

SOUTH AFRICAN LAW COMMISSION

PROJECT 73

**FIFTH INTERIM REPORT ON
SIMPLIFICATION OF CRIMINAL PROCEDURE**

**A MORE INQUISITORIAL APPROACH TO CRIMINAL PROCEDURE - POLICE
QUESTIONING, DEFENCE DISCLOSURE, THE ROLE OF JUDICIAL OFFICERS AND
JUDICIAL MANAGEMENT OF TRIALS**

AUGUST 2002

TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's 5th interim report on the simplification of criminal procedure dealing with a more inquisitorial approach to criminal procedure.

**JUSTICE Y MOKGORO
CHAIRPERSON: SA LAW COMMISSION
AUGUST 2002**

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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The Honourable Mr Justice RW Nugent (co-opted member)
Mr SG Nel (co-opted member)

The Commission would like to express its appreciation to Professor PJ Schwikkard, Judge RW Nugent and Mr SG Nel of the National Director of Public Prosecutions, who assisted with the drafting of the report and legislation and gave inputs on behalf of the National Prosecuting Authority as well as to the German Agency for Technical Co-operation (GTZ) who provided financial and technical assistance by contracting Professor PJ Schwikkard who, with the assistance of Judge RW Nugent, prepared this report.

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EXECUTIVE SUMMARY

1. As part of its original terms of reference the Commission's project committee dealing with the investigation into simplification of criminal procedure resolved to include an investigation into the question of introducing more inquisitorial elements into our criminal procedure. In the course of the investigation a number of components were identified for possible reform. These included a greater role in the process by the judicial officer; providing the court (presiding officer) with access to information (police docket) with the view to enable him or her to control the proceedings more effectively; taking defence disclosure further and making recommendations in this regard; judicial management of trials and case management; and a review of the existing provisions of section 115 of the Criminal Procedure Act.

2. The report addresses the following issues –

- * **Police questioning of the suspect/accused, its legitimacy, effectiveness and the right to silence and its consequences**

3. In this regard the report considers a number of aspects including –

- the extent to which a suspect/accused could legitimately be questioned and hence used as a source of evidence at the different stages of the criminal justice process (from pre-trial to the trial phase);
- different options to make police questioning more effective, including by bringing it under control of codes of conduct, or under judicial control, or by legislating police questioning;
- the consequences of and constitutional implications of police questioning having due regard to the right to silence; and
- the different admissibility requirements for admissions and confessions.

4. The Commission in particular considered a proposal in terms of which a suspect is placed under a duty to disclose particular matters to the police at the risk that a court might in due course draw an adverse inference from his or her failure to do so. Such provisions exist in the Criminal Justice and Public Order Act 1994 (England) and it was proposed that the similar provisions be incorporated in our law. The provisions will have the effect of placing a suspect under a duty to disclose information to the police, at the

risk that an adverse inference might be drawn if he or she fails to do so, in three circumstances:

- (a) where a suspect is questioned by the police in the course of their investigations and fails to disclose matter that is subsequently relied upon in his or her defence.
- (b) where, upon arrest, a suspect is asked to account for objects, substances or marks found on or in the suspect's possession; and
- (c) where, upon arrest, the suspect is asked to account for his or her presence at the place where he or she was found.

5. Although doubt has been cast upon the constitutional validity of the proposal the Commission is of the view that the matter is not so clear that it should be avoided on those grounds alone. As indicated the proposal is in three parts, and the same objections do not apply to all of them. Two parts of the proposal relate, respectively, to the failure of a suspect to explain his or her possession of objects, substances or marks at the time of arrest, and to the failure of the suspect to explain at the time of arrest his or her presence at the scene of a crime. The Commission concluded that there appears to be no substantial objection to a court drawing an adverse inference if the person fails to provide an explanation in either of those circumstances, nor does the Commission believe that to permit a court to do so will open the way to police misconduct. None of the submissions and comments on the Commission's initial proposals identified any substantial objection to those parts of the proposal but were directed rather to the broader question of police interrogation. The one objection that is relevant to this part of the proposal is that it would be incongruous to warn a person upon arrest that he or she had a right to remain silent but then draw an adverse inference for doing so, but this overlooks the fact that the suspect is required to be informed of the consequences of failing to give an explanation.

6. The third part of the proposal concerns the broader question of the failure of a suspect to make disclosures under police questioning. Most of the comments and submissions were based, in one way or another, upon a concern that to encourage the questioning of suspects by the police carried with it the danger that suspects would be overreached. It must be borne in mind, however, that the present proposal does not introduce an innovation in that respect. There is nothing to prevent the police from questioning

suspects, and from thereby securing admissions or confessions, which might be admissible in evidence against the accused if the grounds for such admissibility are established. The proposal does no more than to place the suspect under the risk that if he or she fails to disclose something to the police which is later relied upon in support of the defence, a court might disbelieve the accused. Moreover, a court is not obliged to draw an adverse inference against a suspect, even where it is justified, and it will be open to a court to exclude evidence of what occurred during questioning if it is not satisfied that the accused was fairly treated.

7. The Commission nevertheless recognised that the proposal might provide a further incentive to the police to question suspects with an additional risk that misconduct might occur. In those circumstances the proposal has been modified to limit its application to questioning which has taken place substantially in accordance with a Code of Conduct promulgated in terms of the Police Act.

* **Admissibility of admissions and confessions**

8. Our law draws a distinction between admissions (whether by words or by conduct) and confessions in determining the “threshold” requirements for admissibility. The significance of the distinction is that the requirements for admissibility are more onerous for confessions than for admissions. For an admission to be admitted into evidence it must be established that it was made “voluntarily”, and that term has been restrictively interpreted. An admission is not voluntary if it has been induced by a promise or threat proceeding from a person in authority. A confession may be admitted into evidence only if it was “freely and voluntarily” made by the accused in his “sound and sober senses and without undue influence”. If the confession was made to a peace officer other than a magistrate or justice, the confession must be reduced to writing and confirmed in the presence of a magistrate or justice.
9. In the Discussion Paper the Commission recommended that the Criminal Procedure Act be amended to provide common requirements for the admissibility of all statements or conduct of the accused which might be self-incriminatory and which:
 - (a) does not distinguish between police officers and others;
 - (b) does not require any such statement to be reduced to writing;

(c) expressly confers a discretion upon a court to exclude any such statement or conduct which is elicited in substantial breach of the Code of Conduct relating to the treatment of persons in custody referred to above.

10. The Commission concluded that the proposal that there should be common requirements for the admissibility of confessions and admissions, in whatever form they occur, is largely uncontentious. What is contentious is only whether incriminatory statements made to police officers should be dealt with on a different basis. Bearing in mind that incriminating statements will be admissible only if it is established by the prosecution that the statement was made freely and voluntarily, while the person was in his or her sound and sober senses, and without having been unduly influenced thereto, the Commission is of the view that no purpose is served by an additional requirement that such statements made to the police should be reduced to writing. Accordingly the Commission adheres to its initial recommendation and proposes an amendment of the Criminal Procedure Act to give effect thereto.

* **Defence disclosure before and during the trial**

11. In this regard consideration the Commission considered –

- whether or not the defence should be required to disclose relevant evidence, and if so, the extent to which it should be required; and
- whether the existing provisions with regard to prosecution disclosure are sufficient and, if not, the extent to which amendments would be justified.
- a review of the provisions of section 115 of the Criminal Procedure Act and its interaction with the right to silence and the consequences of non-disclosure.

12. The Commission considered suggestions that the defence should be required to make disclosure of its defence at some time after the indictment has been presented, and at least at the time of the plea. By the time the accused has been indicted it must be assumed that the investigation is complete, and accordingly the only real purpose that is served by requiring defence disclosure at that stage is to curtail the trial. The Commission considered the approach to defence disclosure in a variety of jurisdictions which revealed that in a number of domestic and international tribunals, including

England and the United States, there are fairly extensive duties of disclosure resting upon the defence; but there are also a number of countries that do not require defence disclosure.

13. Following the decision in *Shabalala v Attorney-General, Transvaal*,¹ there is in South Africa a duty upon the prosecution to make extensive disclosure to the defence. However there is no similar general duty upon the accused, although there are certain specific circumstances in which the accused is, in reality, called upon to do so, as for example in the following cases:

- * An alibi defence might be considerably weakened if the accused fails to disclose it in advance.
- * The defence of insanity must, in effect, be disclosed in advance.
- * There are certain special defences which the prosecution is not required to exclude unless they are “raised” by the accused, whether before the trial or in the evidence, for example, an accused should lay a foundation for a defence of sane automatism.

14. In the Discussion Paper the Commission’s provisional view was that no legislative intervention should be made in relation to defence disclosure between the time of indictment and the time of plea. However, the Commission received alternative proposals in this regard from the National Director of Public Prosecutions and these proposals were submitted for general information and comment in the Discussion Paper. The National Director of Public Prosecutions is of the view that we have reached the time in our criminal justice system where we should no longer cling to procedures steeped in the traditions of the past. Those traditions create delays, waste money and lengthen trials unnecessarily . We need to consider enforcing defence disclosure and should seriously consider and adopt the legislative initiatives of certain foreign jurisdictions. The problem of overloading court rolls, unnecessary delays and lengthy trials is a global problem.

15. The National Director of Public Prosecutions recommended that legislation regarding pre-trial disclosure be introduced. The National Director of Public Prosecutions also

¹ 1995 (2) SACR 761 (CC).

recommended that compulsory defence disclosure should be considered and proposed together with comprehensive provisions dealing with compulsory pre-trial disclosure by the prosecution.

16. The proposals of the National Director of Public Prosecutions fall into three distinct groups:

(a) Disclosure of Specific Defences

Essentially they provide for compulsory pre-trial disclosure by the accused (in most cases only if the accused is legally represented) of:

- (i) an alibi;
- (ii) the intention to allege that the accused was not criminally liable by reason of mental illness or defect;
- (iii) the intention to raise any statutory or other ground of justification, or a defence excluding mens rea;
- (iv) the intention to call an expert witness.

The sanction that is sought to be imposed for failure to make such disclosure is that the accused will not be permitted to raise the particular defence, or call the expert witness, as the case may be, without the leave of the court. The proposal provides specifically, however, that the court may not refuse such leave if the accused was not informed of his or her obligations.

(b) Codification of the Disclosure Duties of the Prosecution

That proposal is that prosecution disclosure should be codified.

(c) Disclosure Generally by the Defence and the Prosecution

These proposals include reciprocal disclosure by the defence and the prosecution.

18. The Commission concluded that there is merit in the proposal by the National Director of Public Prosecutions with regard to the disclosure of specific defences and the

intention to call expert evidence. The proposals are confined to specific defences, in respect of which the accused in any event has a duty either to introduce or disclose the defence. Thus it is already well established in terms of our law that an alibi might be regarded with scepticism if it is not disclosed in advance. A defence raising justification for otherwise unlawful conduct, or suggesting that the accused was not criminally capable at the time the offence was committed, must be raised by the defence before the prosecution is required to exclude it. Moreover, there can be little doubt that where such an issue is raised by the defence at a late stage of the trial, the prosecution will be permitted a postponement, or be permitted to reopen its case if necessary, in order to deal with the issue. Similar considerations apply in relation to the calling of expert evidence. Accordingly in that respect the proposals made by the NDPP are not radical and merely seek to ensure that these matters are raised timeously so as to avoid delays in the trial. Insofar as the proposal seeks to enforce disclosure of a “defence that excludes mens rea”, however, in the view of the Commission that is too broadly stated to be meaningful in a practical sense.

19. The Commission is also of the view that prosecution disclosure should be codified and therefore recommends that legislation be introduced in terms of which the prosecution is obliged to provide the defence with documents which tend to exculpate the accused; statements of witnesses, whether or not the state intends to call them, and any material which is reasonably required to enable the accused to prepare his or her defence. In addition it is also proposed that the prosecution may withhold information where it is not required in order to enable the accused to exercise his or her right to a fair trial; where disclosure of the information could lead to the disclosure of the identity of an informer or state secrets and where there is reason to believe that disclosure of the information would prejudice the course of justice.
20. The Commission does not support the proposal by the National Director of Public Prosecutions for reciprocal disclosure by the defence and the prosecution. The Commission is of the view that the proposal for reciprocal disclosure as proposed by the NDPP would be workable only if a distinction were to be made between those accused who are represented and those who are not. The Commission is of the view that such a distinction is not desirable, and to make such a distinction would in any event enable the legislation to be circumvented. The Commission is also of the view that the disclosure provisions sought to be introduced would not be capable of being enforced

in any meaningful way, and that to attempt to do so by purporting to draw an inference against an accused who does not comply with his or her obligations would be futile. Moreover, the complexity of the provisions and the potential for manipulation could contribute to further delays in the trial.

* **A greater role in the criminal justice process by judicial officers.**

21. In this regard the report considers two aspects in particular, namely the judicial officer's access to the police docket and their ability to control the pace of litigation. With regard to access to the docket, the Commission notes that in the current South African system the judicial officer does not have access to the docket. This has important consequences for the ability of presiding officers to control the process and it inhibits their ability to ascertain the truth. The issue raises important questions regarding the status of statements in the docket and the admissibility of evidence in view of evidential rules relating, for example, to previous consistent statements. In the discussion paper the view was expressed that if the docket were available to presiding officers, issues which would in the normal course of events take up days of cross-examination could be solved instantly. This would enhance the ability of judicial officers to participate actively in the trial and to control the judicial process, in particular with reference to the judicial officer's ability to ensure that all relevant witnesses are called or to prevent the calling of unnecessary witnesses.
22. In the course of the investigation the question was raised whether the powers of judicial officers to question and call witnesses should be expanded to ensure better truth-finding. It was suggested that the truth-finding role of judicial conduct should be emphasised to enable the court to compensate for inadequate effort and skill on the part of the litigants. In the discussion paper the Commission recommended that the Criminal Procedure Act be amended to allow for the material to which the defence has access from the prosecution docket to be placed before the judicial officer to enable him or her properly to exercise the powers provided for in section 186, but that such information shall not constitute evidence unless and until it becomes admissible in the normal course.
23. The Commission concluded that the judicial officer should, at the commencement of the trial, be placed in possession of the material that by that stage is in the hands of both

parties, which will enable him or her to evaluate how to conduct the trial. It must be borne in mind that one of the functions of the judicial officer is to control the conduct of the trial and the present proposal does not purport to introduce any innovation in that respect: it merely aims at equipping the judicial officer to perform that task more effectively. The Commission therefore recommends that legislation to this effect should be introduced.

* **Possible ways of enhancing judicial management of trials and case management.**

24. As part of the investigation the discussion paper considers whether provision should be made for pre-trial conferences and, if so, the extent to which legislation are necessary. It has been pointed out that the desirability of providing for a conference to be held before the commencement of the trial, as occurs in civil litigation, has been recognised in other jurisdictions. The purpose of such a conference is to attempt to limit the issues in the trial and generally to facilitate the efficient disposal of the matter. To some degree section 115 of the Criminal Procedure Act is directed towards that purpose but the difficulty arises when an accused chooses not to co-operate. That difficulty will remain if provision is made for the holding of a pre-trial conference and the accused chooses not to co-operate. It has already been pointed out that there is no effective means of compelling co-operation.
25. There is considerable merit in most of the submissions and comments received by the Commission relating to the limits upon the effectiveness of provisions for the holding of a pre-trial conference. Nevertheless, there will be some cases at least in which it could be of material assistance in the conduct of the trial. Bearing in mind that the holding of such a conference will not be compulsory, but is in the discretion of the judicial officer, the Commission is of the view that it is desirable to provide a formal structure for that to take place. The Commission therefore adheres to its initial recommendation that legislation be introduced on this issue.
26. The Commission also recommends that statutory provision be made for pre-trial conferences. In terms of the proposal the presiding officer may on application of the prosecutor or the accused direct the prosecutor and the accused to appear before him to consider the identification of issues not in dispute, the possibility of obtaining

admissions of fact with the aim to avoid unnecessary evidence, to ensure that sufficient details are disclosed where the defence intends to raise a defence of an alibi, the necessity of calling expert evidence and such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner. In such event the court must record in open court the agreements entered into and concessions made.

