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NEW SOUTH WALES  
LAW REFORM COMMISSION

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## CRIMINAL PROCEDURE



### PROCEDURE FROM CHARGE TO TRIAL: A GENERAL PROPOSAL FOR REFORM

A DISCUSSION PAPER  
FOR COMMUNITY CONSULTATION

DP13  
1986



NEW SOUTH WALES  
LAW REFORM COMMISSION

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## Participants

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

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

### Research Director:

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William J. Tearle (from 18 November 1985)

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PROCEDURE FROM CHARGE TO TRIAL:  
A GENERAL PROPOSAL FOR REFORM

PART ONE

INTRODUCTION

1. This Commission has a reference to inquire into and review the law and practice relating to criminal procedure. This reference was prompted in part by concern about and criticism of undue delay, inefficiency and excessive cost in the administration of the criminal justice system in New South Wales. These problems have been encountered in various degrees in recent times in most common law jurisdictions both in Australia and elsewhere. Whilst they are in themselves matters for concern, their most disturbing consequence is that they threaten to affect adversely the overall standard of the administration of justice. In short, delay, inefficiency and excessive costs cause injustice.
  
2. The Commission has prepared a substantial Discussion Paper on that phase of the criminal process which covers the time at which an accused person is charged with an alleged offence up to the time at which the accused person is, or may be, brought before a court for trial. The Discussion Paper examines the following areas and makes tentative and sometimes alternative proposals for reform in each area:
  - \* time limits on the prosecution of criminal offences;
  - \* disclosure by the prosecution;
  - \* disclosure by the defence;
  - \* the determination of jurisdiction in cases where an alleged offence is capable of being tried either on indictment or summarily;

- \* committal proceedings;
- \* listing for trial;
- \* pre-trial conferences and hearings;
- \* the "no bill" procedure;
- \* plea bargaining;
- \* pre-trial publicity in criminal cases; and
- \* the nature and function of the agency responsible for the prosecution of criminal cases.

3. The Discussion Paper tends to take the approach of dealing with the various topics independently of one another and makes tentative proposals for reform in the specific areas covered. The present paper draws together certain of the proposals put forward in the individual chapters of the Discussion Paper and proposes an integrated scheme of procedure to be followed in criminal cases from the time the accused person is charged with an offence until the time of trial. It covers proceedings in all courts but concentrates on those cases which will ultimately be heard in the higher courts since it is apparent that the problems of delay and excessive cost are more serious in those cases.

4. As with the more substantial Discussion Paper on specific issues, this paper is published for the purpose of obtaining responses from people and organisations having a particular interest in the subject of pre-trial procedure in criminal cases. The Commission is acutely conscious of

the fact that there will be differing views held on many of the proposals contained in this paper. We stress that the proposals are tentative and welcome submissions as to whether they are sound in principle and valuable in practice.

5. Reform of pre-trial procedure in criminal cases offers the best prospect for reducing the incidence of delay, inefficiency and the consequent injustice which may result. Whilst the Commission is concerned with the problem of delay, the Discussion Paper also examines whether current procedure, and possible reforms of that procedure, fulfil those principles which we consider should be fundamental features of a criminal justice system, namely:

- \* fairness;
- \* efficiency;
- \* consistency;
- \* accountability; and
- \* public acceptability.

6. Whilst we regard adherence to these general principles as being of paramount importance, we nevertheless think it appropriate to draw attention to some of the many practical problems caused by inordinate delay in the criminal justice system:

- \* delay is generally expensive and wasteful of resources;

- \* it results in the loss of and a deterioration in the reliability of evidence;
- \* it causes a reduction in public respect for the criminal justice system;
- \* there is prolonged anxiety for the victims of crimes;
- \* it causes additional delays in restitution and the payment of compensation to victims of crime;
- \* there is increased inconvenience to witnesses;
- \* there is prolonged anxiety for accused people;
- \* it results in gaol overcrowding caused by increased numbers of people being held in custody for long periods pending trial, and, conversely, the granting of bail to people accused of serious offences are granted bail to avoid gaol overcrowding;
- \* while time spent in custody pending trial is usually "credited" to those who are convicted, for those acquitted there is usually no compensation;
- \* there is a higher incidence of absconding on bail;
- \* it results in a greater reliance on disposition of cases by plea and charge bargaining;
- \* there are increased difficulties in sentencing convicted people; and
- \* there is a diminished likelihood of offender rehabilitation and a diminution in the deterrent effect of the criminal justice system.

7. These are some of the problems which are sought to be overcome by the proposals in this paper. However, it should not be overlooked that there are other equally important problems apart from those caused by delay which have also been addressed in our work on pre-trial procedure. These include:

- \* the lack of effective controls to ensure the expeditious administration of justice;

- \* the absence of comprehensive rules governing the practice of disclosure by the prosecution;
- \* the lack of any formal procedure requiring or facilitating disclosure by the defence;
- \* uncertainty and ambiguity in determining the mode of trial;
- \* the failure of committal proceedings to serve efficiently and adequately the various purposes for which they are intended;
- \* the need for an efficient and reliable procedure for listing criminal cases;
- \* the absence of formal pre-trial procedures designed to reduce the length of trials and ensure effective preparation for trial;
- \* the lack of any formal regulation of the procedure for determining that "no bill" should be found;
- \* the lack of any formal regulation of plea bargaining practices;
- \* the risk that the publication of prejudicial material will prevent a fair trial being conducted;
- \* the organisation of and the interrelationship between prosecuting authorities.

The proposals contained in this general scheme for reform of procedures before trial are designed to meet these problems.

8. We are conscious of the fact that a massive increase in the various resources required for the administration of justice is one means of solving the problems we have identified. However, our emphasis has been to develop more efficient procedures which make more effective use of available resources.

9. After the completion of our research on this aspect of criminal procedure, the Attorney General announced his intention to introduce into Parliament two related items of legislation which would have a significant impact on the procedures covered by this paper. The Director of Public Prosecutions Act 1986 establishes an independent prosecuting authority to be known as the Director of Public Prosecutions. The Criminal Procedure Act 1986 provides for the establishment of a Criminal Listing Director who will have the responsibility for listing criminal proceedings before the higher courts. Both of these initiatives are consistent with our proposals for reform of pre-trial procedure in criminal cases and, indeed, are features of the general scheme that we have put forward in this paper.
10. Whilst this legislation has effectively introduced two of those reforms which the Commission would have recommended in this part of its reference on criminal procedure, there are many other important initiatives put forward in this paper which remain to be considered and which will to a large extent determine how effective the legislation already introduced proves to be. As we have said, we expect these tentative recommendations for reform to be the subject of debate and we would welcome contributions from any person who wishes to comment upon any of these proposals. Similarly, we would appreciate suggestions relevant to this phase of criminal procedure which are not covered in this paper.

11. Our present intention is to complete our Report on this part of the reference by July 1987. Accordingly submissions should be received no later than 30 April 1987. There is a comment sheet at the back of this paper for the convenience of those who wish to express a view about our proposals.

Keith Mason, Q.C.  
Chairman

Paul Byrne  
Commissioner in Charge  
Criminal Procedure Reference

All submissions and inquiries should be addressed to:

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PROCEDURE FROM CHARGE TO TRIAL: A  
GENERAL PROPOSAL FOR REFORM

PART TWO

AN OUTLINE OF A PROPOSED PROCEDURE BETWEEN  
THE TIME A PERSON IS CHARGED AND THE TIME OF  
APPEARANCE IN COURT FOR TRIAL

## THE FUNCTIONS OF THE POLICE AND THE PROSECUTING AUTHORITY

### An Independent Prosecuting Authority

1. The decision to prosecute a person who has been charged with a criminal offence should, for all criminal cases, be the responsibility of a single independent prosecuting authority, which should in turn be ultimately responsible to the Attorney General as the Minister responsible for the administration of justice in an elected government.

