parte Osaseri Explored" (1985) 149 Justice of the Peace 659.

Gibson B "Mode of Trial and Unrepresented Defendants" (1985) 149 Justice of the Peace 67.

Glass H H (Mr Justice) "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 Australian Law Journal 842.

Glissan J L "Limitations and Controls on the Exercise by Prosecutors of their Discretion" in I Potas (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Gold A D "Trial - Production to the Defence" (1984-85) 27 Criminal Law Quarterly 405.

Goldstein A S "The Balance of Advantage in Criminal Procedure" (1959-60) 69 Yale Law Journal 1149.

Grayson "Crown Court Efficiency: A Plea for Pleading Points in Issue in Criminal Trials" [1981] Criminal Law Review 142.

Greenspan E (QC) "The Role of the Defence Lawyer" National (Journal of the Bar Association of Canada, October 1986).

Grier Stephenson Jr D "Fair Trial - Free Press: Rights in Continuing Conflict" (1979) 46 Brooklyn Law Review 39.

Hampel G (Mr Justice) "Plea Bargaining - Judges' Involvement" 59 Law Institute Journal 1305.

Hassett J M "The Distinction between Pre-Trial Information and Prejudicial Publicity" (1980) 43 Law and Contemporary Problems 155.

Hill S "A Study of Pre-Trial Reviews in Wolverhampton Magistrates' Courts" (1984) 148 Justice of the Peace 680.

Hill S "Pre-Trial Reviews" (1984) 148 Justice of the Peace 39.

Hogan J "Problems of Delay in Criminal Proceedings" Proceedings of the Institute of Criminology University of Sydney (No 42 1980).

Hosking W D (QC) "Problems of Delay in Criminal Proceedings" Proceedings of the Institute of Criminology, University of Sydney (No 42 1980).

Jones P et al "The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System" [1985] Criminal Law Review 355.

Justices' Clerks' Society (UK) "Streamlining the Criminal Justice System" February 1984.

Kaufman F "Comparison between the UK and the US Prosecuting Systems" (1980) 49 Fordham Law Review 26.

Kidston R "The Office of Crown Prosecutor" (1958) 32 Australian Law Journal 148.

Kilbrandon (Lord) "Scotland: Pre-Trial Procedure" in J A Coutts (ed) The Accused (London 1966).

King L W, Chief Justice of South Australia "The Listing of Criminal Cases for Trial", a paper presented to the International Criminal Law Congress Adelaide, South Australia, (October 1985).

Kirby M D (CMG) (Mr Justice) "Controls Over Investigation of Offences and Pre-Trial Treatment of Suspects" (1979) 53 Australian Law Journal 626.

Kirby M D (CMG) (Mr Justice) "Free Trial and Free Press", a paper presented to the International Criminal Law Congress (Adelaide, 9 October 1985).

Kirby M D (CMG) (Mr Justice) "Illegally Obtained Evidence" Proceedings of the Institute of Criminology, University of Sydney (September 1984).

Lane W B "Prosecutors: Non-disclosure of Exculpatory Evidence" (1981) 5 Criminal Law Journal 251.

Lawless J and North Q K "Prosecutorial Misconduct: A Battleground in Criminal Law" (1984) 20 Trial 26.

Lidstone K W and Early T L "Questioning Victims: Detention for Questioning in France, Scotland and England" (1982) 81 International and Comparative Law Quarterly 488.

Lomax I S "The Roskill Report and Committal Proceedings" (1986) 150 Justice of the Peace 245.

Louisell D W "Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma" (1965) 53 California Law Review.

Lovegrove A "The Listing of Criminal Cases in the Crown Court as an Administrative Discretion" [1984] Criminal Law Review 738.

Manos N (CSM) "The Role of the Media", a paper presented to the International Criminal Law Congress (Adelaide, 9 October 1985).

Mason K "The Inherent Jurisdiction of the Court" (1983) 57 Australian Law Journal 449.

May C "Maintaining the Good Face of Justice: the Case of Plea Bargaining" in Z Bankowski and G Mungham (eds) Essays in Law and Society (London 1980).

McDonald W F et al "Prosecutorial Bluffing and the Case Against Plea Bargaining" in W F McDonald and J A Cramer Plea Bargaining (1980).

McFarlane G "Trial Delays: Should Time Limits be Introduced?" (1984) 128 Solicitors' Journal 655.