27. The Commission also recommends that section 115 of the Criminal Procedure Act be amended to oblige the presiding officer to inform an accused of the right to silence, the consequences of remaining silent, that he is not obliged to make any confession or admission and to ask him whether he wishes to make a statement indicating the basis of his defence. It also obliges the presiding officer to question an accused where the accused fails to disclose the basis of the defence.

CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 During 1989, the former Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to a number of questions, for example: whether (i) the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse; (ii) objections and arguments with regard to the charge, further particulars and jurisdiction, which unduly delay the commencement of the trial on the merits, could be countered or limited; (iii) the powers of presiding officers to curtail irrelevant or unduly protracted cross-examination and testimony should be extended; (iv) presiding officers should be empowered to call a pretrial conference between the State and the defence; and (v) whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse. The investigation was included in the Commission's programme during 1990 and initially its terms of reference were to consider possibilities of simplifying criminal procedure and to address problems of delays in the finalisation of criminal trials. The Commission appointed a project committee to finalise its investigation.

1.2. However, since inclusion of the investigation in the Commission's programme, the project committee, initially chaired by Judge PJJ Olivier and since 1996 by Judge L van den Heever, was requested to deal with additional aspects. Owing to the extent of the investigation the project committee decided to proceed incrementally with the investigation and publish several working papers dealing with different aspects of the investigation. In the first phase of the investigation the Commission published a working paper which addressed appeal procedures and related matters. This part of the investigation was completed and a report was presented to the Minister during 1994. In the second phase of the investigation the Commission published a working paper for general information and comment during 1993. This working paper addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays, and problems relating to the administration of the process. The Commission approved a report during 1995 which was presented to the Minister on 16 January 1996. The Minister approved the publication of the report which was subsequently Tabled in Parliament during June 1996. Legislation flowing from the report was approved by Parliament during October 1996.

1.3 During his budget vote speech to the National Assembly and the Senate in 1994, the Minister of Justice stated, *inter alia*, that the judicial system was in need of fundamental changes in order to make it more accessible to the public. Legal procedures should be simplified, terminology should be less technical, the judicial system should serve the community and it should also reflect the schools of thought in the community. The Minister expressed concern for the unprecedented crime wave in South Africa and he was of the view that innovating thinking and a new approach to solve these problems was needed. Following these statements the project committee proceeded with an investigation into access to the criminal justice system and an issue paper was published for general information and comment during the course of 1997. The issue paper concentrated to a large degree on the reform of the legal aid system and the introduction of new legislation on lay assessors. Subsequent to the publication of the issue paper a Legal Forum was held on Legal Aid in South Africa during January 1998. The outcome thereof was the appointment of a task team to review legal aid in South Africa. This task team completed a report and submitted it to the Minister during the course of 1998. In addition the Department of Justice proceeded to develop legislation on the use of lay assessors and finalised draft legislation. In view of these developments the project committee reconsidered completion of this part of the investigation and resolved not to proceed with its review of this part of the criminal justice system.

1.4 During 1994 the Minister also requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme (Project 101- The application of the Bill of Rights to the criminal law, criminal procedure and sentencing) and the project committee dealing with the investigation into the simplification of criminal procedure was requested to deal with this matter. A draft discussion paper was published during January 2000 and after taking the comments received into account a report was published in 2001.

1.5 On 30 January 1998 the Minister approved the inclusion of an investigation into allowing the Attorney-General to appeal on a question of fact relating to the merits of the case within the ambit of the investigation into the simplification of criminal procedure. A discussion paper in this regard was published during January 2000 and a report was finalised during the course of the year 2000.

1.6 As part of its original terms of reference the project committee also resolved to include

an investigation into the question of introducing more inquisitorial elements into our criminal procedure and it is dealt with in this report.

1.7 In the final phase of the investigation the Commission considered the issue of plea bargaining and out of court settlements. An interim report which, among other things, recommended the formal recognition of a process of plea negotiations in the Criminal Procedure Act, was finalised and submitted to the Minister on 16 January 1996. What subsequently occurred, especially as far as the interim report related to plea bargaining, is set out in the Commission's *Discussion Paper 94: Simplification of Criminal Procedure (Sentence Agreements)*. This discussion paper deals with sentence agreements, as a part of plea bargaining. Subsequently, sentence agreements have become part of our law, by way of the Criminal Procedure Second Amendment Act 62 of 2001. The Commission dealt with out-of-court settlements separately and its findings will be reported in the sixth interim report which will conclude the Commission's work into the simplification of criminal procedure.

1.8 During 1998 GTZ (*Deutsche Gesellschaft für Technische Zusammenarbeit*) concluded an agreement with the Commission with regard to cooperation through a joint project called Legislative Drafting, which provided for financial and technical assistance to the Commission in the development of legislation relating to the criminal justice system.

1.9 At its meeting on 26 November 1998 the project committee considered the planning of its investigation into a more inquisitorial approach to criminal procedure. With the financial assistance of GTZ a contract was concluded with Professor NC Steytler to research the matter and to prepare a discussion document for consideration by the committee. During the latter part of 1999 a new project committee, chaired by Judge LTC Harms, was appointed and this discussion document was considered by the new committee at its meeting on 3 September 1999. Professor Steytler identified a number of components which should be targeted for investigation, namely

- * a greater role in the process by the judicial officer;
- * providing the court with access to information (docket);
- * taking defence disclosure further and making recommendations in this regard;

- * judicial management of trials and case management; and
- * a review of section 115 of the Criminal Procedure Act.

1.10 Following this meeting the committee resolved that further research should be done and with the assistance of GTZ further research in this regard was undertaken by Professor PJ Schwikkard and Judge Nugent. They were requested to prepare a discussion document which was to build on the discussion document prepared by Professor Steytler and to provide an analysis of the problems as well as goals to be achieved. They were also requested to consider possible solutions to the problems highlighted by Professor Steytler and to give special attention to -

- * Police questioning of the suspect/accused, its legitimacy, effectiveness and the right to silence and its consequences. In this regard special attention had to be given to the following -
 - the extent to which a suspect/accused could legitimately be questioned and hence used as a source of evidence at the different stages of the criminal justice process (from pre-trial to the trial phase);
 - consideration of the different options to make police questioning more effective, including by bringing it under control of codes of conduct or by bringing it under judicial control or by legislating police questioning;
 - the consequences of and constitutional implications of police questioning having due regard to the right to silence; and
 - the different admissibility requirements for admissions and confessions.
- * Defence disclosure before and during the trial. In this regard special attention had to be given to -
 - whether or not the defence should be required to disclose relevant evidence, and if, so the extent to which it should be required; and
 - a review of the provisions of section 115 of the Criminal Procedure Act and its interaction with the right to silence and the consequences of non-disclosure.

- * A greater role in the criminal justice process by judicial officers. In this regard attention had to be given to two aspects in particular, namely access to the docket and their ability to control the pace of litigation.
 - Access to the docket: In the current South African system the judicial officer does not have access to the docket. This has important consequences for the ability of presiding officers to control the process. Furthermore it inhibits their ability to ascertain the truth. The issue raises important questions regarding the status of statements in the docket and the admissibility of evidence in view of evidential rules relating, for example, to previous consistent statements. However, if the docket is available to presiding officers, issues which would in the normal course of events take up days of cross-examination can be solved instantly. This will also enable judicial officers to participate actively in the trial and to control the judicial process, in particular with reference to the judicial officer's ability to ensure that all relevant witnesses are called or to prevent the calling of unnecessary witnesses. In this regard special attention was to be given to -
 - C providing the court with access to the docket;
 - C the admissibility of statements contained in the docket;
 - C the legal status of the docket;
 - C the weight to be given to information contained in the docket;
 - C how judicial officers should use the information in the docket;
 - C possible ways of enhancing judicial management of trials and case management.

1.11 The discussion paper was in the main based upon the research results of Professor Steytler, Professor PJ Schwikkard and Judge Nugent. During the beginning of 2000 the project leader, Judge Harms, had discussions with Adv B Ngcuka, the National Director of Public

Prosecutions, following which Mr G Nel was co-opted to the project committee as representative of the Prosecution Authority. The proposals for legislative amendments are founded on these research results and the input of the Prosecution Authority, and were approved by the project committee at its meeting on 21 November 2000.

1.12 The discussion paper, therefore, firstly identified shortcomings in the adversarial process and secondly investigated whether there are ways of adapting the process in the interest of truth-finding, fairness, and efficiency. The discussion paper commenced with an outline of the basic elements of the adversarial and inquisitorial modes of criminal procedure. Thereafter an exposition was given of how the operation of the adversarial system in South Africa impedes the realisation of the objectives of the criminal trial. This was followed by a sketch of the current approaches to these problems. In search of solutions, recent developments in international law and foreign jurisdictions dealing with similar issues were then surveyed. The paper also identified some aspects of South African criminal procedure which should be addressed, and concluded with proposals and recommendations for legislative intervention. The draft Bill emanating from this exercise is attached as Appendix A.

1.13 The draft discussion paper was published for comment in 2001. On the 29 & 30 October 2001 public workshops were held in Cape Town and Pretoria respectively. (The list of participants who attended these workshops is attached as Appendix C.) The comments received in response to the discussion paper and the contributions made at the workshop have been summarised and evaluated and form part of this report.

CHAPTER 2

TERMS OF REFERENCE

2.1 With limited human and financial resources to provide legal aid for all who cannot afford legal representation, a large number of accused persons will remain undefended in court. Most undefended accused cannot participate effectively in an adversarial system because the rules and practices in terms of which participation takes place, require forensic skills. With the principle of equality before the law further entrenched in the Constitution, it is necessary to investigate whether the mode of procedure denies access to justice to this category of accused persons. The project committee thus resolved to include in its programme of work:

an investigation into the viability of the establishment of a dual system of criminal procedure for defended and undefended accused persons and the incorporation of inquisitorial elements in the procedure to address the problems referred to above.

2.2 On investigating the development of a more inquisitorial mode of procedure for undefended accused persons, the following difficulties were encountered. First, in practice it could cause difficulties and confusion to develop two separate modes of procedure for defended and undefended accused. Second, arguments could also be raised that a bifurcated system may offend the principle of equality before the law. Third, the operation of the adversary system in defended cases may also result in miscarriages of justice from the point of view of the public and the effective functioning of the criminal justice system. This will occur where the prosecution does not perform its role as a competent adversary. Furthermore, the terms of reference of this Project allude to a more general problem pertaining to all adversarial proceedings. It was noted that –

the adversarial system is also criticized for causing inordinate delays in the criminal justice system and the Committee proposed the incorporation of inquisitorial elements in the South African criminal procedure as a possible solution to this problem.

2.3 It therefore became clear that examining the impact of the adversarial system on access to justice should not be confined to the trials of undefended accused, but that the issue should be discussed more broadly.

PROBLEM RESTATED

2.4 The main objectives of the criminal trial can be summarised as follows:

- a) the court proceedings must perform a truth-finding function - the outcome of the trial must be that the guilty are convicted and the innocent acquitted;
- b) the truth-finding process must be fair in respect of protecting both the rights of the accused and the interests of society;
- c) the two preceding objectives must be accomplished in an efficient and effective manner.

2.5 In the words of Van Dijkhorst J:² "Our aim is to arrive at the truth expeditiously and fairly". These objectives ought to be realised through the application of the adversarial mode of procedure. However, the operation of this adversarial system impedes in some respects the achievement of these objectives. Where either the accused or the prosecution fails to perform their roles as competent adversaries, the proceedings, presided over by a passive judicial officer, are bound not to achieve the stated objectives. Even where the two adversaries are competent, their dominance of the proceedings may defeat one or more of the objectives.

OUTLINE OF THE ADVERSARIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE³

2.6 It has been said that distinguishing between the two modes of procedure is "almost a 'metaphysical question' which is now sterile and obsolete" because "nowhere is the model any longer pure; it is, for better or worse, contorted, attenuated, modified".⁴ The basic differences between the two modes of criminal procedure are nevertheless useful reference tools for discussing developments in modes of criminal procedure.

² Van Dijkhorst 1998, 138.

³ See generally Damaska 1997; McEwan 1998 ch 1; Jorg, Field & Brants 1995; Osner, Quinn & Crown 1992; Jackson & Doran 1995 ch 3; Hatchard, Huber & Vogler 1996.

⁴ Tulkens 1995, 8.

2.7 The adversarial and inquisitorial modes of procedure have traditionally been linked to the Anglo-American common law system of procedure and the continental system respectively. Most procedures for the prosecution of crime reflect some of the elements of both models. While some fall squarely in one camp, others are hybrids. The two systems do not differ on the goals of criminal procedure – that the truth be established in a way that is regarded as fair. This is exemplified in Europe, where both the British adversarial and the Continental inquisitorial systems have to comply with the fair trial requirements of the European Convention on Human Rights. The difference between the two systems is about their fundamental assumptions as to the best way of achieving these goals.⁵

2.8 Models are by definition not reflections of reality but provide a set of norms and principles that form a coherent structure serving specified purposes. One can, by outlining the key features of each model, provide an analytical tool with which to assess specific features of a concrete mode of procedure.

2.9 The main difference between the two systems is the role of the judicial officer in the proceedings.⁶ The inquisitorial system is judge-centred while the adversary system is party-driven. The difference in the judicial role-description has profound implications for the way in which the objectives of the criminal justice are pursued.

2.10 In the inquisitorial system a judicial officer generally controls the pre-trial stage – the investigation and gathering of evidence. The dossier containing witnesses' statements and other materials is equally at the disposal of the prosecution and the defence. Evidence in the dossier is often given a higher value than the oral statement a witness may later make in court.⁷ A judicial officer also decides whether there are grounds for instituting a prosecution. The judicial dominance continues during the open court proceedings. On the basis of the dossier, the judge determines which witnesses to call and conducts their questioning. As the judge is also the trier of fact, an open system of evidence is followed – all relevant evidence may be considered. Exclusionary rules are thus avoided. The process is likened to an inquest – the judicial officer attempts to establish the truth by his or her own efforts. The prosecutor and defence counsel play a relatively minor role of assisting the court; the production of evidence is thus not as a

⁵ Jorg, Field & Brants 1995, 42.

⁶ Albrecht 1996, 90.

⁷ Jorg, Field & Brants 1995, 47.

result of their efforts. Moreover, they cannot limit the court's field of inquiry through pleadings.⁸ It is thus said that the court establishes the "material" truth in contradistinction with the "formal" or "party-centred" truth produced in the adversarial system (that which the parties have presented in a partisan manner). The fundamental assumption underlying the judge-dominated system is the belief that a State official will proceed in an objective and professional manner to establish the truth and, at the same time, protect the interests of the accused.

2.11 The adversarial system is party-driven. During the pre-trial stage each party conducts his or her own investigation, and in a partisan way builds a case. While there may be judicial control over whether a prosecution may be instituted, the trial process continues to be party-driven. The prosecutor must provide, independent of the accused, proof of any accusation made. The parties may determine the area of contest through pleadings and agreements over guilt. The key element of the trial is the emphasis on the spoken word - evidence is produced orally - and written statement of witnesses have little value. The role of the judicial officer is to remain essentially passive and to intervene only to ensure that each party plays according to the rules. The role of the judicial officer as umpire is the most pronounced where a jury is the trier of fact. The basic assumption of the adversarial system is a scepticism about trusting the State to produce the truth and protect the interests of the accused.⁹ Those goals are best secured by the parties themselves. However, for the system to work, there ought to be equality of arms between the parties.

ADVERSARIAL PROCEEDINGS AND CRIMINAL JUSTICE OBJECTIVES

2.12 In this section it will be argued that the operation of the adversarial trial proceedings in South Africa may, in some respects, impede the realisation of the objectives of truth-finding, fair process and the expeditious completion of proceedings.

Truth-finding

2.13 In terms of the logic of the adversary process, the objective of truth-finding is defeated if the parties are not equal. This occurs where an accused cannot adequately engage in the process because he or she is not represented (or not properly represented). The same may

⁸ McEwan 1998, 4.

⁹ Jorg, Field & Brants 1995, 45; McEwan 1998, 2.

happen where the prosecution is poor or inexperienced and the defence able. More fundamentally, in a well-matched contest the truth may not emerge because of the partisan approach to evidence production.