### Relationship Between Prosecuting Authority and Police

2. The investigation and charging of people with criminal offences should continue to be the responsibility of the police who should be able to consult the prosecuting authority before discharging those functions. The prosecuting authority should be able to direct the police whether or not to charge a person with any criminal offence.

### The Powers of the Prosecuting Authority

3. The functions of the prosecuting authority should include the power to decide whether or not to prosecute, whether to grant indemnity from prosecution, what charge or charges should be tried and to nominate, subject to the consent of the accused person and the court in certain circumstances, the court in which the charge or charges should be heard (the prospective court of trial). The

prosecuting authority should also have the power to take charge of any prosecution commenced by a private citizen and either continue or abandon that prosecution.

The Criteria for the Decision to Prosecute

4. As a minimum standard, the prosecuting authority should not make a decision to prosecute unless it is of the opinion firstly, that there is evidence capable of proving each of the elements of the offence charged and, secondly, that the weight which a court acting reasonably could attach to that evidence is sufficient to satisfy it of the guilt of the accused person.

Policy of the Prosecuting Authority to be Made Public

5. The prosecuting authority should, subject to the minimum standard set out in para 4, establish the criteria which are to govern the decision to prosecute, together with guidelines for the making of other decisions in the prosecution process. The policy of the prosecuting authority thus formulated should be set out in a public document. It should be periodically reviewed and any changes which follow such a review should also be made public.

Delegation of the Powers of the Prosecuting Authority

6. The prosecuting authority should be able to delegate its power to make the decision to prosecute in the case of summary offences, indictable offences which are capable of being dealt with summarily and offences which are triable

either way, but not in the case of offences triable only on indictment. It would be expected that the delegation of the power to make decisions regarding such prosecutions would be made to the police and to certain public authorities currently responsible for the prosecution of offences of a regulatory kind. The exercise of any delegated power should be subject to review by the prosecuting authority.

Cases Where Consent for Prosecution is Required

7. The range of offences for which the prosecuting authority has the responsibility for making the decision to prosecute should not be restricted by the need to obtain the official consent of some other person or organisation. Where the law currently requires such consent, it should be modified to provide that the prosecuting authority is obliged to consult the relevant person or organisation before making a decision to prosecute but is not required to obtain consent for the prosecution.

Prosecutions by Private Citizens

8. Subject to the powers of the prosecuting authority in para 3 above, and subject to current requirements of official consent for the prosecution of certain offences, a private citizen should retain the right to prosecute a charge which may be heard by the Local Courts. In respect of cases to be dealt with by the higher courts, the right of the private citizen to prosecute should effectively remain

as it is now and be limited to making representations to the prosecuting authority that a prosecution should be instituted in a particular case. Applications of this kind should be determined in accordance with the guidelines for decision making published by the prosecuting authority.

#### PROCEDURE FOLLOWING ARREST AND BAIL DETERMINATION

##### Powers of Arrest Unchanged

9. We do not at this stage of the reference propose any change to the law and practice of arrest and bail. A person may be arrested either with or without a warrant and taken into custody but an arrest should not be made if proceeding by way of summons is reasonably available. As is the current procedure, the police should initially determine the question of bail for any person who is arrested and charged with a criminal offence.

##### Procedure Where Bail is Refused by the Police

10. The current law which requires the police to bring a person who is refused bail by them before a Local Court as soon as is reasonably possible after his or her arrest should be retained. The Local Court should satisfy itself that there is reasonable cause for the decision to charge and either confirm or change the bail decision made by the arresting police. At this initial appearance, the accused person should be ordered to appear again before the Local Court in seven days' time. By the time of that

appearance, the decision as to whether to prosecute, as described in para 12, should have been made and the Local Court advised of that decision. For the purpose of this procedure, a person who has been granted bail on conditions which are not met should be regarded as having been refused bail.

Procedure Where the Accused Person is Released on Bail

11. A person who has been arrested and charged and then released on bail by the police should be required to appear before the Local Court on the first day on which the court sits after the expiration of seven days from the date of the charge. At that first appearance, the decision to prosecute, as described in para 12, should have been made and the Local Court should have been advised of that decision.

Notification of Decision to Prosecute

12. Where a person has been arrested and charged, the prosecuting authority or its delegate should decide whether or not to prosecute within seven days of the time of the charge. If there is a decision to prosecute in one of the higher courts, the prosecuting authority should notify the prospective court of trial and the Local Court in writing of the decision to prosecute within seven days of the date on which the accused person was charged. If there is a decision to prosecute in the Local Court, the Local Court alone need be notified of the decision within the same period of seven days.

Procedure on Appearance Before the Local Court

13. If there has been no decision to prosecute within seven days or a decision not to prosecute, the accused person should, on his or her appearance before the Local Court, be immediately released from custody or exempted from any further obligations under a relevant bail undertaking. If there is a decision to prosecute in a higher court, the accused person should be required to appear in the prospective court of trial. In the case of indictable offences capable of being dealt with summarily and offences triable either way, if there is a decision to prosecute in the Local Court then the Local Court should, if the matter is ready to proceed, immediately conduct a mode of trial hearing. If it is not ready to proceed, the accused person should be required to appear before the Local Court again for a mode of trial hearing. In the case of summary offences, once the Local Court has been notified of the decision to prosecute, it may proceed to hear the matter immediately or require the accused person to appear before the Local Court at a date in the future. Where the case is to be disposed of by the Local Court, the successive procedures, namely the appearance of the accused person before the court, the notification of the decision to prosecute, the mode of trial hearing and the determination of the case, can all occur immediately following one another. This would be expected to occur where there is a plea of guilty to a straightforward charge of an indictable offence capable of being dealt with summarily.

Proceeding by Summons

14. A person who is proceeded against by summons should be summoned to appear in the prospective court of trial. It would normally be expected that, where a summons is issued, the agency responsible for making the decision to prosecute has already made that decision. In that case, the application for the issue of the summons should be accompanied by a notification to the prospective court of trial of the decision to prosecute. In any event, the notification should be given to the court before the date on which the accused person is summoned to appear.

Right to Legal Representation to be Advised

15. An accused person who appears before a Local Court under the procedure outlined in para 10 or para 11, or before the prospective court of trial under the procedures outlined in para 14, should be advised by the court or in the summons of the right to be represented by a lawyer and of the right to make an application for legal aid.

INDICTABLE OFFENCES TO BE DEALT WITH BY A HIGHER COURT

Police to Charge and Determine Bail

16. The police should retain responsibility for charging people with indictable offences. Before making a decision to charge, the police should be able to consult with or obtain advice from the prosecuting authority. Following the charging of an accused person, the procedures outlined in paras 9-14 should apply. That is, the police should

initially determine the question of bail and bring a person held in custody before a Local Court at the earliest reasonable opportunity.

Police to Notify the Prosecuting Authority

17. When a person has been charged with an indictable offence which is not capable of being dealt with summarily, or the charge is one in respect of which the police have not been delegated the power to make the decision to prosecute, the police should immediately notify the prosecuting authority and provide it with all the relevant information and material that is within their knowledge or possession.