McGuire F M (His Honour Judge) "Plea Bargaining: Its Significance in the Australian Criminal Justice System" (1980) 6 Queensland Lawyer 1.

Miles W F "Reconsidering Mode of Trial Decisions" (1986) The Law Society's Gazette 526.

Miller S "Proposed Amendments to the Federal Rules of Criminal Procedure" (1975) 14 Washburn Law Journal 76.

Misner R L "Legislatively Mandated Speedy Trials" (1984) 8 Criminal Law Journal 17.

Morris N "Are Courts Too Soft on Criminals?" 53 Judicature 231.

Morton J "Plea Bargaining" (1985) 135 New Law Journal 457.

Murphy L K (Mr Justice) "Trial by Jury: The Scope of Section 80 of the Constitution" in D Challinger (ed) "The Jury" Proceedings of the Australian Institute of Criminology (Canberra 1986).

Napley D "Committal Proceedings: A Case for Retention" (1986) 150 Justice of the Peace 147.

Napley D "The Case for Preliminary Inquiries" [1966] Criminal Law Review 490.

Nettheim G "Open Justice Versus Justice" (1985) 9 Adelaide Law Review 488.

Nimmer R T "A Mandatory Reform - Plea Bargaining Conferences" in The Nature of System Change - Reform Impact in the Criminal Courts (American Bar Association, 1978).

Pattenden R "The Power of the Courts to Stay a Criminal Prosecution" [1985] Criminal Law Review 175.

Phillips J H (QC) "The Role of the Director of Public Prosecutions", a paper presented to the Annual Conference of the Australian Society of Labor Lawyers (Brisbane 2 July 1983).

Potas I (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Rickard A R "Committal Proceedings - A Submission of No Case" (1986) 150 Justice of the Peace 293.

Rickard R "A Valuable Constitutional Safeguard Three Studies in Committal Proceedings" (1986) 150 Justice of the Peace 52.

Ross D "Discount for a Plea of Guilty" Victorian Bar News, Spring 1986.

Sallmann P A "The Guilty Plea as an Element in Sentencing" (1980) 54 Law Institute Journal 105 (Part I) and 1985 (Part II).

Sallmann P A "The Role of the Victim in Plea Negotiations" in P N Grabosky (ed) National Symposium on Victimology (Australian Institute of Criminology 1982) 17.

Samuels A "Discount for Guilty Pleas in Crown Court and in Magistrates' Court" (1985) 149 Justice of the Peace 696.

Samuels A "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals" [1986] Criminal Law Review 33.

Samuels A "Shortening Jury Trials" (1976) 126 New Law Journal 988.

Sanders A "An Independent Crown Prosecution Service?" [1986] Criminal Law Review 16.

Sanders A "Prosecution Decisions and the Attorney General's Guidelines" [1985] Criminal Law Review 4.

Sanders A "The Uncertain Powers of Crown Prosecutors" (1985) 135 New Law Journal 313.

Scott I R "Is Court Control the Key to Reduction in Delays?" (1983) 57 Australian Law Journal 16.

Seifman R D "Plea Bargaining in England" in W F McDonald and J A Cramer Plea Bargaining (Lexington Books, 1980).

Seifman R D "Plea Bargaining in Victoria - Getting the Judges' Views" (1982) 6 Criminal Law Journal 69.

Seifman R D "The Plea Bargaining Process: Trial by Error?" (1977) 127 New Law Journal 551.

Seymour J "Committal for Trial: An Analysis of the Australian Law Together with an Outline of British and American Procedures: Australian Law Institute of Criminology (Canberra 1979).

Seymour J "The Criteria Governing the Decision to Commit for Trial in Australia" (1979) 3 Criminal Law Journal 3.

Sheehan A V "Time Limits for Prosecutions" (1984) 148 Justice of the Peace 788.

Smith A T H "Immunity from Prosecution" (1982) 42 Cambridge Law Journal 299.

Speed D "Waiting Times in Magistrates Courts" (1984) 148 Justice of the Peace 551.

Spencer J N "Advance Disclosure - the Effect of the Provisions" (1986) 150 Justice of the Peace 356.

Spencer J N "Knowledge by the Magistrates of the Defendant's Bad Character" (1986) 150 Justice of the Peace 307.

