Appendix C:

Response to International Survey PAGE

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Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

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LAW OFFICERS' DEPARTMENT,
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JUN 24 1988

15th June 1988

Dear Mr. Proudfoot,

CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL, Jnr

Your letter of 25 May 1988 addressed to the Attorney General has been passed to me for reply.

I enclose a copy of guidelines which were issued by the Attorney General in December 1981. The guidelines deal with the disclosure of information to the defence, and in particular "unused material", in cases which are to be tried on indictment. I believe that these guidelines are the type of material to referred to in the final paragraph of the first page of your letter. I trust that they will be of some assistance to you.

I suspect you will understand that criminal offences in England and Wales are divided into three categories. First the most serious offences are described as triable only upon indictment. This means the case can only be tried by a Crown Court judge sitting with a jury. The second category of offences are described as cases triable summarily only. Such offences may only be tried by magistrates and generally involve a wide range of less serious criminal conduct. The third category of offences falls between those triable only on indictment and those triable only summarily. These are referred to as either way offences. This third group can be tried either by the magistrates or on indictment by a judge and jury at the Crown Court. The actual venue for the hearing is determined by the Magistrates' Court. If it is felt that the allegation is serious or complicated the magistrates may direct the case to be dealt with on indictment by a judge and jury, although even if they feel it is suitable for the Magistrates' Court the defendant may exercise his right to elect for a trial on indictment in

Crown Court.

It has been a long established principle of criminal law in England and Wales that the prosecution must disclose copies of the statements of witnesses upon whom it intends to rely in cases tried on indictment. The Attorney General's guidelines deal specifically with material which is not disclosed as part of the prosecution case.

In 1985 new rules of advance disclosure for cases tried either way in the Magistrates Court were made. I enclose a copy of the Magistrates' Courts (Advance Information) Rules 1985. These rules extended the right of a defendant to receive details of the evidence against him in either way cases heard by the Magistrates' Court. The rules provide for disclosure in the form of copies of the prosecution witness statements or a precis of the case against the defendant. Although the advance disclosure rules do not apply to cases which are triable only summarily, informal disclosure often takes place between the prosecuting lawyers and those representing the defence.

Although the Attorney General's guidelines on unused material were issued specifically in respect of cases tried on indictment, generally speaking these principles are applied where necessary to all criminal prosecutions.

I do hope that the information in this letter and the enclosures are helpful to you in the preparation of your brief to the Royal Commission. If I can be of any assistance to you or if you require any further information please do not hesitate to contact me.

Yours sincerely,

Michael G Kennedy

M G KENNEDY

Practice Note

Criminal evidence – Prosecution evidence – Disclosure of information to defence – Trial on indictment – Unused material – Guidelines for disclosure.

The Attorney General has issued the following guidelines on the disclosure of information to the defence in cases to be tried on indictment:

1. For the purposes of these guidelines the term 'unused material' is used to include the following: (i) all witness statements and documents which are not included in the committal bundles served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles.

2. In all cases which are due to be committed for trial, all unused material should normally (ie subject to the discretionary exceptions mentioned in para 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3.—(a) If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important (and might even justify delay) if the material might have some influence on the course of the committal proceedings or the charges on which the justices might decide to commit. (b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unused material does not exceed about 50 pages, disclosure should be by way of provision of a copy, either by post, by hand or via the police.

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in para 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with.

6. There is a discretion not to make disclosure (at least until counsel has considered and advised on the matter) in the following circumstances. (i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him. (ii) The statement (eg from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence. (iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant. If called as a defence witness on the basis of this second account, the statement to the police can be of use in cross-examination. (iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulness, eg 'I saw nothing of the fight' or 'He was not at home that afternoon'. There are however grounds to believe that the witness might change his story and give evidence for the defence, eg purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination. (Note: in cases (i) to (iv) the name and address of the witness should normally be supplied.) (v) The statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements

...ing sensitive material are as follows: (a) it deals with matters of national security; ...is by, or discloses the identity of, a member of the security services who would be ...no further use to those services once his identity became known; (b) it is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served on the supplier, e g a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him; (g) It contains details of private delicacy to the maker and/or might create risk of domestic strife.

7. If there is doubt whether unused material comes within any of the categories in para 6, such material should be submitted to counsel for advice either before or after committal.

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt on his guilt or on some material part of the evidence on which the Crown is relying) there must be either full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in para 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material but also the name and address of the maker.

9. Any doubt whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in para 6 should be disclosed to the defence until (a) the investigating officer has been asked whether he has any objections and (b) it has been the subject of advice by counsel and that advice has been considered by the prosecuting solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to counsel, the Director of Public Prosecutions should be consulted.

11. In all cases counsel should be fully informed of what unused material has already been disclosed. If some has been withheld in pursuance of para 10, he should be informed of any police views, his instructions should deal (both generally and in particular) with the question of 'balance' and he should be asked to advise in writing.

12. If the sensitive material relates to the identity of an informant, counsel's attention should be directed to the following passages from the judgments of (a) Pollock CB in *A-G v Briant* (1846) 15 M & W 169 at 185, 153 ER 808 at 814–815:

> '... the rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience ... and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer ...'

(b) Lord Esher MR in *Marks v Beyfus* (1890) 25 QBD 494 at 498:

> '... if upon the trial of a prisoner the judge should be of opinion that the

disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.'

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example. (i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested, and subsequently, if so desired, to arrange for his attendance at court. (ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials. (iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out. (iv) Disclosure of all or part of a sensitive statement or document may be possible on a counsel-to-counsel basis, although it must be recognised that counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case. (v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission in accordance with s 10 of the Criminal Justice Act 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for counsel, if in doubt, to consult the trial judge.

15. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, prosecuting solicitors are advised to consult the Director of Public Prosecutions.

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the prosecuting solicitor on receipt of these guidelines. It should also be adopted as regards cases already submitted, so far as is practicable.

December 1981.

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Your reference

Our reference
AGTT/NJ

Date
14 September 1988

Dear Sir

CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL, Junior

I refer to your letter of 25 May 1988 to the Lord Advocate who has asked me to reply. My apologies for the delay in providing you with a reply and I hope that this letter reaches you prior to the presentation of your brief to the Royal Commission.

While there is no legislation requiring the Crown to provide the defence with any exculpatory statements that have been acquired in the course of a criminal investigation, there exists an underlying principle of fairness to the accused in the Scottish legal system of which prosecutors are reminded in the written regulations issued to them. In particular, they are reminded that such a duty will involve disclosure to the defence of any information which supports the defence, even although it may be damaging to the Crown case. This duty stems from the fact that the Crown prosecutes in the public interest and consequently it would be completely unjustifiable if it were to conceal exculpatory evidence from the defence, or indeed from the court.

Yours faithfully

A G T TURNBULL
for Crown Agent

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA 2600

18 JUL 1988

88/525:AO:DPP

JUL 20 1988

Dear Mr Proudfoot

I refer to your letter of 25 May 1988 in which you requested information as to whether there are, in Australia, any laws, guidelines issued by government or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defence counsel at the earliest moment.

There is no legislation of the Parliament of the Commonwealth of Australia (i.e. the Australian Federal Parliament) requiring prosecution lawyers to acquaint defence counsel with exculpatory material of which the prosecution is aware. However, there is a certain amount of case law having a bearing on the issue. In R v Lucas [1973] VR 693 (Full Court of the Supreme Court of the State of Victoria) Newton J and Norris AJ commented:

> "It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professsional rivalry, and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State. Consistently with these principles, it is the duty of prosecuting counsel not to try to shut out any evidence which the jury could reasonably regard as credible and which could be of importance to the accused's case. We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown, whose function it is to prepare the Crown case in criminal prosecutions." (at page 705)

Similar points were made by Smith ACJ in that case at pages 696-698.

The obligation on prosecuting lawyers to be "ministers of justice" with a "duty to assist the court .....to make

certain that justice is done as between the subject and the State" would, in my view, go beyond not withholding credible evidence from a jury which could be of importance to the accused's case and would include a positive obligation to disclose to the defence any exculpatory material available to the prosecution. This obligation was supported by the Supreme Court of South Australia (In Banco) In the Matter of a Petition by Frits Van Beelen (1974) 9 SASR 163. While acknowledging that a discretion vests in the Crown not to call witnesses for the Crown, the Court in Van Beelen pointed out that this discretion is circumscribed by a number of rules, one of which was this:

> "Where the Crown has in its possession a statement of a credible witness who can speak of material facts 'which tend to show the prisoner to be innocent', it must either call that witness or make his statement available to the defence". (per Walters, Wells and Jacobs JJ at page 249)

In stating this rule, the Supreme Court of South Australia was adopting the views of the English Court of Appeal in Dallison v Caffrey [1965] 1 QB 349 (see Denning MR at page 369 and Diplock LJ at pages 375-376). However, to fall within this rule, the Court pointed out that the evidence must possess three qualities:

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

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

- it must tend to establish the innocence of the prisoner. (see page 249)

I would point out that the Bar Rules of the Bar Association of the State of New South Wales are to similar effect as those obligations imposed by the Courts. Rules 20 and 20A provide as follows:

> "20. A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be

of substance or any argument of fact that does not carry weight in his mind.

20A. A barrister appearing for the prosecution before any court whether briefed by the Crown or privately is obliged to comply mutatis mutandis with rule 20 and to inform defence counsel of the existence, identity and whereabouts (if known) of any witness whom he does not propose to call in the prosecution case but whose evidence he considers is relevant to the case for the defence."

With respect to offences against the laws of the Commonwealth of Australia, the Commonwealth Director of Public Prosecutions (a statutory office established by the Director of Public Prosecutions Act 1983) has responsibility for conducting Commonwealth prosecutions. As the Director (Mr I D Temby Q.C.) has pointed out, one of the reasons for establishing the office was to ensure that key decisions in relation to enforcement of the criminal law of the Commonwealth be made on an objective and professional basis. It is implicit in the Director's requirement that lawyers acting for him do so on a professional basis and that prosecutors consider themselves as "ministers of justice" and conduct themselves accordingly. In short, it is both a legal requirement (from the above cited case law) and a professional standard that Commonwealth prosecutors disclose exculpatory material of which they are aware to the defence.

Finally, I would note that, unlike Canada, responsibility for the enforcement of the criminal law is primarily a matter for the States and the Northern Territory (a self-governing Territory). While I entertain no doubt that State and Northern Territory prosecutors would act in the same way as Commonwealth prosecutors, this is a matter on which you may wish to seek the views of the State and Northern Territory Attorneys-General.

I attach to this reply copies of the following material which relate to your request, or are of background interest:

- "Lawyers", Disney and others, 2nd Edition 1986, pages 910-918;
- "The Criminal Injustice System", edited by Basten and others, 1982, Chapter 7;
- "Practical Advocacy", Mr Justice J H Phillips, (1988) 62 ALJ 64;
- R v Apostilides (1984) 154 CLR 563 (High Court of Australia); and

. "The Prosecution Policy of the Commonwealth", January 1986.

I hope the above will be of some assistance to you.

Yours sincerely

(Lionel Bowen)

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C. ACTING FOR THE PROSECUTION

1. INTRODUCTION

■ In this section we consider a number of special duties which apply to lawyers acting for the prosecution. We begin with the formal rules which have been made in this area by professional associations. We then look at particular areas, namely:

- deciding to prosecute, and plea-bargaining;
- calling witnesses and disclosing potential evidence.

The principal formal rules made by professional associations in Australia are as follows. ■

BAR RULES

New South Wales Bar Association

20. A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind.

20A. A barrister appearing for the prosecution before any court whether briefed by the Crown or privately is obliged to comply mutatis mutandis with rule 20 and to inform defence counsel of the existence, identity and whereabouts (if known) of any witness whom he does not propose to call in the prosecution case but whose evidence he considers is relevant to the case for the defence . . .

57. Where in criminal proceedings a barrister appearing for the prosecution reasonably believes that a document or record included in his brief or instructions may have been unlawfully obtained, he shall in the interests of justice

(a) inform his opponent of his intention to use such document or record; and/or

(b) make a copy of such document or record available to his opponent.

57A. A barrister appearing for the prosecution should not act as an advocate in order to attempt to persuade a court to impose a harsh sentence, but nevertheless should be prepared to correct any error or misstatement made by counsel for the defence, refer the court to any relevant authority which would have a bearing on the appropriate penalty and generally to assist the court to avoid appealable error.

PROFESSIONAL CONDUCT RULES

Law Society of Western Australia

15.1. Prosecuting Counsel shall not seek to obtain a conviction by any improper means. It is his duty to present before the jury the case for the prosecution fairly, impartially and in a competent manner.

15.2. (1) If Prosecuting Counsel knows of the existence of a person who may be able to give evidence relevant to the case, but who is not proposed to be called by the prosecution, he shall cause the defence to be informed of the identity and location (if known) of that person prior to the trial.

(2) Where a witness called by the prosecution gives evidence on a material issue in substantial conflict with a prior statement made by him Prosecuting Counsel shall so inform the defence.

15.3. Prosecuting Counsel shall assist the Court at all times before the verdict is returned by drawing attention to any apparent errors or omissions of fact or law or procedural irregularities which, in his opinion, ought to be corrected.

15.4. If an accused person is unrepresented, it is proper for Prosecuting Counsel to inform the Court of any mitigating circumstances as to which he is instructed.

2. DECIDING TO PROSECUTE AND PLEA-BARGAINING

■ It is not within the scope of this book to consider in detail the principles which must be observed by authorities responsible for instituting prosecutions, or for plea-bargaining. In Australia, these decisions are often taken by the police, rather than by a lawyer. However, in many other cases they are taken by lawyers, whether they be Law Officers of the Crown (or their legal staff) or more rarely, private practitioners. Moreover, the recent appointment of Directors of Public Prosecutions at the Commonwealth level and in Victoria has expanded the role played by lawyers in the commencement and conduct of prosecutions.

The following statement about the principles to be observed when deciding to prosecute or engaging in plea-bargaining was made by the Commonwealth Attorney-General in 1986. It is the most comprehensive public statement on these questions in Australia, but internal guidelines also exist in State Crown Law offices. ■

Lionel Bowen (1986), paras. 2.11, 2.14-16, 2.18, 2.23, 4.4-4.8

The decision to prosecute

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. . . .

A decision whether or not to prosecute must clearly not be influenced by

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;

(b) personal feelings concerning the offender or the victim; or

(c) a possible political advantage or disadvantage to the Government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision. . . .

The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account, many of which are referred to below. Dominant in this context is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility

of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact. It may also be relevant that the particular offence or offender has characteristics which motivate juries towards acquittal.

Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

(b) any mitigating or aggravating circumstances;

(c) the youth, age, physical health, mental health or special infirmity of the alleged offender or a witness;

(d) the alleged offender's antecedents;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) the effect on public order and morale;

(h) the obsolescence or obscurity of the law;

(i) whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;

(j) the availability and efficacy of any alternatives to prosecution;

(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(m) whether the alleged offence is of considerable public concern;

(n) any entitlement of the Commonwealth or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(o) the attitude of the victim of the alleged offence to a prosecution;

(p) the likely length and expense of a trial;

(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(s) whether the alleged offence is triable only on indictment; and

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

Care must therefore be taken to choose the charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence. Charges should not be laid with the intention of providing scope for subsequent "charge-bargaining".

Charge-bargaining

"Charge-bargaining" involves discussions between the defence and the prosecution in relation to the charges to be proceeded with. Such discussions may result in the defendant pleading guilty to fewer than all of the charges he is facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

Charge-bargaining is to be distinguished from consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in *R. v. Marshall* [1981] V.R. 725 at 732 said:

> "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."

This statement has earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

(a) a charge-bargaining proposal should not be initiated by the prosecution; and

(b) such a proposal should not be entertained by the prosecution unless:

- the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
- those charges provide the basis for an appropriate sentence under all the circumstances of the case; and
- there is evidence to support the charges.

Any decision . . . must take into account all the circumstances of the case and, in particular:

(a) whether the defendant is willing to co-operate with regard to the investigation or prosecution of others;

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) whether it is in the public interest that the case should be publicly tried so as to ensure fuller publicity rather than be terminated by a guilty plea;

(g) the likelihood of adverse consequences to witnesses;

(h) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or made arrangements for restitution;

(i) the need to avoid delay in the despatch of other pending cases; and

(j) the time and expense involved in a trial and any appeal proceedings.

In no circumstances should the prosecution entertain a charge-bargaining proposal initiated by the defence if the defendant maintains his innocence with respect to a charge or charges to which he has pleaded guilty.

NOTES [1]

1. For further consideration of these issues, see, for example, A. F. Wilcox, *The Decision to Prosecute* (1972); I. Potas (ed.), *Prosecutorial Discretion* (1984); and I. Temby, "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985) A.L.J. 197. See also the discussion of defence lawyers' roles in plea-bargaining, in Chapter 18 above.

2. For a shameful example of prosecution lawyers in England prosecuting a man they knew to be innocent, see G. Robertson, *The Reluctant Judas* (1976). The misconduct was part of an ill-conceived and inept attempt to "shield" a police informer by prosecuting him but then withholding evidence against him. He was duly acquitted but was murdered a few days later.

3. A person who brings a prosecution without both reasonable cause and proper motive is liable to a tortious action for malicious prosecution (see, for example, J. Fleming, *The Law of Torts* (6th ed., 1983) pp. 576-588).

3. CALLING WITNESSES AND DISCLOSING POTENTIAL EVIDENCE

■ We mentioned in an earlier chapter that, generally speaking, lawyers are under no obligation to call particular witnesses or to disclose information which may assist the other party to gather evidence helpful to its case. As the following extracts indicate, however, special principles apply to prosecution lawyers in these respects.[6] ■

R. v. LUCAS

[1973] V.R. 693 at 697 (Supreme Court of Victoria)

[Lucas was involved in a fatal car accident and was charged with culpable driving. He alleged in his defence that he had been driving fast because he was in fear of the occupants of a pursuing car. An independent witness, Woods, told the police that a car travelling at high speed had passed the scene of the accident immediately after it occurred. This statement was given by the police to the coroner conducting an inquest into the death. Before the trial, the defence asked for Woods to be subpoenaed by the prosecution but a delay in attempting to serve the subpoena had the result that Woods was interstate and unavailable for the trial. The prosecution neither called Woods as a witness at Lucas' trial nor told the defence that he was unavailable. The prosecution did not refer to Woods' statement, and it called another eyewitness who said that there was no sign of a pursuing car. Lucas was convicted, but on appeal the Full Court held that the prosecution's actions meant that the trial was unsatisfactory and unfair, there was a miscarriage of justice, and accordingly a new trial must be ordered.]

SMITH A.C.J: The Crown's duty to act with fairness, and with the single aim of establishing the truth, denies to it the right to pick and choose as between independent and apparently credible witnesses for merely tactical reasons, such as a desire to be able to cross-examine those who are unfavourable, or less favourable than others, to the Crown case: or a desire to force the defence to call evidence and thereby lose the right of the last address. [A]ll those witnesses whose testimony is necessary to put before the court the complete story of the events on which the prosecution is based ought in general to be called by the Crown. . . . And in particular all eyewitnesses to the doing of the acts charged as criminal ought in general to be so called. . . . This general duty is subject to the qualification that the Crown, in its discretion, may properly decline to call any such person as its witness when it has strong and satisfactory reasons for doing so, as for example when the witness is clearly untruthful or unreliable . . . or where the numbers

6. For a general discussion of issues raised in this section, see, for example, W. B. Lane, "Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors", in J. Basten et al. (ed.), *The Criminal Injustice System* (1982), Ch. 7.

to be called would be unreasonably great having regard to the importance of the point to which they can speak. But this discretion is to be exercised in furtherance of justice and with fairness to the defence.

RICHARDSON v. R.

(1974) 131 C.L.R. 116 at 121 (High Court of Australia)

[Richardson was convicted of assault. He appealed on the ground that the prosecution should have called Miss Gardiner as a witness. She was an eye-witness and her evidence was in Richardson's favour.]

BARWICK C.J., MCTIERNAN and MASON JJ.: Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few. . . . [The] prosecutor has [a discretion] not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

It follows that a failure on the part of the Crown prosecutor to call in the Crown case an eye-witness of the incidents giving rise to the offence charged does not of itself constitute a ground for setting aside a conviction and ordering a new trial. Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if it constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice.