Abolition of Committal Proceedings

18. Committal proceedings as they are currently conducted should be abolished and replaced by the procedure outlined in this and the following paragraphs. If the prosecuting authority decides that there is to be a prosecution in a higher court, it should, within seven days of the charge being laid, give written notification to the Local Court and the prospective court of trial of the decision. The prosecuting authority should also advise the agency responsible for listing criminal cases in the higher courts of the decision to prosecute. The decision to prosecute should by itself be sufficient to bring a prosecution before the courts but in the case of prosecutions in the higher courts, that decision should be subject to challenge and review in the manner described in paras 20-23.

Complete Disclosure by the Prosecution

19. If there is a decision to prosecute, the prosecuting authority should immediately file in court a copy of the statements of all persons who may be able to give relevant testimony, together with a copy of relevant documentary exhibits and information regarding access to material exhibits, indicating those intended to be called in the prosecution case at the trial. Unless the court orders that the statements or the names of witnesses be withheld or that access to exhibits be restricted on the ground that it is in the public interest to do so, or unless the accused person makes an informed and deliberate waiver of the right to disclosure, the prospective court of trial should ensure that the accused person is provided with a copy of all the statements which have been filed, together with a copy of intended documentary exhibits and information regarding access to material exhibits. (See also paras 68 and 69.)

A Right to Challenge the Decision to Prosecute

20. Under the current system of criminal procedure, the prosecution is required to establish at committal proceedings that there is a case for trial in a higher court. An accused person is thus given the opportunity at committal proceedings to demonstrate, by revealing the inadequacy of the prosecution case, that he or she should not have to stand trial. However, because a committal is not necessarily followed by a trial, and a discharge at committal proceedings is not a bar to subsequent

prosecution in the higher courts, this opportunity occurs before the effective decision to prosecute is made. It should be replaced by creating a right in the accused person to challenge the decision to prosecute after it is actually made. The accused person will thereby have a means of 'testing' the prosecution case. Depending on the circumstances of the case, this challenge may be combined with pre-trial hearings described at paras 59-63. If this is to occur, it is desirable that the judge who presides at the pre-trial hearing should also preside at the trial.

Grounds for Challenging the Decision to Prosecute

21. A person who is to be prosecuted in the higher courts should have a general right to challenge the decision to prosecute by making an application to the prospective court of trial. Where there is such a challenge, there should be an onus on the prosecution to establish the justification for the decision to prosecute but that onus may be discharged by relying on the papers that have been filed in court. The challenge to the decision to prosecute may be in the nature of a submission of no case to answer based on the material appearing in the relevant papers filed in the court, or it may be in the form of a special plea such as lack of jurisdiction, autrefois convict or autrefois acquit. The court hearing such a challenge should have the power to allow witnesses to be called or produced for cross-examination on their written statements in an appropriate case, although before doing

so the court would need to be satisfied that the circumstances of the case warrant such a course being taken.

Ground for Upholding a Challenge

22. A court hearing a challenge to the decision to prosecute should uphold it if it is of the opinion either that there is a legal bar to the prosecution or that the evidence is insufficient to warrant the accused person being tried in a higher court. Before making a decision of the latter kind, the court should consider, firstly, whether there is evidence capable of proving each of the elements of the offence charged beyond reasonable doubt and, secondly, whether the weight which a jury could reasonably attach to that evidence is sufficient to satisfy it of the guilt of the accused person.

Successful Challenge a Bar to Further Prosecution

23. If the court upholds a challenge to the decision to prosecute, it should order that the case be dismissed. Subject to the next paragraph, such an order should have the same consequences as the acquittal of the accused person at trial. We invite submissions on the question of whether the prosecuting authority should have the right to appeal against a judgment upholding a challenge to the decision to prosecute on the ground that it is erroneous. This question will also need to be addressed when the Commission examines the subject of appeals under the terms of its reference on criminal procedure.

Additional Evidence May Justify Recommencing Prosecution

24. The judgment of the court upholding a challenge to the decision to prosecute may be set aside by that court and the prosecution begun again where the prosecuting authority obtains the leave of the court to do so. Leave should only be granted where the existence of additional evidence can be demonstrated by comparing the new evidence with that contained in the papers filed in the court at the time of the original prosecution and the totality of the evidence justifies recommencing the prosecution. The failure to produce the additional evidence in the original proceedings would need to be explained to the satisfaction of the court.

Legal Aid to be Available from the Time of Charge

25. Since the effectiveness of any procedure before trial is largely dependent upon adequate legal representation being available, a person accused of an offence which is to be dealt with in the higher courts should be entitled, subject to existing guidelines for the availability of legal assistance, to such assistance from the time he or she is charged. Whilst this would obviously increase the legal aid budget, it would ensure that legal representation is available when it is required, thereby overcoming one of the most serious problems affecting the current procedure before a criminal trial. It should be borne in mind that the implementation of our proposal to

abolish committal proceedings would result in a significant reduction in the overall costs of the administration of justice.

The Right to Seek a Directed Acquittal to be Retained

26. The right of an accused person to make an application for a directed verdict of acquittal at any stage during the trial proceedings should remain available notwithstanding the fact that a previous challenge to the decision to prosecute has not been upheld.

TIME LIMITS ON THE PROSECUTION OF INDICTABLE OFFENCES

Specification of Time Limits

27. There should be prescribed time limits within which the hearing of indictable charges must be commenced in the higher courts. For accused persons held in custody pending trial, there should be a maximum of six months between the time of charge and trial. For those on bail, the maximum period should be 18 months. (For summary offences see para 46.) Where the hearing of the charge has not commenced within the prescribed period, the court should, unless there is a reasonable explanation for the delay, dismiss the case.

Calculation of Time Limits

28. The time periods specified should commence to run from the time the accused person is charged. Where a person has spent part of the time pending trial on bail and part in

custody on remand, each day spent in custody should count for three days for the purpose of calculating the time limit within which the trial must be commenced.

The Power of the Court to Allow Exemptions

29. In order to avoid the potential for injustice which may be created by the imposition of inflexible time constraints, the prospective court of trial should have the power to permit exemptions from the time limits in those cases where there is a reasonable explanation for the failure to meet the time limits. Such exemptions may be granted on the application of the prosecution or the defence.

Delayed Introduction of Prescribed Time Limits

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

Power to Grant Stay of Proceedings

31. The power of the court to grant an indefinite stay in a criminal case on the ground that permitting the prosecution to proceed would amount to an abuse of the court's process should be confirmed. With the implementation of rules specifying time limits, it would be expected that the court would only exercise the power

to grant a stay in a case involving unreasonable delay between the time of the discovery of the offence and the time of charging the accused person.

INDICTABLE OFFENCES TRIABLE SUMMARILY AND OFFENCES  
TRIABLE EITHER WAY: THE MODE OF TRIAL HEARING

Range of Offences Affected

32. This category of offences includes those indictable offences triable summarily with the consent of the accused person and the concurrence of the presiding magistrate (eg Crimes Act s476), those indictable offences triable summarily irrespective of the consent of the accused person (eg Crimes Act s501) and those criminal offences which may, according to the legislation which creates them, be prosecuted either summarily or on indictment (eg offences related to drugs, firearms and listening devices).

Disclosure by the Prosecution in the Local Court

33. Where the prosecuting authority or its delegate has nominated the Local Court as the prospective court of trial, the prosecuting authority should be required, as it is under the current law, to provide the accused person with a written statement of the charge. It should, in addition, be required to give the accused person a brief outline of the facts alleged in the form which is currently given to the police prosecutor by the investigating police for the purpose of a plea of guilty. Where the accused person does not indicate an intention to plead guilty and makes a request to the court for complete

disclosure of the prosecution case, the statements of all witnesses whom the prosecution proposes to call should be filed in court, together with any other relevant information or materials necessary to make full disclosure. (See para 19.) These statements, materials and information should then be provided to the accused person unless the prosecution can satisfy the court that they should be withheld, in whole or in part, in the public interest. (See also paras 68 and 69.)

