E 31J

Report No 14

CRIMINAL PROCEDURE: PART ONE DISCLOSURE AND COMMITTAL

June 1990
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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Dear Minister

To deal comprehensively in a single, final report with the reference the Law Commission has been given to review criminal procedure would mean considerable delay. Instead the Commission has thought it better to deal by stages with individual parts of it. Accordingly I am pleased to submit to you this first Report "Disclosure and Committal" as part of an intended series.

As the title suggests, the Report is concerned with two topics. The one is the need for and methods of providing pre-trial disclosure of relevant information in criminal cases. The other is the committal process, a preliminary step which precedes all trials on indictment - those to take place before a judge and jury.

Associated with the Report are draft legislative proposals. They will serve to explain some details of the suggestions for reform which are put forward. As well, they will be a basis for the statutory measures that would be needed if it is decided to implement the recommendations.

The Commission will now begin work on the next parts of its general review of criminal procedure. Topics will include the prosecution of offences, aspects of police powers and some areas of criminal evidence.

Yours sincerely,

Owen Woodhouse
President

The Honourable W P Jeffries MP
Minister of Justice
Parliament House
WELLINGTON

Terms of Reference

Purposes

(1) To ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi.

(2) To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

With these purposes in mind the Law Commission is asked to examine the law, structures and practices governing the procedure in criminal cases from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to

- powers of entry, search and arrest,
- diversion - principles and procedures,
- decisions to prosecute and by whom they should be made,
- the rights of suspects and Police powers in relation to suspects,
- the division of offences into summary and indictable offences,
- preliminary hearings and criminal discovery,
- onus of proof,
- evidence in sexual and child abuse and other special cases,
- payment of costs to acquitted persons,

and to make recommendations accordingly.

But the Commission is not asked in this reference to consider questions of sentencing or to reconsider questions of what courts or other judicial bodies should exercise criminal jurisdiction, or of appeals.

I
Summary of Report

THE BACKGROUND

1 The Law Commission is asked by the Minister of Justice to examine criminal procedure - the critical rules by which the substantive criminal law is expected to be applied justly to individual cases. Central to this is the trial process itself. But beforehand important decisions have to be made by the prosecution and by the defendant which will influence the whole course of events. Resources at the disposal of the prosecution usually provide adequate information for its decisions - about charges to be laid, whether they should be laid in summary form or indictably and about the evidence to be called. But the defendant, lacking much of this knowledge, must consider whether to plead guilty or not guilty, how to set about preparing a defence and decide (if there is a choice) whether to elect trial by jury or accept a summary trial before a judge alone.

2 The purpose of the criminal justice system is to give proper weight to the public interest, of course, as well as to ensure that the essential rights of individuals are not overborne by those of the State. But that imbalance of resources may leave the defendant seriously handicapped by ignorance of information well known to the prosecution. The system is adversarial. Each side puts forward its case as a challenge or in answer to the other. But the basic aim of correct verdicts will not be assisted by sudden surprise at the trial. In the interests of justice the imbalance of resources requires attention.

3 Because each of the two topics of pre-trial disclosure of information and the process of committal (which leads to a trial before a jury or discharge of the accused) has a bearing upon the matter they are the subject of this first Report in answer to the general reference on criminal procedure. Disclosure is concerned with access by the other side to information which is related to a pending trial

while one effect of the committal hearing is to provide the accused with knowledge of the strength of the case to be answered.

PRE-TRIAL INQUIRY

4 It may be said that mandatory processes which would be welcome within the inquisitorial methods applied by the courts in many civil law jurisdictions are something entirely at variance with the adversarial tradition of the common law. But that issue is not so simple. The common law system has always been ready to accommodate certain kinds of inquiry. To take the case of civil proceedings, it is known to every law student that the right to discovery of relevant information in each direction (not only by the contending plaintiff but by the answering defendant as well) has been accepted and governed by formal statutory provisions since the 1850s in England with a developed form of discovery practised in the Courts of Chancery for several decades before that. While in the area of criminal procedure itself there is both the disclosure provided by the preliminary hearing and the inquisitorial oversight (while it lasted) of the grand jury.

JUSTICE AND EFFICIENCY

5 The system must be designed to do justice. At the same time it should recognise the important claims of efficiency. Both these objectives will be promoted by enabling defence as well as prosecution to make balanced pre-trial decisions based on adequate knowledge of the facts. In terms of justice, there could then be few valid complaints based on surprise or ignorance. And efficiency would be better served by earlier pleas of guilty, by the improved definition of issues and by discussion which might lead to withdrawal of charges. There is the further important advantage of increased public confidence in verdicts of guilt where both sides have been able to make suitable preparation and with little chance that any significant fact has been kept from the defence.

THE OFFICIAL INFORMATION ACT 1982

6 Defendants have made recent use of the Official Information Act 1982 to obtain information from the police or other prosecuting agency which might bear upon an alleged offence. The practice has developed since the Court of Appeal held in

Commissioner of Police v Ombudsman [1988] 1 NZLR 385 that the right under the Act to "official" or "personal" information could be used for purposes of a pending trial. However, the Act is unable to meet all the needs of defendants and it is quite unable to meet any need of the prosecution. In addition it gives appropriate access to official or personal information but can do nothing in respect of other material which may be highly relevant in defending a criminal charge. And its use in practice varies from district to district. Disclosure for purposes of criminal cases should be the subject of direct legislative provision.

DISCLOSURE BY THE PROSECUTION

7 Provision for disclosure should apply equally to charges brought summarily as to those to be dealt with on indictment. And in all cases the test of material to be made available to defendants should be relevance: does it tend to support or rebut or have some bearing upon the charge. But in the wider public interest there will be some categories of information which ought to be withheld. To list all the material which should be available would be difficult. Instead, and to avoid oversight, it is desirable to provide for a general rule of disclosure (by reference to relevance) with broadly defined exemptions. That, in essence, is the approach of the Official Information Act 1982. There is the further need for the timing and method of disclosure to be organised with regard to practical considerations of efficiency and need. There should be automatic discovery of certain basic information accompanied by notice of a right of access to further material upon request.

EXEMPTED MATERIAL

8 Material which should be open to exemption from disclosure ought to include such categories as information which could well prejudice special methods used to detect or investigate offences; or the identity of undercover police officers; or of informants; or create a real risk of danger to or intimidation of others; or endanger national security. There are questions related to the right to privacy of persons who may have been interviewed in the course of an investigation. The answer needs to be assessed against the purpose for which disclosure would be sought: the need for persons facing criminal charges to defend themselves. In

appropriate cases the courts are able to do something to protect privacy interests by prohibiting publication of evidence.

DEFENCE OBLIGATIONS

9 At an earlier stage of the criminal justice system in England enquiring justices were not only able but obliged to examine the person suspected of a criminal offence. And the latter was unable to claim any right of silence. But changes in attitude which had developed by about the beginning of the eighteenth century led to protection of accused persons by a rule against self-incrimination and to a requirement that the prosecution must meet an onus to prove its case beyond reasonable doubt. Thus different considerations arise when attention moves from obligations properly due by the prosecution to the position of the defence. Far from having any duty to assist, a defendant is able to rely on the rule against self-incrimination.

10 In this situation the question is whether there should be advance disclosure by the defence at all, or if there is to be some disclosure what ought to be the limits. However, there is a precedent which appears to be generally accepted. In 1973 the Crimes Act 1961 was amended by the insertion of s 367A to require an accused person to give advance notice of an intended defence of alibi. So there is at least that example of the need for pre-trial disclosure by the defence.

EXPERT EVIDENCE

11 The reasons for enlarging that duty of disclosure cannot be related to keeping it in balance with duties to be met by the prosecution. Valid reasons can rest only on promoting the efficient use of resources if that can be done without prejudice to the basic principles upon which the system operates. There will be nothing valid gained by a defendant who has surprised the prosecution by the unexpected use of expert evidence, for example; or by a defendant who has allowed the prosecution to give unnecessary attention to issues which would not be in contest. In the special area of scientific or technical knowledge early advice of opinion evidence would be unlikely to react against the basic rights of a defendant and yet could

assist the efficient conduct of a pending trial. Such expert evidence ought to be made available.

COMMITTAL HEARINGS

12 Prior to every trial on indictment there is a preliminary process designed to demonstrate that the defendant has a prima facie case to answer. If so, there will be an order of committal for trial. If not, the defendant is discharged. That filtering function is the justification for the hearing but because it has the consequential effect of informing the defendant of the strength of the prosecution case it is also a form of pre-trial disclosure.

WRITTEN STATEMENTS

13 Until 1976 the hearing was before a District Court judge or before Justices at which evidence was presented in person by witnesses who could be cross-examined. But in that year statutory provision was made for written statements in lieu of oral evidence if the parties should agree. Frequent but by no means consistent use is made of these statements which save time and expense and in particular relieve the witnesses concerned from appearing in court on two separate occasions. On the other hand the opportunity is lost, of course, of initial cross-examination of those witnesses by the defence.

OPPORTUNITY FOR DISCHARGE

14 There is criticism of the cumbersome need to have a formal hearing of evidence to decide whether there should be a second hearing in the form of the trial itself. There is the problem, too, that not many accused persons are discharged at this preliminary stage; and even when they are, they still may be the subject of a second and similar accusation. In contrast, it has been possible since 1961 to obtain from the trial judge a final judicial decision in favour of the accused which is equivalent to outright acquittal. Nonetheless, defence counsel claim that the rehearsal opportunity for examining prosecution witnesses has significant value for some defendants and should not be lost.

CROSS-EXAMINATION

15 The Law Commission is dubious about the value to the defence of preliminary cross-examinations of witnesses who will soon be available at the trial itself; and shares much of the general criticism of the committal hearing which has been expressed both in New Zealand and overseas. Further, even if its value as a source of pre-trial information to defendants is not greatly diminished already by their use of the Official Information Act 1982, that disclosure value would disappear if the present proposals for much wider disclosure are implemented.

INTERIM PROPOSAL

16 At this stage of the Law Commission's review of criminal procedure, however, there is a dearth of statistical material which would justify any firm recommendation for final and radical change particularly as it will be possible to return to the subject of the committal process before that review is completed. So in the interests both of witnesses and of efficiency in general an interim measure is proposed. It is recommended that in future the requirement of prosecution witnesses to attend a committal hearing should be subject to the prior leave of a District Court judge with permissible cross-examination only for recognisable, practical and limited reasons.