Spencer J N "Time Limits for Prisoners on Remand" (1985) 149 Justice of the Peace 35.

Stevenson N "Criminal cases in the District Court: a pilot study" in Basten J et al the Criminal Injustice System (Australian Legal Workers Group (NSW) and Legal Services Bulletin 1982).

Temby I (QC) "Immunity from Prosecution and the Provision of Witness Indemnities" (1985) 59 Australian Law Journal 501.

Temby I (QC) "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985) 59 Australian Law Journal 197.

Thomas D A "Real Time" (1986) 136 New Law Journal 936.

Timmons J "The Crown Prosecution Service in Practice" [1986] Criminal Law Review 28.

Tombs J "Prosecution: In the Public Interest?" in I Potas (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Traynor R J "Ground Lost and Found in Criminal Discovery" (1964) 39 New York University Law Review 228.

Vennard J "Court Delay and Speedy Trial Provisions" [1985] Criminal Law Review 73.

Vennard J "Speeding up Justice in the United States" Home Office Research Bulletin No 17.

Westling W "Plea Bargaining: A Forecast for the Future" (1973-76) 7 Sydney Law Review 424.

Wilder M S "Prosecution Discovery and the Privilege Against Self-Incrimination" (1967) 6 American Criminal Law Quarterly 3.

Williams G "Advance Notice of the Defence" [1959] Criminal Law Review 548.

Williams G "Proposals to Expedite Criminal Trials" [1959] Criminal Law Review 82.

Williams G "The Power to Prosecute" [1955] Criminal Law Review 596.

Willis J "Reflections on Nolles" in I Potas (ed) "Prosecutorial Discretion" Proceedings of the Australian Institute of Criminology (Canberra 1985).

Willis J and Sallmann P A "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities" (1977) 51 Law Institute Journal 498.

Willis J and Sallmann P A "The Debate About Section 460 of the Victorian Crimes Act: Criminal Investigation in a Nutshell" (1985) 18 Australia and New Zealand Journal of Criminology 215.

Wolchover D "The Right to Jury Trial - I" (1986) 136 New Law Journal 530.

Wolchover D "The Right to Jury Trial - II" (1986) 136 New Law Journal 576.

Woods G D (Dr) (QC) "Illegally Obtained Evidence" Proceedings of the Institute of Criminology, University of Sydney (September 1984).

Wright D "Old Style Committals - R.I.P.?" [1986] Crim LR 660.

Yeldham D A (Mr Justice) "Delays in Criminal Trials", paper delivered to the Criminal Law Committee of the University of Sydney Law Graduates Association (13 March 1984, Sydney).

Zdenkowski G "No Bills in New South Wales" (1986) 11 Legal Service Bulletin 37.

III. CASES

Chapter 1

Lamb v Moss (1983) 49 ALR 533.

Moss v Brown [1979] 1 NSWLR 114.

Tahmindjis v Brown (1985) 60 ALR 120.

Chapter 2

Bales v Parmeter (1935) 35 SR (NSW) 182.

Bunning v Cross (1977-1978) 141 CLR 54.

Clarke v Bailey (1933) 33 SR (NSW) 303.

Cleland v The Queen (1982) 151 CLR 1.

Ex parte Evers Re Leary (1945) 62 WN (NSW) 146.

Ex parte Williams Re Singleton (1928) 45 WN (NSW) 189.

McLachlan v Pilgrim [1980] 2 NSWLR 422 at 425.

R v Iorlano (1983) 151 CLR 678.

Webb v Cain [1965] VR 91.

Williams v The Queen (1986) 60 ALJR 636.

Chapter 3

Barker v Wingo 407 US 514 (1972).

Barton v The Queen (1980) 147 CLR 75.

Bell v Director of Public Prosecutions of Jamaica [1985] 1 AC 937.

Connelly v Director of Public Prosecutions [1964] AC 1254.

Director of Public Prosecutions v Humphrys [1977] AC 1.

Ex parte Cusack Re Searson (1935) 52 WN (NSW) 214.

Ex parte Griffith Re Lalor (1931) 48 WN (NSW) 133.

Ex parte Malouf Re Gee (1943) 43 SR (NSW) 195.

Herron v McGregor (Unreported, Court of Appeal of New South Wales, 12 September 1986).

Mills v Cooper [1967] 2 QB 459.