The Mode of Trial Hearing

34. After the accused person has had an opportunity to consider the case to be presented by the prosecution, but before he or she is required to plead to the charge, there should be a short hearing in the Local Court to determine the mode of trial. This hearing should be conducted in the presence of the accused person and the prosecuting authority or its delegate as soon as is reasonably practicable after the decision to prosecute has been made.

Criminal History of the Accused Person Not to be Considered

35. In determining whether a case may properly be disposed of summarily, the Local Court should not be informed of the criminal history of the accused person since this is not a factor which may be used to increase an otherwise appropriate sentence. The accused person's prior record should be taken into account by the prosecuting authority or its delegate in determining the prospective court of trial.

Local Court May Order Trial by Jury of an Indictable Offence

36. Since some indictable offences capable of being prosecuted summarily without the consent of the accused person are, because of their subject matter or the consequences of conviction for the accused person, so serious that the accused person should not be denied the right to trial by jury, a magistrate conducting a mode of trial hearing should have the power to order that any indictable offence should be heard before a judge and jury, but only where the accused person consents to such an order. This proposal is consistent with the recommendations made by this Commission in its Report The Jury in a Criminal Trial.

Consent of the Prosecuting Authority Required

37. One of the practical effects of giving the prosecuting authority the power to nominate the prospective court of trial would be that, in indictable cases where the availability of summary jurisdiction is currently dependent upon the consent of only the accused person and the presiding magistrate, the consent of the prosecuting authority or its delegate to summary jurisdiction would also be required.

Disposition Following Grant of Summary Jurisdiction

38. In a case where both parties and the court agree that the matter should be heard summarily, the case may be disposed of immediately following the mode of trial hearing, particularly if there is a plea of guilty to the charge.

Where summary jurisdiction is granted after a mode of trial hearing but the matter is not ready to proceed immediately, it should be listed for hearing in the Local Court after consultation with the parties to determine a suitable date for hearing.

Refusal of Summary Jurisdiction

39. Where summary jurisdiction is refused after a mode of trial hearing, the matter should be transferred to the appropriate higher court and referred to the prosecuting authority to consider whether there should be a prosecution in a higher court. The Local Court should formally notify the relevant higher court that the matter has been transferred to it and referred to the prosecuting authority. The higher court should then acquire jurisdiction in the case.

The Power of the Prosecuting Authority to Refer Cases Back

40. In a case where the accused person has indicated a willingness to have the matter dealt with summarily, but summary jurisdiction has been refused, the prosecuting authority should have the power, to be exercised in exceptional cases, to refer the matter back to the Local Court to be disposed of by a different magistrate. If the accused person does not consent to having the matter dealt with summarily, there should be no power in the prosecuting authority to refer the case back to the Local Court. This proposal would mean that the direction of the prosecuting authority as to the mode of trial, where it is

consistent with the view of the accused person, should prevail over the contrary decision of the magistrate who conducted the mode of trial hearing. It is designed to overcome the difficulty created where a magistrate orders a jury trial in a case which is inappropriate for trial before a judge and jury.

Withdrawing Election on the Mode of Trial

41. Where a case which may be heard either in the Local Court or the higher courts has been listed for hearing in the prospective court of trial after a mode of trial hearing, neither the accused person nor the prosecuting authority should be entitled to alter the election made as to mode of trial unless the prospective court of trial grants leave to the party making such an application.

Time Limits for Offences Triable Either Way

42. If an offence in this category is to be tried before the Local Court, it should be regarded as a summary offence for the purpose of calculating the time limit within which the trial must commence. If such an offence is to be tried in the higher courts, it should be regarded for this purpose as an indictable offence. However, the relevant time period should commence at the conclusion of the mode of trial hearing at which the prospective court of trial is determined.

## SUMMARY OFFENCES

### Current Procedure Generally Unchanged

43. Since it is likely that the powers of the prosecution authority will be delegated in relation to the prosecution of summary offences, a person accused of a summary offence will normally be charged by the police and the case prosecuted in the Local Court by the police or another agency to whom that function has been delegated. Where this occurs, the decision to charge and the decision to prosecute will, for practical purposes, be the same. Once the Local Court is notified of the decision to prosecute, the court should be responsible for listing the case.

### Disclosure by the Prosecution in Summary Offences

44. Where the prosecuting authority or its delegate has nominated the Local Court as the prospective court of trial, the prosecuting authority should be required, as it is under the current law, to provide the accused person with a written statement of the charge. It should, in addition, be required to give the accused person a brief outline of the facts alleged in the form which is currently given to the police prosecutor by the investigating police for the purpose of a plea of guilty. Where the accused person makes a request to the court for complete disclosure of the prosecution case, the statements of all witnesses whom the prosecution proposes to call should be filed in court, together with any other relevant information or materials necessary to make full disclosure. (See para 19.) These statements, materials

and information should then be provided to the accused person unless the prosecution can satisfy the court that they should be withheld, on whole or in part, in the public interest. (See also paras 68 and 69.)

Summary Cases May be Referred to the Prosecuting Authority

45. In order to ensure that the policy of the prosecuting authority is implemented by those agencies to whom its powers have been delegated, the relevant agency, the accused person and the Local Court should have the power to refer a summary prosecution to the prosecuting authority for a determination as to whether the prosecution should be continued.

**TIME LIMITS ON THE PROSECUTION OF SUMMARY OFFENCES**

Specification of Time Limits

46. There should be prescribed time limits within which the hearing of summary offences must be commenced. Where a person accused of a summary offence is detained in custody pending the disposition of the case, the trial should commence within two months of the date on which the accused person was charged. Where a person accused of a summary offence is released on bail, the trial of the case should commence within six months of the date on which the accused person was charged. (For indictable offences see para 27.) Where the hearing of the charge has not commenced within the prescribed period, the court should, unless there is a reasonable explanation for the delay, dismiss the case.

Calculation of Time Limits

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

The Power of the Court to Allow Exemptions

48. In order to avoid the potential for injustice which may be created by the imposition of inflexible time constraints, the prospective court of trial should have the power to permit exemptions from the time limits in those cases where there is a reasonable explanation for the failure to meet the time limits. Such exemptions may be granted on the application of the prosecution or the defence.

Delayed Introduction of Prescribed Time Limits

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

THE "NO BILL" PROCEDURE

The Power to Find "No Bill"

50. The Attorney General should retain the power to direct that a "no bill" be found or that no further proceedings be taken against a person who has been charged with a

criminal offence. For present purposes, we use the expression "no bill" to refer to both situations. The power to find "no bill" may be delegated to the prosecuting authority but should not be further delegated. The power to "no bill" may be exercised on the initiative of the Attorney General or the prosecuting authority or it may follow an application made by the accused person.

"No Bill" Certificate to be Filed in Court

51. If a decision to "no bill" is made, it should be reduced to writing, signed by the Attorney General or the prosecuting authority and filed in the prospective court of trial.

"No Bill" to be a Bar to Further Prosecution

52. The filing in court of a "no bill" certificate should act as a bar to any further prosecution unless the court grants leave to recommence the prosecution upon being satisfied by the prosecuting authority that there is additional evidence available which justifies recommencing the prosecution.

"No Bill" and Immunity from Prosecution

53. Where an accused person has been granted immunity from prosecution on the condition that he or she undertake to follow an agreed course of action, and a "no bill" has been filed in consequence of that agreement, the prosecution may be commenced again if the person granted

such a conditional "no bill" does not comply with the terms of the agreement. The accused person would have the right to challenge the propriety of the prosecution as a pre-trial motion. (See paras 61-63 below.)