DRAFT LEGISLATION

17 Draft legislative proposals which could be used to give effect to the recommendations in this Report may be found in Chapter X. But statutory provisions alone will not be enough to achieve the purposes which are contemplated. If the proposals are implemented it should be accepted by all affected by them that the advantages which ought to follow will depend upon wise cooperation and a sensible use of the systems in practice.

II
The Present Inquiry

18 The Law Commission is asked to examine all the numerous aspects of criminal procedure other than appeals, issues of jurisdiction and sentencing. It is a broad subject matter which could not be dealt with comprehensively in a single report without accepting considerable delay. Yet some topics seem to deserve rather more urgent attention than others. In this situation it has been decided to answer the reference by stages and not necessarily in chronological sequence.

19 This first Report deals with two related subjects. They are the extent to which the prosecution should disclose relevant information to the accused before trial; with the further issue as to whether, and if so to what extent, the defence itself may have obligations in this area. Then there is the question as to the contemporary value of formal committal hearings prior to a trial before a judge and jury.

20 The two topics of disclosure and committal are described as related because although the preliminary hearing is intended to act as a filter to enable the discharge of an accused person in the absence of a prima facie case, it certainly provides advance knowledge at least of the strength of the case to be answered. So that any separate obligation upon the prosecution to give pre-trial discovery of this and perhaps further relevant material must raise questions as to the future of that hearing. Conversely there may be some influence upon the sensible design for a new discovery regime depending upon whether the hearing is to remain in its present form or be modified or disappear.

21 One further point should be noted here. The changes that the Law Commission recommends in relation both to disclosure and the preliminary hearing assume the present institutions and machinery for prosecuting offences. In particular they are moulded by the absence from New Zealand of any office of public prosecutor, such as has always existed in Scotland (the "procurator fiscal") and more recently

in England and in such common law countries as Canada and most Australian states (the Director of Public Prosecutions). In he course of the present examination the Commission has felt that the creation of some independent prosecution agency could have practical advantages in a number of areas. This issue is an important and indeed a central one. The Law Commission intends to examine it in depth under its reference. Meanwhile it makes no proposals or suggestions.

22 In New Zealand the issue of discovery was the recent subject of a comprehensive report by the Criminal Law Reform Committee which has been of considerable help in enabling the present inquiry to move ahead. It is the Report on *Discovery in Criminal Cases* (1986).The members of the Criminal Law Reform Committee at that time were Mr D P Neazor QC (Chairman), the Hon Mr Justice Ellis, Mr K N Hampton, Professor G F Orchard, Mr J L Pike, Chief Inspector N B Trendle, Dr W A Young and Mr J S Hammington (Secretary). Since then there has been an important development arising from a decision of the Court of Appeal which held that much of the material gathered together by the police pending prosecution should be disclosed under the Official Information Act 1982: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.

23 As long ago as 1972 the Criminal Law Reform Committee gave some consideration to the value of preliminary hearings and its report published in 1972 resulted in a number of changes to the procedure: see paras 116 and 121. In 1983 the Department of Justice published a study on the effects of these changes which showed that rather more than two-thirds of cases proceeding to a preliminary hearing made some use of the new procedures (Department of Justice, *The Effect of Written Depositions at Preliminary Hearings* 1981, 1983). More recently however little detailed attention has been given to preliminary hearings in this country.

24 Before embarking on the present survey the Law Commission set up a small advisory group of individuals expert in the general area. The willingness to act and the valuable advice of the Honourable Mr Justice Jeffries, Judge Keane, Mrs Janice Lowe and Mr John Haigh is greatly appreciated.

25 The Commission is grateful for the professional contribution of Mr B J Cameron CMG (himself a recent Law Commissioner); and for the work of Mr Garth Thornton QC in preparing proposals for legislation. The Commission gladly acknowledges, as well, the ready assistance in the form of oral or written submissions received from various groups and individuals with knowledge and experience of the criminal law. The names are listed in Appendix A.

III
The Criminal Law

26 Criminal procedure embraces the rules which are intended to promote the just application of the substantive criminal law in actual cases. In its simplest form the purpose is to ensure that the rights of individuals are protected and kept in fair balance with the interests of society as a whole. Thus there is general acceptance of the principle that nobody should be obliged to go through the process of standing trial on a criminal charge unless there is at the least a prima facie case to answer.

27 In accord with the common law tradition the trial process is adversarial in nature rather than inquisitorial. And in that adversarial environment it operates on the basic principle that it will be for the prosecution to prove its case beyond reasonable doubt with a presumption that unless and until that onus is discharged the defendant is not guilty. Nor are accused persons under any obligation, whether at the stage of investigation or subsequently at a trial, to provide explanations or assistance to the prosecution. They enjoy what is described as the right of silence.

28 The aim and the criteria of a fair system of criminal justice are reflected in the language of Article 14 (3) of the International Covenant on Civil and Political Rights - words which in turn are a direct reflection of Magna Carta itself:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ….
>
> (b) To have adequate time and facilities for the preparation of his defence ….

29 Similar attitudes to fairness and justice are discussed at pp 127-129 of the 1981 Report of the Royal Commission on Criminal Procedure in England and Wales in terms of standards designed to support a system which will be ``fair, open,

accountable and efficient". In terms of fairness the system should work uniformly and without undue delay so that there will be avoidance of unnecessary expenditure of time, effort and money or the handicap for an accused person of having to make decisions in ignorance of relevant material available to the prosecution. In terms of openness and accountability the system should operate publicly so that decisions and methods can be scrutinised and where necessary challenged. And in terms of efficiency it must be obvious that there would be real benefit if formal trials were avoided by informed decisions of defendants to plead guilty at an early stage or because of appropriate submissions that a trial could not be justified on the evidence. There would be less pressure upon the courts and reduced strain upon those involved in particular cases.

30 Although conditions vary greatly from one country to another, and experience elsewhere needs to be applied with caution to conditions in New Zealand, pilot schemes in Canada and England have had broadly comparable results. For example, a project in Montreal was conducted on the basis that an organised process of disclosure would precede the committal hearing. In the result it seems that within three years the number of guilty pleas at the preliminary hearing or just before trial had more than doubled and the number of charges withdrawn by the prosecution had nearly tripled. Overall the number of cases disposed of without need for a trial nearly doubled. And a 1977 project in Edmonton resulted in a 50 percent reduction in the number of witnesses called. In New Zealand, the increased information available to the defence since the *Ombudsman* case seems to be producing similar trends.

31 So it is widely accepted overseas that the adversary nature of the hearing in court should not deprive the defendant of earlier access than at the trial itself to information in the hands of the prosecution.

32 To consider whether there is need for change in the area of pre-trial disclosure or in relation to the committal process it will be useful to have in mind the way in which cases are brought to the courts and the methods of trial which apply to them.

THE INITIATION OF PROCEEDINGS

33 The responsibility of the court in relation to an alleged offence begins when the suspect is brought forward following an arrest or when summoned to appear after the laying of an information. Offences themselves are classified as summary and indictable. The first, and far more numerous group, are dealt with by a District Court judge (or Justices of the Peace in the case of relatively minor infringements). Cases to be dealt with indictably go for trial before a judge and jury. There is a further category of offences which are triable either summarily or indictably at the election of prosecution or defence.

34 Until a few years ago there had been little disclosure by the prosecution of material before the hearing of summary offences. Informal discussion may have taken place but usually the defence would have received no more than the information contained in the charge itself and in the case of those ``minor offences" defined in s 20A of the Summary Proceedings Act 1957 a limited summary of the facts relied on by the prosecution together with a reference to penalties: see para 44. Yet many summary charges will be as serious as cases which for one reason or another go on indictment.

35 On the other hand, if the case is to be dealt with by trial on indictment there is (with only a limited exception) an essential preliminary step in the form of committal proceedings. And this has the effect of providing the defence with knowledge of the strength of the prosecution case. It is not necessary for all prosecution evidence to be adduced at the committal stage but it is unusual for any significant part to be omitted. The prosecution is required to present sufficient evidence to establish a prima facie case failing which the defendant will be discharged. If on the other hand there is to be a trial there is an opportunity to plead and if the plea is “not guilty” the accused will be committed for trial.

36 Until 1976 witnesses for the prosecution came forward in person at committal proceedings and could be cross-examined. But by amendments to the Summary Proceedings Act 1957 inserted in that year as ss 173A and 160A it became possible, in the absence of objection, for all or part of the evidence to be given in the form of written statements and also (by consent) for committal orders to be

made on written statements without need for the court to formally weigh the sufficiency of the evidence. It will be seen that by the committal process the defence is made aware of the substance of the prosecution case to be presented at the trial.

37 For civil cases disclosure of information pending trial is handled by a process of what is called discovery. Disclosure to facilitate the trial is the objective while discovery is the means by which appropriate information held by any party to an action (plaintiff or defendant) can be made available to the other or others prior to trial. And traditionally it has been achieved by court-supervised processes, whether by way of direct questions in the form of interrogatories or by a notice for discovery requiring the tabulation of all the documentary or recorded material relevant to any matter in issue which is in the other party's possession with subsequent production of all or part for inspection (rr 293-321, High Court Rules).

38 In the context of the criminal case there are factors which traditionally have been regarded as reasons why the obligations to provide pre-trial information do not fall equally on prosecution and defence alike. In general criminal disclosure has been concerned primarily with provision of information by prosecution to the defence. Disclosure of the defence case has always been severely limited by the right to silence of the accused and the fact that the burden of proof always lies on the prosecution.

IV
Disclosure in Practice

THE POSITION IN 1986

39 It is mentioned in para 22 that soon after the Report *on Discovery in Criminal Cases* was published in 1986 the Court of Appeal held in Commissioner of *Police v Ombudsman* [1988] 1 NZLR 385 that the law requiring disclosure of information in criminal cases had been enlarged by the Official Information Act 1982. In essence the decision meant that defendants, whether facing summary proceedings or indictment, were entitled in terms of the Act (and with only limited exceptions) to pre-trial disclosure of any personal information held by the prosecution: see paras 47, 51-53. The effect of the case has been to supplement, not remove, several common law and statutory rules which already had arisen in a rather random way. Before discussing the case in more detail the nature of some of those individual requirements can be summarised.

40 Except in the infrequent instance of indictments which may be presented directly to the trial court under s 345(3) of the Crimes Act 1961 persons to be tried on indictment will have the information about the prosecution which is contained in the formal depositions taken on committal. It happens (as mentioned in para 35) that the prosecution need not bring forward at a committal hearing all the evidence it may decide to have before the court at the trial. But by reason of s 368(1) of the Crimes Act 1961 the further hearing of the trial may be adjourned or the jury discharged from giving a verdict if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Thus a general practice has arisen that the prosecution will provide adequate notice of intention to call such a witness with a statement of the evidence to be given. Failure to do so may involve an adjournment or even postponement of the trial.