RE VAN BEELEN

[1974] S.A.S.R. 163 at 248
(Supreme Court of South Australia)

WALTERS, WELLS and JACOBS JJ.: [T]he discretion which vests in the Crown not to call witnesses for the Crown case at the trial is circumscribed by the following rules:

(1) Where the Crown calls a witness who did not give evidence at the committal proceedings, the accused should be given reasonable notice of the Crown's intention to call that witness and should be furnished with a proof of the witness's proposed evidence.

(2) Where the Crown does not propose to call a witness who gave evidence at the committal proceedings, it should, unless there are strong and satisfactory reasons to the contrary, have the witness available in court so that the counsel may have the opportunity of calling him, as his own witness, if he so wishes.

(3) Where the Crown has in its possession the statement of a person who can give material evidence, but decides not to call him, it must make him available as a witness for the defence, but need not supply the defence with a copy of the statement taken.

(4) Where the Crown has in its possession a statement of a credible witness who can speak of material facts "which tend to show the prisoner to be innocent", it must either call that witness or make his statement available to the defence (*Dallison v. Caffery* [1965] 1 Q.B. 348 at 369 per Lord Denning M.R.).

NOTE

Rule (1) raises the general issue of prior disclosure of statements (or proofs) by witnesses which the Crown intends to call at committal or trial. We do not consider that issue in this chapter. But see, for example, *Maddison v. Goldrick* [1976] 1 N.S.W.L.R. 651; *R v. Charlton* [1972] V.R. 758.

LAWLESS v. THE QUEEN

(1978) 53 A.L.J.R. 733 at 736, 742 (High Court of Australia)

[Lawless was charged with killing Fitzgerald. He pleaded an alibi as his defence. A key prosecution witness, Mrs Joyce, testified that Lawless had killed Fitzgerald outside a car in which she was sitting. The police did not inform Lawless or his lawyers that another person, Mrs Telford, had told them that she had seen two men outside the car after the shooting, whereas Mrs Joyce testified that there had been only one. After conviction and unsuccessful appeal, the matter was referred by the Attorney-General to the Court of Criminal Appeal to consider whether a new trial should be ordered. The court refused to order such a trial, and Lawless sought leave to appeal to the High Court.]

BARWICK C.J.: Some point was sought to be made of the fact that the Crown Prosecutor was in possession of Mrs Telford's statement to the police officer and that he failed to alert the defence to Mrs Telford's existence, let alone to the relevant contents of her statement. But even if the Crown Prosecutor was at fault in either respect, no ground would thereby be made for the grant of a new trial: this is particularly so having in mind what I have said as to the knowledge of the applicant and his advisers of Mrs Telford's existence and of her possible opportunity to have observed something of what went on outside her residence.

However, as much has been sought to be made of the Crown Prosecutor's conduct, I ought to say, first, that it was a matter for him to decide which witnesses he should call for the prosecution. I cannot see, for myself, any reason why he should have called Mrs Telford particularly as the applicant's defence was an alibi and Mrs Telford could not aid in establishing the applicant's presence at the scene.

In the second place, I am of opinion that it would have been better for the Crown Prosecutor to have informed the defence that Mrs Telford claimed to have seen something of the events of the evening. But I can quite understand, having regard to the nature of the eye-witnesses' evidence and of the applicant's defence, that the Crown Prosecutor might properly conclude that Mrs Telford's statement did not carry any further the Crown's case or that of the defence. It is good practice, in my opinion, in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained. But, clearly, in my opinion, there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such a statement.

[I]t is clear that the prosecutor had in his possession . . . as a part of the police brief, Mrs Telford's statement and that he failed to make its existence known to the defence. However, I am not satisfied that his failure to do so was a conscious act designed to prejudice the defence, still less that it constituted an impropriety or any misconduct such as to give rise to any miscarriage of justice. The immediate purpose for which Mrs Telford's evidence might have been used by the defence, to suggest that Mrs Joyce's description of events immediately after the shooting was incorrect, was in part achieved by the cross-examination of other Crown witnesses and this was much relied upon by the defence at the trial. Thus Mrs Telford's evidence would not have disclosed any new fact or circumstance but would only have added weight to matter already in evidence and upon which the defence relied. Mrs Telford's evidence, while in part of assistance to the defence, was in part adverse to it. Because it covered ground already dealt with by other Crown witnesses it may well have been regarded by the prosecutor as mere surplusage. Although it would certainly have been better had its existence been disclosed to the defence, the failure to do so may well have been no more than an oversight and, having regard to the foregoing and in particular to what I have said earlier as to the cogency of this evidence, what occurred cannot be regarded as involving any miscarriage of justice.

MURPHY J. (dissenting): The prosecution conceded that Mrs Telford's evidence was credible (but not that it would necessarily be accepted by a jury). The Court [of Criminal Appeal] concluded that it qualified as fresh evidence because ". . . reasonable diligence on the part of Lawless and his legal advisers would not have discovered the evidence before the second trial was concluded". I agree. They also held that Mrs Telford's evidence was "inconsistent", "impossible to reconcile", with Mrs Joyce's evidence concerning the number of persons present at the scene. I agree. Mrs Telford's evidence goes to the issue of Mrs Joyce's credibility (as the . . . court held) but it is not restricted to that. The question whether there were two men outside the car after the shooting (as stated by Mrs Telford) or one (as stated by Mrs Joyce) goes directly to the circumstances of the murder. Mrs Telford was an eye-witness to events immediately after the murder. If there were two people outside the car after the shots were fired, then, in a very material respect, Mrs Joyce's account of the circumstances of the murder was false.

The applicant contended that the prosecution caused a miscarriage of justice by suppression of credible material favourable to the applicant on a critical issue in the trial. Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution's suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. Even if the prosecution could be excused for not making Mrs Telford's statement available to the applicant earlier, it could not be excused for failing to do so after the applicant had attempted to show . . . that another person was present.

In my opinion, the verdict of guilty was brought about by conduct which departed from the standard required of those prosecuting on behalf of the community.

The outcome might well have been affected if the jury knew not only the suppressed evidence but also the fact that the prosecution was suppressing it, especially because the applicant claimed he was being framed. Evidence of suppression would have strengthened what otherwise may have seemed fantastic claims—that Mrs Joyce was lying under police pressure, and that the fingerprint evidence was concocted.

NOTES

1. Mason, Stephen and Aickin JJ. concurred with Barwick C.J. in rejecting the appeal.

2. Lawless was subsequently released.

3. For a criticism of the decision, and the majority's reasoning, see W. B. Lane, "Prosecutors: Non-disclosure of Exculpatory Evidence" [1981] 5 Crim. L.J. 251.

4. Several years after the decision in *Lawless*, two professional associations made formal rules requiring prosecution counsel to disclose to the defence the identity of witnesses who can give relevant evidence but whom the prosecution does not intend to call (see New South Wales Bar Association, Bar rule 20A; and Law Society of Western Australia, Professional Conduct Rule 15.2(1), extracted earlier in this chapter).

5. For an example of a successful appeal on the ground of the prosecution's failure to call certain witnesses, and a discussion of the trial judge's power to remedy such failure by calling the witnesses himself or herself, see *R v. Apostilides* (1984) 58 A.L.J.R. 371.

6. For further discussion of prosecutor' duties in relation to the calling of witnesses, see *R v. Whitehorn* (1983) 57 A.L.J.R. 809 esp. at 811 per Deane J. and at 815 per Dawson J.

D. ASSISTING ILLEGAL OR IMPROPER CONDUCT

1. INTRODUCTION

■ In this section we are concerned with the principles governing conduct by lawyers which might assist their clients, or other persons, to engage in illegal or improper conduct. ■

(1) Assistance

■ There is a wide range of ways in which lawyers might assist these types of conduct. At one end of the spectrum there is active and conscious assistance of such a kind as to fall within the ambit of such criminal offences as "aiding and abetting" or being an "accessory after the fact".[7] This includes, for example, a lawyer purchasing a gun for his or her client knowing that it is to be used to kill someone, or hiding a gun which he or she knows has been used to kill someone. There is no doubt that assistance of this kind by a lawyer is not only illegal in itself but also a ground for professional discipline.

At the other end of the spectrum is a lawyer's mere non-disclosure of past or proposed conduct by a client or some other person. We have seen in previous chapters that if the information was obtained by the lawyer in such circumstances that it falls within the ambit of legal professional privilege, then he or she is under a duty not to disclose it unless, for example, it relates to a proposed crime or fraud and some form of compulsory inquiry on the matter is directed towards the lawyer. If the information is not within the privilege but is obtained in the course of professional work, the lawyer is under no duty to disclose it save in response to a compulsory inquiry.

We are principally concerned in this section with conduct which falls between these two ends of the spectrum. This includes, for example, a lawyer giving legal advice which he or she knows, or ought to know, will enable a client to concoct a defence to a charge, or to act illegally without being detected. ■

7. See, for example, G. Williams, *Textbook of Criminal Law* (1978) Ch. 13; and A. Bates, et al., *The System of Criminal Law* (1979), Ch. 9.

(2) Illegal or Improper Conduct

■ We are concerned here not only with assistance for illegal conduct but also with assistance for conduct which, though not illegal, may be widely regarded as improper because it is:

- contrary to the spirit and intention of a law; or
- contrary to the public interest.

As will be seen, there is considerable debate about the extent to which the principles applicable to illegal conduct should apply also to improper conduct. ■

(3) The Cab-Rank Rule

■ In Chapter 17 we discussed the cab-rank rule, which imposes a duty on lawyers to accept work irrespective of whether they approve of the client's conduct. We pointed out, first, that the rule is of limited application. For example, it applies only to barristers, and to matters in courts in which the barrister in question professes to practise. It does not, therefore, apply to any non-litigious work or to any work by solicitors. Secondly, the rule is subject to certain overrriding duties, such as the duties not to accept work when one has a conflict of interest which we discussed in Chapters 21 and 22.

The basic issue in the present discussion is whether lawyers are under a duty in some circumstances *not* to undertake work which is likely to assist illegal or improper conduct. Where such a duty exists, it will override any duty to accept work which may arise from the cab-rank rule. ■

2. GENERAL PRINCIPLES

■ Formal rules stating general principles applicable in this context are given in the first extract below. The second extract is a discussion of general issues and principles in this area. ■

PROFESSIONAL CONDUCT RULES

Law Society of Western Australia

7.1. Subject at all times to the duty of practitioners to the court a practitioner shall give undivided fidelity to his client's interest, unaffected by . . . the practitioner's perception . . . of the public interest.

12.1. A practitioner shall not advise a client to engage in conduct which he considers may be illegal except in good faith to test the validity or scope of the law and provided that prior to so doing he informs the client of the consequences and likelihood of the conduct being found to be illegal and the client is given complete freedom of choice whether or not so to act.

12.2. A practitioner shall draw his client's attention to the possible effect of any proposed course of action which may adversely affect his client's credit or honour.

12.3. Counsel whose client behaves in an illegal, offensive or improper manner shall nevertheless continue to act for him unless:

(a) he is justified in assuming that his instructions have been withdrawn; or

(b) he finds that his professional conduct is being or is likely to be impugned and he can withdraw from the case or matter at that stage without jeopardising his client's interests.

Practical Advocacy

Mr Justice
JOHN H PHILLIPS

The present notes touch on the duties of the Crown Prosecutor in relation to:

(1) the calling of witnesses as part of the case for the prosecution;
(2) prior inconsistent statements made by prosecution witnesses; and
(3) sentence.

The general nature of the responsibilities of a Crown Prosecutor are set out in the words of Newton J and Norris AJ in *R v Lucas* ([1973] VR 693 at 705):

> "It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the Court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State."

Further, Deane J observed of the Crown Prosecutor in *Whitehorn v The Queen* ((1983) 57 ALJR 809 at 811):

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

1. The calling of witnesses as part of the case for the prosecution

". . . the prosecutor's role in this regard is a lonely one." By the High Court, *R v Apostilides* ((1984) 58 ALJR 371 at 376).

During the last fifteen years the High Court has moved to a definitive statement on this matter. In *Richardson v The Queen* ((1974) 131 CLR 116), counsel for the Crown was not prepared to call an alleged eyewitness to the offence charged because he took the view that she was not a truthful witness. In the course of their joint judgment, Barwick CJ, McTiernan and Mason JJ said this:

> "Any discussion on the role of Crown Prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused."

The Court went on to observe that the Crown Prosecutor's decision in this respect may involve consideration of a multiplicity of factors including the credibility of the witness's account and its significance in the presentation of the Crown case. The Court took the view that the Crown Prosecutor had a discretion but that it was a discretion dissimilar from a judicial discretion in that it

> "signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities we have already mentioned" (ibid, at 119).

The Court next considered this particular aspect of the Crown Prosecutor's duty in *Whitehorn v The Queen*, ante, where Dawson J observed (ibid, at 816):

> "All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eyewitnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However a Prosecutor is not bound to call a witness, even an eyewitness, whose evidence he judges to be

unreliable, untrustworthy or otherwise incapable of belief. And if the number of witnesses available for the proof of some matter is such that in the circumstances it would be unnecessarily repetitious to call them all, then a selection may be made. All witnesses whose names are on the indictment, presentment or information should nevertheless be made available by the prosecution in order that they may be called by the defence and should, if practicable, be present in Court."

Finally, five members of the High Court (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ) made a definitive statement on this point in *R v Apostilides* ((1984) 58 ALJR 371 at 376) in these terms:

"We have come to the conclusion that the following general propositions are applicable to the conduct of criminal trials in Australia:

(1) The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

(2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which led the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

(3) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as they then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

(4) When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

(5) Save in the most exceptional circumstances the trial judge should not himself call a person to give evidence.

(6) A decision by the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice."

The Court later added:

"A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call a witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor to simply call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined."

2. Prior inconsistent statements made by prosecution witnesses

Such statements are not infrequently found in the Crown Prosecutor's brief. In some instances the discrepancies between their contents and the sworn evidence of their makers when called as witnesses for the prosecution, may be inconsequential, or irrelevant to the issues raised in the trial, but, when real inconsistency is apparent, the duty of the Prosecutor is clear, namely, he or she is obliged to inform the accused's counsel of the circumstance of inconsistency and disclose the prior statement. The disclosure should be made to the Court if the accused be unrepresented. This obligation is implicit in the decision of the Court of Criminal Appeal in *R v Clarke* ((1931) 22 Cr App Rep 58) where the Court held that counsel for an accused was entitled to see a statement made by a police officer and containing a description of his client for the purpose of considering whether or not to cross-examine as to possible discrepancies between that statement and the witness's sworn evidence.

In *Baksh v The Queen* ([1958] AC 167) statements made to the police by the three main prosecution witnesses had not been available at trial. This led Bernard Gillis QC and J Lloyd-Eley for the appellant to submit:

> "The appellant has been denied the substance of a fair trial. There was in the possession of the Prosecution at the time of his trial evidence of a most cogent character to the effect that the witnesses had given false evidence; he was therefore deprived of the strongest possible weapon when he was seeking to challenge the honesty of the witnesses for the Prosecution. It must be admitted that as soon as counsel and the authorities were aware of the discrepancies proper facilities were given for the production of the statements. If material is in the Prosecution's possession which will destroy their case it is their duty to disclose it."

Lord Tucker, speaking for the Judicial Committee of the Privy Council, observed (ibid, at 172):

> "If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the Prosecution it follows that by cross-examination — or by proof of the statements if the witnesses denied making them — the Defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis."

3. Sentence

Over thirty years ago Christmas Humphries wrote of the Crown Prosecutor (in "The Duties and Responsibilities of Prosecuting Counsel" (1955) *Criminal Law Review* 739):

> ". . . in the matter of sentence he will exercise no grain of pressure towards severity, and will leave his opponent to say what he may in the matter of mitigation."

Such a view is no longer accepted in this country by reason of a gradual change in judicial attitudes in a setting where the Crown, both in the right of the Commonwealth and of the States, has statutory rights touching appeals against sentence (see *R v Tait and Bartley* ((1979) 24 ALR 473)).

The door appears to be shut in the face of persuasive advocacy by the Crown on sentence. In *R v Gamble* ([1983] 3 NSWLR 356) Street CJ (with whom Lee and Enderby JJ agreed) said (ibid, at 359):

> "The further question arises, however, regarding the existence of the duty on the Crown to press upon the sentencing judge forensic considerations adverse to the person standing for sentence. It has not been the practice in this State to impose upon the Crown such an obligation."

His Honour later referred to

> ". . . the traditional and proper role of the Crown, that is to say, a role of abstention from forensic urging upon the Court of considerations adverse to the person standing before it for sentence".

In *R v Burchielli* (Unreported, Court of Criminal Appeal of Victoria, judgment delivered 10 June 1977) Young CJ and Lush J in a joint judgment observed:

> "the general practice in this State is that prosecuting counsel will assist the Judge on matters of law relevant to his sentencing powers but do not offer submissions as to the manner in which a discretion in the choice of courses should be exercised."

Nevertheless, consistently with authority, the Crown Prosecutor must stand ready to assist the sentencing judge in a variety of ways. This assistance may include some or all of the following:

(a) presentation of facts sufficient to properly convey to the judge the nature of the relevant offence or offences and the prisoner's role therein;
(b) the maximum penalty for the offence and the sentencing options available;
(c) the antecedents of the prisoner;
(d) the putting right of any errors of fact or law involved in the presentation of the prisoner's case;
(e) the disclosure of any mitigating circumstance to which the Court's attention has not been drawn on behalf of the prisoner;
(f) the sentences (and the reasons therefor)

imposed on co-accused or upon accused in comparable cases;

(g) the provision of objective information touching on aspects of the case which are technical or unusual.

The consequences of failure to render relevant assistance may be grave indeed; in *DPP v Casey & Wells* (Unreported, Court of Criminal Appeal of Victoria, judgment delivered 20 March 1986) the Court considered appeals by the DPP against sentence, the ground being in each case of manifest inadequacy. The respondents had been convicted of trafficking in a drug of dependence, namely ephedrine; which substance, while proscribed, was non-addictive but was material from which amphetamine can be manufactured. The sentencing judge made it clear he knew nothing about this drug and requested assistance from counsel. The judge was then told, in effect, that ephedrine was more dangerous than marijuana and less dangerous than heroin and that amphetamine use produced adverse psychological effects. The judge then asked for assistance on the appropriate range of sentence, but was told by counsel for the Crown that he felt he was "precluded from making comment". The members of the Full Court (Crockett, McGarvie and Southwell JJ) said this:

> "We do not think it was appropriate for either counsel to suggest precise periods as being appropriate terms of imprisonment but if the prosecution wanted a higher penalty than that imposed — as it now complains it should have got — it ought to have done very much more than it did to allow the Judge to form an accurate appreciation of the nature and extent of the heinousness involved in the offence."

The Court also said:

> "Put another way, if the Prosecution fails to do what is expected of it at the sentencing hearing thus allowing the Judge to fall into error, it cannot expect on its appeal to have that error corrected by an appellate court."

The Court dismissed the appeals although it felt suspicion that "the sentences are probably too light. Perhaps far too light."

Finally, Burt CJ speaking for the Court of Criminal Appeal of Western Australia in *R v Jones* ([1984] WAR 175 at 179) said:

> ". . . notwithstanding error an appeal court on a Crown appeal may decline to intervene and correct it and so decline to displace 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal' — *Whittaker v The King* (1928) 41 CLR 230 per Isaacs J at 248 — if the Crown has failed in its duty to assist the sentencing judge to avoid the error, a fortiori if the Crown with knowledge of what the sentencing judge intended to do has, by its counsel, acquiesced in, and to that extent encouraged him, to do what he did."

JHP

H. C. OF A. 1984. STATE GOVERNMENT INSURANCE COMMISSION v. STEVENS BROS. PTY. LTD. Dawson J

practicality in favour of subtlety: cf. *Fawcett v. B.H.P. By-Products Pty. Ltd.* (26).