The Publication of Reasons for "No Bill"

54. The reasons for a decision to enter a "no bill" should be made public unless it is contrary to the public interest to do so. The publication of reasons should be a matter for the discretion of the Attorney General and the prosecuting authority. If, for example, the publication of specific reasons would jeopardise a major current police investigation or create the risk of prejudice in a pending trial or cause unreasonable distress to a member of the public, it would be expected that they would not be published.

Notification of Reasons to Victims and Investigating Police

55. Where there is a clearly recognisable victim of an incident which results in a criminal charge being laid, and there is a subsequent decision to file a "no bill", the victim should be advised of the reasons for the decision unless there is a compelling reason not to disclose this information. The investigating police should also be advised of the reasons for a decision to "no bill" in order to assist them in the investigation and prosecution of similar cases in the future.

Reasons for Refusing "No Bill" Application

56. The decision of the prosecuting authority or of the Attorney General that a prosecution should proceed to trial is one which should be made in accordance with the current policy of the prosecuting authority. If that policy is made public, there should generally be no need to publish the reasons for the decision to prosecute in an individual case, particularly where the publication of the reasons for prosecuting a particular case before it is heard by a court would be likely to cause prejudice to the accused person.

"No Bill" Applications Not to be a Delaying Tactic

57. The mere fact that there has been an application for "no bill" made by the accused person to the Attorney General and no reply has been received should not of itself preclude the trial from proceeding on the day on which it is listed for hearing in a higher court. The court of trial should be entitled to adjourn the hearing of the case on the ground that a "no bill" application has been made by the accused person. In deciding whether or not to adjourn the case, the court should determine whether the application is made in good faith or is an attempt to delay the commencement of the trial.

PRE-TRIAL PROCEDURE

Jurisdiction

58. From the time that the prospective court of trial is notified of the decision to prosecute, the court should have jurisdiction in the matter and the power to make such

preliminary orders as are necessary for the convenient disposal of the case.

Order of Proceedings Before Trial

59. After the prospective court of trial has been determined, the accused person should be asked on his or her first appearance before that court to plead to the charge. If there is a plea of guilty, the court may deal with the matter immediately if it is ready to proceed, or arrange for it to be listed on a future date. If there is a plea of not guilty, the matter should be listed for mention on a suitable date. Prior to that date, the prosecution should be required to file in court all relevant materials necessary to provide complete disclosure, together with a notice of the formal charge. At the mention, the accused person and the prosecution should be asked if there are to be any pre-trial hearings or a challenge to the decision to prosecute. If there are, a date should be fixed for the hearing of these proceedings. If not, the date on which the trial is to commence should be fixed.

Notification of Formal Charge

60. For prosecutions conducted in the higher courts, a notice of the formal charge (in current terminology the indictment) which the prosecution proposes to present against the accused person at trial should be filed in the prospective court of trial at a time fixed by the court in accordance with the procedure set out in para 59. The formal charge should disclose with sufficient

particularity the specific allegation made against the accused person and any intended co-accused. Subsequent amendments to the formal charge should only be permitted if they are approved by the court. The early filing of the formal charge will enable the court to deal before trial with applications based on the terms and nature of the formal charge. The archaic form of indictments should be abandoned.

#### Pre-Trial Hearings

61. All courts exercising criminal jurisdiction should have the power to order the attendance of the legal representatives of the accused person and the prosecution at pre-trial hearings. Such hearings should be conducted wherever there is a prospect that they may reduce the duration of the trial proceedings and should, if possible, be heard by the judge who is to preside at the trial. Pre-trial hearings should be used to determine whether certain witnesses are required to be called, and to decide matters of law which can be conveniently determined in advance of the trial. Whilst the accused person and his or her lawyer may be compelled to attend a pre-trial hearing, there should be no power, subject to paras 72 and 73 below, to compel the accused person to make positive disclosures regarding evidence which will be called by the defence. The court should be entitled to compel the accused person to call any evidence relevant to the question of admissibility of evidence dealt with at a pre-trial hearing.

Court to Control Conduct of Pre-Trial Hearings

62. Pre-trial hearings may be ordered by the court of its own initiative or on the application of the parties. In order to assist the orderly conduct of pre-trial proceedings, the prospective court of trial should have a general discretionary power to specify a time on or before which pre-trial applications and motions must be made by the parties. An application made after the time specified should only be heard if the leave of the court is first obtained.

Pre-Trial Undertakings

63. Any undertaking made by the accused person or the prosecuting authority at a pre-trial hearing should be able to be withdrawn at trial unless the trial judge is of the view that the intended withdrawal amounts to an abuse of the court's process.

The Need for Adequate Preparation

64. The defence and prosecution lawyers who are to appear in the trial will need to be briefed sufficiently far in advance of the date of hearing to ensure that pre-trial proceedings are of benefit. Advance briefing must occur in order to allow adequate preparation for the purpose of determining in the first place whether there should be a pre-trial hearing and secondly to enable an effective contribution to be made at such a hearing.

Pre-Trial Proceedings Before Court Officials

65. We raise for consideration the question of whether preliminary proceedings in the higher criminal courts, such as first appearances by accused people, mentions to list or confirm a date for trial and pre-trial hearings, should be capable of being conducted by an officer of the court of subordinate ranking to a judge. This officer should have the power to refer to a judge for determination any matter of sufficient importance or difficulty. The Commission is divided in its views on this question and would welcome submissions as to the desirability and practicality of the proposal.

Pre-Trial Decisions Not Binding on Trial Court

66. Decisions made by a judge at a pre-trial hearing should not be binding upon the judge presiding at the trial, since the relevant circumstances may have changed. In order to reduce the likelihood of this occurring and the possibility of conflicting decisions, pre-trial hearings should be held as close as is reasonably practicable to the date of the trial and should ideally be conducted by the judge who is to preside at the trial. We raise for consideration the question whether a decision made at a pre-trial hearing to reject evidence should be effectively binding on the court of trial by providing that the party seeking to tender that evidence should, because of the pre-trial decision, be prohibited from doing so.

Pre-Trial Decisions May be Reviewed on Appeal

67. We raise for consideration the question whether, where a court conducting a pre-trial hearing makes a decision or order which substantially affects the presentation of the case for the prosecution or the defence, the party disadvantaged by the decision or order should have the right to have it reviewed by a court of appropriate jurisdiction.

DISCLOSURE BY THE PROSECUTION

Disclosure by the Prosecution

68. In addition to the obligation established by the procedures described in paras 19 and 44, there should be a continuing obligation upon the prosecuting authority to disclose to the accused person all relevant information known to it or material in its possession, irrespective of its admissibility at trial and whether it is intended to be called at the trial or not. The court should have the power to ensure that this obligation has been fulfilled by making appropriate inquiries of the prosecuting authority.

Verification of Disclosure by the Prosecution

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

Sanctions for Failure to Disclose

70. If the prosecuting authority does not make the disclosure required, the court may of its own initiative or on the application of the accused person make one or more of the following types of order:
- (i) an order requiring the prosecuting authority to comply with its obligations regarding disclosure;
  - (ii) an order granting the accused person an adjournment;
  - (iii) an order prohibiting the prosecuting authority from calling specific evidence at the trial;
  - (iv) an order dismissing the charge against the accused person.