2.14 With regard to undefended accused, an empirical study revealed that

it is evident that the lower criminal courts routinely produced unjust practices and outcomes. It was also clear that this was a result of the legal structure's failure to guard adequately against the undesirable consequences flowing from an undefended accused's ability to be a competent adversary in highly professionalised adversarial proceedings. ... The undefended accused failed to fulfil his role as an effective adversary to the prosecutor. He lacked the legal knowledge, skill, and experience to make considered legal decisions, to test State evidence, to challenge the prosecutor's actions and to present an adequate defence case.¹⁰

2.15 The undefended accused's inability as an adversary is the most acute in the adversarial truth-finding process.¹¹ Where "we are operating the adversary system without the adversaries",¹² the truth will simply not emerge. The consequence is inevitably that innocent accused may be convicted because they do not have the benefit of legal representation.

2.16 The same questions emerge in the case of poor defence counsel. The truth may not emerge and rights may not be protected¹³ when defence counsel are incompetent or lack commitment.¹⁴ *S v Siebert*¹⁵ is an example of where defence counsel failed to inform the trial court adequately about the accused's circumstances for the purposes of sentencing. The defence counsel also appeared not to be fully *au fait* with the rules relating to the sentence of correctional supervision.

2.17 The converse may happen in defended trials. Where the prosecutor is inexperienced or incompetent, the contest model also collapses. The extent of this problem has recently received

¹⁰ Steytler 1987, 503-4.

¹¹ See also McEwan 1998, 15.

¹² Telford George, former Chief Justice of Tanzania, quoted in Twaib 1998, 57.

¹³ See para 4.2 below.

¹⁴ See *S v Siebert* 1998 1 SACR 554 (A).

¹⁵ 1998 1 SACR 554 (A) 559b.

some judicial attention.¹⁶ In *S v Motsasi*¹⁷ the High Court conducted a far-reaching investigation into the undue delays in that trial. It found that one of the reasons for delays in general, in addition to a large number of vacancies in the prosecution service, was the presence of inexperienced and incompetent prosecuting counsel in the High Court.¹⁸

2.18 The failure of the prosecutor to be an adversary is amply illustrated in *S v Manicum*¹⁹ where the prosecutor showed a total lack of interest in or commitment to the prosecution. Despite the fact that the accused contradicted his plea explanation in his evidence-in-chief, the prosecutor failed to put any questions. The explanation by the magistrate of the purpose of cross-examination and the consequences of a failure to challenge the accused's exculpatory evidence was to no avail. On appeal the judge commented as follows on the conduct of the prosecutor:

When I said it was alarming I was not being extravagant with language. There were the two contradictory versions and to think that a prosecutor would in these circumstances have no questions, is incredible. It demonstrates a total lack of competence on the part of the prosecutor and a deplorable attitude of the authorities to put a case in the hands of a prosecutor who just did not care, did not want to care and who, even if she had cared, was not able to contribute a single morsel of cross-examination to assist the magistrate to unravel the issue.²⁰

2.19 The court of appeal did not fault the magistrate for not subjecting the accused to an examination, but placed the acquittal of the possibly guilty person firmly at the door of poor prosecution. Such a state of affairs, the court concluded, will undoubtedly have the following consequences:

But if the prosecuting authorities wish to let inexperienced prosecutors loose on the public they must be prepared to pay the price of seeing possibly guilty persons being acquitted, a price which, I may say, at this time in our history, is one which society cannot afford to pay. Not only does it favour the criminal to an unreasonable extent, but

¹⁶ In *S v Van der Berg* 1995 4 BCLR 479 (Nm) O'Linn J said the following about Namibia: "In a developing country like Namibia, the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications". See also Van Dijkhorst 1998, 136.

¹⁷ 1998 2 SACR 35 (W).

¹⁸ At 68.

¹⁹ 1998 2 SACR 400 (N).

²⁰ At 403h-i.

it also frustrates the efforts of the over-strained police force and tends to lower their morale. Also, it understandably causes the law-abiding majority to lose confidence in the system of criminal justice. Furthermore, it is a waste of the court's time and competence to allow prosecutions to fall into the hands of incompetent, inexperienced prosecutors. At a time when the rule of law cries out to be supported, this state of affairs is to be deplored.²¹

2.20 Even where equality of arms between the prosecution and the defence is more manifest, the operation of the adversarial system may result in the distortion of the truth.²² This argument has been made most forcefully in respect of sexual offences.²³ The ability of the skilled defence lawyer to confuse honest witnesses and distort the truth is well established, and in relation to the cross-examination of child witnesses, the primary tool of the adversarial system has been curtailed by means of legislation.²⁴

2.21 Where an accused is acquitted when he or she is guilty of the crime charged and should rightly have been convicted, the trial is seen and the entire criminal process perceived as unfair. The public perceives the system as favouring the criminal at the expense of society. This could have serious implications for the *Rechtstaat* when the Bill of Rights is seen to be the criminal's licence to crime.

A fair trial

2.22 Distinct from the goal of truth-finding, and at times in conflict with it, an accused's right to a fair trial is enshrined in the Bill of Rights, affording a considerable level of protection. However, as far as undefended accused are concerned, they are usually not aware of their rights and, if informed about them, may not be able to understand or exercise them effectively.

2.23 A similar argument can be made in regard to poorly defended accused. Speaking from a Canadian perspective, Young argues that the defining characteristic of adversarial justice - that control of the process should be left in the hands of the litigants -

²¹ At 406a-c.

²² McEwan 1998, 14-15.

²³ McEwan 1998, 14.

²⁴ S 170A Criminal Procedure Act.

can undercut the foundation for the implementation of constitutional rights because so much will depend upon the good faith exercise of discretion of Crown counsel and the competence of defence counsel.²⁵

2.24 He argues that the jurisprudence under the Canadian Charter of Rights and Freedoms has consistently placed the burden of assertion and proof upon the accused and his or her counsel. This assumption runs the risk of leaving the protection of the Charter in the hands of lawyers with varying degrees of competence, commitment and resources.²⁶ He thus concludes that

the excessive reliance upon competent defence counsel to uncover and present Charter claims may not be a simple affirmation of the basic values of our cherished adversarial system, but may actually be a major shortcoming of the Charter.²⁷

2.25 Young thus argues that the only way of ensuring "institutional respect for constitutional rights is to ensure that all the players (e.g., police, Crown, defence and judge) share the burden of being vigilant in preventing constitutional violations."²⁸

Efficient administration of justice

2.26 In the adversarial trial the conduct of the trial is in the hands of the litigants, and this may result in prolonged trials. The prosecution may delay the process in marshalling sufficient evidence while the defence may employ delaying tactics to avoid the prosecution taking place.²⁹ Delays in seeing that justice is done may undercut the very objectives of the trial, ie of establishing the truth and implementing penal policy effectively and expeditiously. Increasingly the answer has been sought by granting the presiding judicial officer powers of intervention in bringing the proceedings to a satisfactory conclusion.

²⁵ Young 1997, 365.

²⁶ Young 1997, 367.

²⁷ Young 1997, 406.

²⁸ Young 1997, 366.

²⁹ See Van Dijkhorst 1998, 237.

CHAPTER 3

CURRENT APPROACHES TO THE PROBLEMS CAUSED BY THE OPERATION OF THE ADVERSARIAL SYSTEM

3.1 During the past five years significant changes have been brought about in the administration of criminal justice. Many of them are directed at the problems caused by the adversarial mode of criminal procedure as outlined above. The reforms developed along two diverging tracks - the one seeking to strengthen the adversarial process, the other leading to a more inquisitorial process. In this section the broad outlines of these developments will be sketched.

STRENGTHENING THE ADVERSARIAL PROCESS - THE RIGHT TO LEGAL AID

3.2 The entrenchment of the right to legal aid in the Bill of Rights sought to ensure equality of arms within an adversarial trial. Section 35(3)(g) entitles an accused to have a legal practitioner assigned at State expense "if substantial injustice would otherwise result". Moreover, all accused must be informed of this right. This duty is also reflected in section 73(2A) of the Criminal Procedure Act.³⁰ While the Constitutional Court has not yet pronounced definitively on the meaning of substantial injustice,³¹ the present norm is to apply a multi-factor approach: the circumstances of the case, the ability of the accused and the seriousness of the offence may give rise to the right.³²

3.3 This right does not solve the problem of the undefended accused. The right to legal aid applies only to those cases which may result in "substantial injustice". While a significant number of accused are currently represented by legal aid lawyers, a large number of accused still have to fend for themselves. Moreover, because of the high cost of legal aid there are considerable financial and political pressures to cut back on the provision of legal aid.³³ The result will be that a larger percentage of accused will be undefended.

³⁰ Inserted by s 2 of Act 86 of 1996. See South African Law Commission 1995, § 5.39.

³¹ *S v Vermaas* 1995 7 BCLR 851 (CC).

³² See generally Steytler 1998, 307-313.

³³ Legal aid budgets have also come under strain in Australia, for example. See Giddings, Dewar & Parker 1999, 69.

STRENGTHENING THE ACCUSED AS A COURTROOM ADVERSARY

3.4 The difficulties encountered by undefended accused have been acknowledged over the years and provision has been made for some judicial assistance. Within the overall duty to ensure a fair trial, presiding officers are obliged to facilitate accused participation in the proceedings as adversaries by advising them of their rights and duties and assisting them in their exercise.³⁴ This duty has also been entrenched in the Bill of Rights. The Bill of Rights is premised on the notion that accused persons are not necessarily aware of their constitutional rights.

3.5 Section 35(4) provides accused persons with a general right to be informed of their various rights in terms of the section. The duty to give information (to explain rights) is also found in specific provisions, such as the right to legal aid.³⁵ There are, however, limits to the extent to which this duty can ameliorate the difficulties of undefended accused. The information provided is often technical, and having access to information does not mean that it can be used skilfully.³⁶ The rules relating to hearsay illustrate the limits of equipping an undefended accused with legal knowledge.

3.6 In *S v Ngwani*,³⁷ Didcott J held that where the prosecution sought to admit hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act of 1988,³⁸ the accused, who was unrepresented,

had to have the effect of the subsection fully explained to him, in contrast with the legal position where it is not invoked. In particular, he had to be heard on the important one raised by para (vi),³⁹ the issue whether he would be prejudiced were it not to be invoked.

3.7 While the logic of the adversarial process imposes such a duty on the judicial officer, in practice it is most unlikely that an undefended accused, even if properly informed, would be able to employ this knowledge effectively. There may be fairness in form but not in substance.

³⁴ See generally Steytler 1988, 222.

³⁵ S 35(3)(g).

³⁶ Steytler 1987, 505.

³⁷ 1990 1 SACR 449 (N).

³⁸ Act 45 of 1988.

³⁹ "any prejudice to a party which the admission of such evidence might entail".

PROSECUTION DISCLOSURE - INCREASING TRUTH-FINDING

3.8 Perhaps the most dramatic change in criminal law practice was the recognition of the right of access to information held in the police docket. In *Shabalala v Attorney-General of the Transvaal*⁴⁰ the Constitutional Court based prosecution disclosure on an accused's right to a fair trial. With access to state witness statements and other unused materials, defence counsel is entitled to be fully informed of the case to meet. Not only can the reliability and credibility of state witnesses be challenged in the light of inconsistent statements, but also defence strategies can be devised. For prosecutors it became an onerous burden and in the case of bail hearings, the right is now severely restricted.⁴¹

3.9 Prosecution disclosure can be viewed from two angles. One can argue that it is indicative of a more inquisitorial mode of procedure. The information gathered by the prosecution is no longer its property; the police docket becomes a dossier open to the defence. More important, availability of prosecution information furthers truth finding. As it was said in the leading Canadian decision of *R v Stinchcombe*:⁴²

The principle has been accepted that the search for the truth is advanced rather than retarded by disclosure of all relevant material.

On the other hand, it could be said that disclosure is simply a reaffirmation of the adversary process in that it seeks to establish equality of arms. Whichever way one looks at prosecution disclosure, it has changed the position of the prosecutor as an adversary. Although the rhetoric has always been that the prosecutor was a disinterested combatant with only an eye for the truth, it was an unenforceable role as long as the police docket remained privileged. With full disclosure, it is for all to see whether the prosecution is indeed performing its impartial role.

⁴⁰ 1995 12 BCLR 1593 (CC).

⁴¹ S 60(14) CPA, inserted by Act 85 of 1997. In *S v Dlamini et al* 1997 7 BCLR 771 (CC) § 84 Kriegler J for a unanimous Constitutional Court, gave a restricted reading to s 60(14) which undercut the absolute language of the legislation.

⁴² (1991) 68 CCC (3d) 1 (SCC).

IMPOSING MORE INQUISITORIAL DUTIES ON THE PRESIDING OFFICER

3.10 Endowing judicial officers with inquisitorial powers is not a new phenomenon. A presiding officer has the power to question witnesses, and section 167 of the Criminal Procedure Act⁴³ empowers the court to examine any person other than the accused who has been subpoenaed to attend or who happens to be attending the proceedings, and to recall any witnesses who have testified. The court is obliged to do so if it appears "essential to the just decision of the case", and commits an irregularity if it fails to do so.⁴⁴ Section 186 of the CPA, in turn, imposes a similar power and duty with regard to the calling of witnesses.

3.11 The entire trial is not conducted in an adversarial fashion. The sentencing process, for one, is not conducive to adversarial argument;⁴⁵ the role of the court must be inquisitorial in order to establish an appropriate sentence.⁴⁶ In *S v Siebert*,⁴⁷ Olivier JA captured this duty as follows:

In this field of law public interest requires the court to play a more active inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.

3.12 This duty also applies to defended cases, because, in the words of Olivier JA, "[a]n accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance".⁴⁸

⁴³ Act 51 of 1977.

⁴⁴ *S v Mayiya* 1997 3 BCLR 386 (C) 395C.

⁴⁵ Jackson and Doran (1995, 59) writes that "the judge's role changes from one resolving conflict between two sides into a problem-solving mode requiring the implementation of sentencing policy."

⁴⁶ A more traditional adversarial process was followed in *S v Hlangomva* 1999 1 SACR 173 (E). An undefended accused volunteered information about his previous conviction after the prosecutor choose not to prove any. On review the judge held that the magistrate did not have the licence to pose questions relating the precise nature, dates and other information of the previous conviction. The magistrate was restricted to invite the prosecutor to reconsider his stance. If the prosecutor declined to do so, the magistrate was compelled to treat the accused as a first offender.

⁴⁷ 1998 1 SACR 554 (A) 558i-559a.

⁴⁸ At 559b.

3.13 Appellate proceedings have also been likened to an inquisitorial process;⁴⁹ the bench engages with counsel on the issues which it would like to hear. The extent to which judges participate in the hearing often amounts to a "dialogue" between judges and counsel which closely resembles an inquisitorial hearing. The appeal hearing thus becomes "a joint problem-solving enterprise between counsel and the judges".⁵⁰

3.14 Bail proceedings have also been placed in an inquisitorial mould. Commencing with the decision in *Elish v Prokureur-Generaal, Witwatersrand*,⁵¹ and followed by Parliament,⁵² bail proceedings were cast within an inquisitorial mode. In *S v Dlamini et al*⁵³ Kriegler J described the underlying policy as follows:

Although societal interests may demand that persons suspected of having committed crimes forfeit their freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising oversight in regard to bail the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court as essential, it must itself take the initiative. Even where the prosecution concedes bail, the court must still make up its own mind. In principle, that policy of the CPA, and the consequential provisions mentioned, are in complete harmony with the Constitution.⁵⁴

3.15 The endorsement of an inquisitorial procedure in bail hearings as being in harmony with the Constitution, is a significant development. The inquisitorial duty cuts two ways - the court carries the responsibility of ensuring that those who should be released on bail are so released, and that those who are not are detained despite what the parties may have agreed to among themselves. The active pursuit of the interest of justice - the basis of the bail decision - becomes the court's duty; and the adversarial process does not provide the correct answer.

⁴⁹ Malleon 1997.

⁵⁰ Malleon 1997, 178.

⁵¹ 1994 5 BCLR 1 (W). Followed in *Prokureur-Generaal, Vrystaat v Ramakhosi* 1996 11 BCLR 1514 (O); *Bolofo v Director of Public Prosecutions* 1997 8 BCLR 1135 (Lesotho CA).

⁵² S 60(3) Criminal Procedure Act, inserted by s 3 of the Criminal Procedure Second Amendment Act 75 of 1995.

⁵³ 1999 7 BCLR 771 (CC) § 10.

⁵⁴ § 10.