It may probably be conceded that the compressor was not in use whilst it was being conveyed upon the truck rather than upon its own wheels. It may be that if it had not been provided with the means by which it could be lifted from the truck so that it had to be lifted by means of a sling or other lifting equipment it could not be said that it was being used in the relevant sense whilst it was being lifted. It is unnecessary to decide that point. But when the lug, which formed part of the compressor, was being used to convey it, it was being used, in my view, no less than when it was being conveyed by the use of its tow-bar and wheels. It was not merely freight; part of its very equipment was being used for the purpose for which it was designed. Had the lug broken whilst the compressor was being lifted and injuries been inflicted as a consequence it would, I think, have been a necessary conclusion that the injuries arose out of the use of the compressor. It is a conclusion which follows no less, in my view, when, as in this case, arising out of the lifting of the compressor by the same means, injuries were caused by a different action on the part of the compressor. I think that the Full Court was correct in concluding that those injuries were injuries arising out of the use of the vehicle within the meaning of the policy of insurance under the *Motor Vehicles Act*. The first respondent was entitled to judgment against the appellant as a third party in the action. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Ward & Partners.*
Solicitors for the respondents, *Baker McEwin & Co.*

R.A.S.

(26) (1960) 104 C.L.R., at p. 87.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN . . . . . APPLICANT;

AND

APOSTILIDES . . . . . RESPONDENT.

H. C. OF A. 1984. *May* 5; *June* 19. Gibbs C.J., Mason, Murphy, Wilson and Dawson JJ.

Criminal Law — Practice — Trial — Evidence — Crown Prosecutor — Discretion in conduct of case — Failure to call witness — Whether ground for setting aside conviction — Trial judge — Power to direct prosecutor to call witness — Power to call witness of own volition.

Per curiam. (1) In a criminal trial the Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

(2) The judge may, but is not obliged to, question the prosecutor to ascertain the reasons that led the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

(3) Whilst at the close of the Crown case the judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as appear to the judge at that stage of proceedings, he cannot direct the prosecutor to call a particular witness.

(4) When charging the jury, the judge may make such comment as he thinks appropriate about the effect that the prosecutor's failure to call a particular person as a witness would appear to have had on the course of the trial.

(5) Save in the most exceptional circumstances, the judge should not himself call a person to give evidence.

(6) A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial as a whole, it is seen to give rise to a miscarriage of justice.

Reg. v. Evans, [1964] V.R. 717; *Reg. v. Lucas*, [1973] V.R. 693; and *Reg. v. Eastwood and Boland*, [1973] V.R. 709, approved.

Titheradge v. The King (1917), 24 C.L.R. 107; *Shaw v. The Queen* (1952), 85 C.L.R. 365; *Richardson v. The Queen* (1974), 131 C.L.R. 116; and *Whitehorn v. The Queen* (1983), 152 C.L.R. 657, considered.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

Nicholas John Apostilides was tried before the County Court at Melbourne on four counts of rape. Earlier on the night of the alleged rapes, Apostilides and the prosecutrix had been accompanied by two other persons, Tibballs and Brodie. The names of Tibballs

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and Brodie appeared on the presentment but they were not called as witnesses for the prosecution. The prosecutor made available to Apostilides' counsel copies of statements Tibballs and Brodie had made to the police. They were called by the defence and were cross-examined by the prosecutor. Apostilides was convicted. An appeal against conviction to the Full Court of the Supreme Court (Young C.J., Kaye and Tadgell JJ.) was allowed. A new trial was ordered. The Crown applied special leave to appeal to the High Court. Further facts are set out in the judgment.

F. G. Fitzgerald Q.C. (with him *J. T. Hassett*), for the applicant. A criminal trial is an adversary proceeding. Each party is free to decide the ground on which he will contest the issues and the evidence he will call: *Ratten v. The Queen* (1). It is for the prosecutor to decide whether he will call a particular witness. A conviction will be set aside for the prosecutor's failure to call a witness only if that failure constitutes misconduct which gives rise to a miscarriage of justice: *Richardson v. The Queen* (2); *Lawless v. The Queen* (3); *Whitehorn v. The Queen* (4). Even if the prosecutor should have called Brodie and Tibballs, there was no miscarriage of justice: *McInnes v. The Queen* (5). The judge was under no duty to ask for the prosecutor's reasons for not calling them as witnesses: *Whitehorn v. The Queen. Reg. v. Lucas* (6) is to the contrary and is wrong. The judge has no power to call a witness of his own volition: *Titheradge v. The King* (7); *Shaw v. The Queen* (8).

[MASON J. referred to *Reg. v. Damic* (9).]

A. J. Kirkham Q.C. (with him *J. H. Barnett*), for the respondent. A trial judge should ask for the prosecutor's reasons for not calling witnesses whose names appear on the presentment: *Reg. v. Lawson* (10); *Reg. v. Lucas*. The judge's failure to do that gave rise to a miscarriage of justice because the defence had to call them itself and was deprived of the opportunity of cross-examination. It is not contended that the judge could direct the prosecutor to call a witness or that he could call the witness himself. [He referred to *Reg. v. Teitler* (11).]

(1) (1974) 131 C.L.R. 510, at p. 517.
(2) (1974) 131 C.L.R. 116, at pp. 119, 121.
(3) (1979) 142 C.L.R. 659, at p. 678.
(4) (1983) 152 C.L.R. 657.
(5) (1979) 143 C.L.R. 575, at p. 579.
(6) [1973] V.R. 693.
(7) (1917) 24 C.L.R. 107, at p. 116.
(8) (1952) 85 C.L.R. 365, at p. 379.
(9) [1982] 2 N.S.W.L.R. 750.
(10) [1960] V.R. 37.
(11) [1959] V.R. 321.

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J. T. Hassett, in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an application by the Crown for special leave to appeal from a judgment of the Full Court of the Supreme Court of Victoria in its criminal jurisdiction whereby the Court (Young C.J., Kaye and Tadgell JJ.) set aside convictions of the respondent on four counts of rape and ordered a new trial. The case, which was fully argued as if it were an appeal, raises important issues touching the responsibility and powers of a trial judge when a Crown prosecutor declines to call as a witness a person whose name appears on the indictment and who would be expected to be able to give evidence which is material to the matters in issue in the trial. It is not concerned with the related, but nevertheless distinct, topics of the responsibility and powers of a trial judge with respect to the recall of a witness after the party calling him has closed his case or the calling of evidence in rebuttal.

The following passage taken from the reasons for judgment of Kaye J. conveniently outlines the facts of the case and the course of relevant events at the trial:

> "The relevant facts as verified by Crown witnesses were as follows.
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> On Saturday evening, 4 December 1982, the prosecutrix, then aged thirty-two years, and Julie Anne Tibballs were in a section of an hotel bar in Richmond. While they were awaiting the arrival of their friend Anne Lorna Jeffrey, the applicant invited the two women to have a drink with him and his friend, Robert Brodie. They refused because they were about to go in to dinner, having reserved a table in the restaurant of the hotel. Some minutes later the prosecutrix told the men that they could join them for a drink in the restaurant if they wished. When Jeffrey arrived, the three women took their table in the restaurant and commenced to dine. While doing so, the applicant and Brodie joined them at their table. The applicant sat next to the prosecutrix and Brodie next to Tibballs. Conversation between the party was pleasant and about general matters. At one stage the applicant put his arm around the prosecutrix and under her T-shirt, whereupon she quickly removed his arm. The two couples, however, became increasingly friendly, Tibballs and Brodie more so than the applicant and the prosecutrix. There were at least two occasions when the applicant gave the prosecutrix a quick hug.
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> At closing time the party, except Jeffrey, set off for the prosecutrix's home on her invitation, the prosecutrix driving the applicant in his car and Tibballs travelling in Brodie's car. After their arrival, they drank coffee and port in the lounge

room while listening to records. Twice, when the applicant pulled her onto his knee, the prosecutrix stood up. On the other hand, Tibballs and Brodie became increasingly familiar with each other, from time to time kissing and cuddling. Later, at about 2.00 a.m. while the two men were in the bathroom, the prosecutrix and Tibballs washed up the coffee cups. When the party reassembled the prosecutrix told them to drink up as it was time for them to go. The applicant asked whether that included him, to which she replied, 'Yes, you too.' Tibballs then led the way to the front door, from where the prosecutrix saw Brodie and Tibballs leave her home. The applicant asked whether the prosecutrix was sure she wanted him to go; she replied that she had only just met him and that the most she would give him was her telephone number.

The applicant returned to the lounge room, where he poured himself a glass of port, and then with the bottle in his hand walked towards the front door, the prosecutrix preceding him. While standing at the front door, the applicant grabbed the prosecutrix, slammed shut the front door, and pushed her backwards into the nearby bedroom, saying that he intended to have his way whether she wanted it or not. He then pushed the prosecutrix backwards onto a single bed and lay on top of her. With one hand on her chin, the applicant pushed the prosecutrix's head back and sideways while continuing to apply pressure until she was fearful that her neck might break. He acceded to her plea to allow her to go to the toilet, gripping her arm as they proceeded to the bathroom. When she emerged from the toilet, the applicant dragged the prosecutrix backwards into the bedroom and pushed her onto the single bed. There he raped her four times, twice vaginally as well as manually and by forcing his penis into her mouth. (The prosecutrix swore that he also raped her per anum; this was the subject of the count on which he was found not guilty.) From the single bed the applicant compelled the prosecutrix to lie with him on the double bed in the other bedroom. There he fell into deep sleep. While he was sleeping the prosecutrix went to a neighbour's house where she complained that she had been raped. The neighbour summoned police.

Two police officers found the applicant asleep in the double bed. After awakening him, one of the policemen told the applicant that the owner of the house alleged that he had raped her in the house that evening. He replied, 'Well, then, this is a job for the judge and jury. I'm not saying any more.' After some conversation about his clothing, the police officer asked the applicant whether he believed she had any grounds for making the complaint. He replied, 'She may have, mate, but I want my solicitor present.' To the police officer's further question whether he and the prosecutrix had engaged in any sexual activity, the applicant answered that they had done everything.

A short time later at police headquarters, Senior Detective Ryan told the applicant that he was investigating a complaint

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that he had raped a woman in Prahran on the previous evening. Throughout the ensuing interrogation and taking of a record of interview, the applicant insisted that the prosecutrix had been a willing and consenting party to acts of intercourse with him during the previous evening. He said that after they had intercourse an argument developed between them because she wanted him to leave as she was expecting friends from Portsea, and that he refused to go, calling her insulting and offensive names. During the argument she tried to push him out of bed, whereupon he grabbed her around the throat and pushed her. After she left the room, he fell off to sleep."

His Honour then described the relevant ground of appeal as

"that the Crown's conduct in failing to call as witnesses Brodie and Tibballs and the manner in which the trial judge dealt with the Crown's failure were prejudicial to the applicant causing the trial to miscarry"

and continued:

"It is necessary to consider the course which the trial took.

The names of Brodie and Tibballs appeared on the presentment as additional witnesses. The prosecutrix was the first witness called. At the commencement of the second day of the trial and before Mr. Barnett, counsel for the accused, resumed his cross-examination of the prosecutrix, the Crown prosecutor announced that he had formed a judgment that Brodie and Tibballs should not be called as witnesses and that he had so informed defence counsel. Following the announcement, Mr. Barnett drew the trial judge's attention to the omission of the Crown prosecutor to advance any reason for his decision. Mr. Barnett stated that much of the cross-examination of the prosecutrix had been based on the contents of statements made by the two witnesses. Counsel submitted that, unless reasons for not calling the witnesses were disclosed, the Crown should be obliged to call them. During the course of discussion, counsel abandoned his submission but stated that he wished to consider whether the trial judge should call the witnesses on his (counsel's) application, so that he might cross-examine them. His Honour expressed doubt whether he had power to call witnesses. He advised counsel to conduct the defence case on the assumption that the likelihood of him (the trial judge) calling the witnesses was extremely remote. Mr. Barnett then resumed his cross-examination of the prosecutrix.

The Crown made available to the applicant's legal advisers copies of statements of both Brodie and Tibballs taken from them by police officers. Outside the Court, the applicant's legal advisers checked with each witness the contents of their respective statements.

When the Crown case closed, Mr. Barnett did not renew the application which he had foreshadowed. The applicant gave sworn evidence verifying and expanding the contents of his record of interview. Brodie, when called by the applicant's

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counsel, gave evidence substantially in accord with the contents of his police statement. During the course of cross-examination of Brodie by the Crown prosecutor, the applicant's counsel made application that he should be at liberty to cross-examine the witness by way of re-examination and that the trial judge should call Tibballs so that the witness might be cross-examined by both counsel. Disallowing the application, his Honour stated that he was not satisfied the interests of justice made it necessary for him to call either of the witnesses. The prosecutor continued cross-examining Brodie, adducing from the witness that, inter alia, eleven years previously in the County Court he was convicted of conspiracy and released on a bond to be of good behaviour.

Tibballs was then called in the applicant's case. She was cross-examined but briefly by the Crown prosecutor without any challenge being made to the veracity of her evidence. Neither in evidence in chief nor in cross-examination did she depart in any material particular from the matters set out in her police statement.

Brodie and Tibballs and the applicant were the only witnesses called by defence counsel.

During the course of the Crown prosecutor's final address to the jury the foreman asked a question. The discussion which followed and his Honour's answer to the question are matters which are not relevant to this appeal. What is significant in connexion with this ground of appeal is that, after replying to the jury's question and in their absence, his Honour, addressing the Crown prosecutor, expressed concern about the course the trial had taken. He drew attention to the circumstances that the Crown prosecutor, after cross-examining her, had described to the jury Tibballs' evidence as 'a very credible account of the whole evening'. His Honour reminded the Crown prosecutor that, by failing to call her as a Crown witness, the accused's counsel had been deprived of an opportunity to cross-examine Tibballs whose evidence the Crown had commended to the jury. After repeating that he had been left in a state of considerable unease about the way the trial had developed, his Honour volunteered that his decision to disallow the accused's counsel to cross-examine Tibballs might have been wrong. Counsel for the accused then made application that the jury be discharged. In the course of further discussion, his Honour said to the Crown prosecutor: '. . . I think Tibballs should have been called by the Crown and that statement is in accord with the longstanding tradition that has applied, as you know, and I know, and everybody else knows, that witnesses who give a creditable [sic] account of the events, at least of significant events, would ordinarily be called by the Crown.'

A short time later his Honour, again addressing the Crown prosecutor, said: 'I must say that my present state of mind is that I think it would have been a fairer trial for the accused had Tibballs, at any rate, been called by the Crown. To say otherwise would be a misstatement of my feelings in the matter.'

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Following further protracted discussion the Crown prosecutor disclosed to the Court information upon which he had decided not to call as witnesses in the Crown case Tibballs and Brodie. Those reasons were as follows: first, the prosecutor had been informed by a member of counsel, who had a previous professional association with her, that the prosecutrix had been told by Tibballs that she had put herself into the defence camp and that she was inflamed by any attempt to get her to give evidence for the prosecution. The Crown prosecutor added that he suspected, as it had been subsequently confirmed in evidence by her, that Tibballs had maintained a romantic attachment with Brodie. Secondly, as a result of his enquiries made on the first morning of the trial, the Crown prosecutor had learnt that Brodie had engaged in schoolboy theft, that eight counts of false pretences preferred against the witness had been adjourned, and that he had been convicted of a charge of conspiracy.

In the absence of the jury, Senior Detective Ryan was then called as a witness. He swore that during the first day of the trial, while standing together outside the Court, Brodie had told him that the trial was more or less a foregone conclusion, that he knew the outcome, and that the accused would be found not guilty. Ryan further swore that when asked what made him say that, Brodie, smiling, said he would tell the police officer after the trial.

Further discussion between his Honour and the counsel ensued. His Honour refused the application to discharge the jury, adding that he did not consider that a high degree of need to do so had arisen."

It is clear from the judgments the subject of the present application that their Honours held a clear view of the way in which the learned trial judge should have handled the situation that was presented during the trial. The primary question was seen to be whether there were sufficient reasons for the prosecutor's decision not to call Brodie and Tibballs, it being implicit in such a question that the Crown can be required immediately after the close of the Crown case to defend its decision by expounding its reasons. After careful consideration, Kaye J. (with whose reasons the Chief Justice and Tadgell J. were in substantial agreement) concluded that the Crown's reasons were insufficient to justify its decision and that in the proper performance of his role the prosecutor ought to have called both Tibballs and Brodie as witnesses in the Crown case. His Honour considered that if the trial judge had followed the correct procedure he would have established that insufficiency at the close of the Crown case. Having invited the Crown, without avail, to call them, he would then himself have called and sworn both Brodie and

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Tibballs in turn and so made them available for cross-examination by the accused's counsel: see *Reg. v. Lucas* (12); *Reg. v. Evans* (13). Because the prescribed procedure had not been followed defence counsel was constrained to call Brodie and Tibballs as his own witnesses, thereby losing the right to cross-examine them and exposing them to cross-examination by the Crown. In the result, Kaye J. concluded that the accused had been unduly prejudiced in the conduct of his defence and that a substantial miscarriage of justice had occurred. It should be added that there is no suggestion that the trial judge was empowered to *direct* the prosecutor to call the witnesses. The existence of that power was denied by the Full Court in *Evans* and the Court was correct in taking that view. As Gowans J. observed in *Reg. v. Eastwood and Boland* (14): "It is apparent from the authorities that there can be no direction to the Crown to call the witness": cf., also, *Skubevski v. The Queen* (15).

The practice which was so clearly laid down by the Full Court in *Lucas* finds some support in the practice in criminal trials in common law jurisdictions overseas. In England, recent decisions confirm that if the prosecution appears to be exercising its discretion with respect to the calling of a witness improperly, the trial judge may intervene and invite the prosecution to call the witness. If the prosecution refuses to do so, the judge himself may call the witness without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice: *Oliva* (16); *Reg. v. Tregear* (17). The discretion to call a witness should be exercised with caution: *Reg. v. Cleghorn* (18).

The English practice is followed in Canada: *R. v. Skelly* (19); *Reg. v. Bouchard* (20); *Reg. v. Talbot* [No. 2] (21). In *Lemay v. The King* (22), it was held explicitly that the trial judge cannot direct the Crown to call a witness whom the Crown considers to be unreliable.

In New Zealand, in *Reg. v. Fuller* (23) the Court of Appeal observed, when dealing with the question of the duty of the Crown with respect to the calling of witnesses, that New Zealand practice conformed with that of England as outlined by the Court of Criminal Appeal in *Oliva*. However, it may be noted that s. 368(2) of the *Crimes Act* 1961 (N.Z.) empowers the court to "require the

(12) [1973] V.R. 693, at pp. 698, 706.
(13) [1964] V.R. 717, at p. 719.
(14) [1973] V.R. 709, at p. 714.
(15) [1977] W.A.R. 129, at pp. 138-140.
(16) (1965) 49 Cr.App.R. 298.
(17) [1967] 2 Q.B. 574.
(18) [1967] 2 Q.B. 584.
(19) (1927) 61 O.L.R. 497.
(20) (1973) 12 C.C.C. (2d) 554.
(21) (1977) 38 C.C.C. (2d) 560.
(22) [1952] 1 S.C.R. 232 [(1951) 102 C.C.C. 1].
(23) [1966] N.Z.L.R. 865.

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prosecutor to call" a witness whom the court thinks should have been so called.

In the United States there is support for the proposition that it is within the discretion of the court to call a witness for whom neither the prosecutor nor the defence is willing to vouch and who appears to possess material evidence. The right is to be exercised with caution: 23 *Corpus Juris Secundum*, "Criminal Law", §.1017; Rogers, "Court's witnesses (other than expert) in criminal prosecution", *American Law Reports* (2d), vol. 67 (1959), p. 539.

From this brief review of criminal trial practice in overseas common law jurisdictions it may be seen that, speaking generally, there is broad support for the twin principles of prosecutorial discretion as to the calling of witnesses and a power in the court to call a witness. That power, however, is in the nature of an ultimate sanction and is to be exercised with caution. In *Cleghorn* (24), the Court of Appeal referred with approval to the statement of Erle J. in the early case of *Reg. v. Edwards* (25):

> "There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but, generally speaking, we ought to be careful not to overrule the discretion of counsel, who are, of course, more fully aware of the facts of the case than we can be."

Nevertheless, the court then added its own comment that there clearly are cases in which the judge is justified in calling a witness.