DISCLOSURE BY THE ACCUSED PERSON

Defence Disclosure Generally

71. In order to clarify the issues at the trial, the accused person should be invited to nominate before the trial the title and the general nature of any defence upon which he or she intends to rely and to give notice of any matters sought to be proved by the prosecution which are not in dispute. Subject to the next paragraph, the accused person should not be compelled to disclose the names and addresses of the witnesses intended to be called. The practical effect of this proposal would be to change the current law requiring an accused person to disclose particulars of a defence of alibi. This change is suggested on the basis that alibi evidence is not sufficiently different from other forms of defence to

justify a special rule of disclosure. Alternatively, if disclosure is to be mandatory, it may be thought that there should be disclosure of defences other than alibi. The views of the Commission are divided on this issue and submissions would be welcome.

Defence Disclosure of Technical Evidence

72. Any party proposing to call evidence of an expert, scientific or technical nature should disclose that intention to the court before trial and provide an outline of the evidence and the names of the witnesses who are to give it. The use which may be made of any material disclosed under such a rule should be a matter for the determination of the court. Where the requisite notice is not given, the court should refuse to admit such evidence at the trial unless there are special circumstances.

Obtaining Physical Evidence from the Accused Person

73. We raise for consideration the question whether the current law permitting the police to obtain physical evidence from the accused person (Crimes Act s353A) should be amended to provide that this may only be done with the approval of the court. That is to say, where the court is satisfied that evidence capable of being obtained by physical means may be of relevance to a criminal case and cannot practicably be obtained from another source, the court may direct that any person, including the accused person, participate in one or more of the following procedures:

- (i) try on clothing;

- (ii) provide handwriting samples;
- (iii) submit to the taking of photographs;
- (iv) submit to the taking of fingerprints and other bodily impressions;
- (v) submit to the taking of specimens of saliva, breath, hair, nails;
- (vi) submit to bodily examinations which do not involve unreasonable affronts to the dignity of the individual;
- (vii) submit to the taking of a blood or urine sample.

#### Incentives to Defence Disclosure

74. There should be a range of measures designed to encourage rather than compel disclosure by the accused person. Amongst those should be an extension of the right of the prosecutor to call a case in reply to answer evidence which could have been disclosed before the trial by the defence without prejudice to the accused person, and a procedure which gives the accused person the opportunity to address the jury immediately after the prosecutor's opening address for the purpose of identifying those issues which are in dispute in the case. This latter proposal is consistent with a formal recommendation made in our Report The Jury in a Criminal Trial.

### HIGHER COURTS JURISDICTION OVER SUMMARY OFFENCES

#### Concurrent Jurisdiction

75. Where an accused person is charged with both a summary offence and an indictable offence arising out of the same incident, and the indictable offence is prosecuted in a

higher court, the higher court should have the power to deal with the summary offence. Accordingly, the prosecuting authority should be obliged to advise the court before the trial of any summary charges related to the indictable prosecution. We suggest, subject to further consideration on this question when we come to deal specifically with the subject of appeals in criminal proceedings, that appeals from a court (other than the Supreme Court) hearing summary charges may be heard by the Court of Criminal Appeal constituted by a single judge of the Supreme Court.

Taking Matters into Account on Schedule

76. There should be an extension of the range of offences to which the procedure under the Crimes Act s447B applies, whereby a 'schedule' of other offences is taken into account for the purpose of sentence. Where an accused person appearing in one of the higher courts either pleads guilty to or is convicted of an indictable offence, the court should have the power to take summary offences into account on the schedule.

LISTING CRIMINAL CASES IN THE HIGHER COURTS

An Independent Agency Responsible for Listing

77. The listing of cases for trial and sentence in the higher criminal courts should be the responsibility of a listing agency which is independent of the prosecuting authority and the accused person. It should determine the date of hearing and the venue of criminal cases and the judge who

is to preside. In discharging its functions, the listing agency must necessarily consult closely with the courts but it should not operate at the direction of the courts. Although the precise manner of operation of the agency is yet to be determined, the Attorney General's recent action in establishing such an agency is consistent with the proposals formulated independently by the Commission before this action was taken.

#### Powers of Listing Agency

78. Where the accused person or the prosecuting authority wishes the venue of the trial or the date of hearing to be altered, this may be done by the listing agency where both parties agree. Where the listing agency does not make a change sought by either party, that party should have the right to make an application to change the trial venue or the hearing date. This application should be heard and determined by the prospective court of trial.

#### Random Assignment of Cases to Judges

79. In general, but subject to the next paragraph, the distribution of cases to be heard at the major court centres should be by random assignment of those cases to the judges available to hear them. The listing agency should also be responsible for the listing of criminal cases at country sittings of the higher criminal courts, but it is impracticable for such cases to be assigned on a random basis.

Special Procedures for Complicated Cases

80. In order to ensure that cases of an exceptionally complicated or difficult nature will be assigned to a judge of sufficient experience, there should be a separate list of such judges to whom cases falling into this category may be assigned on a random basis. Where cases of this kind are listed at country sittings, the selection of the judge to preside at those sittings should be made following consultation between the listing agency and the head of the court.

Listing Agency to be Advised of the Decision to Prosecute

81. When there is a decision made by the prosecuting authority to prosecute a case in the higher courts, the prosecuting authority should immediately and formally advise the listing agency of that decision. The prosecuting authority should also maintain contact with the listing agency and advise when the matter is ready to be listed for hearing in the prospective court of trial.

Listing Agency to Maintain General Supervision

82. The listing agency should have the power to list a case for mention before the court of trial at any time before the trial begins. The agency should maintain close and regular contact with the legal representatives of the accused person and with the prosecuting authority in order to keep abreast of any relevant developments in the

preparation of the case, to ensure that the optimum use of available court time is made and that criminal cases are brought to trial within the prescribed time limits.

Power of Court to Adjourn Not to be Affected

83. The control of the listing function by an independent agency should not be permitted to limit the power of the courts to grant an adjournment upon application by either of the parties where it is considered just and reasonable to do so.

"PLEA BARGAINING"

Agreements to be in Writing

84. Where there is a concluded agreement, following negotiation between the defence and the prosecuting authority, which results in the accused person pleading guilty to a certain charge or charges on the understanding that the prosecution will take a certain course, that agreement should be recorded in writing. As is the current practice, a written record should also be made of the terms of any agreement to grant an accused person immunity from prosecution.

The Courts Not to be Involved in Plea Negotiation

85. The court should not participate in negotiations regarding the accused person's plea to a charge and any agreement reached between the parties should not bind or be seen to bind the court in the assessment of the penalty for the offence to which the accused person has pleaded guilty.

No Initiation of Plea Negotiations by the Crown

86. The initiation of "plea negotiations" should always be a matter for the accused person or his or her legal representatives. If negotiations of this kind were to be commenced by the prosecuting authority, the prosecution might be encouraged to charge the accused person with a more serious offence than may be warranted by the evidence available. The charges against an accused person should not be laid with the intention of providing scope for subsequent "plea bargaining".

The Victim's Role in Plea Negotiations

87. Where one of the factors taken into account by the prosecuting authority in deciding whether to accept a plea bargain is the likely impact of contested court proceedings on the victim, the prosecuting authority should contact the victim or a person who is representing the interests of the victim and determine the victim's attitude to participating in a contested case.

General Inadmissibility of the Terms of the Agreement

88. The record of any plea negotiation agreement reached between the accused person and the prosecuting authority should not be admissible in any subsequent proceedings unless it is alleged by either of the parties that the terms of the agreement have not been honoured, in which case the record should become admissible at the discretion of the court.