ENSURING AN EFFICIENT PROCESS

3.16 Flowing from recommendations of the South African Law Commission,⁵⁵ recent amendments to the Criminal Procedure Act⁵⁶ have given further legislative form to the presiding officer's management role of court proceedings.⁵⁷ To ensure the expeditious completion of proceedings, section 342A mandates the court to "investigate any delay in the completion of the proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness."⁵⁸

It is important to note that the court is not merely required to give effect to an accused's constitutional right to a speedy trial⁵⁹ but to see to the expeditious completion of the proceedings in the interests of all parties concerned. Note further that the court is bound to "investigate" any unreasonable delay; it may not remain passive until one of the litigants complains about a delay caused by the other party.⁶⁰ The Act provides a court with specific sanctions in order to eliminate or prevent delay and prejudice, including costs orders against the State and the defence.⁶¹

3.17 Linked to the overall duty to secure the expeditious completion of proceedings, the court's powers to curtail and direct cross-examination have been spelled out.⁶² The court may, if it appears cross-examination is being "protracted unreasonably and thereby causing the proceedings to be delayed unreasonably" request the cross-examiner "to disclose the relevancy of any particular line of examination and may impose reasonable limits" with regard to both the

⁵⁵ South African Law Commission 1995.

⁵⁶ Act 86 of 1996.

⁵⁷ See also South African Law Commission's proposal regarding the role of the court in plea bargaining (South African Law Commission 1995, § 10.85).

⁵⁸ S 342A(1).

⁵⁹ S 35(3)(d) Constitution.

⁶⁰ See *S v Motsasi* 1998 2 SACR 35 (W).

⁶¹ S 342A(3).

⁶² See recommendation of the South African Law Commission 1995, § 6.37.

length and line thereof.⁶³ While these powers are implicit in the common law,⁶⁴ the amendment is significant as it indicates that the legislature is willing to articulate the managerial role of presiding officers in detail.

CHILD JUSTICE - THE PROPOSED "INQUIRY MAGISTRATE"

3.18 The most extensive embrace of an inquisitorial mode of procedure has been the recent proposals by the South African Law Commission's Project Committee on Juvenile Justice.⁶⁵ With the aim of diverting as many juveniles as possible from pretrial detention and the criminal courts, a specially trained magistrate, called the "inquiry magistrate", is to fulfil the primary function of making placement decisions (pending plea, trial or resolution of a matter) and final diversion decisions.⁶⁶ All cases, bar minor ones where diversion decisions are made by the police or probation officers, are to be brought before the inquiry magistrate who must hold a preliminary inquiry. At the inquiry conducted by the magistrate in his or her chambers, a free system of evidence (which includes the child's previous convictions or evidence of previous diversion) is recommended.⁶⁷ Where a case cannot be diverted because the child contests guilt, the magistrate must decide whether there is sufficient evidence to put the child on trial.

3.19 This proposal was drafted fully alive to South Africa's current infrastructure and available human and financial resources and conscious that the creation of completely new structures would have been far too expensive and ultimately unrealistic.⁶⁸ Within these constraints the Committee was of the view that the practicable way of protecting the best interest of the child was to place its faith in an active inquisitorial judicial officer.

⁶³ The court may also order that any submission regarding relevance of cross-examination be heard in the absence of the witness (s 166(3)(b) CPA).

⁶⁴ Pretorius 1997, 256-260.

⁶⁵ Project 106.

⁶⁶ § 9.3.

⁶⁷ § 9.26.

⁶⁸ § 9.1.

CONCLUSION

3.20 The unmistakable trend that is emerging from these developments is that, apart from the right to legal aid, the trial process is becoming less party-centred. Even where the accused persons are represented, the court is playing an increasingly important role in establishing a factual basis for making decisions with regard to bail and sentencing, ensuring that the principles of a fair trial are observed and that the court process is managed efficiently. With regard to establishing the truth as to the guilt or innocence of an accused person the development has been uneven. While the full disclosure of the police docket has certainly increased the truth-finding capacity of the proceedings, the lack of reciprocal defence disclosure tends to distort the process.

3.21 The question that this paper seeks to address is whether truth-finding instruments, including giving the presiding officer a more inquisitorial role, should be further developed with respect to the focal point of the trial - the determination of guilt or innocence. In answering this question it is useful to reflect on some of the developments that are taking place in international law and domestic jurisdictions in this regard.

CHAPTER 4

DEVELOPMENTS ABROAD

4.1 The most significant development must surely be the establishment and operation of international criminal tribunals, which have had to grapple with the contending modes of procedure. Important changes have also occurred in some foreign domestic jurisdictions where the effectiveness and fairness of both the adversarial and inquisitorial systems were questioned.

INTERNATIONAL CRIMINAL TRIBUNALS

4.2 International law praxis suggests that the adversarial process has become the dominant mode of criminal procedure. In the international criminal law tribunals set up for the former Yugoslavia and Rwanda, the first after Nürenberg, the mode of procedure was decidedly adversarial. While the International Criminal Court, envisaged by the international treaty concluded in Rome in 1998, also adopted a predominantly adversarial approach, some inquisitorial elements have been included. To the extent that the international human rights instruments⁶⁹ lean toward the adversarial process,⁷⁰ this outcome was to be expected.

INTERNATIONAL CRIMINAL TRIBUNALS FOR FORMER YUGOSLAVIA AND RWANDA

4.3 The structure of the pre-trial and trial procedures greatly resembles adversarial proceedings. A significant exception is the use of a free system of evidence; the admission of evidence falls within the discretion of the tribunal.⁷¹ Hearsay evidence is thus admissible.⁷² The

⁶⁹ Universal Declaration of Human Rights of 1948; International Covenant of Civil and Political Rights of 1966.

⁷⁰ Bassiouni 1993, 277.

⁷¹ See Rules of Procedure and Evidence, Section 3 Rules of Evidence, rule 89:
"(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
(E) A Chamber may request verification of the authenticity of evidence obtained out of court."

tribunals have also some inquisitorial powers. A judge may at any stage put any question to a witness⁷³ and "may order either party to produce additional evidence".⁷⁴ It may also summons witnesses and order their attendance. Moreover, the tribunals are not bound by the parties' view of proof. In the *Tadic* case one of the issues was whether there was sufficient evidence to link certain injuries to the causation of death.⁷⁵ Although the defence did not raise the inadequacy of proof on this issue, the tribunal held that it was nevertheless duty-bound to consider it *mero motu*, and in the event found that the prosecution failed to establish the link beyond reasonable doubt.

INTERNATIONAL CRIMINAL COURT (ICC)

4.4 The statute of the ICC establishes a predominantly adversarial mode of procedure.⁷⁶ The investigatory process is entrusted to the prosecution, which searches and collects evidence. The evidence is then presented by the prosecution in oral proceedings before a tribunal. The detailed trial procedures, including evidential rules,⁷⁷ are yet to be formulated.

4.5 The envisaged adversarial system reflects also the recent development in common-law countries of reciprocal discovery duties on both parties.⁷⁸ The presiding judicial officer may require from the prosecution "the disclosure to the defence within a sufficient time before the trial to enable the preparation of the defence, documentary or other evidence available to the

See also Mann 1995, 368.

⁷² Jones 1998, 300.

⁷³ Rule 85B.

⁷⁴ Rule 98(A) ICTY, Rule 98(A) ICTR.

⁷⁵ *Tadic Opinion and Judgment* Trial Chamber II on 7 May 1997, quoted in Jones 1998, 299.

⁷⁶ Cassese 1999, 168; Sweeney 1998, 254.

⁷⁷ Cassese (1999, 171), a lawyer in civil law tradition, expresses the hope that when the Rules of Procedure and Evidence will be drafted, the best features of the inquisitorial model would be welded into the adversary process. This would probably include a free system of evidence. On the difficulties that hearsay evidence poses in war crimes trials, see Mann 1995.

⁷⁸ See Sweeney 1998, 253.

Prosecutor, whether or not the Prosecutor intends to rely on the evidence".⁷⁹ The presiding officer may also make an order "providing for the exchange of information between the Prosecutor and the defence, so that the parties are sufficiently aware of the issues to be decided at the trial."⁸⁰

4.6 More than in the case of the international tribunals for the former Yugoslavia and Rwanda, there was an attempt to weld elements of the inquisitorial mode into the adversarial system.⁸¹ Cassese, a presiding judge in the International Criminal Tribunal for the former Yugoslavia, identifies a few fundamental elements typical of an inquisitorial system which have been included in the procedure.⁸² First, the prosecutor is obliged to be an impartial truth seeker. Article 54(1)(a) provides that

[i]n order to establish the truth [the prosecutor] shall extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally.

4.7 Second, during the pre-trial stage, the prosecutor acts under the scrutiny and authorisation of a judicial officer (called the Pre-trial Chamber) with regard to matters such as initiating an investigation, preserving evidence and so forth.⁸³ Third, victims are given standing in the proceedings. In particular, they may use the trial to claim reparation for injuries sustained. Fourth, a presiding judicial officer may "order the production of evidence in addition to that already collected prior to the trial and presented during the trial of the parties."⁸⁴

FOREIGN JURISDICTIONS

4.8 In Europe, the home of both the common-law adversarial and the continental inquisitorial systems, changes are occurring in both systems, which "point more to convergence than to

⁷⁹ Art 27(5)(b).

⁸⁰ Art 27(5)(c).

⁸¹ Cassese 1999, 168-171.

⁸² Cassese 1999, 168-9.

⁸³ See arts 15(3), 18(2), 18(6), 19(6).

⁸⁴ Art 64(5)(d).

divergence".⁸⁵ The continental systems have assimilated adversarial due process procedures during both the pre-trial and trial stages, while Britain is using increasingly inquisitorial instruments of truth-finding.⁸⁶

In the former systems the jurisprudence of the European Court of Human Rights has had a profound effect; secret pre-trial inquiries have been banned⁸⁷ and "in principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument".⁸⁸ The jurisprudence of the European Court of Human Rights may have the converse effect with regard to the inquisitorial elements introduced in Britain. These elements may not fall foul of the Court's jurisprudence, which is embedded in the continental tradition of inquiry.⁸⁹

ITALY - AN INQUISITORIAL SYSTEM BECOMING ADVERSARIAL

4.9 Italy radically reformed its criminal procedure in 1988, superimposing an adversarial mode of procedure on an inquisitorial system.⁹⁰ This reform was driven by perceived problems of corruption and intimidation of judges and the inefficiency of the Italian legal system.⁹¹ A key feature of the Criminal Code of 1988 is the disappearance of the investigating judge (*giudice istuttore*) and the emergence of the prosecutor as the principal actor in the pre-trial stage.⁹² The system of compulsory prosecution has been relaxed and a system of plea agreement is explicitly accepted.⁹³ The trial process has also become more adversarial, ascribing to the

⁸⁵ Jorg, Field & Brants 1995, 54.

⁸⁶ Jorg, Field & Brants 1995, 54.

⁸⁷ *Lamy v Belgium* 30 March 1989 Series A no 151. See Tulkens 1995, 9.

⁸⁸ *Kostovski v the Netherlands* 28 Nov 1989 series A no 166 § 20.

⁸⁹ See Sharpe 1999, 278-9; Steyn 1999, 56.

⁹⁰ See generally Cirese & Bertucci 1993.

⁹¹ McEwan 1998, 8. The numerous violation of the right to a speedy trial in the case law of European Court of Human Rights exemplified the problem. See Pizzi & Marafioti 1992, 6; Chiavario 1995.

A similar process is underway in South and Central America, where the drive towards a more adversarial process is motivated by the experienced inefficiency of the received inquisitorial system dating from the previous century.

⁹² Chiavario 1995, 35.

⁹³ Pizzi & Marafioti 1992, 11.

presiding officer a predominantly passive role of ensuring respect for the new rules of evidence; a court may adduce additional evidence after the parties have closed their cases only when it is "absolutely necessary".⁹⁴

4.10 The crisis in the expeditious completion of proceedings, which prompted the reform, has not been solved. This has been attributed not to the new procedure but to the "chronic incapacity of the politicians to devote adequate resources to the system coupled with the equally chronic incapacity within the system to organize itself, given the available resources."⁹⁵

BRITAIN

*** Adversarial system is becoming more truth-seeking**

4.11 Developments in Britain have been dominated by a crisis in confidence that the criminal process can produce the truth. The miscarriages of justice, evidenced by the Birmingham Six, the Guildford Four and other cases in which possibly innocent persons were convicted as a result of biased pre-trial investigations, questioned the adversarial pre-trial process. At the same time there is the perceived increase in crime. A Royal Commission on Criminal Justice,⁹⁶ chaired by Viscount Runciman, was appointed. While no drastic changes to the common-law system were proposed, greater transparency in the system was advocated. The legislation that followed included more truth-finding measures by imposing disclosure duties on accused persons. With the passing of the Human Rights Act of 1998, which obliges English courts to interpret domestic law in compliance with the European Convention on Human Rights,⁹⁷ these developments will be judged not only in Strasbourg but also domestically.

*** Police questioning**

4.12 Commencing with the Northern Ireland Evidence Ordinance of 1988, the Criminal Justice and Public Order Act 1994 has introduced in England and Wales the provision that in certain circumstances adverse inferences can be drawn from an accused's silence under police

⁹⁴ Chiavario 1995, 37.

⁹⁵ Chiavario 1995, 38.

⁹⁶ Report of the Royal Commission on Criminal Justice, July 1993, cm 2263.

⁹⁷ S 3.

questioning.⁹⁸

4.13 In *Murray v United Kingdom*,⁹⁹ the European Court of Human Rights, dealing with the Northern Ireland provision, held that drawing adverse inferences from pre-trial silence was not necessarily incompatible with the right to remain silent, as the right was not absolute. The court held that the way the accused behaved or has conducted his defence was relevant in evaluating the evidence against him. However, the prosecutor must have first established a *prima facie* case against him before any inference could be drawn from his silence. Furthermore, a conviction cannot be based "solely or mainly" on the accused's silence or on a refusal to answer questions or to give evidence. On the basis of this decision, Lord Steyn¹⁰⁰ is of the opinion that it is debatable whether the Human Rights Act will necessarily have much effect on pre-trial disclosure because many continental countries have more far-reaching duties of disclosure.¹⁰¹

* **Judicial questioning**

4.14 The judicial questioning of accused soon after arrest was first introduced in Scotland in 1980¹⁰² as a result of the Thomson Committee on Criminal Procedure.¹⁰³ The Committee argued that if an accused could remain silent, he or she could come forward with a defence which might have been shown to be false had he or she been examined at an early stage of the proceedings. The aim of judicial questioning was thus, first, to afford an accused an opportunity at the earliest possible stage of stating his or her position as regards the charge; second, to prevent the later fabrication of a defence; and, third, to protect the interests of the accused by ensuring that any answers or statements given to the police are fairly obtained.¹⁰⁴

4.15 The Criminal Procedure (Scotland) Act of 1995 repeated the provisions relating to the questioning of an accused before a judicial officer. In petition proceedings, an accused may be

⁹⁸ Ss 34-38. See McEwan 1998, 173ff.

⁹⁹ Decision of 8 Feb 1996, (1996) 22 EHRR 29.

¹⁰⁰ 1999, 56.

¹⁰¹ See also Ashworth 1999, 267; Pattenden 1998, 161-4.

¹⁰² Criminal Justice (Scotland) Act 1980.

¹⁰³ Criminal Procedure in Scotland (Second Report) Cm 6218, October 1975.

¹⁰⁴ See Scottish Home and Health Department 1994, § 8.18.

brought on arrest by the prosecutor before a sheriff (a judicial officer) for judicial examination.¹⁰⁵ The questioning by the prosecutor must be directed towards "eliciting any admission, denial, explanation, justification or comment" which the accused may have with regard to the charge.¹⁰⁶ The questioning must aim, inter alia, at determining whether any accounts which the accused gives "ostensibly disclose a defence", and the nature and particulars of the defence.¹⁰⁷ The questions may thus include those aimed at achieving self-incrimination.¹⁰⁸ The accused may be represented at the examination¹⁰⁹ and may consult with his or her lawyer before answering a question.¹¹⁰ As the role of the judicial officer is to control the reasonableness of the questioning,¹¹¹ the lawyer's role is limited to asking questions in clarification.¹¹² The accused may decline to answer any question but then an adverse inference may be drawn "only where and in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately to that question."¹¹³ The other side of the coin is that the prosecutor must secure the reasonable investigation of any ostensible defence disclosed by the accused,¹¹⁴ a duty to which no sanctions are coupled for non-compliance.¹¹⁵

* **Defence disclosure**

4.16 The Runciman Commission was of the opinion that the judicially imposed duties of prosecution disclosure went too far. Not only did the prosecution have to disclose all material which it intended to adduce as evidence, but also all "unused material". This not only imposed a heavy burden on the prosecution to comb through large masses of material, but also allowed

¹⁰⁵ S 36(1).