41 By reason of a decision of Moller J (affirmed in the Court of Appeal) it is necessary for the prosecution to make available the names and addresses of all those who have been interviewed who are able to give material evidence whether they are to give evidence or not and irrespective of the prosecution view as to their credibility. In "exceptional circumstances" the statements of such witnesses are also to be released: *R v Mason* [1975] 2 NZLR 289; [1976] 2 NZLR 122.

42 At about the same time in England problems relating to the risk of mistake in contested cases raising identification had been considered by the Court of Appeal in *R v Turnbull* [1977] 1 QB 224. Observations made in that judgment became the basis for an amendment to the Crimes Act 1961 made as s 344C in 1980. It provides that on request the defence is entitled to details of identification evidence. The information is to include the name and address of a witness who claims to have seen the person in the circumstances of the offence, a statement of any description given of the offender by that person, and a copy of any identikit picture or drawing made by or from information supplied by that person.

43 In *R v Wickliffe* [1986] 1 NZLR 4, information obtained under the Official Information Act 1982 after the defendant had been convicted gave rise to an issue as to whether a prosecution witness had earlier made a conflicting statement to the police which might have affected the verdict had it been made known to the jury. In the result it was held that where there are earlier conflicting statements made by prosecution witnesses which might be material then they should be given to the defence prior to the trial.

44 Special provisions for preliminary hearings in cases of a sexual nature are set out in Part VA of the Summary Proceedings Act 1957 and s 185C(4) requires the prosecutor to give the complainant's written statement to the defendant seven days before the hearing. Then, in the case of the minor offences defined in s 20A of the Summary Proceedings Act 1957 the prosecution must prepare and serve on the defendant a notice of prosecution which will provide information in a brief form as to the essential nature of the charge. It is to specify the date and nature of the alleged offence, a summary of the facts, the maximum and minimum penalties for the offence, details of any previous convictions which would be relevant to sentence and any other matters which are relevant, either to penalty or generally.

45 A number of summary offences of a regulatory nature are associated with positive statutory defences which require proof by the defendant of special facts and advance notice of an intention to rely on them: see for example Food Act 1981 ss 30(3),(4), 31(4) and 32(3); Medicines Act 1981 ss 80(3),(4), 81(4) and 82(3). Apart from those rather special requirements there is only one legal obligation of disclosure on the defence. Since 1973 it has affected a proposed defence of alibi, although only in trials on indictment. Within 14 days of committal for trial notice is to be given of the particulars of such a defence together with the names and addresses of any witnesses: s 367A Crimes Act 1961. In Police General Instructions a procedure for interview of such witnesses provides for the defendant's solicitor to be notified and given a reasonable opportunity to attend. A copy of any statements taken are to be made available to the defence on request.

46 The police operate under some self-imposed disclosure obligations. For example, the Commissioner of Police has issued an instruction, agreed to by the New Zealand Law Society, setting out a procedure for defence access to expert evidence obtained from the Department of Scientific and Industrial Research. In addition a considerable amount of disclosure has always taken place on an informal basis. This is of course dependent on the existence of a good working relationship between individual prosecutors and defence counsel.

47 A final matter relevant to disclosure in New Zealand when the Criminal Law Reform Committee undertook its review is the effect of the Official Information Act 1982. In broad terms its purpose is to make official information more freely available, to provide proper access by individuals to official information concerning themselves and to do so by giving balanced attention to any countervailing public interest or the interests of personal privacy. It is intended to operate on the principle that the information shall be made available unless there is good reason for withholding it. And distinctions are drawn between official information in general and official information which is about the applicant personally. Conclusive reasons which will apply generally for withholding information are listed in s 6 and other, balancing considerations (which can be outweighed by public interest considerations requiring disclosure) are to be found in s 9. But if the information is personal the ambit of those provisions is limited by s 27 which in turn outlines certain other matters to be taken into account. For

purposes of the criminal law the question as to whether personal information should be disclosed under the Act on application by an accused person would usually (but not always) depend upon whether its disclosure would be likely "to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial": s 6(c).

48 There is nothing in the Act which would indicate the need to apply some test of relevance in order to qualify for disclosure and no such test is included. Thus, for purposes of a criminal trial the criteria might enable access to some wider but irrelevant categories of information while possibly doing nothing in respect of different but highly relevant material: see also paras 53, 55-57.

THE 1986 REPORT

49 The Criminal Law Reform Committee prepared its 1986 Report against the New Zealand background outlined in the preceding paragraphs. It also considered proposals for change which had been discussed for Canada in 1974 and in 1984 and for England and Wales by the Royal Commission on Criminal Procedure in 1981. But although the implications of the Official Information Act 1982 were mentioned by the Committee (see paras 209-220 of its Report) it was at a time when the decision of the High Court in the *Ombudsman* case was under appeal and had not yet been dealt with by the Court of Appeal.

50 The Committee decided in essence that there should be a statutory scheme of disclosure able to supply a good deal of additional information to defendants and applicable to all proceedings, whether summary or indictable. The account given in the Report of the current situation at that time and the survey provided of various options for reform have been of considerable assistance to the Law Commission.

COMMISSIONER OF POLICE V OMBUDSMAN

51 So much for the general environment within which the *Ombudsman* case was decided. The case itself arose from a summary prosecution. The defendant (charged with obstructing the police, driving with excess blood alcohol, driving without a licence, and refusing to accompany a police officer) unsuccessfully

sought under the Official Information Act 1982 copies of briefs of prosecution evidence to be called at the trial. When the Ombudsman recommended that the briefs be disclosed the police sought judicial review of that decision.

52 The police had relied on s 6(c) (described in para 47) as the only relevant exception which would justify refusal of disclosure. In the High Court the police refusal to disclose was upheld but in the Court of Appeal all five Judges held that the material should be made available. There are differences in some of the opinions expressed in the five judgments on appeal but there is a great deal of common ground on the legal position: only the flavour is different. And the division between Jeffries J in the High Court and the Court of Appeal is limited to the issue - does the s 6(c) exception to the need to provide personal information operate to justify refusal to disclose police briefs in general?

53 There was some difference among the Court of Appeal Judges as to whether the Act was satisfactory in the long term as a vehicle for criminal disclosure. Cooke P said that the Act might well be an adequate substitute for the specific legislation envisaged in the 1986 Report of the Criminal Law Reform Committee. Somers J concurred in his judgment. However, McMullin J expressed reservations about the suitability of the Act for this purpose, as did Bisson J, while Casey J was plainly sceptical.

> The kind of information available to the accused may not coincide with what he or she wants, and much of it may be quite irrelevant to the particular case. For example in a case of sexual violation by rape he may have a right to the complainant's statement about him as personal information, but no right to a medical report on her. It is also by no means certain that attempts to fish for information could be prevented, notwithstanding their generally oppressive or vexatious character. [p 413]

THE OFFICIAL INFORMATION ACT 1982 IN PRACTICE

54 The Law Commission received some positive comments about the improved flow of pre-trial information since the *Ombudsman* judgment was delivered in 1988 but as well there is criticism of both principle and method. Certainly there is sufficient experience during the intervening period to show that a system of comprehensive pre-trial disclosure is both workable and desirable, not only for the immediate purpose of enhancing the rights of defendants, but also as a means of improving

the efficiency of the court process. At the same time it is clear that problems surround the application in practice of the Official Information Act 1982 as the basis for a regime of statutory disclosure.

55 First there are difficulties which arise from the classification of material to which the Official Information Act 1982 applies. The Act is not designed to apply any test of relevance. As mentioned in para 47 information held by a Department or listed organisation is defined as official information to be made available on request and (according to the general principle in s 5) "unless there is good reason for withholding it". In the event of refusal complaint may be made to the Ombudsman who may then recommend disclosure or agree that the refusal had been justified.

56 In contrast personal information, the particular category of official information held about an identifiable person, is the subject of an explicit right given to that person to have access unless it is within some limited exceptions. And in the *Ombudsman* case the Court of Appeal has held that in the event of refusal that right supports an implied remedy collateral to complaint to the Ombudsman in the form of direct recourse to the courts. In a case where relevant official information had been withheld the absence of that additional remedy could be crucial.

57 The comment of Casey J cited in para 53 points inter alia to this kind of problem. If the Official Information Act 1982 is to be the vehicle by which accused persons may obtain useful material from the prosecution then relevance as the test of what is needed will be relegated to testing for information of the kinds defined for purposes of that Act as "personal information" or more generally as "official information". Yet there is clearly potential for a significant shortfall between information restricted in those ways and the wider kind of information which ought to be made available on grounds of relevance to the accusation.

58 It has always been envisaged that the Official Information Act 1982 would not provide a complete regime comprehensively applicable to all information held by the Government, its departments and agencies. Prior to its enactment satisfactory regimes already existed in some particular cases or would be established where

needed in appropriate areas. So the Official Information Act 1982 from the outset did not apply to courts or to tribunals in their exercise of judicial functions.

59 At the same time the principles and indeed the detail of the Official Information Act 1982 will of course be relevant for the particular regime.

60 As well there are problems if disclosure is to be dependent on request, particularly for defendants without the support of legal advice. In general, information held by the prosecution should be available to a defendant as of right and automatically. However there are practical considerations which suggest that the process of discovery should be structured. The first need will be for sufficient information to enable an informed decision as to plea. Then, if there is to be a trial, wider disclosure will be required of relevant material which ought properly to be available to the accused. But at least at the first stage there should be no need for the discovery process to be triggered by a request.

61 Then there is the need for consistency. It seems that there has not been a sufficiently uniform approach to the interpretation of prosecution obligations. This is one of the major concerns expressed by the Criminal Law Reform Committee in the 1986 Report and it is the concern most frequently mentioned to the Law Commission in the course of its consultations. It arises in a number of ways. In the case of the police, practices differ between regions or police districts and the differences may relate to the amount of information which will be passed on to the defence, or to timing, or to what will be made available automatically and what upon request. As an example, in some parts of the country the bulk of the material on a file has customarily been released. In other areas the approach has been circumspect. Clearly, appropriate disclosure should be regulated on a more uniform basis than considerations of convenience or cooperation.

62 A different issue raised by some groups concerns the responsibilities under the Official Information Act 1982 of a Crown solicitor. Apparently it is thought that as the office of Crown solicitor cannot be regarded as a government agency any material which had been passed across for the purposes of prosecution would fall outside the ambit of the Act. And also that questions of legal professional privilege might arise. It seems that in practice Crown solicitors simply assume the

obligations under the Act of the prosecuting authority. Nonetheless it is preferable for the responsibility to be put on a more formal footing and in addition for private prosecutors to be covered: they plainly fall outside the scope of the Official Information Act 1982.