"Sentence Indication" by the Prospective Court of Trial

89. We raise for consideration the question whether, upon the parties requesting from the court of trial an indication as to the likely nature of the penalty to be imposed upon conviction, the court should, as a matter of discretion for the individual judge in the particular circumstances of the case, be entitled to give such an indication. If such a proposal were accepted, this may be done at a formal hearing or conference attended by the legal representatives of both the prosecution and the accused person but it should never occur in the presence of potential jurors. Whilst an accurate record of any such proceedings should be made, their publication should be strictly prohibited until the case has been finally disposed of. We should emphasise that the Commission is divided on this question and would welcome submissions as to the desirability of this proposal.

Prosecutor's Discretion to Accept Plea Retained

90. Section 394A of the Crimes Act, which provides that the prosecution has an unfettered discretion to accept a plea of guilty to a lesser offence which is a true alternative verdict in full discharge of an indictment on a more serious charge, should be retained. Such a provision ensures that the courts do not become involved in the process of plea bargaining which may occur as a result of negotiations between the prosecution and the defence. However, the court should not be compelled to accept a plea of guilty. If the court considers that the plea has

not been made voluntarily, it may reject the plea of guilty and order that the accused person stand trial on the lesser charge. Since the plea of not guilty to the more serious charge has been accepted by the prosecution, then a verdict of not guilty on that charge should be entered by the court.

#### PUBLICITY OF PROCEEDINGS BEFORE TRIAL

##### No Restriction on Reporting of Court Proceedings

91. As a general rule, all proceedings in criminal cases should be conducted in open court and there should be no restriction upon the media publishing the proceedings where the publication is a fair and accurate report of those proceedings and is published within a reasonably short period (having regard to the nature of the publication) after those proceedings have taken place. So far as the publication of court proceedings of historical relevance is concerned, the only restriction should be on the publication of a report of earlier court proceedings which is likely to prejudice the conduct of a forthcoming or current trial.

##### Courts to have General Power to Prohibit Publication

92. A court conducting a hearing of any kind before the trial of a criminal case should have the discretionary power, exercisable of its own motion or on the application of a party, to make an order prohibiting the publication of all or any part of the proceedings where it considers that the publication of that material may prejudice the fair trial

of any criminal case. An order of this kind may be made subject to such conditions or varied or revoked as the court thinks fit.

Publicity Reduced by Abolition of Committal Proceedings

93. The abolition of committal proceedings should mean that there is less publicity given to the prosecution case before the trial, thereby reducing the possibility that potential jurors will develop a view about the case inconsistent with their obligation to consider the case on the basis of the evidence presented at the trial. Unless the decision to prosecute is the subject of a pre-trial challenge made by the accused person to the prospective court of trial, there will be little publicity of the case generated by the media reporting proceedings that have occurred in court.

General Restrictions on Publication of Prejudicial Material

94. The right of the media to publish material relating to the arrest of and the decision to prosecute an accused person should be limited to reporting the circumstances of the arrest and a brief description of the offence with which the accused person is charged. The publication of information which may prejudice the fair trial of the case should be generally prohibited.

Prosecuting Authority and Defence to Limit Media Contact

95. Neither the prosecuting authority nor a lawyer appearing for an accused person should release for the purpose of publication any information or opinion relating to a

pending or current criminal trial if there is a reasonable likelihood that the publication of that material will prejudice a fair trial or otherwise interfere with the administration of justice. In particular, lawyers should be prohibited from publishing information concerning the following:

- (i) the prior criminal record or the character or reputation of the accused person;
- (ii) the existence or the contents of any confession or statement made by the accused person or the refusal or failure of the accused person to make any statement;
- (iii) the results of any examinations or test or the fact that the accused person refused to submit to any examination or test;
- (iv) the identity, testimony or credibility of any prospective witnesses;
- (v) any opinion or conjecture as to the guilt or innocence of the accused person or as to the merits of the case or the evidence in the case.

Criminal History of an Accused Person Not to be Published

96. The publication before trial of material which simultaneously identifies a person as being charged with an offence and as having a prior criminal history should be prohibited where the hearing of the offence charged is or may be before a jury. This proposal was the subject of a formal recommendation in our Report The Jury in a Criminal Trial.

Special Circumstances Justifying Prejudicial Publicity

97. The prosecuting authority or the police may publish information where it is necessary to obtain assistance in the apprehension of a suspect, to warn the public of any danger or otherwise to assist the investigative process notwithstanding the fact that the publication of the information may prejudice a forthcoming trial.

No Photographs in Identification Cases

98. In any criminal case in which the identification of the accused person is likely to be in issue, the media should be prohibited from publishing a photograph, sketch or any other likeness or description of a person in circumstances suggesting that he or she is either suspected of or charged with a criminal offence unless the publication is made in the reasonable belief that it will assist in the investigation of the offence or the apprehension of the person.

No Public Comment Regarding Appropriate Penalty

99. From the time a person has been arrested or a decision to prosecute has been made (whichever occurs first) and until the disposition of the case, irrespective of whether there has been an indication during that period that the accused person intends to plead guilty, there should be a general prohibition against any person making a statement intended to be published to the general public which contains an opinion as to the sentence or penalty which should be imposed on the accused person.

Publication of Disputed Evidence Prohibited

100. A court conducting pre-trial proceedings in a criminal case should generally prohibit the publication of any material presented during those proceedings where there is, or is likely to be, any issue or dispute as to the admissibility of that material in evidence at the trial.

Powers of Court to Ensure Fair Trial

101. Where the publication of prejudicial material has jeopardised the prospect of conducting a fair trial, the prospective court of trial should have the power, exercisable of its own motion or on the application of a party, to do any of the following if it considers that it will increase the likelihood of a fair trial:

- (i) change the venue of the trial;
- (ii) postpone the trial for such period as will diminish or eliminate the influence of the prejudicial publicity;
- (iii) in the case of trials to be heard by a jury, invite potential jurors to disqualify themselves if they have been subjected to material which they consider makes them either unable or unlikely to approach the case impartially.

COMMENT SHEET

An Independent Prosecuting Authority

Comment

Agree .....  
Disagree .....

Relationship Between Prosecuting Authority and Police

Comment

Agree .....  
Disagree .....

The Powers of the Prosecuting Authority

Comment

Agree .....  
Disagree .....

The Criteria for the Decision to Prosecute

Comment

Agree .....  
Disagree .....

Policy of the Prosecuting Authority to be Made Public

Comment

Agree .....  
Disagree .....

6. Delegation of the Powers of the Prosecuting Authority

Agree .....  
Disagree .....

Comment

7. Cases Where Consent for Prosecution is Required

Agree .....  
Disagree .....

Comment

8. Prosecutions by Private Citizens

Agree .....  
Disagree .....

Comment

9. Powers of Arrest Unchanged

Agree .....  
Disagree .....

Comment

10. Procedure Where Bail is Refused by the Police

Agree .....  
Disagree .....

Comment

11. Procedure Where the Accused Person is Released on Bail

Agree .....  
Disagree .....

Comment

12. Notification of Decision to Prosecute

Agree .....  
Disagree .....

Comment

13. Procedure on Appearance Before the Local Court

Agree .....  
Disagree .....

Comment

14. Proceeding by Summons

Agree .....  
Disagree .....

Comment

15. Right to Legal Representation to be Advised

Agree .....  
Disagree .....

Comment

16. Police to Charge and Determine Bail

Agree .....  
Disagree .....

Comment

17. Police to Notify the Prosecuting Authority

Agree .....  
Disagree .....

Comment

18. Abolition of Committal Proceedings

Agree .....  
Disagree .....

Comment

19. Complete Disclosure by the Prosecution

Agree .....  
Disagree .....

Comment

20. A Right to Challenge the Decision to Prosecute

Agree .....  
Disagree .....