¹⁰⁶ S 36(1).

¹⁰⁷ S 36(2).

¹⁰⁸ Bradley & Shiels 1996, 46-50.

¹⁰⁹ S 35.

¹¹⁰ S 36(6).

¹¹¹ S 36(5).

¹¹² S 36(7).

¹¹³ S 36(8).

¹¹⁴ S 36(10).

¹¹⁵ Brown 1996, 47; Bradley & Shiels 1996, 46-50.

the defence to cause delays by successive requests for more material.¹¹⁶ To strike a "reasonable balance"¹¹⁷ between the duty of prosecution disclosure and the rights of the accused, the Commission proposed, first, an automatic primary duty of prosecution disclosure of "all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intends to rely upon that material";¹¹⁸ second, a duty on the defence to disclose its line of defence; and third, depending on disclosure by the defence, secondary disclosure by the prosecution.

4.17 The Commission advanced the following reasons for defence disclosure:

If all the parties had in advance an indication of what the defence would be, this would not only encourage earlier and better preparation of cases but might well result in the prosecution being dropped in the light of the defence disclosure, and earlier resolution through a plea of guilty, or the fixing of an earlier trial date.¹¹⁹

4.18 It would also keep "ambush defences" to a minimum.¹²⁰ Defence disclosure would entail the "disclosure of the substance of their defence in advance of the trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make out its case."¹²¹ As a sanction for non-disclosure, adverse inferences could be drawn.¹²² The Commission was convinced that the duty did not compromise the accused's right against self-incrimination. It was merely disclosing the substance of a defence sooner rather than later.¹²³

4.19 These recommendations were endorsed by the Home Office. In a consultation

¹¹⁶ Ch 6 § 42.

¹¹⁷ Ch 6 § 50.

¹¹⁸ Ch 6 § 51.

¹¹⁹ Ch 6 § 59.

¹²⁰ Ch 6 § 59.

¹²¹ Ch 6 § 66.

¹²² Ch 6 § 70.

¹²³ Ch 6 § 60.

document¹²⁴ defence disclosure was couched essentially in a truth-finding framework:

By clarifying the issues before the trial starts, these proposals should help to ensure that those who are guilty are convicted, without prejudicing the acquittal of the innocent. If the Defendant is telling the truth in the line of argument he discloses, that will trigger prosecution disclosure of any material which tends to support that defence and thereby enable the defence to run its case more effectively.¹²⁵

4.20 The recommendations were duly enacted in the Criminal Justice and Investigations Act of 1996 (CPIA). This extended the disclosure duty already existing in serious or complex fraud cases¹²⁶ to all Crown Court trials.¹²⁷ The prosecution duty of disclosure with regard to unused materials is restricted to such material as in its view "might undermine the prosecution case".¹²⁸ The defence is then compelled to provide a statement setting out the defence in general terms, the matters in dispute, and the reasons why the matters are placed in dispute.¹²⁹ Upon such disclosure, the prosecution is subject to a duty of secondary disclosure of any further material "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement".¹³⁰

4.21 The Act provides no sanction against the prosecution for failing to act properly.¹³¹ For the success of prosecution disclosure, Corker¹³² remarks that the CPIA "assumes that prosecutors will act in a more fastidious and counsel-like manner, acting in a detached objective way as ministers of justice". This assumption is, of course, highly contested. Sharpe writes that an adversarial system "should not operate on the premise that the Crown is a neutral seeker of the truth and that there will therefore be a total transparency between police, prosecutors and

¹²⁴ Home Office *Disclosure. A Consultation Document* (1995) cm 2864, quoted in Corker 1996, § 5-02.

¹²⁵ § 27. See also McEwan 1988, 18-9.

¹²⁶ Section 9(5) of the Criminal Justice Act 1987 permits the judge to order an accused in a case of serious or complex fraud to provide a statement in writing setting out in general terms the nature of his or her defence. See Corker 1996 § 2-07.

¹²⁷ S 1 CPIA.

¹²⁸ S 3(1)(a) CPIA.

¹²⁹ S 5(6) CPIA.

¹³⁰ S 7(2)(a) CPIA.

¹³¹ Corker 1996, § 5-24; Sharpe 1999, 280-1.

¹³² 1996, § 5-23.

the courts".¹³³ In contrast, the sanction of defence failure to disclose is that adverse inferences can be drawn.¹³⁴ However, a defence statement does not become evidence on which the prosecution case can be built.¹³⁵

4.22 In specific cases the defence disclosure must go even further. In the case of an alibi defence the accused must give particulars of the alibi, including the name and address of any witness the accused believes is able to give evidence in support of the alibi.¹³⁶ In the case of long or complex cases a judge may order a preparatory hearing, in which case statements may be required from the prosecution and the accused.¹³⁷ The defence case statement must include in general terms, the nature of the defence, and indicate the principal matters on which issue is being taken with the prosecution, objections to the prosecution case statement and any points of law it intends taking.¹³⁸ The obligation does not, however, include the disclosure of the identities of defence witnesses.¹³⁹

4.23 The question remains whether defence disclosure is compatible with the European Convention on Human Rights, now directly applicable through the Human Rights Act of 1998. Although some argue that the duty runs "fundamentally counter to adversarial theory in weakening the privilege against self-incrimination",¹⁴⁰ others regard it as legitimate in view of full prosecution disclosure.¹⁴¹ In the light of the European Court's decision in *Murray v United Kingdom*,¹⁴² which holds that the right to remain silent is not absolute and silence through the proceedings has implications for the evaluation of inculcating evidence, the conclusion is that

¹³³ 1999, 281. See also Corker 1996, § 5-46.

¹³⁴ S 10(3) CPIA.

¹³⁵ S 11(5) CPIA. On the evidential difficulties surrounding the defence statement, see Sprack 1998.

¹³⁶ S 5(7) CPIA.

¹³⁷ S 29 CPIA.

¹³⁸ S 31(6) CPIA.

¹³⁹ S 33(1) CPIA.

¹⁴⁰ Sharpe 1999, 277.

¹⁴¹ Jackson & Doran 1995, 62; McEwan 1998, 18-9.

¹⁴² Decision of 8 Feb 1996, (1996) 22 EHRR 29.

compelled defence disclosure after primary prosecution disclosure will not fall foul of article 6(2) of the Convention.¹⁴³

4.24 Sprack¹⁴⁴ commented in 1998 that the question whether there should be defence disclosure is no longer on the legal or political agenda; there is consensus that defence disclosure is desirable "particularly because of its powerful potential as a tool for trial management."¹⁴⁵ The question has moved to the limits of the duty and how to make it compatible with the "golden thread of English criminal justice" that the burden of proof rests squarely on the prosecution.¹⁴⁶

* **Strengthening inquisitorial powers**

4.25 The Runciman Commission also recommended that judges play a more active role in the production of evidence and the management of trials. A study conducted on behalf of the Commission revealed that in 19% of contested cases trial judges reported that they knew of one or more important witnesses who had not been called by either side.¹⁴⁷ The Commission noted that if the power to call witnesses is exercised more often, it "might constitute an incentive to counsel to ensure that the jury is allowed to hear all the relevant witnesses in a case."¹⁴⁸ The following recommendation was thus made:

Judges should be prepared, in suitable cases, to ask counsel why a witness has not been called and, if they think it appropriate, urge counsel to rectify the situation. In the last resort judges must be prepared to exercise their power to call the witness themselves.¹⁴⁹

¹⁴³ 1999, 285.

¹⁴⁴ 1998, 230.

¹⁴⁵ Sprack 1998, 230.

¹⁴⁶ Sprack 1998, 231.

¹⁴⁷ Study by Zander and Henderson *Crown Court Study*, Royal Commission on Criminal Justice Research Study 19, 1993; Royal Commission Report ch 8 § 18.

¹⁴⁸ Ch 8 § 18.

¹⁴⁹ Recommendation 185.

4.26 It also recommended that the hearsay evidence should be more readily admitted¹⁵⁰ and that presiding officers exercise greater control over cross-examination.¹⁵¹

CONCLUSION

4.27 From the cursory review of international law and some European jurisdictions, four important conclusions can be drawn. First, the adversarial system certainly dominates the international law scene. If anything, a similar process is occurring with respect to continental systems under the influence of international human rights instruments. Second, the adversarial system is becoming more transparent, demanding full disclosure by both parties. The notion of a trial as a game is giving way to a quest for greater truth-finding. Third, in the adversarial system the passive role of the court is being transformed into a more pro-active one with regard to both truth-finding and procedural fairness. Fourth, developments in Europe indicate growing trends towards hybrid systems in pursuit of greater efficiency. Italy moved towards the adversarial system to make their process more efficient. Common law jurisdictions make the presiding judicial officer more active with the same goal. In conclusion, the confluence of these tendencies seems to suggest that the optimal system is a hybrid one; it is only through the collective effort of all the role players that the three goals of criminal justice system can be achieved.

¹⁵⁰ Recommendation 189.

¹⁵¹ Recommendations 180, 181 and 182. The recommendation were not dissimilar to those contained in the South African Law Commission's interim report of 1995.

CHAPTER 5

IDENTIFYING THE ISSUES

INTRODUCTION

5.1 With regard to the central truth-finding objective of the criminal trial, it has been argued that the adversarial system routinely produces unfair results. Undefended accused are usually not competent adversaries and may as a result be wrongly convicted. The same applies to accused defended by incompetent counsel. Unskilled prosecutors may cause unjustified acquittals. Where there is an equality of arms in terms of competent adversaries, truth-finding may also be distorted by unilateral prosecution disclosure. In this section it will be argued that one way of ameliorating these problems is to articulate with greater precision judicial officers' inquisitorial powers and to require reciprocal defence disclosure.

JUDICIAL TRUTH-FINDING - QUESTIONING THE SUSPECT

5.2 Judicial officers have well-recognised inquisitorial powers of questioning and calling witnesses. The question is, then, whether these powers can, and should, be elaborated to ensure better truth-finding.

General principles

5.3 The approach to the power and duty to question and call witnesses for the "just decision" in a case¹⁵² has for the past 70 years been expressed in the oft-quoted dictum of Curlewis JA in *R v Hepworth*:¹⁵³

By the words 'just decision in the case' I understand the legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied to both sides. A Judge is an administrator of justice, not

¹⁵² S 167 and 186 Criminal Procedure Act.

¹⁵³ 1928 AD 265 at 277.

merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done ... The intention of section 247 [s 186 CPA 1977] seems to me to give a Judge in a criminal trial a wide discretion in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake or technicality.¹⁵⁴

5.4 This approach was more recently confirmed by the Supreme Court of Appeal in *S v Gerbers*.¹⁵⁵

Assisting the defence

5.5 The use of these inquisitorial powers to the benefit of accused has never been questioned. Indeed, in the case of the undefended accused it has been widely accepted that the judicial officer must be more interventionist, questioning state witnesses in order to establish the truth. In *S v Mosoinyane*¹⁵⁶ the court quoted with approval the following passage:¹⁵⁷

Participating in the testing of the State evidence does not *per se* compromise the court's impartiality. To the contrary, by remaining aloof where the accused is unable to test the State evidence, the judicial officer would actually be siding with the prosecution by letting the latter draw an unfair advantage from the accused's inept cross-examination.

The same principle applies with regard to calling witnesses who may be of assistance to the defence.¹⁵⁸

Assisting the prosecution

5.6 The more difficult question is whether a judicial officer may intervene where it may be

¹⁵⁴ See also *R v Omar* 1935 AD 230 at 323 where Wessels CJ said when interpreting s 247 of the CPA of 1917 that the task of the judicial officer "to see that *substantial justice* is done, to see that an innocent person is not punished and that a guilty person does not escape punishment." (emphasis added).

¹⁵⁵ 1997 2 SACR 601 (SCA) 606b.

¹⁵⁶ 1998 1 SACR 583 (T) 595a-d.

¹⁵⁷ Steytler 1988, 150.

¹⁵⁸ Steytler 1988, 175-7.

to the prejudice of the defence. In the case of *S v Manicum*,¹⁵⁹ the magistrate was confronted with a prosecutor unwilling or unable to cross-examine the accused on his conflicting statements. The court of appeal recognised that this situation placed the presiding magistrate in a "difficult position":

He was well aware of the legal duties imposed on a judicial officer. He knew he could not enter the arena and cross-examine the appellant. He knew he could not assume the role of prosecutor and endeavour to establish that the appellant's version fell to be rejected. He did ask a few questions. These were not leading questions and they were not designed to discredit the accused.¹⁶⁰

5.7 The pertinent question is whether the court should have been so restricted in its intervention, which allowed a possibly guilty person to walk free. There are two issues involved - the one is conceptual, the other is one of perception.

*** A court may not assume the role of the prosecution**

5.8 Is it conceptually in order that judicial intervention may be to the prejudice of the defence? If the court intervenes with this effect, is it performing a prosecutorial function in conflict with its judicial role? In principle, judicial intervention to the prejudice of the defence is not *per se* irregular. In *S v Gerbers*¹⁶¹ the Supreme Court of Appeal approved the following dictum from *R v Hepworth*:¹⁶²

The discretion and power under s 247 [of 1917 Criminal Code similar to s 186 CPA 1977] can be exercised by a Judge, whether the effect thereof be in favour of the Crown or the accused person. I see no reason to distinguish between the exercise of that power on behalf of the accused or of the Crown, provided the power is exercised for the purpose of doing justice as between the prosecution and the accused.

5.9 Questioning an accused is to be judged in the same way. While "judicial harassment" of an accused is unacceptable, it

does not mean that a court may not ask an accused questions which he may find it

¹⁵⁹ 1998 2 SACR 400 (N).

¹⁶⁰ At 404b-c.

¹⁶¹ Supra 606e.

¹⁶² At 278.

difficult to answer without doing damage to his case. Nor is the perception of partiality justified merely because a court's questions have the result that answers damaging to the accused emerge.¹⁶³

5.10 Questions that show that a witness was false or unconvincing do not indicate that the questions were unfair or partisan.¹⁶⁴

5.11 There is, however, clear authority that the judicial officer may not assume the role of the prosecution.¹⁶⁵ How is the court's legitimate truth-finding role to be distinguished from performing an unacceptable prosecutorial role? This question is pertinently raised in the context of the court's duty of ensuring an undefended accused a fair trial by discharging him or her *mero motu* if there is no evidence at the end of the state case.¹⁶⁶ How can a presiding officer be allowed to fill in the gap in a prosecution case, yet at the same time be under a duty to discharge an accused where there is no case to meet because there are gaps in the prosecution case?

5.12 The case law gives some indications as to how an appropriate distinction can be drawn. In *S v Jada*¹⁶⁷ Eksteen AJP held that the purpose of section 186 is not to place the presiding officer in the position of the prosecutor by calling witnesses from the outset in order to prove the allegations contained in the charge sheet. In *S v Kwinika*¹⁶⁸ the court drew a similar distinction. Where no evidence whatsoever is advanced by the prosecution the court was not at liberty to call a witness in terms of section 186, but had to discharge the accused *mero motu*. By contrast, the court may call evidence which has been omitted by mistake or is necessary in order to rectify some technical deficiency.¹⁶⁹

¹⁶³ At 608h-j.

¹⁶⁴ *S v Van Dyk* 1998 2 SACR 363 (W) 379a.

¹⁶⁵ *S v Manicum supra* 404c.

¹⁶⁶ *S v Becket* 1987 4 SA 8 (C); *S v Mathebula* 1997 1 SACR 10 (W); *S v Jama* 1998 2 SACR 237 (N) 242j; *S v Ndlangamandla* 1999 1 SACR 391 (W). See also Steytler 1988, 154.

¹⁶⁷ 1985 2 SA 182 (E) 184G.

¹⁶⁸ 1989 1 SA 896 (W).