63 Nor is the Act concerned with information which might properly be required from the defence prior to the trial in a criminal matter. It is concerned only with the availability of information held by government authorities. So that if it were thought there should be some degree of defence disclosure (as for example the pre-trial provision of reports of experts) it would involve some independent statutory attention.

64 Against that background the alternatives are to leave the present arrangements to develop, centred as they are on the Official Information Act 1982. Or to legislate for a tailored statutory code. The answer can hardly be in doubt. Already difficulties affect the use of the Act as a suitable mechanism for comprehensive pre-trial disclosure in criminal cases and there is potential for others to arise. Some are matters which could probably be remedied in time by the courts. But others are sufficiently numerous and serious enough to require a different approach. Disclosure in criminal cases should be the subject of direct legislative provision. That is what the Law Commission recommends.

V
A Statutory Code

65 If disclosure in criminal cases is to be dealt with comprehensively, on what principles should a code be based and what ought to be its purposes? In essence they are indicated in the preceding survey but it is useful to summarise them before turning to their practical implementation.

66 The central principle in our system of criminal justice is implicit in that word justice and depends upon promoting a fair balance between the general public interest and important personal rights of individual citizens. In the present context it means that accused persons ought not to be left handicapped by a lack of relevant information and by the imbalance of resources available to them in preparing a defence compared with those at the disposal of the State. So that all relevant information in the hands of the prosecution should be made available to the defence subject only to exceptions needed to avoid prejudice to the wider public interest.

67 Such information should be available as of right, by means which will enable opportune decisions to be made by defendants and by a comprehensible process which will be applied consistently. And it should promote efficiency in the flow of work through the courts and increased confidence in the verdicts they produce.

68 There are considerations surrounding the onus upon the prosecution to prove the charge, the presumption of innocence in favour of accused persons and their right to remain silent which put clear limits upon any corresponding duty of general disclosure by the defence. But if there is information of a restricted or technical nature which could be provided by the defence before trial without adverse effect upon those basic rights and with advantage to the efficient conduct of proceedings then it should be made available.

VI
The Broad Basis of the Commission's Proposals

69 For the reasons mentioned it is undesirable for disclosure obligations in criminal trials to be uncertain or dependent partly on the Official Information Act 1982, partly on scattered provisions to be found in the Crimes Act 1961 or the Summary Proceedings Act 1957 and partly on rulings of the courts. The applicable principles should be drawn together as a coherent code. That is the central recommendation of this Report.

70 In considering what should be the systematic basis for a regime of disclosure the Law Commission has been able to draw heavily on the comprehensive and valuable analysis of the Criminal Law Reform Committee contained in its 1986 Report on Discovery in Criminal Cases. It has been explained that since then the 1988 decision of the Court of Appeal in *Commissioner of Police v Ombudsman* (see paras 54-64) has led to the useful example of the prosecution meeting in practice much wider disclosure responsibilities than formerly. As a result, there is now some experience as to how a disclosure regime might best operate.

71 There appears to be broad acceptance (by both prosecution and defence interests) of the desirability of a comprehensive scheme for disclosure. The real issue is how to achieve an uncomplicated, comprehensible system which will keep in fair balance the rights of individual citizens on the one hand and the general public interest on the other while operating uniformly and efficiently for all types of case. As to that last matter the argument that disclosure should apply to summary and indictable offences alike is overwhelming. Many summary offences have implications every bit as serious as others which are taken on indictment. There may be a need for some distinction to be drawn in terms of timing or the means of discovery but not on the point of principle.

72 In all cases the test must be relevance to the accusation in issue. But there will be certain categories of information which ought to be withheld in the wider public interest. One example would be material pointing solely to investigatory methods, disclosure of which could adversely affect the efforts of the police or a regulatory agency such as Customs to control criminal activity. There are others.

73 But if there are to be exemptions the question is whether they should be spelled out against a general requirement of disclosure; or whether the items to be disclosed should be defined by individual specification. Whichever course is adopted, whether it is by description of particular categories of material to be exempted or by itemising the kinds of material to be disclosed, there will be difficult problems of definition. And there is less risk of oversight or of subsequent argument as to whether particular material ought to be disclosed if the general rule is for inclusion but subject to defined categories of exception.

74 That, in essence, is the approach of the Official Information Act 1982, based on the quite explicit reasoning of the Committee on Official Information (the Danks Committee). Moreover, it is the method applied by the police in several parts of the country since the *Ombudsman* case. The police have informed the Commission that it is often simpler and less costly to discover the full file after removing exempted material than to deal with items piece-meal.

75 Then there is a need to provide for the practical matters of timing and method. When should discovery be made, how is it to be done and subject to what oversight? And there is the issue of sanctions.

76 As to timing and method, commonsense suggests that it is unreal to imagine that there is a need for or that it would be possible to meet a requirement of automatic discovery of everything on the instant. Instead, at the initial stage of a prosecution, advice of basic material given in summary form would usually be sufficient; with additional and full discovery within a reasonable time after a plea of not guilty to a summary charge or following an election for trial by jury or after a first appearance on a charge laid indictably. And provided the interests of accused persons were fairly protected by written notice concerning their right to further information it should be possible in the interests of cost and efficiency to provide

for some discovery to be automatic and for some upon request. These matters are discussed in paras 86-92. The topics of oversight and sanctions (mentioned in the preceding paragraph) follow in paras 93 and 95-97.

SCOPE OF DISCLOSURE

77 In respect of both summary and indictable charges all relevant information on the prosecution files should be disclosed at the times and in the fashion indicated subject only to expressly defined classes which the wider public interest requires should be withheld. The adjective "relevant", which in the preceding sentence is used to describe the kind of information that should be made available, has a plain enough meaning. However, for the avoidance of doubt it is used to describe information which tends to support or to rebut or has a bearing upon any element of the prosecution case.

78 Since the recommendation is for full disclosure described in that way it would be superfluous to try to tabulate every kind of information which prima facie should be regarded as discoverable. It may be worth mentioning a few of the categories, however, as an indication of the scope of the proposals. Examples of the material to be disclosed will include:

- not merely briefs of evidence to be adduced but any written or electronic record of interviews with or statements provided by the potential witnesses;
- together with similar material in relation to other persons who had been interviewed but are not to be called to give evidence;
- or in relation to co-defendants;
- and including exhibits;
- in the case of police files, relevant information in the job sheets;
- in terms of a system involving full disclosure, any statement of expert opinion obtained by the prosecution and not restricted as at present to opinion or advice of the Department of Scientific and Industrial Research;

- advice of the previous convictions of a potential witness where relevant to credibility and known by or available to the prosecution: see also *Commissioner of Police v Ombudsman* at p 392.

79 The items in the preceding paragraph are not intended to provide an exclusive list of discoverable material. But it should be mentioned at this point that it would be unreal to put a statutory obligation upon the prosecution (as has sometimes been suggested) to disclose unrecorded information which had been received by some individual during an investigation or prior to trial. Oversight or carelessness or pressure of work or even impropriety might wrongly result in the absence on record of information which ought to have been processed and filed. However the matter is not one to be controlled by legislation. It can and ought to be controlled by explicit administrative regulation in the form of general police instructions or those of other agencies with the responsibility of investigating special kinds of offence. Similarly, the need for the investigative arm to pass on conscientiously all relevant information to the prosecutor will be crucial to the success of a disclosure regime; but that obligation also cannot be appropriately laid down by legislative decree. This, too, is a matter for internal regulation.

80 Specific examples can be given of material which should be open to exemption from the general rule in favour of disclosure on grounds that the greater needs of public interest require it. Quite often in the present context that last principle will embrace information which relates solely to special methods used by the police to detect or investigate criminal activity - the process rather than the fruits of investigation, a rather apt phrase used by the Criminal Law Reform Committee when paraphrasing Canadian proposals for exemption: see its 1986 Report at para 173. For example, would it normally be necessary to disclose internal instructions concerning the progress of an investigation? There will be situations, too, where information should be withheld if it would prejudice the investigation of other or future cases. Or facilitate the commission of an offence. Or if the information would create a real risk to others of danger or intimidation. And it may be right to protect the identity of informants; or of undercover police officers. In addition there are aspects of national security which sometimes could be put at risk. And privileges against the giving of evidence at trial must be protected: it would be

anomalous if they could be undermined by the pre-trial process. There are other examples. It is possible, however, and with less chance of oversight, to comprehend this kind of detail within defined categories.

81 It is recommended therefore that all relevant information held by the prosecution, whether written or otherwise recorded, must be made available by discovery to the defence subject only to exemptions required in the wider public interest as follows:

Information may be withheld if its disclosure would create a real and substantial risk of

- prejudice to methods of investigating and detecting offences,
- prejudice to the investigation and detection of another alleged offence,
- facilitating the commission of an offence,
- causing any person to be intimidated or physically endangered, prejudice to national security, or
- a breach of an evidentiary privilege.

82 The exemptions set down in the preceding paragraph point to general situations where the wider public interest (including, of course, the interests of justice) will outweigh the needs of the defendant in preparing a defence. But as a practical matter it is worth adding that if it were possible to make partial discovery of recorded information while protecting exempted, sensitive material then clearly it should be done.

83 Before leaving the list of items which should be exempt from a general obligation of disclosure it is necessary to note the provisions of s 13A of the Evidence Act 1908 (as inserted by the Evidence Amendment Act 1986), which deals with the position of undercover police constables. The broad aim of the amendment is to prevent disclosure of the true identity of an undercover police officer unless the court is satisfied that there is good reason for calling the credibility of the police officer into issue. No doubt there are reasons associated with possible prejudice to

future work which might be undertaken by the officer concerned, or perhaps personal safety. In this situation there should normally be no pre-trial disclosure of the identity of such witnesses in the absence of the leave of the court.

84 Conversely, although there might be proper reason for withholding the names or addresses of witnesses before a trial on the ground of risk of intimidation, that information would not normally be kept back at the trial itself. In a few cases these grounds for exemption will mean that the common law requirement of disclosure contained in *R v Mason* will not be able to be complied with (see para 41).