There is limited authority in this Court dealing with the power of the trial judge in a criminal case to call a witness. The only case in which that question actually fell for decision was *Titheradge v. The King* (26). In that case, after all the evidence called by both the prosecution and the defence had been given, the judge not only called a witness whose evidence seemed to him to be indispensable, but also, being informed by the Crown prosecutor of statements allegedly made by the witness which were inconsistent with his testimony, then recalled two other witnesses to whom those statements were said to have been made. Neither the accused nor the prosecutor consented to this course, although apparently no objection was raised. It was held that there was a substantial miscarriage of justice. However, there was no clear statement of the principles involved which commanded the assent of a majority of the Court. Isaacs and Rich JJ. were of the opinion that a judge in a criminal trial cannot call evidence of his own motion except where the Crown raises no objection and the accused consents. They

(24) [1967] 2 Q.B., at p. 588.
(25) [1848] 3 Cox C.C. 82, at p. 83.
(26) (1917) 24 C.L.R. 107.

simply applied the decision of the English Court of Appeal in a civil case, *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (27), saying that the observations of Moulton L.J. in that case are of general application to the administration of justice both civil and criminal (28). It is to be noted that this view of that decision has not been taken in England. In *R. v. Dora Harris* (29), it was said that it was clearly established that the rule in *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* "does not apply to a criminal trial where the liberty of a subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the State" and as we have already indicated subsequent authorities in England have confirmed that the rule in criminal cases is not the same as that in civil cases. The development of the law in this way in England may have been influenced by the absence prior to 1968 of any power in the Court of Criminal Appeal to order a new trial in any event including a case where the failure of the Crown to call a witness may be found on appeal to have resulted in a miscarriage of justice. The other members of the Court in *Titheradge v. The King* were Barton and Gavan Duffy JJ. The latter contented himself by saying that there had been a miscarriage of justice (30). Barton J. said (31):

> "No one, then, will doubt that there are instances, not numerous, in which in furtherance of justice and in exceptional circumstances presiding judges have rightly taken it upon themselves to actually examine a witness, and, of course, it happens every day that a Judge, in order to understand what a witness has said, asks him a question. But that is a very different matter from the assumption by the Court of the conduct of the case. A trial is a proceeding inter partes, whether the Crown is a party or not, and the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties. Where departures from the rigid observance of this principle have occurred, it has, I think, been upon necessity, as, for instance, in the case where, the parties having definitely closed their evidence, the jury wish a person present to be called for their better information. But the right, where it exists, of a judge to take the conduct of the examination of persons not called by either party must be used with extreme caution. In a civil case there must either be the consent of the parties or an acquiescence on their part from which the strong inference is consent. I have already pointed out that the sections of the *Evidence Act* cited at the Bar are framed, save in a sole particular, upon the assumption that the parties themselves will lead the evidence. That is the normal and proper

(27) [1910] 1 K.B. 327.
(28) (1917) 24 C.L.R., at p. 118.
(29) [1927] 2 K.B. 587, at p. 594.
(30) (1917) 24 C.L.R., at p. 119.
(31) (1917) 24 C.L.R., at pp. 116, 117.

> practice, and any deviation from it must be safeguarded by every precaution. This is especially true in a criminal case. . . . It seems to me that in a criminal case the defence ought to be asked whether the accused consents to the course which the judge proposes to take when he desires (for strong cause) to examine a witness, and the examination ought not to take place without such consent. No such consent was asked or given here. That was, I think, a substantial irregularity."

In *Shaw v. The Queen* (32), Dixon, McTiernan, Webb and Kitto JJ. said:

> "The decisions in England allow the presiding judge at a criminal trial to call a witness if he thinks the imperative demands of justice require it. This view was acted on in Victoria (*R. v. Collins* (33)). But in *Titheradge v. The King* (34) this Court denied the power."

In *Shaw* the Court was concerned with the circumstances in which the Crown might be allowed to call evidence in rebuttal of evidence given during the defence case. In that context the reference to *Titheradge* may have been no more than a passing reference by way of narrative without intending either to approve or disapprove of it. Fullagar J., who delivered a separate judgment, also referred to *R. v. Collins*, which was a case in which Cussen J. had exercised the power to call a witness of his own motion, although not requested by either party to do so; Fullagar J. said (35) that he could not feel the slightest doubt that the course taken by Cussen J. in that case was "entirely correct and proper".

Two further authorities remain to be mentioned. *Richardson v. The Queen* (36) was a case where the prosecutor declined to call an eyewitness to the alleged offence because he considered her to be neither a credible nor truthful witness. The Court comprised Barwick C.J., McTiernan and Mason JJ. Their Honours, in a joint judgment, discussed, in relation to the calling of witnesses, both the role and responsibility of a prosecutor and the powers of a trial judge. With respect to the former topic, their Honours said (37):

> "Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the

(32) (1952) 85 C.L.R. 365, at p. 379.
(33) [1907] V.L.R. 292.
(34) (1917) 24 C.L.R. 107.
(35) (1952) 85 C.L.R., at p. 383.
(36) (1974) 131 C.L.R. 116.
(37) (1974) 131 C.L.R., at p. 119.

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Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.

What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. But to say this is not to give the prosecutor's decision the same character as the exercise of a judicial discretion or the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable. In the context the word 'discretion' signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities which we have already mentioned."

With respect to the powers of a trial judge, their Honours said (38):

"In argument it was submitted that the trial judge had power to direct the Crown prosecutor to call a witness or that he had power to call a witness of his own motion (see *Reg. v. Lawson* (39)). For the disposition of this application it is unnecessary to decide whether a trial judge possesses either of the suggested powers. It is sufficient to say that we remain to be persuaded of the correctness of the submission. It does not seem to accord with the adversary procedure which has hitherto been followed. If the power should be held to exist, the occasions for its exercise should be rare and infrequent, because all too often the trial judge lacks that knowledge and information about the witness, his relationship to the parties and to the evidence to be presented which is essential to the making of a decision whether the witness should be called in the Crown case. The trial judge should be astute to acknowledge the nature of the discretion which is reposed in the prosecutor and the limitations attaching to his judicial knowledge of material circumstances."

In this passage the Court expressed no concluded opinion on the question whether a judge in a criminal case could call a witness of his own motion, but made it clear that if the power does exist it should be rarely and cautiously exercised.

Finally, in *Whitehorn v. The Queen* (40) Dawson J., in the course of a discussion of the authorities in England and Australia, said that there is "a clear divergence in this aspect of criminal law and

(38) (1974) 131 C.L.R., at p. 122.
(39) [1960] V.R. 37, at p. 40.
(40) (1983) 152 C.L.R. 657, at p. 681.

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procedure between England and this country" and that "Since *Titheradge v. The King* (41) it has been established here that the rule is the same in civil and criminal cases and that a witness cannot be called by the judge save with the consent of both parties and then only in exceptional circumstances." However, Gibbs C.J. and Brennan J. (42) expressly reserved their opinion on this question and the other members of the Court, Murphy and Deane JJ., did not find it necessary to discuss it.

We have come to the conclusion that the following general propositions are applicable to the conduct of criminal trials in Australia:

1. The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.

6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

We have not attempted in our first proposition to deal exhaustively with the responsibility of the prosecutor. The description of that responsibility, which we have cited from *Richardson*, emphasizes that the prosecutor's role in this regard is a lonely one, the nature of which is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system. It is not only a lonely responsibility

(41) (1917) 24 C.L.R. 107.
(42) (1982) 152 C.L.R., at p. 660.

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but also a heavy one. A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined.

In the formulation of the fifth proposition we have allowed for the possibility that circumstances may arise when the trial judge will be constrained to call a person to testify. The circumstances which would justify such a course would be rare. It is clear to us that more would be required to establish "most exceptional circumstances" than the refusal of the prosecutor, for reasons which the judge thinks insufficient, to call a witness. Some of the reasons for the need for the extreme reluctance with which the trial judge should even consider usurping the responsibility of the parties with respect to the calling of witnesses appear in the following passage from the judgment of Dawson J. in *Whitehorn* (43):

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. . . . As was pointed out in *Richardson v. The Queen* (44), he frequently lacks that knowledge and information about the witness or his relationship to the parties and to the evidence to be presented which is essential in making such a decision. If he calls a witness himself he will almost always have to do so in the dark, not knowing with any certainty what the witness is going to say or whether he can be relied upon: cf. *R. v. Collins* (45). If the witness is unreliable (and if neither party has seen fit to call him, that is more likely than not), the fact that he is called by the judge may give his evidence an undesirable aspect of objectivity. There can be no assurance that his credit will be tested by either side but, if it is, the judge has no means whereby he can ensure that any necessary steps to re-establish the witness's credit are taken.

(43) (1983) 152 C.L.R., at pp. 682-683.
(44) (1974) 131 C.L.R. 116.
(45) [1907] V.L.R. 202.

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> Because the judge does not know what a witness called by him may say, he may by calling him necessitate the calling of further evidence so that the trial takes a turn which was not intended and which further involves the judge in a function not appropriately his.
>
> Moreover, evidence called by a trial judge may have the effect of shifting the ground upon which the parties have determined to contest the issue; indeed it may have the effect of altering the issue itself."

His Honour illustrated the final comment in the passage we have cited by referring to the recent case of *Reg. v. Damic* (46).

It remains to offer a comment on the sixth proposition. In *Richardson* (47), the Court said:

> "Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call a particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if it constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice."

In our formulation of the sixth proposition we have omitted the reference to misconduct, intending thereby to broaden the approach so as to focus directly on the consequences, objectively perceived, that the failure to call the witness has had on the course of the trial and its outcome. It is not necessary to postulate misconduct of the prosecutor as an essential condition precedent to a miscarriage of justice. No doubt in the great majority of cases of this kind an appellate tribunal which finds a miscarriage of justice to have occurred will trace that miscarriage to a wrong exercise of judgment by the prosecutor which led to the witness not being called. In cases where there has been no error of judgment there will be less likelihood of a miscarriage resulting from the failure to call the witness. Nevertheless, the absence of testimony from a witness may lead to a miscarriage of justice without any error having occurred. *Whitehorn* (48) was regarded as such a case, by some at least of the members of the Court who took part in that decision. The absence, for whatever reason, of any evidence from the complainant was the basic reason, in the light of such evidence as was called, for the Court's conclusion that the verdict was unsafe and unsatisfactory. So, if a prosecutor fails to call a witness whose evidence is essential to the unfolding of the case for the Crown the central question is not

(46) [1982] 2 N.S.W.L.R. 750.
(47) (1974) 131 C.L.R., at pp. 121-122.
(48) (1983) 152 C.L.R. 657.

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whether his decision constitutes misconduct but whether in all the circumstances the verdict is unsafe or unsatisfactory.

The questions which we have discussed are of such importance that, if there were nothing more in the case, they would require special leave to appeal to be granted. However, the Full Court, after a full and careful consideration of the course taken at the trial, reached the conclusion that a substantial miscarriage of justice had occurred. They came to this conclusion after expressing the opinion that the prosecutor's decision not to call Tibballs was not made for satisfactory reasons and that, in the proper performance of his role, he ought to have called both Tibballs and Brodie as witnesses in the Crown case. Although their Honours took a different view of the law from that which we have stated, in the end the question for their decision was whether the failure of the prosecutor to call Tibballs and Brodie, and the fact that the respondent (the accused) was obliged to call them, so prejudiced the respondent in the conduct of his defence that a substantial miscarriage of justice resulted. This is a matter on which opinions might readily differ, but it would be an unusual and in general an undesirable course for this Court to grant special leave to appeal simply to enable the prosecution to seek to overturn an order for a new trial made by a Court of Criminal Appeal which has unanimously decided that, having regard to the circumstances of the particular case, a substantial miscarriage of justice has occurred. We have taken the opportunity to state, so far as is necessary for the present case, the correct practice to be applied, and there remains no sufficient justification for us to grant special leave to appeal.

Special leave to appeal is accordingly refused.

Application for special leave to appeal refused.

Solicitor for the applicant, *J. M. Buckley*, Solicitor for the Director of Public Prosecutions.

Solicitor for the respondent, *J. R. Gardner*, Legal Aid Commission of Victoria.

R.A.S.

[HIGH COURT OF AUSTRALIA.]

STATE BANK OF NEW SOUTH WALES . . . . . PLAINTIFF AND FIRST CROSS-DEFENDANT;

AND

THE COMMONWEALTH SAVINGS BANK OF AUSTRALIA . . DEFENDANT AND FIRST CROSS-CLAIMANT;

AND

THE STATE OF NEW SOUTH WALES SECOND CROSS-DEFENDANT.

H. C. OF A. 1984.

SYDNEY, July 13, 20

Gibbs C.J.

High Court — Practice — Federal jurisdiction — Action commenced in High Court — Action in which Commonwealth party — Power to remit to another court — Specific power to remit to Federal Court — Alternative power to remit to other federal court or State court — Significance of applicable law upon selection of court — Judiciary Act 1903 (*Cth*), s. 44.

Section 44(1) of the *Judiciary Act* 1903 (Cth) provides that any matter other than a matter to which sub-s. (2) applies that is at any time pending in the High Court may be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties. Sub-section (2) provides that where a matter referred to in s. 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may remit the matter to the Federal Court of Australia or any court of a State or Territory. Sub-section (2A) provides that where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may remit the matter to the Federal Court of Australia.

Held that s. 44(2A) is not an exhaustive statement of the power to remit matters of the kind to which it refers, and matters that fall within sub-ss. (1) or (2) can be remitted to courts other than the Federal Court even though they fall also within sub-s. (2A).

Per curiam. Where the High Court is called on to decide to which of two courts a remitter should be made, if the law to be applied in one of the competing jurisdictions is the same as, and that in the other is materially

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Magistrates' Courts (Advance Information) Rules 1985 (a)

(SI 1985 No 601)

5–312 **1.** These Rules may be cited as the Magistrates' Courts (Advance Information) Rules 1985 and shall come into operation on 20th May 1985

(a) Made by the Lord Chancellor in exercise of the power conferred on him by s 144 of the Magistrates' Courts Act 1980, as extended by s 48 of the Criminal Law Act 1977.

5–313 **2.** These Rules apply in respect of proceedings against any person ("the accused") for an offence triable either way other than proceedings where the accused was charged or an information was laid before the coming into operation of these Rules.

5–314 **3.** As soon as practicable after a person has been charged with an offence in proceedings in respect of which these Rules apply or a summons has been served on a person in connection with such an offence, the prosecutor shall provide him with a notice (a) in writing explaining the effect of Rule 4 below and setting out the address at which a request under that Rule may be made.

(a) A suggested form of notice was annexed to Home Office Circular No 26/1985, dated 26 April 1985.

5–315 **4.**—If, in any proceedings in respect of which these Rules apply, either before the magistrates' court considers whether the offence appears to be more suitable for summary trial or trial on indictment or, where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court, before he is asked whether he pleads guilty or not guilty, the accused or a person representing the accused requests the prosecutor to furnish him with advance information, the prosecutor shall, subject to Rule 5 below, furnish him as soon as practicable with either—

(*a*) a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings, or

(*b*) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings.

(2) In paragraph (1) above, "written statement" means a statement made by a person on whose evidence the prosecutor proposes to rely in the proceedings and, where such a person has made more than one written statement one of which contains information as to all the facts and matters in relation to which the prosecutor proposes to rely on the evidence of that person, only that statement is a written statement for purposes of paragraph (1) above.

(3) Where in any part of a written statement or in a summary furnished under paragraph (1) above reference is made to a document on which the prosecutor proposes to rely, the prosecutor shall, subject to Rule 5 below, when furnishing the part of the written statement or the summary, also furnish either a copy of the document or such information as may be necessary to enable the person making the request under paragraph (1) above to inspect the document or a copy thereof.

5–316 **5.**—(1) If the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements imposed by Rule 4 above might lead to any person on whose evidence he proposes to rely in the proceedings being intimidated, to an attempt to intimidate him being made or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that fact or matter.

(2) Where, in accordance with paragraph (1) above, the prosecutor considers that he is not obliged to comply with the requirements imposed by Rule 4 in relation to any particular fact or matter, he shall give notice in writing to the person who made the request under that Rule to the effect that certain advance information is being withheld by virtue of that paragraph.

5–317 **6.**—(1) Subject to paragraph (2) below, where an accused appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before it considers whether the offence appears to be more suitable for summary trial or trial on indictment, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

(2) Where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before the accused is asked whether he pleads guilty or not guilty, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

5–318 **7.**—(1) If, in any proceedings in respect of which these Rules apply, the court is satisfied that, a request under Rule 4 of these Rules having been made to the prosecutor by or on behalf of the accused, a requirement imposed on the prosecutor by that Rule has not been complied with, the court shall adjourn the proceedings pending compliance with the requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Where, in the circumstances set out in paragraph (1) above, the court decides not to adjourn the proceedings, a record of that decision and of the reasons why the court was satisfied that the conduct of the case for the accused would not be substantially prejudiced by non-compliance with the requirement shall be entered in the register kept under Rule 66 of the Magistrates' Courts Rules 1981.

Prosecution Policy of the Commonwealth

Guidelines for the making of decisions in the prosecution process

Presented to the Parliament by the Attorney-General,
the Hon. Lionel Frost Bowen M.P.

Prepared by the Office of the Director of Public Prosecutions
January 1986

Attorney-General's Department

PROSECUTION POLICY OF THE COMMONWEALTH

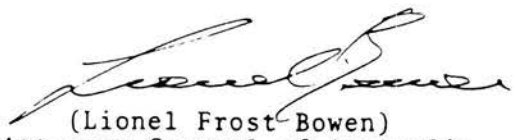
Guidelines for the making of decisions in the prosecution process

Australian Government Publishing Service
Canberra 1986

FOREWORD

In December 1982 a statement concerning the prosecution policy of the Commonwealth was presented to the Parliament on behalf of the then Attorney-General. It gathered together for the first time the guidelines to be followed in the making of decisions relating to the prosecution of Commonwealth offences. That statement reflected the significant role of the Attorney-General in the prosecution process at that time. Apart from the Attorney-General's accountability to Parliament in relation to prosecutions generally - which continues to be the case - he was frequently required to be involved directly in prosecution decisions.

The Director of Public Prosecutions Act 1983 effected a number of significant changes in the Commonwealth prosecution process. The Office of the Director of Public Prosecutions has now prepared a new statement which reflects those changes, as well as the Office's experience to date. This statement, which supersedes the 1982 statement, will provide DPP lawyers and other Commonwealth officers engaged in law enforcement with clear guidelines for the making of the various decisions which arise in respect of prosecutions. It will also inform the public generally of the considerations upon which those decisions are made.



(Lionel Frost Bowen)
Attorney-General of Australia

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PROSECUTION POLICY OF THE COMMONWEALTH

1. INTRODUCTION

1.1 On 5 March 1984 the Director of Public Prosecutions Act 1983 ("the Act") came into operation. It established an Office of the Director of Public Prosecutions ("D.P.P.") controlled by the Director of Public Prosecutions ("the Director").

1.2 The Act effected a number of significant changes in the Commonwealth prosecution process. Perhaps the most significant change is the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General as First Law Officer is responsible for the Commonwealth criminal justice system. He remains accountable to Parliament for decisions made in the prosecution process notwithstanding that those decisions are now in fact made by the Director and lawyers of the D.P.P., subject to any guidelines or directions which may be given by the Attorney-General pursuant to section 8 of the Act. Such guidelines or directions may only be issued after consultation with the Director, and must be published in the Gazette and tabled in each House of the Parliament. Although the power under section 8 may be exercised in relation to particular cases, in his second reading speech the then Attorney-General, Senator Evans Q.C., indicated that it would be very unusual for that to be done in relation to a particular case. No directions or guidelines under section 8 have been issued to date.

1.3 In its 1981 report the U.K. Royal Commission on Criminal Procedure stated that the prosecution system should be judged by the broad standards of fairness, openness and accountability, and efficiency:

> "Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted ..., and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and

> accountable in the sense that those who make the decisions to prosecute or not can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? Each of these standards makes its own contribution to what we see as being the single overriding test of a successful system. Is it of a kind to have and does it in fact have the confidence of the public it serves?" (Cmnd 8092, Report, p.127-8)

These are useful standards for assessing the operation of the Commonwealth prosecution system in Australia; they also afford worthy objectives for the D.P.P.