R v Climo and Bentley (Unreported, District Court of New South Wales, Herron DCJ, 5 May 1986).

R v Grays Justices Ex parte Graham [1982] 3 All ER 653.

R v Heston-Francois [1984] 1 All ER 785.

R v McConnell (1985) 2 NSWLR 269.

R v McConnell (1985) 2 NSWLR 269.

R v Reibold (1967) 1 WLR 674.

R v Sheerin (1976) 64 Cr App R 68.

R v Urbanowski [1976] 1 All ER 679.

Whitbread v Cooke (Unreported, Supreme Court of New South Wales, Maxwell J, 9 December 1986).

Chapter 4

Attorney General for New South Wales and Another v Findlay and Another (1976) 50 ALJR 637.

Brady v Maryland 373 US 83 (1963).

Cain v Glass (No 2) (1985) 3 NSWLR 230.

Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182.

Clewis v Texas 386 US 707 (1967).

Commissioner of Police v Ombudsman [1985] 1 NZLR 578.

Craig v The King (1933) 49 CLR 429.

D v National Society for the Prevention of Cruelty to Children [1978] AC 171.

Dallison v Caffery [1965] 1 QB 348.

Gallagher v The Queen (1986) 60 ALJR 404.

In Re Van Beelen (1974) 9 SASR 163.

Lawless v The Queen (1979) 53 ALJR 733.

Maddison v Goldrick [1976] 1 NSWLR 651.

Mahadeo v R [1936] 2 All ER 813.

Marks v Beyfus (1890) 25 QBD 494.

McBain v Chricton [1961] SC(J) 25.

Moore v Illinois 408 US 786 (1972).

Moss v Brown [1979] 1 NSWLR 114.

R v Bryant and Dickson (1946) 31 Cr App R 146.

R v Charlton [1972] VR 758.

R v Cleghorn [1967] 2 QB 584.

R v Connell [1985] 2 NZLR 233.

R v Evans [1964] VR 717.

R v Liberato (1985) 61 ALR 623.

R v Lucas [1973] VR 693.

R v Mason [1975] 2 NZLR 289.

R v Oliva [1965] 3 All ER 116.

R v Rankine [1986] 2 All ER 566.

R v Thomas (No 2) [1974] 1 NZLR 658.

Ratten v The Queen (1974) 131 CLR 510.

Regina v Damic [1982] 2 NSWLR 750.

Richardson v The Queen (1974) 131 CLR 116.

Russell v United States 369 US 749 (1962).

Smith v H M Advocate [1952] SC(J) 66.

The Queen v Apostilides (1984) 154 CLR 563.

The Queen v Harry ex parte Eastway (1985) 39 SASR 203.

The Queen v Perry (No 1) (1981) 27 SASR 166.

Titheradge v The King (1917) 24 CLR 107.

United States v Agurs 427 US 97 (1976).

United States v Debrow 346 US 374 (1953).

Wentworth v Rogers [1984] 2 NSWLR 422.

Whitehorn v The Queen (1983) 152 CLR 657.

Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279.

Chapter 5

Lattouf and Carr (1980) 2 A Crim R 65.

R v Littleboy [1934] 2 KB 408.

R v Ryan (1966) 50 Cr App R 144.

R v Skilton and Blackham (1982) 4 Cr App R (S) 339.

R v Spinks (1980) 2 Cr App R (S) 335.

R v Visser (Unreported, Court of Criminal Appeal of New South Wales, 15 November 1985, 21 November 1985).

R v Wasow (1986) 18 A Crim R 348.

United States v Nobles 422 US 225 (1975).

Wardius v Oregon 412 US 470 (1973).

Williams v Florida 399 US 78 (1970).

Chapter 6

Attorney General for New South Wales v Dawes [1976] 1 NSWLR 242.

Chiu v Richardson [1983] NZLR 513.

Grech v Drake (Unreported, Court of Appeal of New South Wales, 7 August 1979).

Hall v Braybrook (1956) 95 CLR 620.

In the Appeal of Baldock (1958) 75 WN (NSW) 21.

Kingswell v The Queen (1985) 60 ALJR 17.

Melek v Borthwick [1979] 1 NSWLR 350.

Perry v Nash (1980) 32 ALR 177.

R v Colchester Justices Ex parte North Essex Building Co Ltd [1977] 3 All ER 567.