Comment

21. Grounds for Challenging the Decision to Prosecute

Agree .....  
Disagree .....

Comment

22. Ground for Upholding a Challenge

Agree .....  
Disagree .....

Comment

23. Successful Challenge a Bar to Further Prosecution

Agree .....  
Disagree .....

Comment

24. Additional Evidence May Justify Recommencing Prosecution

Agree .....  
Disagree .....

Comment

25. Legal Aid to be Available from the Time of Charge

Agree .....  
Disagree .....

Comment

26. The Right to Seek a Directed Acquittal to be Retained

Agree .....  
Disagree .....

Comment

27. Specification of Time Limits: Indictable Offences

Agree .....  
Disagree .....

Comment

28. Calculation of Time Limits: Indictable Offences

Agree .....  
Disagree .....

Comment

29. The Power of the Court to Allow Exemptions

Agree .....  
Disagree .....

Comment

30. Delayed Introduction of Prescribed Time Limits

Agree .....  
Disagree .....

Comment

31. Power to Grant Stay of Proceedings

Agree .....  
Disagree .....

Comment

32. Range of Offences Affected

Agree .....  
Disagree .....

Comment

33. Disclosure by the Prosecution in the Local Court

Agree .....  
Disagree .....

Comment

34. The Mode of Trial Hearing

Agree .....  
Disagree .....

Comment

35. Criminal History of the Accused Person Not to be Considered

Agree .....  
Disagree .....

Comment

36. Local Court May Order Trial by Jury of an Indictable Offence

Agree .....  
Disagree .....

Comment

37. Consent of the Prosecuting Authority Required

Agree .....  
Disagree .....

Comment

38. Disposition Following Grant of Summary Jurisdiction

Agree .....  
Disagree .....

Comment

39. Refusal of Summary Jurisdiction

Agree .....  
Disagree .....

Comment

40. The Power of the Prosecuting Authority to Refer Cases Back

Agree .....  
Disagree .....

Comment

41. Withdrawing Election on the Mode of Trial

Agree .....  
Disagree .....

Comment

42. Time Limits for Offences Triable Either Way

Agree .....  
Disagree .....

Comment

43. Current Procedure in Summary Offences Generally Unchanged

Agree .....  
Disagree .....

Comment

44. Disclosure by the Prosecution in Summary Offences

Agree .....  
Disagree .....

Comment

45. Summary Cases May be Referred to the Prosecuting Authority

Agree .....  
Disagree .....

Comment

46. Specification of Time Limits: Summary Offences

Agree .....  
Disagree .....

Comment

47. Calculation of Time Limits: Summary Offences

Agree .....  
Disagree .....

Comment

48. The Power of the Court to Allow Exemptions

Agree .....  
Disagree .....

Comment

49. Delayed Introduction of Prescribed Time Limits

Agree .....  
Disagree .....

Comment

50. The Power to Find "No Bill"

Agree .....  
Disagree .....

Comment

51. "No Bill" Certificate to be Filed in Court

Agree .....  
Disagree .....

Comment

52. "No Bill" to be a Bar to Further Prosecution

Agree .....  
Disagree .....

Comment

53. "No Bill" and Immunity from Prosecution

Agree .....  
Disagree .....

Comment

54. The Publication of Reasons for "No Bill"

Agree .....  
Disagree .....

Comment

55. Notification of Reasons to Victims and Investigating Police

Agree .....  
Disagree .....

Comment

56. Reasons for Refusing "No Bill" Application

Agree .....  
Disagree .....

Comment

57. "No Bill" Applications Not to be a Delaying Tactic

Agree .....  
Disagree .....

Comment

58. Jurisdiction

Agree .....  
Disagree .....

Comment

59. Order of Proceedings Before Trial

Agree .....  
Disagree .....

Comment

60. Notification of Formal Charge

Agree .....  
Disagree .....

Comment

61. Pre-Trial Hearings

Agree .....  
Disagree .....

Comment

62. Court to Control Conduct of Pre-Trial Hearings

Agree .....  
Disagree .....

Comment

63. Pre-Trial Undertakings

Agree .....  
Disagree .....

Comment

64. The Need for Adequate Preparation

Agree .....  
Disagree .....

Comment

65. Pre-Trial Proceedings Before Court Officials

Agree .....  
Disagree .....

Comment

66. Pre-Trial Decisions Not Binding on Trial Court

Agree .....  
Disagree .....

Comment

67. Pre-Trial Decisions May be Reviewed on Appeal

Agree .....  
Disagree .....

Comment

68. Disclosure by the Prosecution

Agree .....  
Disagree .....

Comment

69. Verification of Disclosure by the Prosecution

Agree .....  
Disagree .....

Comment

70. Sanctions for Failure to Disclose

Agree .....  
Disagree .....

Comment

71. Defence Disclosure Generally

Agree .....  
Disagree .....

Comment

72. Defence Disclosure of Technical Evidence

Agree .....  
Disagree .....

Comment

73. Obtaining Physical Evidence from the Accused Person

Agree .....  
Disagree .....

Comment

74. Incentives to Defence Disclosure

Agree .....  
Disagree .....

Comment

75. Concurrent Jurisdiction

Agree .....  
Disagree .....

Comment

76. Taking Matters into Account on Schedule

Agree .....  
Disagree .....

Comment

77. An Independent Agency Responsible for Listing

Agree .....  
Disagree .....

Comment

78. Powers of Listing Agency

Agree .....  
Disagree .....

Comment

79. Random Assignment of Cases to Judges

Agree .....  
Disagree .....

Comment

80. Special Procedures for Complicated Cases

Agree .....  
Disagree .....

Comment

81. Listing Agency to be Advised of the Decision to Prosecute

Agree .....  
Disagree .....

Comment

82. Listing Agency to Maintain General Supervision

Agree .....  
Disagree .....

Comment

83. Power of Court to Adjourn Not to be Affected

Agree .....  
Disagree .....

Comment

84. Agreements to be in Writing

Agree .....  
Disagree .....

Comment

85. The Courts Not to be Involved in Plea Negotiation

Agree .....  
Disagree .....

Comment

86. No Initiation of "Plea" Negotiations by the Crown

Agree .....  
Disagree .....

Comment

87. The Victim's Role in Plea Negotiations

Agree .....  
Disagree .....

Comment

88. General Inadmissibility of the Terms of the Agreement

Agree .....  
Disagree .....

Comment

89. "Sentence Indication" by the Prospective Court of Trial

Agree .....  
Disagree .....

Comment

90. Prosecutor's Discretion to Accept Plea Retained

Agree .....  
Disagree .....

Comment

91. No Restriction on Reporting of Court Proceedings

Agree .....  
Disagree .....

Comment

92. Courts to have General Power to Prohibit Publication

Agree .....  
Disagree .....

Comment

93. Publicity Reduced by Abolition of Committal Proceedings

Agree .....  
Disagree .....

Comment

94. General Restrictions on Publication of Prejudicial Material

Agree .....  
Disagree .....

Comment

95. Prosecuting Authority and Defence to Limit Media Contact

Agree .....  
Disagree .....

Comment

96. Criminal History of an Accused Person Not to be Published

Agree .....  
Disagree .....

Comment

97. Special Circumstances Justifying Prejudicial Publicity

Agree .....  
Disagree .....

Comment

98. No Photographs in Identification Cases

Agree .....  
Disagree .....

Comment

99. No Public Comment Regarding Appropriate Penalty

Agree .....  
Disagree .....

Comment

100. Publication of Disputed Evidence Prohibited

Agree .....  
Disagree .....

Comment