¹⁶⁹ *R v Hepworth supra* 277.

5.13 Where there is no evidence against the accused a judicial officer, by intervening, would be playing the role of the prosecutor. Where it is apparent that there is no case for the accused to meet, the court must order a discharge. Where a reasonable suspicion has been established, but falling short of a *prima facie* case, it should be acceptable for the court to call a witness whose evidence may easily fill in the missing link in a prosecution case. The court thus performs a supplementary or complementary role to that of the prosecution in the interest of justice. Where there is nothing to supplement, intervention would be wrong.

5.14 The recent decision in *S v Matthys*¹⁷⁰ provides a good example of the difficulties in drawing these distinctions. The accused was charged with murder in the regional court. The first state witness testified that the accused struck the deceased with a knobkierie on the chest whereupon the latter died on the spot. The post-mortem report (presumably handed in as evidence) indicated a fracture of the skull. When the prosecutor indicated that there were no further witnesses, the court suggested to him that he call the district surgeon to testify whether the head wound was old or could have been caused by the accused falling as result of a blow to the chest. The court on appeal responded as follows to this judicial intervention:

Suggesting to the prosecutor in the manner in which he did, was, with respect, grossly irregular inasmuch as he was telling the prosecutor what the 'missing link' was, or put differently, the regional magistrate provided the prosecution with an opportunity of strengthening a link which he knew to be weak.¹⁷¹

5.15 If a more inquisitorial role is to be formulated for judicial officers, then this type of intervention should not necessarily be labelled as grossly irregular. There was a reasonable suspicion that the accused was linked to the death of the deceased and an independent expert may have provided support for either the accused's or the prosecution's case. It would appear that the regional magistrate intervened because the prosecutor too readily abandoned the prosecution in the face of incriminating evidence and the availability of a crucial witness. It was a clear case for judicial truth-finding.¹⁷²

¹⁷⁰ 1999 1 SACR 117 (C).

¹⁷¹ At 119f.

¹⁷² This case also highlight the dilemma judicial officers face when they are confronted with the prospect of having to acquit a patently guilty person because the prosecution or court *a quo* has not done its job properly. While the court on appeal strongly disapproved of the regional magistrate's conduct (which was patently motivated by the prospect of the accused getting away with murder), it appears to have fallen in the same trap. The correct outcome of the successful appeal should have been that the

5.16 In the instant case the court did not call the district-surgeon but suggested that the prosecutor should do so. Does the irregularity lie in the fact that by telling the prosecutor how to conduct the prosecution, the magistrate created the perception of bias?¹⁷³ This brings us to the second obstacle in the way of a more inquisitorial role for judicial officers - the problem of perceiving intervention as an indicator of judicial bias or partiality.

* **The court may create the impression of partiality**

5.17 It is established law that the conduct of a presiding officer must not create the impression that he or she is biased in favour of the prosecution. Commenting on the lengthy cross-examination of the accused in *S v Matthys*,¹⁷⁴ Hlophe ADJP said the following:

The conduct of the learned regional magistrate was, with respect, shocking. His conduct was clearly in conflict with the wholesome English principle which is part of our law that justice should not only be done but should manifestly be seen to be done, and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.¹⁷⁵

The critical question is when does intervention lead to a legitimate perception of bias.

5.18 As searching for the truth should not *per se* be equated with bias; the usual references to English cases as to proper judicial behaviour are inappropriate on two scores. Jackson and Doran¹⁷⁶ have pointed out that the requirement of judicial passivity was developed in the context of jury trials. Should the presiding judicial officer (who in the true sense presides over the proceedings, not being the trier of fact) intervene to the detriment of the defence, it could easily

proceedings were set aside; the gross irregularity of the magistrate repeatedly entering the arena, constitutes a failure of justice and the conviction should be reversed without reference to the evidence. The court proceeded, however, to convict the accused, on the basis of his own evidence, of assault with the intention to do grievous bodily harm. Rather than seeing the accused walk free of a self-confessed offence, the court responded to meet out punishment on an unprincipled basis.

¹⁷³ Cf *S v Mosoinyane* 1998 1 SACR 583 (T) 594h.

¹⁷⁴ *Supra* 120i.

¹⁷⁵ At 120c.

¹⁷⁶ 1995, 109.

have influenced the jury.¹⁷⁷ Furthermore, many of the leading cases on the proper judicial role (for example *Jones v National Coal Board*¹⁷⁸) stem from civil litigation where the role as umpire is most appropriate.¹⁷⁹ Even in England the notion of a passive judicial officer is under scrutiny and a more interventionist role was recommended by the Runciman Commission.¹⁸⁰

5.19 Where the judicial officer calls a witness to the prejudice of the accused, that act by itself should not be construed as bias. The issue of bias is more real when it comes to the judicial questioning of witnesses because the nature of such intervention lends itself more readily to charges of bias. Again, the mere fact that the consequences of a court's questions are prejudicial to the accused does not constitute bias.¹⁸¹ Furthermore, the length of questioning alone is a relatively neutral factor.¹⁸² What is decisive is the manner in which the questioning takes place.¹⁸³ In the words of Marais JA:

It goes without saying that objectively legitimate questions may be put so belligerently or intimidatingly or so repetitively or confusingly as to amount to judicial harassment and therefore an irregularity.¹⁸⁴

5.20 These may very well be some of the characteristics of cross-examination – questioning from a partisan perspective.¹⁸⁵ It is well-established that judicial questioning may not amount to cross-examination.¹⁸⁶ In contradistinction with the partisan nature of cross-examination, judicial

¹⁷⁷ In their study of the Diplock courts in Northern Ireland, Jackson and Doran (1995, 75) they point out that the absence of the jury, "trial judges may take on a more directorial, or inquisitorial, role in the trial, even though in theory they still be performing a merely umpireal role." With reference to the United States, Damaska (1997, 135) notes that, with the marginalisation of jury trial, there is a greater involvement of the court fact-finding activities.

¹⁷⁸ [1957] 2 QB 55, 64 per Lord Denning.

¹⁷⁹ Jackson & Doran 1995, 99.

¹⁸⁰ Recommendation 185.

¹⁸¹ *S v Gerbers supra* 608i.

¹⁸² *S v Gerbers supra* 608h.

¹⁸³ *S v Gerbers supra* 608h.

¹⁸⁴ *S v Gerbers supra* 608h.

¹⁸⁵ See *S v Sallem* 1987 4 SA 772 (A) 795A; Steytler 1988, 150.

¹⁸⁶ *S v Matthys supra* 120h.

questioning must exhibit "open-mindedness".¹⁸⁷ A dismissive attitude towards a witness, portrayed by adverse comments on his or her evidence, may be legitimate cross-examination but not proper judicial questioning.¹⁸⁸

5.21 The tension between truth-finding and perceptions of bias will always be there, but that should not preclude the court from performing its truth-finding duty. As Marais JA pointed out in *S v Gerbers*:

There is obviously potential tension between the need to fulfil the role of a judicial officer as described in *Hepworth's* case *supra* and the need to avoid conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as *S v Rall* 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains incumbent upon all judicial officers to constantly bear in mind that their *bona fide* efforts to do justice may be construed by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.¹⁸⁹

Structuring the court's truth-finding activities

5.22 While *Hepworth* established the principle that the role of the judicial officer is to ensure "substantial justice" between the accused and the prosecution, the practice may vary considerably. The proposal is to build on the *Hepworth* principle by nudging judicial conduct in the direction of a more truth-finding role where the effort and skill of the litigants fail to do so adequately. There should be a clear duty that would have obliged the magistrate in *S v Manicum*¹⁹⁰ to have examined the accused on his conflicting statements. This duty should also have safeguarded convictions where the judicial officer "filled the missing link" in the prosecution case.

5.23 A greater inquisitorial judicial approach would affect undefended accused both favourably and adversely; favourably where the court tests the reliability of state witnesses, adversely where the accused and defence witnesses are examined.

¹⁸⁷ *S v Rall* 1982 1 SA 828 (A) 832H.

¹⁸⁸ *S v Aspeling* 1998 1 SACR 561 (C) 569.

¹⁸⁹ At 607b-c.

¹⁹⁰ 1998 2 SACR 400 (N).

5.24 If it is accepted that presiding officers should perform a greater truth-finding role, the issue becomes how such a role can be implemented and structured. Although the courts have wide inquisitorial powers in terms of sections 167 and 186 of the Criminal Procedure Act, their application in practice varies considerably. Implementing a more extensive greater truth-finding role within the present legislative framework may encounter two difficulties. The first is that judicial officers steeped in an adversarial culture may not easily change habits.¹⁹¹ In Northern Ireland, for example, the introduction of bench trial did not significantly alter the passive approach required of judges in jury trials.¹⁹² The second difficulty is that unguided judicial intervention may result in legitimate complaints of partisan behaviour.

Judicial attitude

5.25 By establishing a more inquisitorial role, the danger exists that presiding officers may subsume the role of the prosecution, giving rise to legitimate claims of bias. How can the correct balance be struck? The answer to this question does not lie in the law, but in judicial appointment and training. Drawing magistrates from a broader pool than the ranks of prosecutors may be a partial solution. Judicial training in the proper execution of the truth-finding function would be necessary for both current and new judicial officers. The focus of the training would be to ensure judicial intervention which does not compromise a court's well-established duty to be open-minded, impartial and fair.¹⁹³ This is a balance that the continental system has achieved. We need not share the Anglo-American scepticism that any State intervention is partisan by nature and should therefore be avoided.

¹⁹¹ Cf South African Law Commission 1998, § 6.36. Although presiding officers always had the power to control cross-examination, the Commission was of the opinion that this power should be specifically expressed by statute. One of the reasons advanced was that since "our lower courts especially are hesitant to exercise this power [to curtail cross-examination], the Commission feels that it would be useful to embody it in legislation which will, at the same time, lay down basic requirements for its application." (§ 6.36). See also Jackson (1997, 334) on changing judicial behaviour.

¹⁹² Jackson & Doran 1995. See also Doran, Jackson & Seigel 1995.

¹⁹³ *S v Rall* 1982 1 SA 828 (A) 832H; *S v Gerbers* 1997 2 SACR 601 (SCA); *S v Aspeling* 1992 1 SACR 561 (C) 571c.

DISCLOSURE

Prosecution disclosure and truth-finding

5.26 The prosecutorial duty to disclose the content of the police docket has advanced the truth finding process in the case of defended cases. Defence counsel can test the reliability of state witnesses with reference to their police statements, and unused materials may indicate evidence favourable to the defence. While the prosecutor's duties to disclose deviations in state witnesses' testimony and exculpatory evidence to the defence was firmly entrenched prior to 1994, their enforceability depended ultimately on prosecutorial discretion. With access to the police docket now a constitutional right, the major defect in the system has been cured by placing the docket in the hands of the defence.

5.27 Generally speaking, placing the police docket in the hands of the court would enable it to play a more effective truth-finding role. In the case of the undefended accused, the court would at least be able to test the reliability of state witnesses or call exculpatory evidence where the accused manifestly neglects to do so. Where the prosecution fails to call a key state witness, the court will also be aware of it.

5.28 Disclosing the police docket to the court would resemble the key position the dossier assumes in inquisitorial systems. Introducing this inquisitorial element in a mainly adversarial system may give rise to major conceptual difficulties in our law. At present any material in the police docket disclosed to the defence becomes part of the court record only on being properly admitted in terms of the usual admissibility criteria of the law of evidence.¹⁹⁴ When a state witness's testimony differs from his or her police statement, the defence may seek to hand in the statement as an exhibit for the purposes of cross-examination. Conversely, a statement of a person who does not testify may not be admitted.

5.29 With the principle of oral evidence and a limited admissibility of evidence being central to the adversarial system, the police docket cannot be equated to the dossier. The two documents are by their very nature fundamentally different. The dossier is the product of a judicial inquiry, the docket the product of a (possibly) partisan police investigation.¹⁹⁵ It is thus

¹⁹⁴ *S v Tsabalala* 1999 1 SACR 163 (T).

¹⁹⁵ Cf Jorg, Field & Brants 1995, 48.

submitted that the docket in the present system has a limited role to play in the court's truth-finding activities.

Defence disclosure

5.30 Prosecution disclosure may hamper truth-finding. With the full prosecution case disclosed, the defence, by withholding its line of defence, may seek to exploit investigative weaknesses in the prosecution case and trim the sails of its defence as the prosecution case unfolds. Defence disclosure in response to prosecution disclosure would meet this negative consequence.

5.31 Four years ago the Commission disapproved of a proposal emanating from the Project Committee dealing with the simplification of criminal procedure that defence disclosure should be obligatory.¹⁹⁶ The argument was based on the view that such a duty was in violation of an accused's right to be presumed innocent and the right to remain silent. As the law then stood, that view was no doubt correct. However, since the right to prosecution disclosure has been firmly established, defence disclosure during trial proceedings would be justifiable where full prosecution disclosure has taken place. As Mr Justice van Dijkhorst¹⁹⁷ has recently observed:

I fail to see how the full disclosure of the versions of both state and defence at the outset and the elimination of evidence on that which is common ground can be regarded as unfair. We are, after all, attempting to arrive at the truth, not to obfuscate it.

5.32 With the weight of opinion that the English legislation on defence disclosure will not fall foul of the European Convention on Human Rights, a similar South African provision is also likely to pass constitutional muster. On the other hand, Van Dijkhorst J's more extensive proposal of judicial questioning on arrest, similar to the Scottish procedure, is most likely in conflict with the Bill of Rights.

5.33 It was therefore suggested that the issue of defence disclosure in response to prosecution disclosure be reopened and that appropriate proposals in this regard be formulated.

¹⁹⁶ South African Law Commission 1995, § 8.43.

¹⁹⁷ Van Dijkhorst 1998, 138.

CHAPTER 6

THE COMMISSION'S EVALUATION

INTRODUCTION

6.1 From the research outlined in the chapters above the Commission, in the discussion paper, identified a number of issues warranting further consideration. These issues are set out more fully in the chapters hereafter under the following main headings:

1. Questioning of the suspect/accused by the police, its legitimacy, effectiveness and the right to silence and its consequences.
2. Defence disclosure before and during trial.
3. A greater role in the criminal justice process by judicial officers, with particular reference to access to the police docket.
4. Enhancing judicial management of trials and case management.

6.2 The topics raised under the first two headings are closely interrelated, in that similar issues of principle arise irrespective of the stage at which defence disclosure might be required. There are three separate stages of the process of criminal justice at which the issue might arise:

- (a) From the time that suspicion first falls upon the accused until the time he or she is indicted.
- (b) From the time the accused is indicted until the time he or she is required to plead.
- (c) During the course of the trial.

6.3 This chapter deals, in three parts (Parts A, B and C), with police questioning and defence disclosure at each of those three stages. It also deals with a number of related issues

which emerged during the course of the inquiry viz. Whether there should be a Code of Conduct to regulate police questioning of suspects; the requirements for the admissibility of admissions and confessions; the status of the accused's evidence in a trial-within-a-trial; and certain issues relating to proceedings in terms of section 115 of the Criminal Procedure Act.

6.4 Chapter 7 deals with the remaining issues referred to in paragraph, 6.1, namely a greater role in the criminal justice process by judicial officers, with particular reference to access to the police docket and enhancing judicial management of trials and case management.

PART A

**POLICE QUESTIONING AND DEFENCE DISCLOSURE:
FROM THE TIME SUSPICION FALLS UPON THE ACCUSED
UNTIL THE TIME HE OR SHE IS INDICTED**

CREATING A DUTY TO ANSWER POLICE QUESTIONS

6.5 This section discusses a proposal to amend the law so as to permit a court to draw an appropriate inference against an accused person who fails to disclose matter to the police in various circumstances. In effect, it places a suspect under a duty to disclose such matter to the police at the risk that a court might in due course draw an adverse inference from his or her failure to do so. Such provisions exist in the Criminal Justice and Public Order Act 1994 (England) and it is proposed that the same provisions be incorporated in our law. The provisions will have the effect of placing a suspect under a duty to disclose information to the police, at the risk that an adverse inference might be drawn if he or she fails to do so, in three circumstances:

- (a) where a suspect is questioned by the police in the course of their investigations and fails to disclose matter that is subsequently relied upon in his or her defence.
- (b) where, upon arrest, a suspect is asked to account for objects, substances or marks found on or in the suspect's possession;
- (c) where, upon arrest, the suspect is asked to account for his or her presence at the place where he or she was found.