R v Gannon (Unreported, Court of Criminal Appeal of New South Wales, 29 August 1984).

R v Hall (1979) 1 Cr App R (S) 27.

R v Hayes [1977] 1 NSWLR 364.

R v Justices of Bodmin Ex parte McEwen [1947] KB 321.

R v Maher (1979) 1 Cr App R (S) 52.

R v Stramandinoli (Unreported, Court of Criminal Appeal of New South Wales, 2 September 1977).

R v Todd [1982] 2 NSWLR 517.

Regina v Harrow Justices Ex parte Osaseri [1986] 1 QB 589.

Chapter 7

Acs v Anderson [1975] 1 NSWLR 212.

Australian Federal Police v Wong and Others (Unreported, Mr J Williams, magistrate, 27 March 1985).

Australian Federal Police v Murphy (Unreported, Mr A M Reidel, magistrate, 16 April 1985).

Bacon v Rose [1972] 2 NSWLR 793.

Barton v Walker (Unreported, Supreme Court of New South Wales, O'Brien CJ of CrD, 20 December 1979).

Boughey v The Queen (1986) 65 ALR 609.

Bourke v Hamilton [1977] 1 NSWLR 470.

Carlin v Thawat Chidkhunthod (1985) 4 NSWLR 182 at 190.

Cheng Kui v Quinn and Others (1984) 67 ALR 231.

Clyne v Director of Public Prosecutions (1984) 58 ALJR 493.

Conwell v Tapfield [1981] 1 NSWLR 595.

Cordell Porquet and Porquet (1984) 10 A Crim R 475.

Director of Public Prosecutions v Foord (Unreported, Mr R Evans, magistrate, 30 April 1985).

Doyle v The Queen (1976) 29 CCC (2d) 177.

Ex parte Coffey Re Evans and Another [1971] 1 NSWLR 434.

Ex parte Cousens Re Blackett (1947) 47 SR (NSW) 145.

Ex parte Dowsett Re Macauly (1943) 60 WN (NSW) 40.

Forster v Jododex Pty Ltd (1972) 127 CLR 421.

Gorman and McLaurin v Fitzpatrick and Barrett (1985) 4 NSWLR 286.

Huddart Parker & Co Pty Ltd v Moorehead (1908) 8 CLR 330.

McAfee v Kearney and Another (Unreported, Supreme Court of New South Wales, Yeldham J, 25 July 1986).

Murphy v Director of Public Prosecutions (1985) 60 ALR 299.

Prevto v Governor Metropolitan Remand Centre (1986) 64 ALR 37.

R v Epping and Harlow Justices Ex parte Massaro [1973] 1 QB 433.

R v Fazzari (Unreported, Court of Criminal Appeal of New South Wales, 8 December 1979).

R v Galbraith (1981) 73 Cr App R 124.

R v Horseferry Road Magistrates Court ex parte Adams [1978] 1 All ER 373.

R v Roscommon Justices Ex parte Blakeney [1894] 2 IR 158.

R v Wells Street Metropolitan Stipendiary Magistrate ex parte Westminster City Council [1986] 3 All ER 4.

Reg v Kent Ex parte McIntosh (1970) 17 FLR 65.

Sankey v Whitlam (1978) 142 CLR 1.

Souter v Webb (1984) 54 ALR 683.

Spautz v Williams [1983] 2 NSWLR 506.

Wentworth v Rogers [1984] 2 NSWLR 422.

Willesee v Willesee [1974] 2 NSWLR 275.

Wong v Evans (1985) 60 ALR 629.

Chapter 8

Lemon v Attorney-General (1932) 50 WN (NSW) 19.

R v Dorrington [1969] 1 NSWR 381.

R v Holden (1956) 73 WN (NSW) 444.

R v Rushbrook [1974] 1 NSWLR 699.

Chapter 9

Adams v Anthony Bryant & Co Pty Ltd and Others (1986) 67 ALR 616.

Furnell v Betts (1978) 20 SASR 300.

R v Olsen [1982] 1 NZLR 578.

R v Simmonds [1969] 1 QB 685.

Chapter 10

Gee v Director-General of Social Services (1981) 58 FLR 347.

Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447.

R v Woolcott Forbes (1944) 44 SR (NSW) 333.

Chapter 11

Boykin v Alabama 395 US 238 (1968).