85 There is a question as to the right to privacy of other persons. Should there be any general provision enabling information to be withheld to protect that right? The answer turns on the purpose for which disclosure is sought. Unlike the Official Information Act 1982 the criminal law is concerned with accusations levelled on behalf of an agency of the State against individuals who for obvious reasons need to be given every proper opportunity of defending themselves. And for purposes of trial relevant evidence has never been regarded as inadmissible on grounds merely that it may have an injurious effect upon the privacy of others. Nor as a matter of justice could considerations of privacy alone override necessary and proper interests of accused persons to have access to information that was relevant to their defence. The power of the courts in proper cases to prohibit publication of evidence would be a means of protecting those privacy interests.

DISCOVERY AT TIME OF CHARGE

86 It must be emphasised that under this proposal there could be no obligation upon the police or other agency to disclose information prior to an arrest or charge. The process is concerned with the information which should be made available to persons who may require it in their defence when facing actual prosecution.

87 Submissions to the Law Commission understandably explained that the key to a successful system of disclosure will be the times within which obligations should be discharged. For the defence it is essential to have adequate information in time for investigation and preparation. On the other hand, the prosecution must have sufficient time to comply. For those reasons, as indicated in para 76, there should

be a preliminary and basic level of discovery followed by full disclosure if the proceedings are likely to proceed to trial.

88 Accordingly, before defendants are required to plead, they should be given automatically information covering the essential features of the case against them. If the decision is then to plead guilty no further information will normally be required, except perhaps for purposes of submissions on sentence. But defendants who have entered a plea of not guilty to a summary charge or who have elected trial by jury or who have made a first appearance on a charge laid indictably will be entitled to full disclosure. Thus the Law Commission recommends a two-stage process.

89 If there is to be an informed decision to plead guilty or as to the mode of trial, defendants should have as a minimum, basic information covering the charge, the statutory authority for the charge, the prescribed penalty for the offence charged, a short summary of the alleged facts and information which may be relevant to sentence. These items of information should be made available at, or as soon as possible following, the time at which the information for the offence is laid. When the summons itself will not suffice a separate notice covering those details will need to be prepared and given to the defendant before the charge is read. In addition the material should be accompanied by a written statement that the defendant will be entitled to access to all relevant information in the event of a plea of not guilty to a summary charge or where the charge is to be dealt with indictably.

90 The basic information should be provided as soon as practicable. In no instance should provision of this first-stage material be delayed beyond 14 days after service of a summons. No election as to mode of trial and no plea of guilty should be accepted prior to the receipt by a defendant of such information.

91 The above recommendations need not apply to minor offences as defined in s 20A(12) of the Summary Proceedings Act 1957. Already s 20A makes provision for adequate information to be supplied to persons facing such charges for purposes of making a plea: see paras 34 and 44.

FURTHER (PRE-TRIAL) DISCOVERY

92 Defendants who have pleaded not guilty to a summary charge together with those who face trial on indictment or who have elected to do so will already know of their right to have further information by reason of the notice mentioned in para 89. Actual discovery should follow within 21 days of a request by the defendant to that effect. At the same time the defence should receive a list of documents or items of information in respect of which disclosure is resisted. In addition the reasons for withholding them should be notified whether it be on grounds of lack of relevance or for some reason of public interest.

93 If a difference should arise as to whether information has been withheld for proper reason or not it will be necessary in the end for the court to rule on the question. Such an issue should be dealt with by an interlocutory (pre-trial) application with a right by leave for either party to appeal.

94 Already, on an informal basis, the District Court has been arranging where possible for pre-trial conferences in respect of both summary and indictable trials. The purpose has been to assist the flow of work by defining the real issues likely to arise in defended cases and to promote the convenience of parties and witnesses. The practice in this regard may be somewhat variable. And to be effective it has required the cooperation of both prosecution and defence. In particular, defendants cannot be compelled to disclose their intentions in advance of trial.

UNDISCLOSED INFORMATION : SANCTIONS

95 By the time of trial there may be some items of information which have not been made available to the defence. They could fall into one or other of two categories. First, there is material which the defence is aware has been withheld and which may or may not have been the subject of an unsuccessful application to the court for its disclosure. And second, there may be information in the hands of the prosecution about which the defence has no knowledge. What protection or remedy should be available to a defendant if at the trial the prosecution proposes to bring forward the undisclosed material as evidence?

96 There is a difference between the two situations. In the second there could be instances of a deliberate decision that possession of the material was to be kept hidden from the defence; or carelessness could be the reason why it had not been disclosed or listed as withheld. Depending on the circumstances in this second area the court should have power to exclude the material as evidence at the trial or to accept it, subject to terms as to adjournment or costs. On the other hand the circumstances would rarely, if ever, justify exclusion of the material as evidence in cases within the first situation. At the same time it could often be necessary in the interests of justice to grant an adjournment of the trial on application by the defence.

97 There is a different issue. It concerns information which comes to light after a conviction that, given in evidence at the trial, may have resulted in a different verdict. Clearly disclosure rights and correlative obligations ought not to expire with the trial or subsequent appeal. Subsequent information which appears to be significant enough to raise a real doubt about the correctness of a verdict of guilty ought always to be disclosed.

RIGHTS TO OFFICIAL INFORMATION

98 Then, if the present proposals are adopted as a means of access to relevant information, there is a question as to whether rights *under the Official Information Act 1982* should continue to be available to persons facing a criminal charge. If the answer is yes, it might seem that existence of collateral remedies could result in some persons applying for information under the Act, some seeking disclosure under the new regime and some deciding to proceed at both levels. All this, it may be thought, would involve duplicated effort for the prosecution with the further complication of different criteria referable to the different requests.

99 There are, however, other considerations. One is indicated by the need explained in para 97. Clearly rights provided by a statutory scheme of criminal disclosure should not be terminated by but should continue after the proceedings have concluded. Yet, to exclude the defendant from subsequent recourse to the Official Information Act 1982 would be clearly unsatisfactory. And equally, pending or during a trial a defendant ought not to be deprived of the access to the Official

Information Act 1982 enjoyed by everybody else. It would be odd if the commencement of criminal proceedings (possibly of minor import) could be used as a bar to information wanted for some personal or other purpose. Further, there is provision in s 27(h) of the Act which can sift out a request that is "frivolous or vexatious". And there is an analogous provision in s 17(2) of the Ombudsmen Act 1975 which enables the Ombudsman to refuse to entertain a complaint that information had been withheld. The Ombudsman may also put aside such a complaint in terms of s 17(1)(a) "if it appears to him that under the law or administrative practice there is an adequate remedy [elsewhere] to which it would have been reasonable for the complainant to resort".

100 The Official Information Act 1982 reflects a policy that particular regimes for the release and protection of information should have priority over its general provisions. The reforms made in 1987 supported this approach. In the particular case of criminal discovery, that policy might be made more explicit in the general savings provision of s 52. It would not be easy to find a legislative formula to exclude operation of the Official Information Act 1982 where otherwise there might be some occasional slight untidiness. Nor does it seem warranted. It can be noted that in many situations the general regimes of the Ombudsmen Act 1975 and the Official Information Act 1982 coexist with particular regimes, with preference in practice usually being given to the particular.

101 A final point relates to s 24A of the Official Information Act 1982, inserted in 1987 but not yet made effective. The section would take away the right of a person sentenced to imprisonment to have access to personal information relating to the conviction. There can be no justification in principle for such a restriction and the Law Commission recommends that it be repealed. Furthermore, unless there had been some unfortunate pre-trial oversight, the prosecution would always be in a position to respond to a request with the simple answer that all information had been disclosed. On the other hand, if relevant information had come to light subsequently, it ought to be made available. For the reasons just discussed in paras 98-100 the two routes to disclosure should be left to coexist.

DOMESTIC TRIBUNALS

102 It has been suggested that the requirements of disclosure for criminal cases should be made applicable to proceedings before such domestic tribunals as the disciplinary committees of the New Zealand Law Society or the Medical Council of New Zealand. But the Law Commission's terms of reference do not extend to the responsibilities of such bodies. Their proceedings are of a civil nature and not within the ambit of the criminal law. Nor would it be desirable to make any formal recommendations concerning them in the absence of forewarning or prior discussion. Already there is general or particular legislation applicable to the procedures to be adopted by disciplinary tribunals but in terms of the jurisdiction to review the work of such tribunals it is for the courts to decide what will be appropriate in particular classes of case. It can properly be said, however, that already disciplinary proceedings have been described judicially as "sufficiently analogous in some respects to criminal proceedings for assistance to be derived from the criminal rules of procedure; *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 at 155; and on that page see the reference to the useful comment to the same effect of Jeffries J in the earlier case of *Duncan v Medical Practitioners Disciplinary* Committee [1986] 1 NZLR 513 at 535.

VII
Disclosure by the Defence

GENERAL CONSIDERATIONS

103 At para 181 of its 1986 Report the Criminal Law Reform Committee stated that it ``took the view that the issue of defence disclosure rests on somewhat different criteria from that of disclosure by the prosecution". The Law Commission is of the same opinion and for reasons similar to those given by the Committee (see para 38 above). Some of the reasons are central to the whole system of criminal justice. An accused person is presumed innocent until proved guilty. There is the privilege against self-incrimination. The burden of proof is on the prosecution.

104 The need for full disclosure by the prosecution has already been discussed. Other considerations turn upon such practical problems as the wide resources usually at the disposal of the prosecution but rarely available to a defendant in preparing a defence. And for reasons of fairness and confidence in eventual verdicts it is important that the various decisions to be made by an accused person before trial should be made on a basis of the available information and also that there should be minimal risk of trial by ambush. On the other hand the justification for disclosure to the prosecution depends upon practical considerations of efficiency and cost.

105 At present the only defence obligation of a general nature (see para 45) is in respect of trials on indictment. Notice must be given within 14 days of committal of the particulars of an intended claim of alibi. The question now before the Law Commission is whether there should be some further pre-trial disclosure by the defence, particularly if provision is to be made for wide disclosure by the prosecution.

106 As indicated, for example in para 104, the point does not arise, as some might imagine, because obligations of disclosure on the prosecution deserve to be kept in some kind of fair balance by putting corresponding obligations upon the defence. That is in no way the issue. Instead the reasons are related to promoting the efficient flow of work in the courts. If knowledge of a defendant's intentions could save unnecessary attention by the prosecution to aspects of a case that were not to be contested, or avoid the surprise of an unexpected defence as reason for adjournment of the trial, there would obviously be consequential benefits in terms of convenience and expense for all concerned. That is the proper basis for deciding whether disclosure obligations should be put upon defendants.

SCOPE OF DEFENCE DISCLOSURE

107 The answer really depends on the level of benefit likely to be promoted by defence disclosure; and whether it is possible to design a mandatory system without prejudice to the principles mentioned in para 103. Several suggestions have been made from time to time although there is general agreement that defendants could not be obliged to provide full disclosure, that disclosure could not extend to requiring positive assistance for the prosecution in proving its case.