1.4 At the time of publication of this statement branch offices of the D.P.P., each headed by a Deputy Director of Public Prosecutions, have been established in Victoria, New South Wales, Queensland, the Australian Capital Territory and Western Australia. In those States and the Northern Territory where no D.P.P. branch has been established prosecutions are conducted by the relevant Director of Legal Services on behalf of the Director pursuant to an arrangement made with the Secretary of the Attorney-General's Department under section 32 of the Act. References in this statement to a Deputy Director include a reference to a Director of Legal Services in a State or the Northern Territory where no D.P.P. branch has been established.

2. THE INSTITUTION OF COMMONWEALTH PROSECUTIONS

Who may institute Commonwealth prosecutions

2.1 As a general rule any person has the right at common law to initiate a prosecution for a breach of the law. That right is recognised by section 13 of the Crimes Act 1914 and is expressly preserved by sub-section 10(2) of the D.P.P. Act. Nevertheless, while that is the position in law, in practice all but a very small number of prosecutions are instituted by Commonwealth officers.

2.2 The decision to initiate investigative action in relation to alleged criminal conduct ordinarily rests with the Department which is responsible for administering the relevant Act or regulation. The D.P.P. is not usually involved in such decisions although occasionally it may be called upon to provide legal advice or legal policy guidance, for example, where the facts of the matter are unlikely to be in dispute but there is doubt whether they disclose a breach of Commonwealth law.

2.3 The actual investigation is usually carried out by the Australian Federal Police ("A.F.P.") except where the Department or agency concerned has its own investigative arm. Generally speaking, the D.P.P. is not involved in investigations although from time to time it may be called upon to provide legal advice or legal policy guidance during the investigation stage. In major or very complex investigations such an involvement may occur at an early stage and be of a fairly continuous nature.

2.4 If as a result of the investigation an offence appears to have been committed a brief of evidence should be forwarded to the D.P.P. where it will be examined to determine whether a prosecution should be instituted. Although an A.F.P. or other Commonwealth officer may make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution should proceed. It is therefore generally inappropriate that a prosecution be commenced by an officer without this prior determination by the D.P.P. The Director possesses sufficient powers under section 11 of the Act to require prior consultation in appropriate cases.

2.5 There are circumstances, however, where consultation with the D.P.P. before a prosecution is commenced is either unnecessary or not feasible. First, it is the practice that certain summary prosecutions are conducted by lay persons within particular Commonwealth Departments or agencies where there is a right of audience before the courts. That is acceptable provided the offences are of a routine nature, devoid of difficulty (where, for example, pleas of guilty are common or averment provisions can be relied upon) and are unlikely to result in imprisonment. It is expected that those responsible for such prosecutions will observe these guidelines and that the D.P.P. will be consulted when difficult questions of fact or law arise.

2.6 Secondly, the Director may enter into arrangements with the Australian Government Solicitor for the latter to conduct proceedings for certain types of offences or offences under certain Acts. This may occur, for example, where summary prosecutions under an Act are closely connected with proceedings under another Act to recover a pecuniary penalty and the Director does not have a function to conduct the latter proceedings.

2.7 Finally, cases will inevitably arise where it will be necessary and appropriate that a prosecution be instituted without prior consultation with the D.P.P. One example is where an alleged offender is arrested without warrant. It is also recognised that a significant number of prosecutions for offences against Australian Capital Territory, as opposed to Commonwealth, law are of such a nature that prior consultation with the D.P.P. is either unnecessary or not feasible. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there should be consultation before the institution of the prosecution provided the exigencies of the situation permit.

2.8 The Director has a statutory function of instituting proceedings for an offence, but in practice prosecutions arising out of investigations conducted by the A.F.P. or Commonwealth Departments or agencies are almost always commenced by officers within those organisations with the Director carrying on the proceedings once commenced. There is no legal requirement that a prosecution, once commenced, must be carried on by the Director. Nevertheless, it is most unusual for that not to happen except in the limited circumstances mentioned above. The Director possesses sufficient statutory powers to assume control of prosecutions sought to be carried on by others. The nature of those powers is dealt with later in this statement.

2.9 Mention should be made of a prosecution for a Commonwealth offence instituted by a State police officer. While ordinarily such prosecutions should be carried on or, if necessary, taken over by the Director, there are exceptions to

that general rule. If a person has been charged with both State and Commonwealth offences it may be appropriate for the matter to remain with the State authorities. That will require consideration of (a) whether the prosecution in respect of the Commonwealth offence should in any event proceed, (b) the relative seriousness of the State and Commonwealth charges, (c) the degree of inconvenience or prejudice to either the accused or the prosecution if the proceeding is split and (d), if the offences are indictable, any arrangements between the Director and the relevant State authorities making provision for a "joint trial" on an indictment containing both Commonwealth and State counts. There may also be cases when the balance of convenience dictates that a prosecution for a Commonwealth offence should remain with State authorities notwithstanding that no State charge is involved, for example, when the prosecution relates to a minor Commonwealth offence brought in a remote locality and it would be impracticable for a D.P.P. lawyer to attend.

The decision to prosecute

2.10 Sir Hartley Shawcross Q.C., then Attorney-General, stated to the House of Commons on 29 January 1951:

> "The truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions ... It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.... (T)he public interest... is still the dominant consideration." (See H.C. Debates, Vol. 483, col. 681).

This statement is equally applicable to the position in Australia. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

2.11 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

2.12 It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

2.13 In deciding whether or not a matter should be prosecuted any views put forward by the A.F.P., or the Department responsible for the administration of the law in question, are carefully taken into account. Ultimately the decision is to be made having regard to the considerations referred to below.

2.14 The initial consideration in the exercise of this discretion is whether the available evidence establishes a prima facie case; that is to say, on the basis that the available evidence is accepted without reservation by a jury it could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt. In this regard, if a prosecution has already commenced but on an objective assessment there is not, nor will there be, a prima facie case, the prosecution should not proceed.

2.15 The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account, many of which are referred to below. Dominant in this context is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact. It may also be relevant that the particular offence or offender has characteristics which motivate juries towards acquittal. This assessment may be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In such cases of doubt it may still be appropriate to proceed with the prosecution when regard is had to any other relevant public interest factors, provided a conviction is reasonably open on the available evidence. On the other hand, the public interest may require that a prosecution not be brought although a conviction is more likely than not.

2.16 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:-

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

(b) any mitigating or aggravating circumstances;

(c) the youth, age, physical health, mental health or special infirmity of the alleged offender or a witness;

(d) the alleged offender's antecedents;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) the effect on public order and morale;

(h) the obsolescence or obscurity of the law;

(i) whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;

(j) the availability and efficacy of any alternatives to prosecution;

(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(m) whether the alleged offence is of considerable public concern;

(n) any entitlement of the Commonwealth or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(o) the attitude of the victim of the alleged offence to a prosecution;

(p) the likely length and expense of a trial;

(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(s) whether the alleged offence is triable only on indictment; and

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

2.17 Special considerations apply to the prosecution of persons under the age of 16 years. Prosecution action against children should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as the sentencing alternatives available to the relevant Childrens' Court if the matter were to be prosecuted. The practice of the D.P.P. is that any decision to prosecute a child under 16 years of age should be taken by a senior lawyer, usually the Deputy Director of the Branch Office concerned.

2.18 A decision whether or not to prosecute must clearly not be influenced by:-

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;

(b) personal feelings concerning the offender or the victim;

(c) possible political advantage or disadvantage to the Government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Consent to prosecution

2.19 A number of Commonwealth Acts provide that a prosecution for an offence under the Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister or some specified officer. There are a variety of reasons for the inclusion of such consent requirements in legislation but all are basically intended to ensure that prosecutions are not brought in inappropriate circumstances.

2.20 By various means, principally sub-section 6(4) of the Act, the Director has been authorised to give consent to prosecutions for offences under a number of Acts. In appropriate cases the Director has delegated his power of consent to senior D.P.P. lawyers where that course has been available.

2.21 Often the reason for the requirement for consent is a factor which will ordinarily be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account or to prevent trivial prosecutions. In such cases the question of consent is really bound up in the decision whether to prosecute. Other cases, however, require special care. In some cases the consent provision will have been included as it was not possible to so precisely define the offence that it covered the mischief aimed at and no more. Other cases may involve a use of the criminal law in sensitive or controversial areas, such as censorship, or must take account of important considerations of public policy. In appropriate cases the decision whether to consent to a prosecution is made after consultation with the relevant Department or agency.

2.22 Mention should be made of those prosecutions which require the consent of a Minister or some officer other than the Director. Although there are unlikely to be any differences of view between the person authorised to give consent and the Director on a question whether a prosecution is required in the public interest, it is clearly desirable that there be prior consultation with the D.P.P. where there appear to be difficult questions of fact or law involved.

Choice of charges

2.23 In many cases the same conduct constitutes an offence against several different laws. Care must therefore be taken to choose the charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence. Charges should not be laid with the intention of providing scope for subsequent "charge-bargaining". The decision as to the choice of appropriate charges may also involve consideration as to whether the case should proceed summarily or upon indictment. This aspect is dealt with later.

2.24 A choice of charges will often arise where the general provisions of the Crimes Act 1914 cover the same ground as the provisions of a specific Act. One example is section 138 of the Social Security Act 1947 which overlaps with sections 29A, 29B, 29C, 29D and 67(b) of the Crimes Act. The penalties on summary disposition may be similar but the penalties for Crimes Act offences when prosecuted on indictment are often higher. In addition, a prosecution under a specific Act may be subject to a time limit where a prosecution under the Crimes Act would not. Ordinarily the provisions of a specific Act should be applied unless to do so would not adequately reflect the nature and extent of the criminal conduct disclosed by the evidence. Again, ordinarily the provisions of the Crimes Act should not be invoked to avoid a time limit for a prosecution under the specific Act, particularly where the responsible investigative body has been dilatory in making enquiries in respect of suspected criminal conduct. However, resort to the Crimes Act provisions for such a purpose may be justified in special circumstances, for example, where the defendant has substantially contributed to the lapse of time.

2.25 A number of recent decisions have highlighted the need for restraint in laying conspiracy charges. Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of defendants jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to defendants.

3. CONTROL OF COMMONWEALTH PROSECUTIONS BY DIRECTOR

Background

3.1 As indicated earlier, most prosecutions for Commonwealth offences are instituted by an A.F.P. or other Commonwealth officer and only rarely is a prosecution instituted by a private citizen. Such a prosecution is often referred to as a "private prosecution" but every informant is a private individual in the eyes of the court even if that informant holds an official position (see generally per Fox J. in R v. Kent, Ex parte McIntosh (1970) 17 F.L.R. 65 at 70-73).

3.2 Prior to the Act an A.F.P. or other Commonwealth officer who instituted a proceeding for summary conviction or committment for trial was usually represented by the Crown Solicitor. The relationship between the Crown Solicitor and such an officer was one of solicitor and client. While the Crown Solicitor could advise as to how or whether the prosecution should proceed, as a matter of strict law so long as he represented that officer in the proceeding he was bound to act in accordance with the instructions he received provided, of course, that they were consistent with the Crown Solicitor's duty to the court. Upon a committal for trial being obtained it was for the Attorney-General to ultimately determine whether a prosecution on indictment should proceed (sections 69 and 71 of the Judiciary Act 1903). However, it is extremely doubtful whether the Attorney-General had power to intervene in committal proceedings before commitment or in proceedings for summary conviction.

3.3 The Act has significantly altered the position just outlined. The Director is given a supervisory role as to the prosecution of offences against Commonwealth law and is empowered to intervene at any stage of a prosecution for a Commonwealth offence instituted by another person, except a prosecution on indictment instituted by the Attorney-General or a Special Prosecutor. Pursuant to sub-section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction. Having taken over the proceeding the Director may continue it with himself as informant or he may decline to carry it on further. Pursuant to sub-section 9(4) of the Act the Director may decline to proceed further in the prosecution of a person under commitment or who has been indicted.

The power to intervene in summary or committal proceedings

3.4 If a prosecution is instituted by an A.F.P. or other Commonwealth officer by far the most usual situation is that the Director carries on the prosecution once commenced. If there has been consultation with the D.P.P. prior to the institution of the prosecution there is unlikely to be any differences of view between such an informant and the D.P.P. as to the conduct of the prosecution. However, there may have been no prior consultation and, upon receipt of the brief of evidence, it may appear, having regard to the criteria to be applied in deciding whether to prosecute, that the prosecution should be brought to an end. Alternatively, events may have occurred or new evidence become available which makes it no longer appropriate for the prosecution to proceed. In that event instructions are sought from the informant to bring the prosecution to an end. If those instructions are forthcoming no necessity arises for the Director to exercise the power under sub-section 9(5). However, if the informant declines to give the instructions sought the Director, after considering any reasons advanced by the informant for the matter proceeding, will determine whether the prosecution should be taken over with a view to declining to carry it on further.

3.5 In exceptional circumstances it may be appropriate for the Director to exercise the power under sub-section 9(5) to take over a proceeding instituted by an A.F.P. or other Commonwealth officer with a view to continuing the proceeding with the Director as informant, for example, where there are irreconcilable differences of opinion as to how the prosecution should be conducted.

3.6 Different considerations apply to the exercise of the power under sub-section 9(5) to take over a proceeding instituted by a private citizen with a view to either continuing it or bringing it to an end. The right of a private citizen to institute a prosecution for a breach of the law has long been regarded as "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in Gouriet v. Union of Post Office Workers [1977] 3 All ER 70 at 79). On the other hand, that right may be employed to bring groundless, oppressive or frivolous prosecutions. A balance must therefore be struck between, on the one hand, the private citizen's rights under section 13 of the Crimes Act and, on the other hand, the Director's statutory duty implicit in sub-section 9(5) to ensure that unworthy prosecutions do not proceed.

3.7 A question whether the power under the sub-section should be exercised may arise at the instance of a party to the "private prosecution". Alternatively, the Director of his own motion may determine that the prosecution should not be

left in the hands of a "private informant". To enable the Director to determine whether he should exercise his powers under the sub-section in respect of such a prosecution the Director may require the person who instituted or is carrying on the proceeding to furnish him with a full report of the circumstances of the matter the subject of the proceeding together with other relevant information or material (section 12 of the Act).

3.8 Any consideration whether the power under the sub-section should be exercised with a view to bringing a "private prosecution" to an end ordinarily would not involve as rigid an application of the above criteria to prosecute as would occur in the case of a prosecution instituted by an A.F.P. or other Commonwealth officer. However, the power will be exercised where there is clearly insufficient evidence available to support the charge or continuation of the prosecution is clearly contrary to the public interest.

3.9 On the other hand, where it is proposed that the Director take over a "private prosecution" with a view to carrying it on, ordinarily the Director will determine whether it is appropriate that he do so having regard to the criteria to prosecute that would apply if the prosecution had been commenced by an A.F.P. or other Commonwealth officer.

Declining to proceed further after commitment

3.10 After the defendant has been committed for trial the question may arise, either on the initiative of the D.P.P. lawyers involved in the prosecution or as a result of an application by the defendant or his legal representatives, whether the defendant should be indicted. In this regard, while certain senior D.P.P. lawyers have been authorised pursuant to paragraph 9(2)(b) of the Act to sign indictments, at the present time only the Director or the Senior Deputy Director as the Director's delegate can exercise the power under sub-section 9(4) to decline to proceed further in a prosecution on indictment.

3.11 Where the D.P.P. was involved in the decision to prosecute and conducted the proceedings leading to the commitment, it will be a most exceptional course for a decision to be made not to file an indictment. However, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may have to be reassessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under sub-section 9(4) it is determined on the criteria set out earlier on the decision to prosecute. In the normal course the A.F.P. or relevant Commonwealth Department or agency is consulted before any decision is made.

3.12 Special mention should be made of no bill applications addressed to the Attorney-General. The Attorney-General has indicated to the Director that they should be determined by the Director and further stated that he would consider such applications addressed to him following an earlier refusal by the Director only in exceptional circumstances and only after consultation with the Director. This approach was approved by the Federal Court in Clyne v. Attorney-General (1984) 55 A.L.R. 92 at 99 in which Wilcox J. said:-

> "Parliament has given to the Director the power to determine for himself whether an indictment shall be filed and whether a prosecution shall be discontinued.

> The evident intention was to divorce the Government, and the Attorney-General in particular, from day-to-day decision making in those areas".

4. SOME OTHER DECISIONS IN THE PROSECUTION PROCESS

Mode of trial

4.1 Where an indictable offence can be determined by a court of summary jurisdiction the prosecution plays a major role in the decision as to mode of trial; indeed, under some Acts the request or the consent of the prosecution is a pre-condition to summary disposition.

4.2 In determining whether or not a case is appropriate for trial on indictment regard should be had to all the circumstances of the case including:

(a) any implied legislative preference for a particular mode of trial;

(b) the adequacy of sentencing options if the case were determined summarily;

(c) the delays, cost and adverse effect on witnesses likely to be occasioned by proceeding on indictment;

(d) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions in order to deter similar breaches;

as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.

4.3 A decision whether to insist upon or seek (as the case may be) trial on indictment should be made and communicated to the defendant and the court at the earliest possible stage.

Charge-bargaining

4.4 "Charge-bargaining" involves discussions between the defence and the prosecution in relation to the charges to be proceeded with. Such discussions may result in the defendant pleading guilty to fewer than all of the charges he is facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

4.5 Charge-bargaining is to be distinguished from consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in R. v. Marshall [1981] VR 725 at 732 said:

> "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does

not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."

4.6 This statement has earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

(a) a charge-bargaining proposal should not be initiated by the prosecution; and

(b) such a proposal should not be entertained by the prosecution unless -

(i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;

(ii) those charges provide the basis for an appropriate sentence in all the circumstances of the case; and

(iii) there is evidence to support the charges.

4.7 Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter proposal to the defence, must take into account all the circumstances of the case and, in particular:-

(a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) the likelihood of adverse consequences to witnesses;

(g) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;

(h) the need to avoid delay in the despatch of other pending cases; and

(i) the time and expense involved in a trial and any appeal proceedings.

4.8 In no circumstances should the prosecution entertain a charge-bargaining proposal initiated by the defence if the defendant maintains his innocence with respect to a charge or charges to which he has offered to plead guilty.

4.9 Where the relevant legislation permits an indictable offence to be dealt with summarily, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the proposed charges be dealt with summarily and that the prosecution either consent to or not oppose (as the legislation requires) summary disposition of the matter. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the matter is dealt with summarily. While the decision of the prosecution in respect of such a request should be determined having regard to the above considerations reference should also be made to the considerations set out in the earlier sub-heading "Mode of Trial".

4.10 Any participation of the prosecution in charge-bargaining discussions should be cleared by a senior D.P.P. lawyer, preferably the relevant Deputy Director. Where such discussions take place following a committal for trial the defence is to be informed in writing that any agreement which may be reached is subject to the approval of the Director.

4.11 Where a charge-bargaining proposal is made in connection with a proceeding for commitment or for summary conviction, the informant should be consulted and his instructions sought to proceed with any proposed agreement. If the informant declines to give the instructions sought and it is considered that in the interests of justice the proposed agreement should still be entered into, the matter should be referred to the Director to determine whether he should exercise his power under sub-section 9(5) of the Act to take over the proceeding.

Indemnification of witnesses

4.12 In principle it is desirable that the criminal justice system should operate without the need to grant an indemnity or immunity against prosecution to persons who participated in offences in order to secure their evidence against the principal offenders. However, it has long been recognised that in some cases this course may be necessary in the interests of justice.

4.13 Sub-section 9(6) of the Act provides, in effect, that where the Director considers it appropriate to do so he may give a person an undertaking that the evidence the person gives in specified proceedings for an offence against Commonwealth law will not be used in evidence against the person. Where the Director gives such an undertaking the person's evidence, by force of sub-section 9(6), is not admissible against the person "in any civil or criminal proceedings in a federal court or in a court of a State or Territory other than proceedings in respect of the falsity of evidence given by the person".

4.14 Sub-section 9(6) of itself does not provide any immunity against prosecution and a person who is given an indemnity under the sub-section may still claim privilege against self-incrimination should he so choose (see generally Sorby v Commonwealth (1983) 57 ALJR 248). Accordingly, if the co-operation of a

prospective accomplice/witness is to be secured for the prosecution the decision whether or not to indemnify him will often essentially involve consideration whether it is in the interests of justice that he not be prosecuted in respect of some or all of the offences which can be established against him. It is for this reason that, as a general rule, an indemnity under this sub-section is only given as a last resort in order to secure for the prosecution the testimony of a relatively minor participant in the criminal activity which is the subject of the charges against a principal offender. Strong justification is required for any departure from this general rule. In particular, where the prospective accomplice/witness cannot be regarded as a minor participant yet his evidence may be necessary to secure the conviction of a principal offender, it may not be appropriate for that accomplice to be indemnified unless he is prosecuted in respect of at least some of the offences committed by him or some lesser charge or charges.