6.6 At the time the discussion paper was prepared there was not unanimity on the proposal, and in particular different views were held as to whether it would be constitutionally permissible. What follows is an edited version of the two views that were presented in the discussion paper.

Argument In Support of the Proposal ¹⁹⁸

6.7 Questioning by the police of persons suspected to have committed a crime and of innocent members of the public who might be in possession of material information is integral to the modern investigation of crime. Most jurisdictions recognise the legitimacy of such questioning and attempt to regulate the manner in which it is done so as to avoid oppressive practices rather than to prohibit it altogether. It has been argued that to place excessive barriers in the way of police questioning of suspects might serve to divert attention from where the real problem lies and thereby serves to encourage unacceptable police practices.¹⁹⁹

6.8 It is inherent in the process of criminal investigation that personal privacy will be invaded. It is well recognised that to invade personal privacy is justified where it serves the interests of the proper administration of justice. Thus, an ordinary member of the public who is in possession of information concerning the commission of crime is, in general, obliged to disclose it in the absence of a “just excuse”²⁰⁰ and it will be a just excuse if the information required to be disclosed is self-incriminatory.²⁰¹

6.9 The position of a person who is suspected to have committed a crime is different only insofar as anything that he or she might say has the potential to be self-incriminatory. Two conclusions follow from this: First, a suspect cannot be compelled by threat of punishment to make disclosures of any kind, for such disclosures will always be potentially self-incriminatory and there can be no doubt that threatening punishment for the failure to make disclosures which might be self-incriminating will be unconstitutional.²⁰² Second, to object to defence disclosure

¹⁹⁸ This section summarises the views that were expressed by Judge Nugent.

¹⁹⁹ Adrian A.S. Zuckerman “The Right Against Self-Incrimination: An obstacle to the Supervision of Interrogation” 1986 (102) *LQR* 43, points out that what the suspect needs is “not a lofty and impractical right (against self-incrimination) but a meaningful and effective protection from abuse and distortion.”

²⁰⁰ A person may be compelled to disclose information that is “necessary for the administration of justice or the maintenance of law and order” in terms of s.205 of the Criminal Procedure Act, unless there is a “just excuse” for refusing to do so.

²⁰¹ *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A); *Nel v Le Roux NO & Others* 1996 (1) SACR 572 (CC).

²⁰² Section 35(1)(a) of the Constitution clearly prohibits threats of punishment for failure to disclose information that is potentially self-incriminatory. Whether the section extends further than that is a matter upon which the authors of this report disagree.

merely on the grounds that it constitutes an invasion of privacy would afford greater protection to a person suspected to have committed a crime than to an innocent member of the public, something for which there is no rational justification.

6.10 The reaction of a suspect when confronted with apparently incriminating evidence might be relevant to issues which will arise at the subsequent trial, and would ordinarily be admissible in evidence. An explanation that is proffered by the suspect might constitute an admission of one or more of the relevant facts and thus contribute to a conviction, or it might constitute a confession which is sufficient by itself to found a conviction. Even an exculpatory explanation will be relevant if it is in conflict with a defence that is subsequently advanced at the trial insofar as it might cast doubt upon the truthfulness of that defence.

6.11 Similarly, the failure to give an explanation for apparently incriminating evidence might also be relevant if the accused gives evidence at a subsequent trial, for it might warrant an inference that what is advanced in evidence at the trial is the product of recent fabrication. Naturally, if the accused does not give evidence at the trial the fact that he also did not offer an explanation to the police has no material significance for silence, by itself, will never suffice to discharge the onus that rests upon the State.

6.12 It is apparent, then, that positive statements made to the police and silence when questioned by the police will ordinarily be relevant when deciding the question of guilt. There is thus a value to police questioning of suspects irrespective of whether the suspect replies, for the failure to reply might itself constitute relevant evidential material.

6.13 Apart from the evidence that might result from police questioning (whether by positive assertions or by silence) there are other sound reasons for placing a suspect under a duty to reply to police questioning (albeit that such a duty can never be enforced by the threat of punishment). In summary, the failure to disclose an innocent explanation during the course of the investigation results in the inefficient use of police resources, for the police cannot know when they have exhausted all avenues of investigation. Furthermore, the police might terminate an investigation prematurely, believing, quite genuinely, that the culprit has been discovered, and thus creating the risk that the true culprit might avoid detection. Apart from those considerations the suspect is otherwise placed in the position that he or she is able to tailor the explanation that is in due course advanced at the trial in order to meet the prosecution

evidence.²⁰³

6.14 It is not intended in this report to deal at any length with the manner in which the efficient administration of criminal justice is inhibited if an innocent explanation is withheld from the police but is instead reserved for the trial, for they ought to be self-evident. The more pertinent question is whether the recognition of a duty upon suspects to make disclosure of innocent explanations during the police investigation is objectionable, either in law or in the interests of other considerations of justice. Before turning to that question, however, an explanation should be given of why the problem arises.

6.15 There is no prohibition upon police questioning of suspects. If the suspect chooses to make disclosures, after an appropriate warning, they will in general be admissible in evidence.²⁰⁴ However there is no reason why even an innocent suspect should make any disclosures to the police, because while the law remains as it is, the failure to do so cannot be to his or her detriment. Indeed, a suspect who is properly advised will almost invariably decline to say anything to the police.

6.16 The reason that the silence of a suspect is not capable of acting to his or her detriment is the following: The inference which might be drawn from the silence of a suspect when confronted with apparently incriminating evidence is that *at that stage* he has no innocent explanation (the relevance of which will be that an explanation subsequently tendered at his trial must be false). What is perhaps more important is that if the suspect is aware that there are consequences to remaining silent he or she is less likely to do so.

6.17 However, a court can only draw an inference if it is the only reasonable inference that the circumstances permit.²⁰⁵ Yet if a suspect has been brought under the impression, at the time he or she refrained from making disclosures, that he or she was not called upon to provide explanations to the police and might reserve any such explanations for the trial, then purely as a matter of logic it will not be possible to draw the inference that the cause of the silence was

²⁰³ Bearing in mind that the prosecution is required to disclose the evidence in its possession, since the decision in *S v Tshabalala* 1999 (1) SACR 163 (T).

²⁰⁴ If they meet the requirements for the admissibility of admissions or confessions, as the case may be.

²⁰⁵ In accordance with the "cardinal rules of logic" referred to in *R v Blom* 1939 AD 288

the lack of an innocent explanation. It is reasonably possible, in those circumstances, that the suspect merely chose to reserve the explanation for the trial because the suspect was brought under the impression that he or she was entitled to do so. That is what is implicit in the warnings that are customarily given to suspects in this country, and in the United States and, until recently in England, and prevents an adverse inference from being drawn.²⁰⁶

6.18 Although initially the courts in England grounded their reasons for not drawing such an inference upon the terms in which the warning was framed (as have the courts in this country), more recently it has been said by the Privy Council that “the caution merely serves to remind the accused of a right that he already possesses at common law”.²⁰⁷

6.19 Although not expressly so stated in our case law, it must follow that a warning given to suspects ought to do no more, nor less, than to convey to suspects what their true rights are in any event. Accordingly, if the warning given to suspects conveys to them, in effect, that the law does not call upon them to provide explanations to the police, then it must be assumed that they were in any event not called upon to do so, irrespective of whether a warning had been given.

6.20 There is a suggestion in some of the decided cases that, in the absence of a warning, a court would be justified in drawing the appropriate inference from silence.²⁰⁸ One view is that there can be no middle path, which is what those cases might suggest, and that was recognised in the decision of the Privy Council which has been referred to.²⁰⁹ Either the law does recognise that a suspect is called upon to provide an explanation to the police (in which case the terms in which the warning is currently being given are inaccurate) or the law does not call upon the suspect to provide an explanation to the police (in which case it ought not to matter

²⁰⁶ See for example *R v Mashelele & Ano* 1944 AD 571 at 583-5; *R v Patel* 1946 AD 903 at 908; *R v B* 1960 (2) SA 424 (T) at 426 F-H; *S v Maritz* 1974 (1) SA 266 (NC) at 267D-268E. It was pointed out in *Doyle v Ohio* 426 US 610 (1976) that silence after a “*Miranda*” warning is “insolubly ambiguous.” The same approach has been adopted in England: *R v Naylor* (1933) 1 KB 685; *R v Leckey* (1944) 1 KB 80.

²⁰⁷ *Hall v R* [1971] 1 WLR 298.

²⁰⁸ In the absence of a warning the inference was held to be justified in *R v Barlin* 1926 AD 459, and see too *Jenkins v Anderson* 447 US 231 (1980). Whether the distinction is sustainable seems somewhat doubtful. If the warning does no more than to inform suspect of their rights, then it is the content of the rights that creates the “insoluble ambiguity” rather than the warning itself.

²⁰⁹ See footnote 205 above.

whether the suspect was given a warning).²¹⁰

6.21 However it need not be debated whether it is the common law or the terms of the warning that give rise to the inherent ambiguity that precludes the drawing of an inference,²¹¹ for in either event the question will remain the same for present purposes, which is whether a suspect ought to be under a duty to furnish to the police an innocent explanation (if the suspect has one) even though that duty will not be capable of being enforced by the threat of punishment if the suspect fails to do so.²¹² It has already been suggested that there are obvious advantages for the efficient administration of justice that such a duty be recognised. The more pertinent question is whether it is objectionable to do so.

6.22 The question which naturally arises when considering whether to introduce similar provisions in this country is whether it will be contrary to section 35(1) of the Constitution, which guarantees to every person who is arrested for allegedly committing an offence the “right to remain silent ... and not to be compelled to make any confession or admission that could be used in evidence against that person”.

6.23 At this early stage of our constitutional jurisprudence it is often difficult to determine what is or is not prohibited. Although it is arguable that the innovation that is proposed in this report might not be constitutional, the matter is by no means certain, and if need be there are mechanisms in the Constitution to allow for the testing of the proposals before they are brought into effect. A central consideration when assessing the constitutional validity of the proposals is that the rationale for the protection against self-incrimination is to safeguard the

²¹⁰ The proposition might be tested by asking whether the inference would be warranted if the evidence established that no warning was given, but that the suspect in any event had a full understanding of what his or her rights were.

²¹¹ GL Davies “The Prohibition Against Adverse Inferences From Silence: A Rule without Reason?” *2000 Austral. LJ* 26, suggests that what started out as the consequence of the warning given in terms of the Judges’ Rules came later to be interpreted as a consequence of the common law.

²¹² Quite clearly compulsion to make disclosures by threat of punishment for failing to do so will conflict with the Constitution. It is not suggested that any constitutional amendment should be considered to alter this. There are sound reasons of policy for that Constitutional guarantee.

innocent from the potential that they might be induced to make false confessions.²¹³ In many cases the guilty will benefit equally from that protection but that is merely the inevitable price that has to be paid in order to safeguard the innocent. It follows that the principle has no application in circumstances in which there is no potential that innocent persons might be induced to falsely incriminate themselves.

6.24 To draw an inference from the silence of the accused does not give rise to that potential. Drawing an inference from silence is no more than a process of inferential reasoning which, by definition, cannot have the effect of inducing innocent persons to incriminate themselves. Precluding a court from using that tool of inferential reasoning has the sole effect of shielding the guilty from the consequences of the knowledge of their guilt. It is therefore argued that there is no rational reason for recognising a principle which only has that effect, and it is submitted that it is doubtful that the Constitutional Court will do so.²¹⁴

6.25 To apply a process of inferential reasoning based on the silence of a suspect has no potential to act as an inducement to an innocent person to make a false confession or admission. Undoubtedly there is merit in the inherent resistance to exposing suspects to police questioning, founded upon abuses that have accompanied such questioning in the past in all countries, but as pointed out by Zuckerman,²¹⁵ the creation of obstructions to legitimate police questioning tends only to drive the abuses underground for questioning is an integral part of modern police investigation. The remedy is rather to ensure that it is adequately controlled in order to avoid abuses. It provides no reason for excluding such evidence when it has not been accompanied by police abuse. What must always be borne in mind is that there is, by definition, no prospect of suspects being induced to incriminate themselves falsely, which, it is submitted, is the rationale for the prohibition upon compulsory self-incrimination.

²¹³ This view has been expressed by Judge RW Nugent more fully in "Self-Incrimination in Perspective" 1999 *SALJ* 501. See too GL Davies, footnote 13, which is to the same effect, and the 11th Report of the Criminal Law Revision Committee (England).

²¹⁴ The reasoning of the Constitutional Court in cases like *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) and *S v Manamela* 2000 (3) SA 1 (CC), provides support for the view that the present proposals will not be considered to be objectionable.

²¹⁵ See footnote 17 above.

6.26 The question now under consideration has been the subject of considerable debate in other countries which in an adversarial system of criminal justice recognise the right of a suspect to remain silent. The arguments against recognising such a duty were fully explored by the Royal Commission on Criminal Justice,²¹⁶ and were reiterated in the report of an enquiry conducted by a Committee of the Parliament of Victoria.²¹⁷ The arguments all come down to a fear that the inference which will be drawn might not be the correct one, rather than to any principled objection to the admissibility of a correctly drawn inference. In other words, the argument which is advanced is that a jury might draw an inference in circumstances in which the inference is not warranted (which takes us back to the first facet of the "modern rationale" referred to above). It was pointed out in the reports of those enquiries that there might be cases in which the suspect is distrustful of the police, lacks the sophistication to appreciate the significance of his or her failure to reply to a question, does not make the relevant disclosure for fear that some other, unrelated, consequence might eventuate or does not make the disclosure for any one or other of a number of reasons that are unrelated to whether he or she has an innocent explanation.²¹⁸ Quite obviously if those were to be the true facts, then the requisite facts from which to draw the inference would be absent and the inference ought not to be drawn. However, that provides no explanation for why the inference ought not to be drawn if it is the correct one. It merely reminds one that there are inherent dangers in inferential reasoning.

6.27 The arguments which have been advanced in those countries should serve as a salutary reminder of the danger of slavishly adopting the views that have been expressed in countries that utilise procedures which differ materially from our own.²¹⁹ Mr Justice G.L. Davies of the Queensland Court of Appeal has recently expressed the opinion that:

²¹⁶ Which reported in 1993.

²¹⁷ The report was produced in 1996 and is available at:
www.parliament.vic.gov.au/sarc/rts99.html.

²¹⁸ The objections are set out more fully in paragraph 6.55 of this discussion paper.

²¹⁹ The objections advanced in the alternative section of this discussion paper (paragraphs 6. - 6.) rely heavily upon the views that have been expressed in countries which utilise juries for fact-finding. It has been suggested that there are major objections to an uncritical transposition of the opinions expressed in those countries to a system such as ours. Moreover, there is no reason to believe that the opinions which have been expressed in those countries bear any relationship to reality, in that the reasoning of juries is not open to scrutiny.

... the unstated reason for the existence of (the immunity against adverse inferences from silence) and the reluctance of judges and practising lawyers to contemplate its abolition is a distrust of the capacity of juries to draw sensible unprejudiced inferences.²²⁰

6.28 There are several reasons why it is submitted that those objections ought not to be accorded undue weight:

- * In countries in which the fact-finding function is placed in the hands of a jury, which is not required to disclose the process of its reasoning, there may well be justification for avoiding a risk that the jury will fall into an error of deductive reasoning, but the experience of those countries is not relevant, in that respect, in this country. The process of fact-finding in this country is generally in the hands of a judicial officer. Even where the participation of assessors might be decisive, the reasons for reaching any conclusion of fact are required to be articulated and are thus open to scrutiny by an appeal court.

- * The problem is in any event more apparent than real. When debating this issue one should avoid talking in general terms of an “adverse inference” being drawn, without at the same time identifying just what that inferential fact might be. There can be no suggestion that a finding of guilt might be made merely upon the production of evidence that the suspect failed to reply to questions, for evidence of silence in the face of police questioning, without anything more, adds nothing to a complete absence of evidence. There is no possibility of a finding of guilt merely upon evidence that the accused failed to reply to police questions. The only inference that arises from the silence of the suspect, is that he or she did not have an innocent explanation at that time.²²¹ By itself, that cannot support a finding of guilt. It is only where

²²⁰ See footnote 209 above.