108 Against the precedent of the alibi provisions there are arguments that advance notice should be given of an intention to introduce any other special or positive defence. It is said that other defences which might create difficulties would include those which usually will rest on expert medical or other professional opinion. So there is the related matter of expert evidence.

EXPERT OPINION

109 It is convenient first to consider that last matter. And like the Criminal Law Reform Committee in 1986, the Law Commission recommends that whether the opinion of an expert is to be given in evidence to rebut expert evidence to be adduced by the prosecution or whether it is for the purpose of raising a new issue it should be passed across to the prosecution for purposes of prior analysis. The nature of such evidence cannot always be anticipated. If not disclosed in advance it can lead to delays during the trial. By its very nature it needs to be the subject of

considered assessment. And usually the disclosure of the material will be in the context of receiving similar expert opinion obtained by the prosecution. It is worth adding that some defence counsel have stated that there can be actual advantage to the defence if it is known to the jury that the evidence of expert witnesses has been available for assessment in advance of the trial.

110 Discovery of expert opinion obtained by the defence and intended to be used as evidence at the trial should be made available at least 14 days prior to trial.

POSITIVE DEFENCES

111 The issue of special or positive defences is not so clearcut. For present purposes those defences may be regarded as including insanity, provocation, automatism, intoxication, self-defence, accident and compulsion. Listed in that way the category seems to have reasonable enough boundaries. And perhaps the category can be defined by specification. But as the 1986 Report has pointed out (in para 197) such an approach will be open to the criticism that it is arbitrary. For example, automatism or intoxication are defences only in the sense that the condition is capable of disproving the necessary element of intent. But there are other situations where the issue will turn upon voluntariness or upon mens rea, including mistake of fact. Why, it could be asked, require prior advice in the one kind of situation and not in others?

112 There is a different problem. Prior to presentation of the prosecution case a defendant may not know whether a positive defence should be raised. Or if identification were an issue, for example, it might seem that a challenge to the sufficiency of the prosecution evidence would be weakened had it been necessary to give prior advice of an alternative claim of automatism. Yet the two defences could actually be consistent.

113 When the Criminal Law Reform Committee assessed the value of or need for extending a requirement of prior notice of a positive defence beyond the present provision which affects alibi it included the following consideration:

> In practice, there can be few cases in which the prosecution is not capable of anticipating the accused's answer to the charge. That number will be significantly

> narrowed by the requirement of advance disclosure of ``expert'' evidence, which is a necessary component of many defences.

That passage at para 199 of the 1986 Report ends with the Committee's conclusion:

> On balance, the value of prescribing further disclosure on the part of the defence is probably minimal.

Accordingly no recommendation to that effect was made.

114 The Law Commission received from several prosecution counsel advice which confirms the opinion of the Committee. The Law Commission agrees both with the Committee's assessment and with the decision that the alibi precedent need not be extended.

ALIBI

115 A final comment is required. In accord with the general recommendation that a new regime of disclosure should apply equally to summary and indictable trials it would be anomalous if the alibi requirement were to remain the one exception. It should be extended to cover summary trials as well: see the draft Act in Part X where the present, rather lengthy wording of s 367A of the Crimes Act 1961 is maintained.

VIII
The Preliminary Hearing

116 The opening paragraphs of this Report indicate why the committal hearing has been associated with disclosure in this first review of criminal procedure. In the case of offences to be tried indictably it has the purpose of requiring the prosecution to demonstrate sufficient evidence to justify a trial. But an important consequential effect has been that the defendant is given at least that much pre-trial information. It is this element of disclosure which suggests that the committal hearing should be reviewed beside any wider proposals for disclosure generally. Already it has been thought appropriate in the past few years (see para 121) to make several statutory changes to the committal process. Should there now be others?

HISTORICAL DEVELOPMENT

117 The preliminary hearing has its origins in what was an early investigatory role of Justices of the Peace. At first their task was to gather evidence to put before a grand jury which then decided whether the suspect should stand trial. But by the middle of the sixteenth century their responsibility had been extended to an examination of both accused and witnesses with a need to commit the result to writing for use at trial.

118 However, as a full-time police force began to develop in the nineteenth century it took over the initial, investigatory part of the justices' functions. And by mid-century, legislation had completed the transformation of what had begun as a purely inquisitorial exercise into the preliminary examination of witnesses at a pre-trial hearing for purposes of committal. In 1836, for the first time in England, accused persons were permitted to inspect all depositions taken against them; and in 1848 prosecution witnesses had to be examined in the presence of the accused, who could question them. Most importantly the legislation in 1848 required the

examining justice to decide if there was sufficient evidence to justify a trial. (The grand jury was thus rendered superfluous but nonetheless it was not done away with until 1933 in England and until 1961 (after much debate) in New Zealand.)

CONTEMPORARY PURPOSES

119 The check on unfounded cases being sent for trial is supposed to be the basic purpose of the preliminary hearing. At the same time it goes some distance towards meeting that second important need mentioned in para 116. The defendant is able to assess the strength of the case to be answered and to gain some information for preparing a defence. There is a consequential but secondary advantage that a record can be kept of testimony in the form of a deposition which may be read into the evidence at the trial should the witness die or abscond or otherwise become unavailable to give the evidence in person. Also it has been serving a collateral purpose. The committal hearing is used by the defence as a rehearsal opportunity not only to see and hear but to cross-examine prosecution witnesses before the trial itself takes place in the presence of a jury.

120 There are two questions. First, does the preliminary hearing adequately fulfil those functions? Second, are they necessary? And the answers must take account not only of the current performance of the process but also possible alternatives together with the problem of competing pressures on the courts. Since 1848 when the committal process was introduced the criminal justice system has had to make procedural changes from time to time in order to accommodate dramatic increases in the number and variety of cases which come to trial and the need to make more efficient use of resources.

121 Indeed in this very context there have been four quite recent changes to the law. Three are amendments made in 1976 to the Summary Proceedings Act 1957. By s 173A the evidence of any witness may now be given in the form of a written statement if the parties agree. The second provision is s 160A which enables the court to make an order committing the accused for trial without need to consider the evidence, provided it is in written form and the defendant (being legally represented) agrees. A third 1976 amendment to the Act, s 153A, allows a defendant who is legally represented to plead guilty at any time before or during a

preliminary hearing and for the court then to commit that person for sentence without further consideration of the evidence. Then in 1985 the Act was amended by s 185C which provides that in specified cases alleging a sexual offence the complainant's evidence is to be given in the form of a written statement unless the complainant wishes to give oral evidence or the court requires attendance of that witness.

122 In some degree those amendments to the committal process reflect criticisms that to conduct an oral hearing in order to decide whether there should then be a second hearing in the form of the actual trial is an improbable and laboured way of achieving that purpose. There is, too, the not unimportant fact that the process applies to indictable cases only and is unable to filter out unfounded summary charges which often will have implications for the defendant which are quite as serious.

123 Furthermore, in New Zealand there seems to be fairly general agreement among both prosecution and defence counsel that for some time the committal hearing has not been achieving its central purpose of acting as an effective filter. Regrettably there are no statistics which provide the number of instances when accused persons are discharged at this preliminary stage, but they are few. There appear to be two main reasons. First, most hearings are before lay Justices of the Peace who may feel unqualified to put an end to the prosecution even though they will be aware that a second and similar charge could then be preferred. And second, since the abolition of the grand jury in 1961, it has been possible for a defendant to apply under s 347 of the Crimes Act 1961 for a final judicial decision that the case should not continue. Such an order is equivalent to an acquittal. In other words the lesser advantage of discharge at the committal stage (with the possible need to face a second hearing) has been made redundant. The filtering purpose of the committal hearing is described in the English context as ``now almost a formality". (See Report of the Royal Commission on Criminal Procedure, 1981, para 8.6.) That is a fair description of the situation in New Zealand.

124 The next function it serves is the provision of information to the accused person. But clearly that degree of disclosure would be more than overtaken by a regime such as that recommended in the earlier section of this Report. The proposals are

much wider in content and as well they extend beyond indictable cases to include those to be dealt with summarily.

125 Nor can the provision of a permanent record of evidence in the form of depositions be regarded as a major reason for retaining the process.

126 More importance is often attached to the opportunity given by the committal hearing to conduct a preparatory cross-examination of witnesses, something which has assumed greater significance for some counsel than the basic filtering purpose itself. Indeed it is often claimed as an essential right. It is said that cross-examination enables further information to be gathered which can show that the accused should be discharged and that it enables counsel both to test a line of defence and to define the live issues in the case. It must be appreciated, however, that quite apart from the special statutory exemption for complainants in certain sexual cases it is not necessary for the prosecution to call all prosecution witnesses at the preliminary hearing. Thus the advantages spoken of are limited to those witnesses actually brought forward to establish a prima facie case.

127 And there are disadvantages. They include the strain and inconvenience for those witnesses who are obliged to attend court on two separate occasions. There are added legal costs and other expenses. And often there is extra delay before the trial can take place.

128 There are also concerns that the present opportunity for cross-examination at preliminary hearings is open to abuse. Some police experience suggests that although the use made of cross-examination varies throughout New Zealand there is a tendency in a few parts of the country for defence counsel to habitually require the attendance of most if not all witnesses. There is anecdotal evidence, as well, that among some counsel a practice has been developing of wide-ranging and lengthy cross-examinations with little obvious direction, with doubtful benefit to defendants but at considerable cost to the system.

POSSIBILITIES FOR REFORM

129 These various considerations have led to the value of the committal hearing in the modern context being questioned in several jurisdictions. For example it has been

the subject of recent studies in Canada, England and Australia and in each of these countries there are proposals for some degree of reform of the hearing or for its replacement by a more effective process or for its abolition.

130 In Canada an initial view expressed by the Canadian Law Reform Commission in 1974 was that the committal hearing should disappear. The matter was referred to again by the Commission in a 1984 paper which was focused upon the matter of disclosure. At that time it was thought the hearing might have some utility. However, the Commission's review of the whole of pre-trial procedure is still in progress and no final opinion has yet been provided.

131 There has been continuing debate for several years in Australia. In the case of New South Wales it led the Attorney-General to introduce legislation for reform of the process as recently as 8 May 1990. Its purpose is to end committal by a formal hearing in court in favour of a screening process in the hands of the Director of Public Prosecutions. The proposal is contentious, it seems, but the approach is an interesting one which would recognise that a process aimed at obtaining a decision as to whether there should be a trial is of an administrative rather than judicial nature; and yet it would leave that decision to an officer quite independent of the executive branch of government. A limited opportunity would remain for cross-examination by the defence on defined grounds. On application a hearing, supervised by a magistrate, would be set up for that single purpose; and if leave were to be given for cross-examination a transcript of the oral evidence would then be forwarded to the Director of Public Prosecutions to consider (together with the other material relevant to the charge) when deciding whether there should be a trial or not.