4.15 On the other hand, an indemnity under sub-section 9(6) will be given more readily where, disregarding the witness' co-operation or likely co-operation with the authorities, his prosecution would not be warranted when regard is had to other public interest factors.

4.16 Set out below is the list of matters on which information is ordinarily required to be furnished to the Director in support of a request for a witness to be given an indemnity under sub-section 9(6). The list should not be regarded as exhaustive. Further, it should not be assumed that because satisfactory information is provided in respect of the matters listed that the indemnity will be granted as a matter of course.

The Facts

(a) (i) A summary of the relevant facts indicating in particular the full extent of the involvement of the person proposed to be indemnified ("the witness") with the principal offender.

(ii) Whether the participation in the offence by the witness was in any way prompted by the police or some other authority.

(iii) Whether the available evidence (including that expected from the witness proposed to be indemnified) establishes prima facie the offences alleged against the principal offender.

The Principal Offender

(b) The charges preferred against the principal offender in the subject proceedings.

(c) Whether the public interest requires that the case proceed against the principal offender.

(d) Whether all possible alternatives to secure the conviction of the principal offender have been pursued so that indemnification of any accomplice is a matter of last resort.

The Person for Whom Idemnification is Proposed

(e) Particulars of the general character of the witness and a full account of any prior criminal history together with details of any charges pending against the witness in respect of criminal conduct unrelated to the subject proceedings against the principal offender.

(f) Whether the witness is a principal in the criminal activity which is the subject of the proceedings or only a minor offender.

(g) The offences it is considered the witness has committed in respect of the criminal activity which is the subject of the proceedings against the principal offender. Whether there is sufficient admissible evidence available to establish prima facie any or all of those offences and, if so, whether it is intended to prosecute the witness for any such offence.

(h) Whether any reward or inducement other than an agreement to seek an indemnity was offered to the witness either as a condition of his being prepared to give evidence or otherwise.

(i) A full statement, that has been signed by the witness if possible. If necessary, recourse should be had to obtaining a statement that is clearly inadmissible against the witness. Whether it is likely that the witness will give evidence in accordance with the statement once indemnified.

(j) The value of the witness'likely evidence in the proceedings against the principal offender. Whether it is available from other sources.

(k) The effect, if any, the proposed indemnity under sub-section 9(6) and other indemnities (if any) will have upon the weight of the evidence the witness will be able to give having regard to any inducement given, previous denials by the witness, the present relationship of the witness to the principal offender etc.

(l) Whether counsel (if briefed) agrees that the indemnity should be granted.

(m) Whether the witness' likely testimony will disclose the commission of an offence under State or foreign law and, if so, whether it is considered necessary to obtain an indemnity from the State or foreign authorities concerned.

(n) Details of any protection or special privileges to be provided to the witness and, if so, for what duration.

(o) Any other matters which may be thought relevant to a decision in the particular case.

5. CONCLUSION

5.1 These guidelines do not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. It is presently sufficient to state that throughout a prosecution the prosecutor must conduct himself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of Government or of individuals - he is a servant of justice. At the same time it is important not to lose sight of the fact that the prosecutor discharges his responsibilities in an adversarial context and seeks to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigourously and skilfully.

5.2 It is intended that this statement will be kept under review. Any changes will be made public.

JUN 30 1988

OFFICE OF THE

MINISTER OF JUSTICE

WELLINGTON 1

23 June 1988

Mr Gordon F Proudfoot
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CANADA

Dear Mr Proudfoot

I have your letter of 25 May 1988 regarding the Canadian Bar Association's submission to a Royal Commission of Enquiry.

The issue of disclosure in criminal cases was the subject of the Criminal Law Reform Committee's final report. I attach a copy of the report which canvasses the present law in New Zealand, reviews current legal practice, and makes recommendations for legislative change. I can tell you that the report will form the basis of Government legislation on the topic.

The current position in New Zealand law is that the prosecution has a duty to disclose to the defence the name and address of any person interviewed by the Police (but not to be called as a prosecution witness) who can give evidence on a material subject, whether or not the prosecution considers the person creditworthy. This statement of the law derives from R v Mason [1975] 2 NZLR 289; [1976] 2 NZLR 122 (CA). There is no general duty to go further and disclose the actual information tendered to the Police. However, the court recognised that there may be exceptional circumstances in which a failure to disclose the substance of the information could give rise to a miscarriage of justice.

Disclosure of statements taken from a defendant is reasonably common practice, but by no means automatic. The Criminal Law Reform Committee recommended that any such statements, or other records of interviews with a defendant, should be disclosed on request before the defendant is asked to plead to the charge.

These matters are all canvassed in the Committee's report. In particular, I refer you to paragraphs 13-20, 50-60, 115-156 and to Part IV, which contains the Committee's proposed legislative scheme.

I trust these comments will be of some assistance in the preparation of your brief.

Yours sincerely

Minister of Justice

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REPORT
on
DISCOVERY IN CRIMINAL CASES

Criminal Law Reform Committee
New Zealand

12 We have also considered whether disclosure should be required of the defence. In this regard, we accept that there should be no duty to disclose material which may assist the prosecution to prove its case. More generally, while the diminution of surprise is a desirable object, we do not think, for other reasons, that mandatory disclosure by the defence can be sustained in principle or in practice except in respect of "expert" evidence. This would include evidence of a medical, technical or scientific nature which the defence proposes to use at the trial.

PART I

CURRENT LAW AND PRACTICE

BACKGROUND

13 New Zealand criminal law has never provided for a general scheme of pre-trial disclosure. Subject to a small number of common law rules and statutory provisions, disclosure is based principally on the prosecution's discretion in the conduct of its case. The exchange of information on a counsel-to-counsel basis is typically an informal process. The extent of pre-trial disclosure may hinge on a number of factors including the degree of trust between counsel, the seriousness of the charge, the perceived credibility of witnesses, and also of some significance, the respective views of counsel about the nature of the criminal process.

14 The prosecutor performs the pivotal function in a criminal trial. His or her objective is to present "a precisely formulated case for the Crown against the accused, and to call evidence in support of it."[2] It is for the prosecutor to determine what evidence will be adduced; no duty is owed to the defence to call every witness who can testify to the events giving rise to the offence charged.[3] Nevertheless, it is widely accepted that the prosecutor must present the Crown case with fairness to the accused.

15 Generally, it is for the prosecutor to determine whether fairness requires disclosure of information or elements of the Crown case. Not surprisingly, in an adversary system there is a diversity of opinion amongst prosecutors as to the scope and form of disclosure which should be allowed. There are, however, a minimal number of legal obligations with which the prosecution must comply.

FORMAL DISCLOSURE

16 The leading New Zealand case is R v Mason,[4] which concerned the duty of the prosecution to disclose information which it did not intend to produce in evidence. In Mason, defence counsel, after depositions, sought production of copies of statements made by witnesses who were not to be called. Moller J applied English authority[5] in finding that "if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him creditworthy or not, it must make his name and address available to the defence".[6] It is for the prosecutor to decide whether the evidence is "material" but that decision must be reached with "complete fairness"[7] to the defence. It is not clear whether the rule in Mason applies prior to depositions.

17 As to statements made by such witnesses, Moller J concluded:[8]

> I find that there is no general duty placed upon the prosecution to make available to the defence the written statements that the police have obtained from the persons who, in this case, will come within the ambit of my order [to supply their names, addresses and phone numbers].

18 His Honour suggested that production of such statements may be required in the exceptional case:[9]

> At the same time I am inclined to the view, although I make no decision upon the matter, that in truly exceptional cases, a refusal by the prosecution to comply, at least to some carefully considered extent, with a request for the production of statements of this kind might result in unfairness to the defence, and even, perhaps, a miscarriage of justice.

19 The Court of Appeal[10] affirmed Moller J's decision, agreeing that there must be some circumstances which would justify more than the disclosure of the names of witnesses but declining to set limits on a Judge's discretion to make an order in favour of the defence.

20 There is one categorical exception to the general principle that there is no duty to disclose statements by persons interviewed but not to be called. The exception concerns identification evidence. Pursuant to section 344C of the Crimes Act 1961,[11] the prosecution must supply to the accused, on request, the name and address of any identification witness, a statement of any description of the offender given by the witness, and a copy of any identikit picture or drawing made by such a witness or from information supplied by him or her. Production of the name and address of the witness may be excused if the Judge is satisfied that such an order is necessary to protect the witness or any other person.

Statements of Witnesses Called by the Prosecution

21 There is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence.[12] One or two exceptions should be noted.

22 The first concerns previous inconsistent statements. Where the witness's statement is seriously at variance with his or her actual or intended testimony at trial, defence counsel is entitled to see the statement.[13] Although production has been ordered in a number of cases,[14] the duty to disclose will not extend to statements which exhibit only minor discrepancies with oral testimony.

23 The second exception applies to witness statements shown to the accused. In R v Church,[15] Chilwell J ordered production of statements which were "specifically shown to the accused for the precise purpose of noting his reaction thereto".[16] His Honour reasoned that the police had waived any "privilege" they had in the statements once they had been disclosed to the accused.

24 Barring these limited exceptions, defence counsel can assert no general right to inspect or obtain production of statements made by prosecution witnesses.

Character of Witness

25 The previous convictions of Crown witnesses may, in some circumstances, be subject to disclosure. While it seems clear that if the prosecution knows of a conviction going to the credit of a witness, it should be disclosed,[17] it is doubtful whether the prosecution has a duty to disclose all convictions of all witnesses, even on request.[18] On review, the conviction of the accused will stand unless it can be shown that the verdict was unsafe.[19]

Expert Evidence

26 There are no firm rules regarding the disclosure of "expert" evidence of a medical, scientific or technical nature. In the occasional case, the courts have found reason to require disclosure of evidence relating to the psychiatric disposition of the accused.[20] No general principle can be readily extracted from such decisions.

27 Rules providing a guide to access by the defence to forensic evidence prepared by the DSIR are found in the New Zealand Law Society's Code of Ethics[21] and, in the same terms, in Police General Instructions.[22] Under the rules which, it is stated, "cannot bind practitioners in the conduct of an individual case" the defence must request access to reports and information through the prosecution. On request, the prosecutor shall advise the defence of the general findings of an analysis or examination conducted by the DSIR. A copy of any written report or certificate will be supplied. A request as to the general technique employed by the analyst will be answered in written form. A DSIR analysis or test which favours the defendant shall be forwarded to the defence even if there is no request for it. The defence may ask that the DSIR perform a particular test on a prosecution exhibit or on material supplied by the defence, and the request shall be satisfied unless after consultation with the prosecutor "good reason" exists for refusal.

28 The ethical rules contained in the Code do not deal with disclosure by the defence, nor with access to evidence prepared by "experts" other than those employed by the DSIR.

witness statements and summaries of expected testimony, disclosure in general being less common. When asked whether they disclosed information of any kind which did not assist the prosecution but which might be helpful to the defence, only prosecutors in Toronto appeared to have a regular practice of disclosure.

The Institute's Survey

50 When we commenced consideration of this topic, it was apparent that we needed more information on the practice of disclosure in New Zealand. Apart from Dr Hodge's study, which was itself limited in its scope, the evidence before us was largely anecdotal. In order to approach our inquiry with any confidence, we arranged for the Institute of Criminology at Victoria University to conduct a survey of prosecutors and defence counsel, and that survey is being published[38] contemporaneously with this report.

51 The study, written by Dr M Stace of the Institute, was designed to obtain information of two kinds. First, we wanted to know the extent of disclosure in current practice. Second, we thought it useful to canvass opinion as to the scope and form of disclosure which should be required.

52 A series of questionnaires[39] was prepared for distribution to Crown solicitors, defence counsel in jury trials, police prosecutors, and defence counsel in summary hearings. Each questionnaire dealt with current practice and possible reform. The questionnaires focussed on disclosure at the following stages of the trial process: prior to plea; prior to a defended summary hearing; prior to the preliminary hearing; and before trial on indictment.

53 While we do not propose to discuss Dr Stace's findings in great detail here, a number of general matters should be mentioned. The study confirmed that the range of disclosure varied considerably between individual prosecutors. Also not surprisingly, the responses of prosecutors and defence counsel often differed as to the frequency of disclosure of particular categories of information. For instance, there was a reasonable consensus that the names and addresses of persons interviewed by the prosecution were usually disclosed but considerable disagreement about the freedom of access to exhibits held by the Crown.

54 Generally, both prosecutors and defence counsel confirmed that a relationship of trust was the most common basis for disclosure. As one prosecutor remarked, disclosure was "not based on type of case but type of defence counsel".[40] Additional factors influencing the prosecution approach included the willingness of defence counsel to reciprocate by disclosing information about the defence case, the likelihood of a guilty plea being forthcoming, the seriousness of the charge(s), the perception that information could be used to manufacture a defence or would lead to perjury or intimidation

of witnesses, and a desire to protect the privacy of persons who supplied information in confidence.

55 In some instances, the practice was said by defence counsel to vary between prosecution agencies, although the variation was not consistent. As between the police, Crown Solicitors and the Ministry of Transport, opinion was often divided as to which agency was more helpful.

56 It is at least clear that the exercise of prosecutorial discretion presently holds the key to disclosure between the parties. This observation is particularly important in respect of material which the prosecution is legally required to disclose. A number of the rules of law require the prosecution to make an assessment of the "materiality" or "relevance" of evidence which could be given by persons interviewed by the prosecution. Dr Stace found, however, that prosecutors frequently take other matters (such as those mentioned in paragraph 54) into account. He also found that at least some prosecutors do not comply with Mason in that the names and addresses of potential witnesses are often disclosed only on request.

57 Moreover, the responses from both prosecutors and defence counsel indicate that the notions of "materiality" and "relevance" are susceptible to differing interpretations. The majority of Crown Solicitors confirmed that fairness and possible assistance to the defence were the central criteria in determining materiality, while one or two others implied that the only material evidence was that which supported, or at least did not undermine, the Crown case. The difficulty of subjectively assessing what material would be relevant to the defence was freely acknowledged.

58 At the same time, the prosecution often makes available material it has no duty to disclose, albeit on request. For instance, a summary of facts is usually made available to defence counsel, if requested, before a plea is entered in the District Court. Likewise, prior to a defended summary hearing, the names of prosecution witnesses, copies of forensic reports and the defendant's statement are commonly disclosed.

59 Both prosecution and defence counsel confirmed that such disclosure is by no means automatic. For reasons which have already been mentioned, prosecutors are equally likely to withhold the information. In respect of most categories of information, prosecutors exhibit a wide variation of practice.

60 Prosecutors are particularly cautious about disclosing material to an unrepresented defendant. In Dr Stace's study, a substantial minority of respondents said that at all stages of proceedings prosecution practice differed if the defendant had no counsel. It is apparently rare for the unrepresented defendant to request information and prosecutors seldom initiate contact. In many cases, the caution arises from

that a general notion of privacy attaches to information supplied to the Police. This cannot be so because any person who is interviewed may be required to give evidence, irrespective of his or her wishes. That person does not retain property in the information. There is then a difficulty in reasoning that because a person is not called, his or her consent must first be obtained before the information can be handed over. Indeed, some might think that disclosure of names and addresses only will result in greater, rather than less, infringement of privacy if it means that counsel will then feel bound to approach every person so named.

153 On balance, the majority of the Committee would not place a restriction on the disclosure of statements by persons who have supplied information about particular matters nominated by the defence. We all accept that there is a potential for defence counsel to embark on so-called "fishing" expeditions and agree that requests framed in this way would go beyond the purpose of the disclosure scheme. Most of us consider that the prosecution would be perfectly justified in declining a request which appeared to be either frivolous or vexatious. The merits of the request could then be determined by a Judge, if the defence decided to dispute non-disclosure.

154 As to "statements", we would not restrict disclosure to formal signed statements. Unsigned statements and records of interviews would also be subject to the disclosure rules. If the information is "material" or of particular interest to the defence, access to it should not be denied merely because of the form in which it is recorded.

(vi) Exhibits collected by the prosecution but not to be produced in evidence

155 A similar procedure is recommended for disclosure of exhibits collected by the prosecution. We envisage a duty to notify the defence of any exhibit which is "material". On request, a list of other exhibits relating to particular matters nominated by the defence should be supplied. We also recommend a right to receive copies of, or to inspect, such exhibits if requested. If the articles in question are capable of being duplicated copies should be supplied. Otherwise, the parties should make suitable arrangements for supervised inspection.

156 Although such provisions would afford fairly comprehensive disclosure of information arising out of the police investigation, the proposal is so framed that the obligation to seek access to information other than that considered to be "material" rests with the defence. The sensible course, in our view, is to require the defence to request disclosure and to do so with a reasonable degree of particularity.

MODE OF DISCLOSURE

157 We have already commented, in particular instances, on the means by which disclosure should be effected. Subject to those specific recommendations, we propose that disclosure should usually involve copies of the relevant documents being made available to the defence. In respect of those categories of information which must be supplied automatically at the pre-trial stage, we envisage a standard procedure whereby the prosecution notifies the appropriate court that the disclosure requirements have been satisfied.

158 In all cases, the responsibility for provision of documents and making any other arrangements for disclosure should rest with whoever is to conduct the prosecution. Requests for information should always be forwarded to the prosecutor and not, for instance, to instructing agencies or particular witnesses. It should be the duty of the officer in charge of each case to draw the prosecutor's attention to any and all information which is subject to the rules. It is then for the prosecutor to make disclosure as required, which will in many cases entail the exercise of judgment as to the materiality or relevance of particular information (on this point see paragraphs 163-168). A similar arrangement should apply to prosecutions initiated by other Government departments or local bodies, or to any private prosecution.

159 Except where specifically mentioned, we do not favour a strict timetable for disclosure, incorporating a statutory period of notice. Such a requirement would be quite impractical in many cases, particularly those summary prosecutions which entail an early court appearance. A more flexible approach is required. There will, for instance, be information which does not become available to the prosecution until shortly before a hearing. There is the possibility that the defence itself may not request, at the one time, all the information it is entitled to receive. The preferable course, in our view, is to allow counsel to make their own arrangements for disclosure. While there will need to be provision for adjournment if disclosure has not been made or if the defence has not received sufficient opportunity to assess the material disclosed, a trial should be allowed to continue where an unreasonably late request is made and no injustice would result from proceeding.

160 It follows that there will be a continuing obligation to disclose information. In any case where there is a duty to disclose or where a request has been made for information governed by the rules, any information which falls within the terms of the duty or request should be disclosed as and when it come to the attention of the prosecutor.

161 We have one further recommendation under this head, concerning the defendant who appears without legal representation. That person should have the same rights to request and receive information as would counsel on his or her behalf.

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JUN 2 8 1988

MINISTERIE VAN JUSTITIE

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TO: mr. Proudfoot
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Uw brief:
Onderwerp:

Ons kenmerk: DIDO/APP-127
Datum : 21 June 1988
Doorkiesnummer: 070-70 68 50

Dear mr. Proudfoot,

In reply to your letter of 25 May 1988 concerning the Canadian Bar submission to the Royal Commission on the prosecution of Donald Marshall Jr, I would inform you as follows.

Under Articles 30 et seq. of the code of Criminal Procedure (*Wetboek van Strafvordering*, Sv.), the suspect is allowed access to the trial document. However, during the preliminary judicial examination the examining magistrate is authorised to withhold certain trial documents from the suspect and the defence counsel (Article 51, Sv). The Public Prosecutor is also entitled to do so.

In such cases the suspect must be informed in writing that the document to which he has been given access are incomplete (Article 30, paragraph 2, Sv.). He must be allowed to see the official record of his interrogation. The same applies to official records of the interrogations of other individuals, if their contents have been reported to the suspect by word of mouth. However, an exeption can legally be made with regard to the official reports of interrogations at which the suspect was not present (Article 31, paragraph 1 b, Sv.).

Once the examination has been concluded the suspect is entitled to see <u>all</u> of the trial documents (Article 33, Sv.), including statements by experts regarding the extent to which he may be held responsible for his actions.