Bruce v The Queen, (Unreported, High Court of Australia, 21 May 1976).

R v Cain [1976] Crim LR 464.

R v Dubien (1982) 67 CCC (2d) 341.

R v Gray [1977] VR 225.

R v Hall (1968) 52 Cr App R 528.

R v Johnson and Tremayne [1970] 4 CCC 64.

R v Llewellyn (1978) 67 Cr App R 149.

R v Marshall [1981] VR 725.

R v Meade (1982) 4 Cr App R(S) 193.

R v Nicholls and Bushby (Unreported, Court of Criminal Appeal of New South Wales, 21 September 1978).

R v Plimmer [1975] Crim LR 730.

R v Robert John Booth, (Unreported, Supreme Court of New South Wales, Cross J, 21 April 1983).

R v Ross [1984] Crim LR 53.

R v Ryan (1977) 67 Cr App R 177.

R v Schumacher (1981) 3 A Crim R 441.

R v Shanower (1972) 8 CCC (2d) 527.

R v Skilton (1982) 4 Cr App R(S) 339.

R v Soanes (1948) 32 Cr App R 136.

R v Tait and Bartley (1979) 24 ALR 473.

R v Turner [1970] 2 QB 321.

R v Warby (1983) 9 A Crim R 349.

R v Winterflood (1979) 68 Cr App R 291.

Santobello v New York 404 US 257 (1971).

The Queen v Shannon (1980) 21 SASR 442.

Chapter 12

Clyne v Scott (1984) 52 ALR 405.

Dyson v Attorney-General [1911] 1 KB 410.

Gouldham v Sharrett [1966] WAR 129.

Gouriet v Union of Post Office Workers [1978] AC 435.

Hill v Anderton [1982] 2 All ER 963.

J and P Coats Ltd v Brown (1909) SC(J) 29.

Oyler v Boles 368 US 448 (1962).

R v Broad (1979) 68 Cr App R 281.

R v Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118.

R v George Maxwell (Developments) Ltd (1980) 71 Cr App R 83.

R v McKaye and Others (1885) 6 LR (NSW) 123.

R v Redbridge Justices ex parte Sainty [1981] RTR 13.

Raymond v Attorney-General [1982] QB 839.

Turner v DPP (1978) 68 Cr App R 70.

Chapter 13

Alexander v The Queen (1981) 145 CLR 395.

Attorney General for New South Wales v Willesee [1980] 2 NSWLR 143.

Attorney General for New South Wales v John Fairfax & Sons Ltd (Unreported, Court of Appeal, Supreme Court of New South Wales, 20 December 1985).

Attorney-General (Victoria) v Hinch and Another (Unreported, Supreme Court of Victoria, Murphy J, 22 May 1986).

Attorney-General v Leveller Magazine [1979] AC 440.

Craig v The Queen (1933) 49 CLR 429.

Director of Public Prosecutions (Cth) v Wran (Unreported, Court of Appeal, Supreme Court of New South Wales, 8 December 1986).

Ex parte Attorney-General Re Truth & Sportsman Ltd (1961) 61 SR (NSW) 484.

Fraser v The Queen, Meredith v The Queen [1984] 3 NSWLR 212.

Gallagher v Durack (1983) 45 ALR 53.

Hinch and Another v Attorney-General (Victoria) (Unreported, Supreme Court of Victoria, Full Court, 11 December 1986).

James v Robinson (1963) 109 CLR 593.

John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351.

Kingswell v The Queen (1985) 60 ALJ 17.

Miller v Samuels (1979) 22 SASR 271.

Mirror Newspapers v Waller (1985) 1 NSWLR 1.

P v P (1985) 2 NSWLR 401.

Packer v Peacock (1912) 13 CLR 577.

R v Daily Mirror [1927] 1 KB 845.

R v Kray (1969) 53 Cr App R 412.

R v Parke [1903] 2 KB 432.

R v Tait and Bartley (1979) 24 ALR 473.

Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 46.

Re Truth & Sportsman Ltd Ex parte Bread Manufacturers Ltd (1937) 37 SR (NSW) 242.

Registrar of the Court of Appeal v Willesee [1985] 3 NSWLR 650.

Scott v Scott [1913] AC 417.

Taylor v Attorney General [1975] 2 NZLR 675.

The Queen v Sherrin (1978) 20 SASR 164.

The State of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25.