132 In England a year ago the Home Office and the Lord Chancellor's Department issued a paper which in essence proposes that the committal hearing in England and Wales be abolished. In its place there would be an application for discharge by the defendant. In this last respect the proposal may be regarded as something anticipated in New Zealand as long ago as 1961 (see para 123).

133 Discussion of the procedural arrangements of the common law systems often ignores less complicated methods which appear to have worked satisfactorily in

Scotland for generations. It has never been thought necessary in that jurisdiction to interpose a formal hearing of evidence between charge and trial in order to decide whether the case should proceed. Instead, at the point where investigation ends and the process of prosecution is to begin the papers are passed to a procurator fiscal who makes decisions as a member of a team which is under the control of the Lord Advocate. The procurator fiscal may request further investigation but for the most part decisions are made at once about the sufficiency of the evidence and whether there should be summary trial to be heard by a sheriff alone or solemn trial before a judge or sheriff and a jury.

134 In New Zealand the 1986 report of the Criminal Law Reform Committee on Discovery in Criminal Cases recommended a form of automatic committal, subject to a request by either the prosecution or defence for a preliminary hearing. It was proposed that the defence could nominate which prosecution witnesses it wished to cross-examine. However, the Committee regarded the implementation of its recommended discovery procedures as a step towards the eventual abolition of preliminary hearings but before taking such a step, suggested a study to examine the purposes the hearing is supposed to serve.

135 Earlier reference has been made (para 21) to the Law Commission's intention to examine whether an office of public prosecutor might be established in New Zealand.

136 The discovery proposals of the Committee have not been implemented and insufficient time has passed since the *Ombudsman* decision to assess with any assurance the effect upon the committal process of defence access to wider information. In this situation and because the Law Commission has future opportunities to consider the matter in its general review of criminal procedure it does not propose at the present stage to recommend any major change in the pre-trial hearing. In the meantime it is fortunate that beneficial use can be made of the amendments which permit “paper” committals and it may be hoped that a regime of full disclosure will see that practice extended.

137 However, for reasons of efficiency and on behalf of witnesses who with little reason are at times brought to be cross-examined at preliminary hearings it is

possible to make an interim proposal. To avoid the attendance of witnesses at committal hearings without good reason, and to discourage use of cross-examination except when it is likely to serve a useful purpose, two recommendations are made. First, that prosecution evidence be accepted in the form of a written statement unless personal attendance is required by the court, of its own motion or on the application of any party. And second, that cross-examination of prosecution witnesses be by leave and only for limited, recognisable, practical reasons.

138 Accordingly, prior application should be made to a District Court judge if either party should wish to have a witness for the prosecution attend in person at a committal hearing and leave should be granted if and only if:

- the witness is to give evidence concerning identification of the defendant;
- the witness is to give evidence of an alleged confession of the defendant;
- the witness is alleged to have been an accomplice of the defendant; or
- the witness has made an apparently inconsistent statement.

139 By reason of a recent Part VA of the Summary Proceedings Act 1957 special provisions are now made to apply to preliminary hearings in cases alleging certain sexual offences. In particular it is provided that evidence of complainants in such cases may be given in the form of a written statement. They could not be the subject of an application to come forward to give evidence in person because of that express provision. The section itself anticipates, however, that in some circumstances the evidence may be given orally. If that happens then the section itself states that cross-examination of the complainant may follow.

IX
Precis Recommendations

PUBLIC PROSECUTOR

140 The changes that the Law Commission recommends in relation both to disclosure and the preliminary hearing assume the present institutions and machinery for prosecuting offences. The creation of some independent prosecution agency could have practical advantages in a number of areas. This issue is an important and indeed a central one. The Law Commission intends to examine it in depth under its reference. Meanwhile it makes no proposals or suggestions: *para 21*.

SCOPE OF DISCLOSURE

141 In respect of both summary and indictable charges all relevant information on the prosecution files should be disclosed being information which tends to support or to rebut or has a bearing upon any element of the prosecution case: *para 77*.

142 It would be unreal to put a statutory obligation upon the prosecution to disclose unrecorded information which had been received by some individual during an investigation or prior to trial. The matter can and ought to be controlled by explicit administrative regulation in the form of general police instructions or those of other agencies with the responsibility of investigating special kinds of offence: *para 79.*

143 Similarly, the need for the investigative arm to pass on conscientiously all relevant information to the prosecutor will be crucial to the success of a disclosure regime; but that obligation also cannot be appropriately laid down by legislative decree. This, too, is a matter for internal regulation: *ibid*.

EXEMPTIONS

144 All relevant information held by the prosecution, whether written or otherwise recorded, should be made available to the defence subject only to exemptions required in the wider public interest as follows:

Information, the disclosure of which would create a real or substantial risk of

- prejudice to methods of investigating and detecting offences,
- prejudice to the investigation and detection of another alleged offence,
- facilitating the commission of an offence,
- causing any person to be intimidated or physically endangered,
- prejudice to national security, or
- a breach of an evidentiary privilege.

:*para 81*.

145 The exemptions set down in the preceding paragraph point to general situations where the wider public interest (including, of course, the interests of justice) will outweigh the needs of the defendant in preparing a defence. But if it were possible to make partial discovery of recorded information while protecting exempted, sensitive material then clearly it should be done: *para 82*.

146 There could be no obligation upon the police or other agency to disclose information prior to an arrest or charge. The process is concerned with the information which should be made available to persons who may require it in their defence when facing actual prosecution: *para 86*.

TIMING

147 If there is to be an informed decision to plead guilty or as to the mode of trial, defendants should have automatically basic information covering the charge, the statutory authority for the charge, the prescribed penalty for the offence charged, a short summary of the alleged facts and information which may be relevant to

sentence. These items of information should be made available at, or as soon as possible following, the laying of the information: *para 89.*

148 The material should be accompanied by a written statement that the defendant will be entitled to access to all relevant information in the event of a plea of not guilty to a summary charge or where the charge is to be dealt with indictably: *ibid*.

149 The basic information should be provided as soon as practicable. In no instance should provision of this first-stage material be delayed beyond 14 days after service of a summons. No election as to mode of trial and no plea of guilty should be accepted prior to the receipt by a defendant of such information: *para 90*.

150 The above recommendations need not apply to minor offences as defined in s 20A(12) of the Summary Proceedings Act 1957. Already s 20A makes provision for adequate information to be supplied to persons facing such charges for purposes of making a plea: *para 91*.

FURTHER (PRE-TRIAL) DISCOVERY

151 Further discovery should follow within 21 days of a request by the defendant to that effect. At the same time the defence should receive a list of documents or items of information in respect of which disclosure is resisted. In addition the reasons for withholding them should be notified whether it be on grounds of lack of relevance or for some reason of public interest: *para 92*.

DISPUTE

152 If a difference should arise as to whether information has been withheld for proper reason or not it will be necessary in the end for the court to rule on the question. Such an issue should be dealt with by an interlocutory (pre-trial) application with a right by leave for either party to appeal: *para 93.*

153 If at the trial the prosecution proposes to bring forward undisclosed material as evidence the court should have power to exclude the material as evidence or to accept it, subject to terms as to adjournment or costs: *para 96*.

154 Disclosure rights and correlative obligations ought not to expire with the trial or subsequent appeal. Subsequent information which appears to be significant enough to raise a real doubt about the correctness of the verdict ought always to be disclosed: *para 97*.

OFFICIAL INFORMATION ACT 1982

155 There is a question as to whether rights under the Official Information Act 1982 should continue to be available to persons facing a criminal charge. Just as rights provided by a statutory scheme of criminal disclosure should not be terminated by but should continue after the proceedings have concluded so should rights under the Official Information Act 1982 enjoyed by everybody else be available to defendants pending or during or after a trial. It would not be easy to find a legislative formula to exclude operation of the Official Information Act 1982 where otherwise there might be some occasional slight untidiness. Nor is it warranted: *paras 99-100*.

156 Section 24A of the Official Information Act 1982 (inserted in 1987 but not yet made effective) would take away the right of a person sentenced to imprisonment to have access to personal information relating to the conviction. There can be no justification in principle for such a restriction and it is unnecessary in practice. It should be repealed*: para 101*.

DISCLOSURE BY THE DEFENCE

157 At least 14 days prior to trial, disclosure should be made of expert opinion obtained by the defence which is intended to be used as evidence: *para 110*.

158 In the case of trials on indictment, defendants have an obligation to give prior notice of an alibi defence. In 1986 the Criminal Law Reform Committee stated that probably there is minimal value in extending mandatory disclosure on the part of defendants to other special defences; and it made no recommendation to that effect. The Law Commission agrees both with the assessment and with the conclusion: *para 114*.

ALIBI

159 In accord with the general recommendation that a new regime of disclosure should apply equally to summary and indictable trials the alibi requirement should be extended to cover summary trials as well: *para 115*.

THE COMMITTAL PROCESS

160 In 1986 the Criminal Law Reform Committee contemplated the eventual abolition of committal hearings with a system in the meantime of automatic committal, subject to a request by either prosecution or defence for a preliminary hearing. That measure was to be dependent on the effect of proposals for disclosure. As yet there is little statistical information about the effect upon the committal process of wider defence access to pre-trial information. In this situation the Law Commission will delay any possible proposals for major change in favour of an interim recommendation: *paras 135-137*.

161 For the present it is recommended that prosecution witnesses should not give evidence in person or be cross-examined at the committal stage except by leave of a District Court judge, to be granted if and only if:

- the witness is to give evidence concerning identification of the defendant;
- the witness is to give evidence of an alleged confession of the defendant;
- the witness is alleged to have been an accomplice of the defendant; or
- the witness has made an apparently inconsistent statement. :*para 138*.

162 It is provided by s 185A of the Summary Proceedings Act 1957 that evidence of complainants in cases alleging certain sexual offences may be given in the form of a written statement. The section anticipates that in some circumstances the evidence may be given orally. If that happens then the statute itself provides that cross-examination of the complainant may follow: *para 139*.