Article 51 of the Sv. explicitly accords the defence counsel the same rights as those granted to the suspect by Articles 30-34 of the Sv. Naturally, this also applies to trial documents in cases where the suspects are not being held in custody. If documents are withheld from the suspect, he is entitled (under Article 32, Sv.) to submit a petition to the court to which the Public

- Prosecutor -

Prosecutor or the examining magistrate is attached. It is only during the preliminary judidial examination that the law makes provision for the defence counsel to be present at the interrogations of witnesses (Article 186, Sv.). The suspect may not attend the interrogations of witnesses unless the circumstances for which provision is made in Article 187, Sv. obtain. However, he is informed of the statements made by witnesses as soon as he himself is interrogated. Here, too, the proviso that this must not conflict with the interests of the examination (Article 209, Sv.9) is applicable.

The Code of Criminal Procedure has little to say on the subject of the interrogation of witnesses by investigating officers. Article 159 of the Sv. requires the Assistant Public Prosecutors and the other investigating officers to wait for orders from the Public Prosecutor after drawing up their first official report. It is only if the importance of the investigation is such that further delay is impossible that they continue their investigation, collecting data which may help to advance the case and drawing up official reports on suspect or his lawyer to be present during this investigation. There are no provisions in the law which might imply or give rise to such an obligation. Nor is the Public Prosecutor obliged to allow the suspect or the defence counsel to be present on any occasions when he is questioning witnesses, which he may do on the basis of his personal competence to investigate offences. (Article 148, paragraph 3, Sv.).

Yours sincerely,

mr. M.H.J.M. van Hezik
Information Department

— 2. Hem wordt daartoe, telkens wanneer hij dit verzoekt, zooveel mogelijk de gelegenheid verschaft om zich met zijn raadsman of met zijne raadslieden in verbinding te stellen.

Art. 29. — 1. In alle gevallen waarin iemand als verdachte wordt gehoord, onthoudt de verhoorende rechter of ambtenaar zich van alles wat de strekking heeft eene verklaring te verkrijgen, waarvan niet gezegd kan worden dat zij in vrijheid is afgelegd. De verdachte is niet tot antwoorden verplicht.

— 2. Voor het verhoor wordt de verdachte medegedeeld dat hij niet verplicht is tot antwoorden.

— 3. De verklaringen van den verdachte, bepaaldelijk die welke eene bekentenis van schuld inhouden, worden in het proces-verbaal van het verhoor zooveel mogelijk in zijne eigen woorden opgenomen. De mededeling bedoeld in het tweede lid wordt in het proces-verbaal opgenomen.(*1)

Art. 30. — 1. Tijdens het gerechtelijk vooronderzoek staat de rechter-commissaris, en overigens tijdens het voorbereidende onderzoek het openbaar ministerie, aan den verdachte op diens verzoek toe van de processtukken kennis te nemen.

— 2. Niettemin kan de rechter-commissaris of het openbaar ministerie, indien het belang van het onderzoek dit vordert, den verdachte de kennisneming van bepaalde processtukken onthouden. In dit geval wordt den verdachte schriftelijk medegedeeld dat de hem ter inzage gegeven stukken niet volledig zijn.

Art. 31. Aan den verdachte mag niet worden onthouden de kennisneming van:

a. de processen-verbaal van zijne verhooren;

b. de processen-verbaal betreffende verhooren of handelingen van onderzoek, waarbij hij of zijn raadsman de bevoegdheid heeft gehad tegenwoordig te zijn, tenzij en voor zoover uit een proces-verbaal blijkt van eenige omstandigheid waarvan hij in het belang van het onderzoek tijdelijk onkundig moet blijven, en in verband daarmede een bevel als bedoeld in artikel 50, tweede lid, is gegeven;

c. de processen-verbaal van verhooren, van welker inhoud hem mondeling volledige mededeeling is gedaan.

Art. 32. Ingeval den verdachte de kennisneming van processtukken wordt onthouden, kan hij daartegen binnen drie dagen na de mededeeling vermeld in het tweede lid van artikel 30, een bezwaarschrift indienen bij het gerecht waartoe het openbaar ministerie of de rechter-commissaris behoort, dat binnen vijf dagen beslist.

Art. 33. De kennisneming van alle processtukken in het oorspronkelijk of in afschrift mag den verdachte niet worden onthouden zoodra de beschikking tot sluiting van het gerechtelijk vooronderzoek overeenkomstig artikel 238 voor den officier van justitie onherroepelijk is geworden, dan wel het gerechtelijk vooronderzoek met toepassing van artikel 258, tweede lid, is beëindigd, of, indien een gerechtelijk vooronderzoek niet heeft plaats gehad, zoodra de kennisgeving van verdere vervolging of de dagvaarding ter terechtzitting in eersten aanleg is beteekend.(*2)

Art. 34. — 1. De wijze waarop de kennisneming van processtukken mag geschieden, wordt geregeld bij algemeenen maatregel van bestuur.

— 2. De verdachte kan van de stukken waarvan hem de kennisneming is toegestaan, ter griffie afschrift krijgen; doch het onderzoek mag daardoor niet worden opgehouden.

— 3. Omtrent het verstrekken van afschriften en uittreksels worden regelen gesteld bij algemene maatregel van bestuur.(*3)

Art. 35. — 1. Het gerecht dat tot eenige beslissing in de zaak is geroepen, is bevoegd den verdachte in de gelegenheid te stellen om te worden gehoord.

— 2. Aan een daartoe strekkend verzoek van den verdachte wordt gevolg gegeven, tenzij het belang van het onderzoek dit verbiedt.

— 3. Artikel 23, laatste lid, is van toepassing.

Art. 36. — 1. Wordt eene vervolging niet voortgezet, dan kan het gerecht in feitelijken aanleg, voor hetwelk de zaak het laatst werd vervolgd, op het verzoek van den verdachte verklaren dat de zaak geëindigd is. De verdachte wordt gehoord, althans opgeroepen.

— 2. Het gerecht is bevoegd, de beslissing op het verzoek telkens gedurende een bepaalden tijd aan te houden, indien het openbaar ministerie aannemelijk maakt dat alsnog verdere vervolging zal plaats vinden.

— 3. De beschikking wordt onverwijld aan den verdachte beteekend.

(*1) Art. 29 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 33 is gewijzigd bij de Wet van 26 juni 1975, *Stb.* 340.
(*3) Art. 34 is gewijzigd bij de Wet van 28 maart 1963, *Stb.* 130.

7°. de door Onze Minister van Justitie aangewezen andere ambtenaren van het Korps Rijkspolitie en van gemeentepolitie;

8°. de door Onze Minister van Justitie aangewezen andere onderofficieren van de Koninklijke marechaussee.(*1)

Art. 155. De hulpofficieren van justitie bij de nummers 1-6 van artikel 154 vermeld, doen de processen-verbaal, bij hen ingekomen of door hen opgemaakt, en de inbeslaggenomen voorwerpen onverwijld toekomen aan de officier van justitie.(*2)

Art. 156. — 1. De hulpofficieren van justitie bij de nummers 7 en 8 van artikel 154 vermeld en de ambtenaren, bedoeld bij artikel 141, die geen hulpofficier van justitie zijn, doen hun processen-verbaal, de aangiften of berichten ter zake van strafbare feiten, met de inbeslaggenomen voorwerpen, onverwijld toekomen aan de hulpofficier van justitie, bedoeld bij artikel 155, onder wiens rechtstreeks bevel of toezicht zij staan voor zover Onze Minister van Justitie niet anders bepaalt.

— 2. De officier van justitie kan in bijzondere gevallen gelasten, dat een en ander hem, in afwijking van het voorafgaande lid, rechtstreeks zal worden toegezonden.(*2)

Art. 157. Onverminderd het bepaalde in bijzondere wetten doen de personen bedoeld bij artikel 142 hun processen-verbaal, de aangiften of berichten ter zake van strafbare feiten, met de inbeslaggenomen voorwerpen, onverwijld toekomen aan de officier van justitie, voor zover Onze Minister van Justitie niet anders bepaalt.(*2)

Art. 158. Kan het optreden van de officier van justitie niet worden afgewacht, dan heeft ook ieder zijner hulpofficieren de bevoegdheden bij de artikelen 150 en 151 omschreven.(*2)

Art. 159. Na overeenkomstig de voorgaande vier artikelen te hebben gehandeld, wachten de hulpofficieren van justitie en de overige opsporingsambtenaren de nadere bevelen van de officier van justitie af; gedoogt het belang van het onderzoek zodanig afwachten niet, dan zetten zij het onderzoek inmiddels voort en winnen zij de narichten in, die de zaak tot meer klaarheid kunnen brengen. Van dit onderzoek en de ingewonnen narichten doen zij blijken bij proces-verbaal, waarmede zij handelen overeenkomstig de artikelen 155, 156 of 157.(*2)

VIERDE AFDEELING

Aangiften en klachten

Art. 160. — 1. Ieder die kennis draagt van een der misdrijven omschreven in de artikelen 92-110 van het Wetboek van Strafrecht, in Titel VII van het Tweede Boek van dat Wetboek, voor zoover daardoor levensgevaar is veroorzaakt, of in de artikelen 287-299 van dat wetboek, van menschenroof of van verkrachting, is verplicht daarvan onverwijld aangifte te doen bij een opsporingsambtenaar.

— 2. De bepaling van het eerste lid is niet van toepassing op hem die door de aangifte gevaar zou doen ontstaan voor eene vervolging van zichzelven of van iemand bij wiens vervolging hij zich van het afleggen van getuigenis zou kunnen verschoonen.

— 3. Evenzoo is ieder die kennis draagt dat iemand gevangen gehouden wordt op eene plaats die niet wettig daarvoor bestemd is, verplicht daarvan onverwijld aangifte te doen bij een opsporingsambtenaar.

Art. 161. Ieder die kennis draagt van een begaan strafbaar feit is bevoegd daarvan aangifte of klachte te doen.

Art. 162. — 1. Openbare colleges en ambtenaren die in de uitoefening van hun bediening kennis krijgen van een misdrijf met de opsporing waarvan zij niet zijn belast, zijn verplicht daarvan onverwijld aangifte te doen, met afgifte van de tot de zaak betrekkelijke stukken, aan de officier van justitie of aan een van zijn hulpofficieren,

a. indien het misdrijf is een ambtsmisdrijf als bedoeld in titel XXVIII van het Tweede Boek van het Wetboek van Strafrecht, dan wel

b. indien het misdrijf is begaan door een ambtenaar die daarbij een bijzondere ambtsplicht heeft geschonden of daarbij gebruik heeft gemaakt van macht, gelegenheid of middel hem door zijn ambt geschonken, dan wel

c. indien door het misdrijf inbreuk op of onrechtmatig gebruik wordt gemaakt van een regeling waarvan de uitvoering of de zorg voor de naleving aan hen is opgedragen.

— 2. Zij verschaffen de officier van justitie of de door deze aangewezen hulpofficier desgevraagd alle inlichtingen omtrent strafbare feiten met de opsporing waarvan zij niet zijn belast en die in de uitoefening van hun bediening te hunner kennis zijn gekomen.

— 3. De bepalingen van het eerste en tweede lid zijn niet van toepassing op de ambtenaar die door het doen van aangifte of het verschaffen van inlichtingen gevaar

(*1) Art. 154 is gewijzigd bij de Wetten van 4 juli 1957, *Stb.* 244, 24 okt. 1979, *Stb.* 615.
(*2) De art. 155-159 zijn gewijzigd bij de Wet van 4 juli 1957, *Stb.* 244.

vooronderzoek geen grond bestaat, verklaart hij dit bij een met redenen omklede beschikking.

— 2. Onverminderd het bepaalde in artikel 181 kan de rechter-commissaris, zo de verdachte zich in voorlopige hechtenis bevindt en aan hem nog niet een dagvaarding ter terechtzitting of een kennisgeving van verdere vervolging is betekend, ambtshalve of op het verzoek van de verdachte een gerechtelijk vooronderzoek instellen ten aanzien van het feit waarvoor de voorlopige hechtenis is bevolen. Indien de rechter-commissaris oordeelt, dat grond tot gebruik van deze bevoegdheid bestaat, verklaart hij dit bij een met redenen omkleede beschikking. Een afschrift daarvan zendt hij aan de officier van justitie.

— 3. Zodra een overeenkomstig het voorgaande lid ingesteld gerechtelijk vooronderzoek moet worden uitgebreid tot andere strafbare feiten, dient de officier van justitie een daartoe strekkende vordering in.

— 4. Wanneer een meer nauwkeurige omschrijving van het feit mogelijk is geworden, dient de officier van justitie een dienovereenkomstige vordering in, zodra het belang van het onderzoek de indiening toelaat.

— 5. Artikel 182, tweede lid, en artikel 183 zijn van overeenkomstige toepassing.(*1)

TWEEDE AFDEELING

Instellen van het gerechtelijk vooronderzoek

Art. 185. — 1. Indien tot het instellen van het onderzoek wordt overgegaan, worden zo spoedig en zo dikwijls het belang der zaak dit vordert, verdachten, getuigen en deskundigen gehoord. Bestaat een redelijk vermoeden dat de verdachte op geld waardeerbaar voordeel van enig belang heeft verkregen door middel van of uit het feit ter zake waarvan het onderzoek wordt ingesteld, dan wordt dit mede in het onderzoek betrokken.

— 2. Op uitnodiging van de rechter-commissaris of voor zover deze op een schriftelijk daartoe gedaan verzoek verklaard heeft daartegen geen bezwaar te hebben, kan de officier van justitie de verhoren geheel of gedeeltelijk bijwonen. Hij is daartoe steeds bevoegd, indien de raadsman bij het verhoor tegenwoordig is. In dit geval bevordert de rechter-commissaris, op het verzoek van de officier van justitie, dat deze bij de verhoren tegenwoordig kan zijn, zonder dat het onderzoek daardoor mag worden opgehouden.

— 3. De officier van justitie kan, ook wanneer hij de verhoren niet bijwoont, de vragen opgeven, die hij wenst te zien gesteld.(*2)

Art. 186. — 1. Voor zoover het belang van het onderzoek dit naar het oordeel van den rechter-commissaris niet verbiedt, is de raadsman bevoegd de verhooren bij te wonen. De rechter-commissaris bevordert, op het verzoek van den raadsman, dat deze bij de verhooren tegenwoordig kan zijn, zonder dat het onderzoek daardoor mag worden opgehouden.

— 2. Indien de raadsman het verhoor bijwoont, noodigt de rechter-commissaris hem uit om in of buiten tegenwoordigheid van den te verhooren persoon de vragen op te geven, die hij wenscht te zien gesteld.

— 3. Indien de raadsman het verhoor niet bijwoont, kan hij de vragen opgeven, die hij wenscht te zien gesteld.

— 4. Het eerste lid is niet van toepassing ten aanzien van den raadsman van een verdachte die zich naar het oordeel van den rechter-commissaris desbewust en zonder dat van eene geldige reden van verhindering blijkt, aan zijne verschijning in het gerechtelijk vooronderzoek onttrekt.

Art. 187. Indien er naar zijn oordeel gegrond vermoeden bestaat dat de getuige of de deskundige niet ter terechtzitting zal kunnen verschijnen, noodigt de rechter-commissaris den officier van justitie, den verdachte en den raadsman tot bijwoning van het verhoor uit, tenzij het belang van het onderzoek geen uitstel van het verhoor gedoogd.

Art. 188. De rechter-commissaris neemt de noodige maatregelen om te beletten dat de ten verhoore verschenen verdachten, getuigen en deskundigen zich vóór of tijdens hun verhoor met elkander onderhouden.

Art. 189. — 1. De verdachten, getuigen en deskundigen worden ieder afzonderlijk verhoord.

— 2. De rechter-commissaris kan hen echter, hetzij ambtshalve, hetzij op de vordering van den officier van justitie of op het verzoek van den verdachte of diens

(*1) Art. 184 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 185 is gewijzigd bij de Wet van 31 maart 1983, *Stb.* 153.

— 2. Het bevel vermeldt de redenen welke tot de inverzekeringstelling hebben geleid.

Art. 207. — 1. Telkens ter gelegenheid van het eerste verhoor van de verdachte, nadat een vordering als vermeld in de artikelen 181, 182 en 184, derde en vierde lid, is ingekomen, dan wel een beschikking als bedoeld in artikel 184, tweede lid, is gegeven, wordt hem door de rechter-commissaris een afschrift van die vordering of beschikking ter hand gesteld.

— 2. De rechter-commissaris kan echter bevelen, dat de vordering of de beschikking reeds vóór het verhoor aan e verdachte zal worden betekend.(*1)

Art. 208. — 1. De verdachte kan bij zijn verhoor mondeling getuigen en deskundigen alsmede feiten ten onderzoek opgeven. Bij het proces-verbaal wordt voor zoover de opgave redelijke grenzen niet overschrijdt, van een en ander melding gemaakt, met korte aanduiding van hetgeen de getuigen en deskundigen volgens de opgave van den verdachte zouden kunnen verklaren.

— 2. Indien de rechter-commissaris bezwaar heeft, hetzij tegen het vermelden van een en ander in het proces-verbaal, hetzij tegen het hooren van de opgegeven getuigen of deskundigen, hetzij tegen het onderzoek naar de opgegeven feiten, deelt hij zijne weigering om tot een of ander over te gaan, bij het verhoor of het eerstvolgend verhoor aan den verdachte mede.

— 3. De verdachte kan binnen drie dagen daarna tegen die weigering een bezwaarschrift indienen bij de rechtbank die zoo spoedig mogelijk beslist.

Art. 209. Den verdachte wordt bij zijn verhoor mondeling mededeeling gedaan van de verklaringen van getuigen en deskundigen, die buiten zijne tegenwoordigheid zijn gehoord, voor zoover naar het oordeel van den rechter-commissaris het belang van het onderzoek dit niet verbiedt. Wordt den verdachte de wetenschap van bepaalde opgaven onthouden, dan geeft de rechter-commissaris hem dit mondeling te kennen.

VIERDE AFDEELING

Het verhoor van den getuige

Art. 210. De rechter-commissaris verhoort den getuige, wiens verhoor door hem wenschelijk wordt geoordeeld, door den rechter wordt bevolen of door den officier van justitie wordt gevorderd. Hij kan diens dagvaarding bevelen.

Art. 211. — 1. De eerste twee leden van artikel 201 alsmede de artikelen 203 en 204 vinden ten aanzien van het verhoor van getuigen, die zich in een ander kanton of arrondissement of in de Nederlandse Antillen of Aruba ophouden, overeenkomstige toepassing. Op den verhoorenden rechter binnen het rijk zijn dan de artikelen dezer afdeeling van toepassing, met uitzondering van de artikelen 221-225.

— 2. Houdt de getuige zich op in een ander arrondissement, dan beveelt de rechter-commissaris diens dagvaarding alleen, indien hij eene overkomst noodzakelijk of in het belang van den getuige oordeelt. Het bevel wordt gegeven, hetzij ambtshalve, hetzij op de vordering van den officier van justitie of op het verzoek van den verdachte of diens raadsman. In de dagvaarding wordt van de noodzakelijkheid der overkomst of van het belang van den getuige melding gemaakt.(*2)

Art. 212. — 1. Indien de getuige verhinderd is te verschijnen, kan zijn verhoor geschieden op de plaats waar hij zich ophoudt.

— 2. De rechter-commissaris kan daartoe met de personen door hem aangewezen, en met inachtneming van de bepalingen van artikel 192 elke plaats betreden.

Art. 213. — 1. Ieder die als getuige is gedagvaard, is verplicht voor den rechter-commissaris te verschijnen.

— 2. Indien de getuige niet op de dagvaarding verschijnt, kan de rechter-commissaris hem andermaal doen dagvaarden en daarbij voegen een bevel tot medebrenging of zoodanig bevel later uitvaardigen.

Art. 214. — 1. Indien dit in het belang van het onderzoek dringend noodzakelijk is, kan de rechter-commissaris bevelen dat de overeenkomstig het voorgaande artikel medegebrachte getuige gedurende ten hoogste vier en twintig uren in eene door hem aan te wijzen plaats in verzekering zal worden gesteld.

— 2. Het bevel vermeldt de redenen die tot de inverzekeringstelling hebben geleid.

Art. 215. De getuige verklaart de geheele waarheid en niets dan de waarheid te zullen zeggen.

Art. 216. — 1. De rechter-commissaris beëedigt, indien er naar zijn oordeel gegrond vermoeden bestaat dat de getuige niet op de terechtzitting zal kunnen verschijnen, of in geval de overlegging van beëedigde getuigenissen noodig is om de uitleve-

(*1) Art. 207 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 211 is gewijzigd bij de Wetten van 11 dec. 1980, *Stb.* 666, 12 dec. 1985, *Stb.* 662 (i.w.tr. 1 jan. 1986).

Der Bundesminister der Justiz
- 3262 - 1 - R2 0688/88 -
(Geschäftszeichen: bei Antwort bitte angeben)

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Dear Mr. Proudfoot,

Thank you for your letter of 25 May 1988, in reply to which I should like to give you the following information:

Pursuant to section 147 subsection 1 of the German Criminal Procedure Code, defence counsel is entitled to inspect those files which are available to the court as well as those which would have to be submitted to the court if an indictment were to be preferred, and to inspect items of evidence that are in official custody. However, according to subsection 2 of this provision, defence counsel may be denied inspection of the files or of individual documents on file and may be denied inspection of the items of evidence in official custody where no note has yet been made in the files stating that investigations have been completed and where inspection of the files would jeopardise the purpose of the investigation. By virtue of subsection 3 of section 147 of the German Criminal Procedure Code the following exceptions are made in respect of the above restriction: inspection of written records made of the

examination of the accused and of those judicial investigatory acts in respect of which defence counsel's presence was permitted or should have been permitted.
Where a witness is examined by a judge defence counsel's presence is permitted pursuant to section 168 a subsection 2 of the German Criminal Procedure Code. On the other hand, however, defence counsel's right to be present does not apply where a witness is examined by the public prosecutor.

The interaction of these two provisions thus has the effect that on application defence counsel must be given access, at any stage, to the written record of a judicial examination of a witness, i.e. also where investigations are still in progress. On the other hand, under the conditions referred to, he may be denied inspection of the files until the investigations have been completed in a case where the witness was examined by the police or the public prosecution.

Furthermore, according to section 160 subsection 2 of the German Criminal Procedure Code the public prosecutor is obliged to investigate not only incriminating but also exonerating factors and, where there is a fear that any evidence may be lost, he has to make sure that such evidence is taken.

For your information, I am enclosing photocopies of sections 147 and 168 c of the German Criminal Procedure Code, to which reference has been made above.

Yours sincerely,
For the Federal Minister of Justice,

(Enge)

in the file; he also will be provided informally a copy of the decision.

Section 146. Common Defense Counsel.

(1) The defense of several accused by a common defense counsel is not permitted.

Section 147. Inspection of the Records.

(1) The defense counsel is entitled to inspect those files which are available to the court, those which would have to be submitted to the court if charges have been preferred, and to inspect officially secured pieces of evidence.

(2) If the termination of the investigations has not yet been noted in the file, the defense counsel may be refused inspection of the files of individual documents, as well as the inspection of officially secured pieces of evidence, if such may endanger the purpose of investigation.

(3) At no stage of the proceedings may the defense counsel be denied the inspection of the minutes concerning the examination of the accused, nor of such judicial acts of investigation to which the defense counsel has been or should have been admitted as well as the inspection of expert opinions.

(4) Upon motion, the defense counsel may be permitted to take the files, with the exception of pieces of evidence, to his office or to his apartment for inspection, unless there are significant reasons to the contrary. The decision is not subject to attack.

(5) Regarding the permission to inspect the files, the office of the public prosecutor will decide during the preliminary investigation; in other cases, the presiding judge of the court before which the case is pending is competent.

(6) If the reason denying the inspection of the files has not ceased to exist already before, the office of the public prosecutor must rescind the order no later than upon completion of the investigation. The defense counsel shall be notified as soon as the right to inspect the records exists again without restriction.

Section 148. Attorney-Client Communication.

(1) The accused, even if not at large, is entitled to communicate with the defense counsel in writing as well as orally.

The latter signs and certifies the correctness of the transcript. The proof of the incorrectness of the transcript is permitted.

Section 168b. Records of the Public Prosecutor.

(1) The result of investigation acts by the office of the public prosecutor shall be made part of the records.

(2) The examination of the accused, the witnesses and experts shall be recorded pursuant to Sections 168, 168a as far as this can be made without a considerable delay of the investigations.

Section 168c. Right to be Present.

(1) The prosecutor and the defense counsel are permitted to be present during the judicial examination of the accused.

(2) The prosecutor, the accused and the defense counsel are permitted to be present during the judicial examination of a witness or expert.

(3) The judge may preclude an accused from being present at the hearing if his presence would endanger the purpose of the investigation. This especially applies if it is expected that a witness will not tell the truth in the presence of the accused.

(4) If an accused, not being at liberty, has a defense counsel he is entitled to be present only at such hearings held at the court of that place where he is in custody.

(5) The persons entitled to be present shall be previously notified of the hearing date. The notification is not made if it would endanger the success of the investigation. The persons entitled to be present may not request postponement of a hearing when they are prevented from being present.

Section 168d. Judicial Inspection.

(1) The prosecutor, the accused and the defense counsel are permitted to be present at the hearing when a judicial inspection is made. Section 168c, paragraph (3), first sentence, paragraphs (4) and (5) apply mutatis mutandis.

(2) If at the judicial inspection experts are consulted, the accused may request that the experts to be recommended by him for the trial be summoned to the hearing and if the judge rejects the request,

Appendix D

Uniform Law Conference Disclosure Guidelines

It is recognized that there is a general duty upon Crown Counsel to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information, which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of the client;

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

(c) to encourage the entering of guilty pleas at a date early in the proceedings.

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

Pursuant to this duty, upon request, the accused is entitled to full disclosure of the case in chief for the Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary of trial, as the case may be, of the following information:

(a) The circumstances of the offence. The method of providing the circumstances may include the provision of contents of the police report, the provision of a summary prepared by the investigating policy agency of the case as a whole, the provision of a summary of witnesses' statements or the contents of witnesses statements.

(b) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.

(c) A copy of the accused's criminal record.

(d) Copies of medical and laboratory reports.

(e) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.

(f) A copy of the information.

Additional disclosure beyond what is outlined above is to be at the discretion of the Crown Attorney responsible for the prosecution balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include the following:

(a) Copies of the Criminal records of witnesses.

(b) Names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

The method of disclosure of evidence to an unrepresented accused remains in the discretion of the Crown Attorney responsible for the prosecution.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

It is recognized that the precise mechanics or procedure for providing disclosure will vay from jurisdiction to jurisdiction throughout the country keeping in mind that full and fair disclosure whould be given unless there is a demonstrable need that such full and fair disclosure should not be given.

Appendix E

1981-Ontario Disclosure Guidelines

Guidelines To Crown Attorneys and Other Crown Counsel in the Ministry of the Attorney General with respect to Disclosure to the Crown in Criminal Cases

Introduction

1. It is recognized that generally there is a duty on the Crown:

(a) to disclose the Crown's case;

and (b) to make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the defence may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with the local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be formalized as with other indictable offences.

First Appearance Disclosure

5.(a)Where resources and personnel permit the accused should be provided at the time of his first appearance with a document similar in nature to Appendix "A" to these guidelines [not attached].

(b)Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date (which in some jurisdictions is referred to as an assignment court date), the Crown, at the request in writing of counsel for the accused or counsel's agent, should provide the following:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce them when available;

(c) disclosure of the accused's criminal record and where in the Crown counsel's view relevant, the criminal record of any witness;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to provide same when available;

(e) photos, films, and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copes at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure intends to call as part of the Crown's case-in-chief at trial; an oral outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purposes of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be: if a written outline or synopsis is available at this early stage, it may be provided in lieu of an oral outline or synopsis;

(g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact that witness to advise the witness of the fact that he or she may be contacted by the Defence and that it is up to the witness to decide, if he or she wishes to be interviewed.

<u>Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial</u>

7.(a)Fulfil any undertakings made pursuant to paragraphs 6(a),

(b), (d) and (e) above.

(b) In summary conviction and hybrid matters the oral outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6(f) above together with the disclosure provided pursuant to paragraph 5 shall, as a general rule, be sufficient if Defence counsel has been sufficiently informed in the manner prior to the setting of the date to proceed.

(c) In indictable (non-hybrid) matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure, copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although Defence counsel will use his own discretion as to what portion of the content of written disclosure he will communicate to his client, it is expected that he will refrain from providing such written disclosure or copies thereof to this client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

(a) Defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s. 10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and (b) if counsel chooses to cross-examine on the content of the document, he will refrain from doing so without first applying to the Court to have the jury excluded for the purpose of determining whether the "Will Say" statement is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness' present testimony so as to permit cross-examination pursuant to s. 11 of the Canada Evidence Act.

11. In indictable (non-hybrid) matters it is expected that after receiving the disclosure referred to above Devence counsel will advise the Court and the Crown, prior to the date set to preceed,

the form in which his client elects to be tried.

Appendix F

Model Rules of Professional Conduct and Code of Judicial Conduct

American Bar Association

As amended August, 1984

conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer had a duty to disclose the perjury.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the Model Code to paragraph (d).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or

concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Model Code Comparison

With regard to paragraph (a), DR 7-109(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that a lawyer "shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness. . . ." DR 7-106(C)(7) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(C) provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; [or] (3) A reasonable fee for the professional services of an expert witness." EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (c) is substantially similar to DR 7-106(A), which provided that "A lawyer shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Paragraph (d) has no counterpart in the Model Code.

Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to paragraph (f), DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented ... other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Model Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire. ..." DR 7-108(B) provided that during the trial of a case a lawyer "shall not communicate with ... any member of the jury." DR 7-110(B) provided that a lawyer shall not "communicate ... as to the merits of the cause with a judge or an official before whom the proceeding is pending, except ... upon adequate notice to opposing counsel," or as "otherwise authorized by law."

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excessive bail to prevent release. Since eventually (if not immediately) counsel will usually represent the accused, the prosecutor should not communicate with the defendant until arrangements for legal representation have been made or counsel is waived, unless the prosecutor's reasons for doing so relate to obtaining counsel for the accused or assisting in arrangements for pretrial release. This is consistent with the spirit of the Code of Professional Responsibility, which prohibits counsel from communicating with a party known to be represented by another lawyer.[3]

In some jurisdictions a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Moreover, prosecutors sometimes seek postponement of the preliminary hearing in order to bring the case before the grand jury to obtain an indictment that renders the preliminary hearing moot. Although an adversary preliminary hearing is not a constitutional necessity,[4] these practices may deprive the defendant of valuable information without serving any important public interest. However, some situations may arise in which considerations of valid public policy exist for a continuance at the prosecutor's request; for example, there may be a genuine need to protect an undercover agent or the life or safety of a material witness.

Since the function of the preliminary examination is to determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. Postponement of such hearing should be sought only for good cause and never for the sole purpose of mooting the preliminary hearing by securing an indictment.

Standard 3-3.11. Disclosure of evidence by the prosecutor

(a) It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

3. *See* ABA, Code of Professional Responsibility DR7-110(B).

4. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

(b) The prosecutor should comply in good faith with discovery procedures under the applicable law.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

History of Standard

In paragraph (a), modifications have been made for reasons of style and the word "intentionally" has been added. In addition, there is a stylistic change in paragraph (c).

Related Standards

ABA, Code of Professional Responsibility DR7-103(B)
ABA, Standards for Criminal Justice 4-4.5, 11-2.1, 11-2.2, 18-6.3(d)(i), (ii)
NAC, Courts 3.6, 4.9

Commentary

Withholding Evidence of Innocence

The standard adopts the definition of exculpatory material contained in the Supreme Court's decision in *Brady v. Maryland,*[1] that is, material that tends to negate guilt or reduce punishment. Although the test necessarily presents some questions of relevance, prosecutors are urged to disclose all material that is even possibly exculpatory as a prophylactic against reversible error and possible professional misconduct. The Supreme Court has voiced a similar suggestion with its comment that because the standard for disclosure is "inevitably imprecise . . . the prudent prosecutor will resolve doubtful questions in favor of disclosure."[2]

Paragraph (a) is virtually identical to a provision in the chapter on Discovery and Procedure Before Trial,[3] except that (1) the instant standard refers to the prosecutor's failure to reveal as "unprofessional con-

1. 373 U.S. 83 (1963).
2. United States v. Agurs, 427 U.S. 97, 108 (1976).
3. *See* standard 11-2.1(c).

duct," and (2) the duty of the prosecutor to make disclosures to the defense is not conditioned upon a request by the defense.[4] In addition, paragraph (a) is similar to the Code of Professional Responsibility, which requires a prosecutor to "make timely disclosure . . . of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[5]

Compliance with Discovery

The prosecutor should seek in good faith to make discovery procedures in criminal cases function fairly and effectively. To this end, the prosecutor should not compel the defense to resort to a court order for discovery in order to harass the defense, increase the costs of defense, or obstruct the flow of information when it is known that the information is discoverable.

Independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most if not all of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant's best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.

Intentional Ignorance of Facts

Just as it is unprofessional conduct for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.

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4. For additional commentary pertaining to the substance of paragraph (a), *see* the commentary to standard 11-2.1(c).

5. ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR7-103(B).

Appendix H

England and Wales-Disclosure Guidelines-1982

1. For the purposes of these Guidelines the term 'unused material' is used to include the following: (i) All witness statements and documents which are not included in the committal bundles served on the defence; (ii) The statements of any witnesses who are to be called to give evidence at commital and (if not in the bundle) any documents referred to therein; (iii) The unedited version(s) of any edited statements or composite statement included in the committal bundles.

2. In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary expceptions mentioned in paragraph 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3.(a)If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important - and might even justify delay - if the material might have some influence upon the course of the commital proceedings or the charges upon which the Justices might decide to commit. (b)If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unsued material does not exceed about 50 pages, disclosure should be by way of a copy - either by post, by hand, or via the police.

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in paragraph 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with.

6. There is a discretion not to make disclosure - at least until Cousel has considered and advised on the matter - in the following circumstances:

(i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at Court or otherwise to intimidate him.

(ii) The statement (e.g. from a relative or a close friend

of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

(iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor quite a different, and false, story favourable to the defendant. If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination.

(iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulness - e.g. 'I saw nothing of the fight' or 'He was not at home that afternoon'. There are however grounds to believe that the witness might change his story and give evidence for the defence - e.g. purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination.
(N.B. In cases (i) to (iv) the names and addresses of the witness should normally be supplied.

(v) The statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows: - (a) It deals with matters of national security; or it is by, or discloses the identity of a member of the Security Services who would be of no further use to those Services once his identity became known. (b) It is by, or discloses the identify of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger. (c) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known. (d) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime. (e) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplies - e.g. a bank official. (f) It relates to other offences by, or serious allegations against, someone who is not an accused or discloses previous convictions or other matters prejudicial to him. (g) It contains details of private delicacy to the marker and/or might create risk of domestic strife.

7. If there is doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to Counsel for advice either before or after committal.

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between

the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, that information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt upon his guilt or upon some material part of the evidence on which the Crown is relying) there must either be full disclousre or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in paragraph 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for some reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material, but also the name and address of the maker.

9. Any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in paragraph 6 should be disclosed to the defence until (a) the investigating officer had been asked whether he has any objections, and (b) it has been the subject of advice by Counsel and that advice has been considered by the Prosecuting Solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to the Counsel, the Director of Public Prosecutions should be consulted.

11. In all cases Counsel should be fully informed as to what unused material has already been disclosed. If some has been withheld in pursuance of paragraph 10, he should be informed of any police views, his Instructions should deal - both generally and in particular - with the question of 'balance' and he should be asked to advise in writing.

12. If the sensitve material relates to the identity of an informant, Counsel's attention should be directed to the following passages from the judgements of (a) Pollock C.B. in Attorney General v. Briant (1846) 15 Meeson & Welsby's Reports 169 and (b) Lord Esher M.R. in Marks v. Beyfus (1890) 25 Q.B.D.:

(a) 'The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been the settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience...and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer.'

(b) 'If upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence,

then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with Counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example:

(i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try and make the witness available for interview, if requested; and subsequently, if so desired, to arrange for his attendance at Court.

(ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials.

(iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(iv) Disclosure of all or part of a sensitive statement or document may be possible on a Counsel-to-Counsel basis although it must be recognized that Counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

(v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission with section 10 of the Criminal Justice Act 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would have normally been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for Counsel, if in doubt, to consult the trial judge.

15. If, either before or during a trial, it becomes apparent

that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, Prosecuting Solicitors are advised to consult the Director of Public Prosecutions.

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the Prosecuting Solicitor on receipt of these Guidlelines. It should be adopted as regards cases already submitted, so far as is practicable.

NOTE: Comprehensive though the above Guidelines are, it should be remembered that the word 'documents' embraces artists' impressions, photofits and notes of oral descriptions given by identifying witnesses.

Magistrates' Courts (Advance Information) Rules 1985 (a)

(SI 1985 No 601)

5–312 **1.** These Rules may be cited as the Magistrates' Courts (Advance Information) Rules 1985 and shall come into operation on 20th May 1985

(a) Made by the Lord Chancellor in exercise of the power conferred on him by s 144 of the Magistrates' Courts Act 1980, as extended by s 48 of the Criminal Law Act 1977.

5–313 **2.** These Rules apply in respect of proceedings against any person ("the accused") for an offence triable either way other than proceedings where the accused was charged or an information was laid before the coming into operation of these Rules.

5–314 **3.** As soon as practicable after a person has been charged with an offence in proceedings in respect of which these Rules apply or a summons has been served on a person in connection with such an offence, the prosecutor shall provide him with a notice (**a**) in writing explaining the effect of Rule 4 below and setting out the address at which a request under that Rule may be made.

(a) A suggested form of notice was annexed to Home Office Circular No 26/1985, dated 26 April 1985.

5–315 **4.**—If, in any proceedings in respect of which these Rules apply, either before the magistrates' court considers whether the offence appears to be more suitable for summary trial or trial on indictment or, where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court, before he is asked whether he pleads guilty or not guilty, the accused or a person representing the accused requests the prosecutor to furnish him with advance information, the prosecutor shall, subject to Rule 5 below, furnish him as soon as practicable with either—

(*a*) a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings, or

(*b*) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings.

(2) In paragraph (1) above, "written statement" means a statement made by a person on whose evidence the prosecutor proposes to rely in the proceedings and, where such a person has made more than one written statement one of which contains information as to all the facts and matters in relation to which the prosecutor proposes to rely on the evidence of that person, only that statement is a written statement for purposes of paragraph (1) above.

(3) Where in any part of a written statement or in a summary furnished under paragraph (1) above reference is made to a document on which the prosecutor proposes to rely, the prosecutor shall, subject to Rule 5 below, when furnishing the part of the written statement or the summary, also furnish either a copy of the document or such information as may be necessary to enable the person making the request under paragraph (1) above to inspect the document or a copy thereof.

5–316 **5.**—(1) If the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements imposed by Rule 4 above might lead to any person on whose evidence he proposes to rely in the proceedings being intimidated, to an attempt to intimidate him being made or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that fact or matter.

(2) Where, in accordance with paragraph (1) above, the prosecutor considers that he is not obliged to comply with the requirements imposed by Rule 4 in relation to any particular fact or matter, he shall give notice in writing to the person who made the request under that Rule to the effect that certain advance information is being withheld by virtue of that paragraph.

5–317 **6.**—(1) Subject to paragraph (2) below, where an accused appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before it considers whether the offence appears to be more suitable for summary trial or trial on indictment, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

(2) Where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before the accused is asked whether he pleads guilty or not guilty, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

5–318 **7.**—(1) If, in any proceedings in respect of which these Rules apply, the court is satisfied that, a request under Rule 4 of these Rules having been made to the prosecutor by or on behalf of the accused, a requirement imposed on the prosecutor by that Rule has not been complied with, the court shall adjourn the proceedings pending compliance with the requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Where, in the circumstances set out in paragraph (1) above, the court decides not to adjourn the proceedings, a record of that decision and of the reasons why the court was satisfied that the conduct of the case for the accused would not be substantially prejudiced by non-compliance with the requirement shall be entered in the register kept under Rule 66 of the Magistrates' Courts Rules 1981.