X
Proposals for Legislation

SUMMARY PROCEEDINGS AMENDMENT ACT [ ]

Entry into force

1 This Act comes into force on 1 January 1991.

Application

2 This Act applies to all prosecutions commenced on or after the day on which this Act comes into force.

Cross-examination at preliminary hearings

Repeals

3 Sections 160, 160A, 161, 165 and 173A of the principal Act are repealed.

Procedure at preliminary hearing

4 After section 159 of the principal Act the following sections are inserted:

"Conduct of preliminary hearing

160 (1) At any preliminary hearing after the charge has been read to the defendant, the informant shall present statements in accordance with section 160A and may call witnesses in accordance with any orders made under section 160C.

(2) The defendant may then call witnesses.

(3) Each witness who is called shall be examined and may be cross-examined and re-examined.

(4) The evidence of each witness shall be recorded in writing, and shall then, in the presence of the defendant, be read over to the witness (if the defendant so requests), and signed by the presiding District Court Judge or Justices.

(5) This section is subject to section 160B (which provides for committal by consent).

Evidence usually by written statements

160A (1) Prosecution evidence at a preliminary hearing shall be admitted by way of written statements unless a District Court Judge orders in accordance with section 160C that that evidence be given orally.

(2) A written statement by a person may be admitted as evidence at a preliminary hearing only if the following conditions are satisfied:

(a) it purports to be signed by that person;

(b) the statement includes a passage to the following effect:

Everything in this statement is true to the best of my knowledge and belief. I know that the statement might be admitted as evidence at a preliminary hearing and that I could be prosecuted for making a statement which I know to be false and by which I intend to mislead;

(c) the party proposing to tender it as evidence has given a copy of it to every other party or that party's solicitor;

(d) if the person is aged under 20 years, the statement sets out the age;

(e) if the person who made the statement cannot read it, the statement has been read to the person; and there is attached to it a statement signed by the reader to the effect that it was so read and the person appeared to understand its contents; and

(f) if the statement refers to any document or object as an exhibit, any copy given under paragraph (c) is accompanied by a copy of the exhibit or the information necessary to

enable the party or solicitor to inspect the exhibit or a copy of it.

(3) All the parties to a preliminary hearing may consent to the admission as evidence of a statement that does not comply with the provisions of subsection (2).

(4) Any document or object accompanying a written statement tendered in evidence under this section, and referred to in it as an exhibit, shall be treated as if it had been produced as an exhibit and identified in Court by the maker of the statement.

(5) A person who makes, in a written statement that that person knows may be admitted in evidence at a preliminary hearing under this section and that is so admitted, a statement that would amount to perjury if made on oath in a judicial proceeding commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three years.

Committal on written statements by consent

160B A Court at a preliminary hearing may, without deciding that the evidence is sufficient to put a defendant on trial for an indictable offence, proceed in accordance with section 168 (or section 172 when the defendant is a corporation) as if it had decided that the evidence was sufficient to put the defendant on trial if:

(a) all the evidence consists of written statements or exhibits tendered under section 160A;

(b) the defendant is represented by a barrister or solicitor; and

(c) that barrister or solicitor advises the Court that the defendant agrees to the Court proceeding in that way.

Order for oral evidence

160C A District Court Judge may, on the application of either party or on the Judge's own motion, require that a witness for the informant (including a person whose statement has been tendered under section 160A) attend before the Court at a

preliminary hearing and give evidence and be subject to cross-examination if and only if:

(a) the witness is to give evidence concerning the identification of the defendant;

(b) the witness is to give evidence of an alleged confession by the defendant;

(c) the witness is alleged to have been an accomplice of the defendant; or

(d) the witness has previously given a statement that appears to conflict with the evidence to be given by that witness."

Amendments and repeals consequential upon sections 3 and 4

5 [A list of consequential amendments will need to be compiled.]

Pre-trial disclosure of information

Part VB inserted

6 After Part VA of the principal Act the following Part is inserted:

"PART VB

PRE-TRIAL DISCLOSURE

Disclosure to defendants

Defendant's right to information

185F (1) A defendant in a criminal prosecution is entitled to disclosure, in accordance with this Part, of information that is relevant to the charge against the defendant and is held in recorded form by the prosecutor, whether recorded in writing or otherwise.

(2) Information is relevant for the purposes of this Part if it tends to support or rebut or has a material bearing on the case against the defendant.

(3) A prosecutor may refuse to disclose information to a defendant if the disclosure of that information would create a real and substantial risk of:

(a) prejudice to methods of investigating and detecting offences;

(b) prejudice to the investigation or detection of another offence;

(c) facilitating the commission of another offence;

(d) causing any person to be intimidated or physically endangered;

(e) prejudice to national security; or

(f) a breach of an evidentiary privilege.

(4) Where part only of the information contained in a particular record may be withheld under subsection (3), the prosecutor shall make available the remainder of the record if it is possible to protect the exempted material by deletion or otherwise.

(5) The entitlement of a defendant to information under subsection (1) continues after the defendant is convicted.

Preliminary disclosure of nature of charge

185G (1) The prosecutor shall provide the defendant at the time the information is laid for an offence or as soon as practicable after that time, and in any event not later than 14 days after the defendant has been served with a summons in relation to that offence, with the following information:

(a) the date and nature of the alleged offence;

(b) a summary that is sufficient to inform the defendant fully and fairly of the facts on which it is alleged that an offence has been committed and the facts alleged against the defendant;

(c) the maximum penalty for the offence;

(d) if a minimum penalty is provided for the offence, that minimum penalty;

(e) particulars of any previous conviction of the defendant if the prosecutor wishes the Court to take that conviction into account if the defendant is found guilty;

(f) a summary of any matters, other than previous convictions, that the prosecutor considers are relevant to the imposition of a penalty; and

(g) a statement informing the defendant of the defendant's entitlement under section 185H to further disclosure of relevant information if the defendant pleads not guilty to the charge or the charge is to be dealt with on indictment.

(2) A Court may not record a plea of guilty or an election under section 66 from a defendant in respect of an offence unless the Court is satisfied that preliminary disclosure of the information referred to in subsection (1) has taken place in respect of that offence and that the defendant has had an opportunity to evaluate that information.

(3) This section applies whether a defendant is to be tried summarily or on indictment but it does not apply to information that is relevant to a charge against a defendant who is charged with a minor offence as defined in section 20A(12).

Full disclosure to defendant

185H (1) A defendant who has entered a plea of not guilty to a summary charge or who is to be tried on indictment is entitled to disclosure of information in accordance with section 185F(1), other than information which may be withheld under section 185F(3).

(2) The prosecutor shall disclose the information within 21 days of a request for disclosure made to the prosecutor by the defendant.

(3) At the same time as disclosure is made under this section, the prosecutor shall provide the defendant with a list of any items of information held by the prosecutor that the prosecutor refuses to disclose to the defendant and the list shall indicate on which of the grounds referred to in section 185F(3) each item is withheld.

(4) If additional information of a kind required to be disclosed under subsection (1) reaches the prosecutor after the time fixed by subsection (2) and the charge against the defendant has not been finally determined or the defendant has been found guilty, the additional information shall be disclosed by the prosecutor to the defendant as soon as possible.

Interlocutory orders and appeals

185I (1) In this section, "Court" means

(a) if the defendant is to be tried on indictment, the Court before which the defendant is to be tried; and

(b) in every other case, the District Court.

(2) If an item of information is withheld from a defendant under section 185F(3), the defendant may apply to a Court for an order that the information be disclosed to the defendant.

(3) The Court shall give each party an opportunity to be heard in respect of the application before deciding whether or not to make the order.

(4) The Court may make an order under this section on such terms and conditions as the Court considers appropriate.

(5) The prosecutor or the defendant may appeal against the decision of the Court in respect of an application under this section.

(6) In the case of a decision made by a Court under subsection (1)(a), the appeal lies to the Court of Appeal with the leave of that Court; and section 379A of the Crimes Act 1961, as far as it is applicable, applies to every such appeal.

(7) In the case of a decision made by a Court under subsection (2)(b), the appeal lies to the High Court with the leave of that Court; and the provisions of sections 116 to 144, as far as they are applicable, apply to every such appeal.

Undisclosed information

185J If a prosecutor fails to comply with the requirements of section 185H in respect of a defendant, the Court may on the trial of the defendant:

(a) exclude evidence based on information that was not disclosed to the defendant or referred to in a list provided to the defendant under section 185H(3); or

(b) admit that evidence but on such terms as to adjournment of the proceedings and costs as the Court thinks just.

Disclosure By defendants

Notice of disclosure requirement

185K When a defendant enters a plea of not guilty to a charge that is to be tried summarily the Registrar shall give written notice of the requirements of section 185L to the defendant's counsel or solicitor, or to the defendant if he or she is not represented.

Notice of alibi in summary trials

185L (1) A defendant who is proceeded against summarily shall not, without the leave of the Court, adduce evidence in support of an alibi unless, within 14 days of entering a plea of not guilty to the charge, the defendant has given notice of the particulars of the alibi.

(2) Without prejudice to subsection (1), the defendant shall not without the leave of the Court call any other person to give evidence in support of an alibi unless:

(a) the notice under subsection (1) includes the name and address of the witness or, if the name and address is not known to the defendant when the notice is given, any information in the defendant's possession that might be of material assistance in finding that witness;

(b) if the name or the address is not included in the notice, or the Court is satisfied that before giving the notice the defendant took all reasonable steps to ensure that the name and address would be ascertained, and that after giving the notice the defendant continued to take all such steps;

(c) if the name or the address is not included in the notice, but the defendant subsequently discovers the name or address or receives other information that might be of material assistance in finding the witness, the defendant forthwith

gives notice of the name, address, or other information, as the case may require; or

(d) if the defendant is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, the defendant forthwith gives notice of any such information which is in his or her possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) Any evidence tendered to disprove an alibi may, subject to any directions by the Court as to the time when it is to be given, be given before or after evidence is given in support of the alibi.

(4) Any notice purporting to be given under this section on behalf of the defendant by counsel or solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the defendant.

(5) A notice under subsection (1) shall either be given in Court or be given in writing to the prosecutor; and a notice under subsection (2)(c) or (d) shall be given in writing to the prosecutor.

(6) In this section, ``evidence in support of an alibi'' means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time, the defendant was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Disclosure of expert evidence by defendant

185M (1) A defendant shall disclose to the prosecutor at least 14 days before the day fixed for the defendant's trial particulars of the opinion of an expert that the defendant proposes to adduce as evidence at the trial.

(2) This section applies to summary trials and to trials on indictment."

Notice of appeal

7 Section 116 of the principal Act is amended in subsection (1A) by deleting "or section 115D" and substituting the following:

", 115D or 185I".

Repeal

8 Section 24A of the Official Information Act 1982 is repealed.

Appendix A
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