²²¹ It has been submitted that some of the objections advanced in favour of the alternative viewpoint in this discussion paper do not sufficiently differentiate the nature of the inferences that are capable of being drawn at different stages of the process. The suggestion that it is impermissible to draw an inference because there is no “prima facie” case seems to confuse the two **quite different** inferences that might be drawn from the failure to testify, on the one hand, and the failure to reply to police questions, on the other. Inferential reasoning is not some sort of legal magic. It is common, logical, reasoning, that is applied in the everyday business of courts. It is most

incriminating evidence is advanced in court, and the accused provides a different explanation for that evidence, that the inferential fact becomes relevant. Accordingly, an accused person against whom an inference might be sought to be drawn for failing to make disclosures to the police will always be in a position to provide an explanation for why he or she chose to remain silent, which a court might accept or reject, precisely because the inference is only relevant if he or she testifies. If the accused does fail to make disclosures to the police for any one or other of the reasons which have been referred to, his or her remedy is simply to say so at the time he or she gives evidence at the trial. If a court accepts the explanation it will not draw an inference against the accused. If it rejects the explanation it might draw an inference against the accused. These are the normal incidents of fact-finding. The danger that an incorrect factual finding will be made is no different in this case to the danger that presents itself in relation to inferential reasoning in general, yet it has never been suggested that inferential reasoning should be prohibited because it might result in errors. It has been suggested that the objections which were advanced by the Royal Commission, and the Victoria enquiry, do not withstand critical scrutiny.

6.29 Notwithstanding the recommendations of the Royal Commission to the contrary,²²² the English law was amended by the Criminal Justice and Public Order Act 1994 to allow inferences to be drawn from silence in specified circumstances. The relevant provisions are contained in sections 34 to 37 of the Act. For present purposes it is not necessary to consider the provisions of the Act insofar as they relate to inferences from the failure to testify, nor is it appropriate to attempt any analysis of the sections. In broad terms the Act expressly allows the jury to draw an appropriate inference from the failure of the accused to disclose to the police a fact that is relied upon for the defence (section 34), or fails to account, at the time of arrest, for any object or substance or mark that is found upon his person or clothing or in his possession or at the place of the arrest (section 36), or fails to account for his presence at the place of arrest (section 37).

important that the inferential fact that might arise in various situation should be correctly identified in order for debate on this topic to be meaningful.

²²²

But in accordance with the 11th Report of the Criminal Law Revision Committee.

Argument Against the Proposal ²²³

6.30 In this section the constitutional validity of the proposal as outlined above is questioned. The view is expressed that to draw an adverse inference against a person from silence in the course of questioning by the police might infringe his or her constitutional right to remain silent and the privilege against self incrimination, and that it has insufficient utility to constitute a justifiable limitation on those rights.

6.31 The right to remain silent can be described as the absence of a legal obligation to speak.²²⁴ The scope of this legal immunity is contentious. Fourteen members of the European Court of Human Rights in *Murray v United Kingdom*²²⁵ held that in certain circumstances drawing an adverse inference from silence during interrogation would not violate the right to remain silent. In this case the court considered whether provisions in the Criminal Evidence (Northern Ireland) Order 1988 permitting adverse inference from silence during interrogation to be drawn infringed Article 6(1) and (2) of the European Convention of Human Rights, which implicitly protects the right to remain silent. The court found that there were safeguards built into the Order and that there was no compulsion to give evidence in that the Order did not impose a criminal sanction for silence, nor did it require that guilt be automatically assumed from silence. Nevertheless, the court found that in the circumstances Articles 6(1) and (2) had been infringed on another basis: the denial of legal representation to Murray for the first 48 hours of his detention being unfair. Although the court recognised that the right to legal representation could be restricted on good cause shown, the Order, by permitting adverse inferences from silence, placed Murray in a situation where he would be severely prejudiced without legal representation.

6.32 Five members of the court were unable to agree with a narrow definition of the right to remain silent that merely guaranteed immunity from criminal prosecution. Mr E Busuttil²²⁶ held:

²²³ This section summarises the opposing view that was put forward by Prof Schwikkard.

²²⁴ *R v Esposito* (1985) 49 CR (3d) 193 (Ont.C.A).

²²⁵ 1996 (22) EHRR 29.

²²⁶ At 51.

“In my view, the attachment of adverse inferences to the exercise of the right to silence in the pre-trial stage is a means of compulsion, in that it can constitute a form of direct pressure exercised by the police to obtain evidence from a suspect. The co-operation of the detainee can be obtained during interrogation with the threat of adverse inferences being drawn against him for remaining silent. Thus the suspect is faced with Hobson’s choice - he either testifies or, if he chooses to remain silent, he has to risk the consequences, thereby automatically losing his protection against self-incrimination.”

6.33 At common law it is clear that the right to remain silent prohibited the courts from drawing adverse inferences from silence at the investigative stage of the proceedings. In terms of the common law the only time at which an adverse inference from silence was permissible was after the prosecution had established a prima facie case.²²⁷ This prohibited the drawing of adverse inferences from silence at the plea stage. The question that then arises is whether it would be constitutionally permissible to read down the common law right to remain silent to accord with the definition in *Murray*.

6.34 The High Court in *S v Brown*²²⁸ held that whilst the right to remain silent was recognized at common law, its constitutional status required a change in emphasis as regards its application. (The most obvious change is that any infringement of the right to remain silent is required to be justified with reference to the limitations clause).²²⁹ Buys J, finding that the use of silence as an item of evidence amounted to an indirect compulsion to testify and the drawing of an adverse inference from silence diminished and possibly nullified the right to remain silent, held that it would be unconstitutional for the court to draw an adverse inference where accused persons elect to exercise their constitutional right to remain silent.²³⁰ However, the court held that this does not mean that certain adverse

²²⁷ See for example *S v Mthetwa* 1972 (3) SA 766 (A); *S v Snyman* 1968 (2) 582 (A); *S v Letsoko* 1964 (4) SA 768 (A); *R v Ismail* 1952 (1) SA 204 (A).

²²⁸ 1996(2) SACR 49 (NC). In *Brown* the issue before the court was the admissibility of a pointing-out and accompanying statement at the conclusion of trial within a trial. The court, finding that the State had through direct evidence established that the accused had not been assaulted and had made the statement and pointing-out voluntarily considered whether any adverse inference could be drawn from the accused’s failure to testify. It held that whilst no adverse inference could be drawn from the accused’s silence, in the absence of evidence contradicting the prima facie evidence presented by the State it was persuaded beyond reasonable doubt that the pointing-out and statement had been made voluntarily.

²²⁹ See *S v Bhulwana*; *S v Gwadiso* 1995 (2) SACR 748 (CC) at 16.

²³⁰ *Brown* supra 62.

consequences will not arise should an accused exercise the right to remain silent.²³¹ Where the State has established a *prima facie* case against the accused and the accused fails to testify or adduce any other evidence, the court is required to base its decision on the uncontradicted evidence of the State. In this situation it is possible, indeed common, that the *prima facie* case will be sufficient to sustain a conviction. In other words, although the accused's silence may not be treated as an item of evidence he will incur the risk of conviction on the basis of the State's uncontradicted *prima facie* case. But any inference drawn must be drawn from the uncontroverted evidence and not from silence.²³²

6.35 Reaching the opposite conclusion (and without reference to *Brown*), the court in *S v Lavehengwa*²³³ fully endorsed the view of Trengove²³⁴ that an adverse inference could be permitted in the appropriate circumstances, based on the following reasons:

"It accords, first, with common sense. The inference is permissible only when the accused fails to give evidence despite the fact that the prosecution evidence strongly indicates guilt, an innocent accused would have refuted evidence against him, and there is no other explanation of his failure to do so. In these circumstances common sense demands that an inference be drawn and human nature is such that one would be all but inevitable. It has indeed been suggested that 'no rule of law can effectively legislate against the drawing of an inference from a failure to testify'. Secondly, it is not mere sophistry to reason ... that an accused's right to remain silent is not denied or eroded by an inference drawn from his choice to exercise that right in circumstances where an innocent person would not have chosen to do so. It is suggested thirdly that, even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent, it is any event probably a justifiable limitation."²³⁵

²³¹ At 63.

²³² See also *S v Scholtz* 1996 (2) SACR 40 (NC). See also SE Van der Merwe 'The constitutional passive defence right of an accused versus prosecutorial and judicial comment on silence: must we follow *Griffin v California*' (1994) *Obiter* 1.

²³³ 1996 (2) SACR 453 (W).

²³⁴ W Trengove (Chaskalson et al eds) *Constitutional Law of South Africa* (1996) 26-14 - 26-16.

²³⁵ *Supra* 487. The court in *Lavehengwa* was required to consider, inter alia, whether the summary procedure in s 108 of the Magistrates Court Act 32 of 1944, applicable to a charge of contempt of court, infringed the accused's right to be presumed innocent and to remain silent. This arose because a magistrate, once he believes unlawful conduct justifies a conviction under s 108(1), may ask the accused to show cause why he should not be convicted. The court found that this procedure was analogous to the shifting of an evidentiary burden once the prosecution has established a *prima facie* case. The court held that the ultimate test in determining whether s 108 contravened the presumption of innocence was whether the accused could be convicted despite the

6.36 Both these cases concerned drawing inferences from silence during the trial. While they diverged on whether or not that is permissible, both the cases accept that no question of an inference being drawn will arise until the prosecution has established a prima facie case.²³⁶

6.37 In *R v Noble*²³⁷ the Canadian Supreme Court was required to consider under what circumstances (if any) a trier of fact may draw an adverse inference from the failure of an accused to give evidence. Sopinka J (L'Heureux-Dube, Cory, Iacobucci and Major JJ concurring), in reaching the conclusion that the accused's silence could not be used as inculpatory evidence, relied not only on the right to remain silent but also on the right to be presumed innocent. He held that if silence is treated as evidence, then the right to silence is violated as the accused has no choice but to furnish evidence, whether or not he elects to testify. Furthermore, the burden on the prosecution to prove guilt beyond a reasonable doubt prohibits the accused's silence from being used as evidence so as to meet the required standard of proof. Sopinka J reasoned as follows:

“If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown, as required by the Charter, the silence of the accused should not be used against him or her in building the case for guilt.”²³⁸

existence of a reasonable doubt. Consequently, as the standard of proof beyond a reasonable doubt still had to be met in contempt proceedings the procedure employed could not be said to infringe the presumption of innocence.

²³⁶ The following criticisms have been made regarding the approach adopted by Trengove *op cit* and reflected in *Lavhengwa* *supra*. ‘This view is based on a presumption of guilt in that it disregards any other possible explanation for silence. Nor does it explain why the drawing of negative inferences from the exercise of a constitutionally conferred right, in the context of the interim Constitution, does not negate the existence of that right. Although it may be correct that no legislative enactment can prevent a jury which is not required to give reasons, from drawing an adverse inference, the same cannot be said in the context of a non-jury system’. See Schwikkard *Presumption of Innocence* (1999) 120.

²³⁷ (1997) 1 SCR 874, 6 CR (5th) 1.

²³⁸ At 76.

6.38 However, as noted by Lamer CJC (dissenting), the drawing of an adverse inference only becomes a possibility once the prosecution has discharged its evidentiary burden of establishing a prima facie case; silence cannot be used to establish a prima facie case. Healy,²³⁹ defending Sopinka J's conclusion, argues that treating silence as an item of evidence places an obligation on the accused to adduce evidence. He states that this infringes the presumption of innocence, 'which protects the accused not only in disallowing the imposition of a legal burden on any exculpatory claim but by shielding him from the obligation to produce affirmative defence evidence'.

6.39 Although a consequence of the presumption of innocence is that the accused need not prove her innocence, logically the presumption of innocence cannot protect the accused from the risk of losing if she does not adduce sufficient evidence to raise a reasonable doubt in the face of a prima facie case. However, if an inference of guilt were an automatic consequence of silence, ie mandatory, the unreliability of such an inference would infringe the presumption of innocence as it would allow the possibility of conviction despite the existence of a reasonable doubt. Lamer CJC held that the accused's silence would not be a basis for drawing an inference whenever a prima facie case was established, and would only be permissible where the accused is enveloped in a cogent network of inculpatory facts.²⁴⁰

6.40 In the South African context this might be equated with only allowing the drawing of an adverse inference from circumstantial evidence where the inference to be drawn is consistent with all the proven facts and the proven facts are such that they exclude every reasonable inference save the one sought to be drawn.²⁴¹ It is submitted that if the 'circumstantial evidence test' is applied, an inference from silence will not infringe the presumption of innocence. But this does not necessarily mean that the right to remain silent or the privilege against self-incrimination will not be infringed.

²³⁹ P Healy 'Risk, Obligation and the Consequences of Silence at Trial' (1997) 2 *Canadian Criminal Law Review* 385.

²⁴⁰ At [50]. In *Trompert v Police* (1984) 1 CRNZ 324 the New Zealand Court of Appeal took a similar approach as that advocated by Lamer CJ. For a criticism of this case see C Cato 'Inferences and a Defendant's Right not to Testify' (1985) *New Zealand Law Journal* 216.

²⁴¹ *R v Blom* 1939 AD 188; *R v De Villiers* 1944 AD 493; *S v Reddy* 1996 (2) SACR 1 (A).

6.41 However, it can be argued that the rationale for the right to remain silent falls away once the prosecution has established a prima facie case. Lamer CJC expressed the rationale for the right to silence in the following terms:

“[I]t is up to the state with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a prima facie case, such that it cannot be non-suited by a motion for a direct verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him- or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences.”²⁴²

6.42 This approach may be criticised on the basis that the right to remain silent has an independent rationale other than a necessary reinforcement for the presumption of innocence. Although much has been written about the historical rationale for the right to remain silent and the privilege against self-incrimination²⁴³ the modern rationale would appear to have three facets: (1) concern for reliability (by deterring improper investigation) which relates directly to the truth-seeking function of the court; (2) a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (3) the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence.²⁴⁴

6.43 It is difficult to predict whether the South African Constitutional Court would favour the approach of Lamer CJC or Sopinka J. However, it can be assumed that if a negative inference has any chance of passing constitutional muster the prosecution must have discharged its burden of proving a prima facie case and, furthermore, that a negative inference cannot be an automatic consequence of silence.

6.44 The argument in favour of an adverse inference being drawn from pre-trial silence would be that the requirement of a prima facie case is met, as the adverse inference cannot be drawn until the prosecution has established a prima facie case. The contrary argument is that drawing an adverse inference from silence at the investigation stage compels the accused to speak before a prima facie case has been established.

²⁴² At [29], quoting from *R v P (MB)* 1 SCR 555 at 579, 13 CR (4th) 302.

²⁴³ See for example R Nugent ‘Self-incrimination in Perspective’ 1999 *SALJ* 550.

²⁴⁴ See Schwikkard op cit 122.

6.45 Easton notes:

“In the context of interrogation there is the possibility of suspects being pressured to make incriminating statements and a well documented danger of unreliable statements being produced, when the individual is subject to pressure and the risk that fundamental values of the criminal law may be infringed, including respect for privacy, human autonomy and dignity, the presumption of innocence and the principles of natural justice.”²⁴⁵

6.46 The right to remain silent is described by Dennis as a feature of the criminal justice system which is required as a functional necessity in certain contexts.²⁴⁶ (Dennis does not consider it appropriate to justify these rights as human rights). According to Dennis, the privilege against self-incrimination together with the right to remain silent are functionally necessary during custodial interrogation:

“The vulnerability consists of a risk either that the investigative powers may be used to obtain evidence which is factually unreliable or that they may be misused to compel the production of incrimination evidence by means inconsistent with the fundamental values of the common law. If either of these risks materialises the legitimacy of the criminal verdict may be compromised.”²⁴⁷

6.47 Compelling the accused to speak before a prima facie case has been established severely compromises the function of the right to remain silent as a necessary corollary of the privilege against self-incrimination.

6.48 To date the Constitutional Court has favoured a purposive and generous approach to interpretation.²⁴⁸ Given the common-law recognition that no inference could be drawn from pre-trial silence, a generous approach to interpretation militates against a definition of the right to remain silent which means no more than immunity from criminal liability for silence. A generous interpretation would also best promote the purpose of the right in deterring improper investigative procedures and consequently protecting against the unreliability of coerced statements and upholding the rights to dignity and privacy.

²⁴⁵ Op cit 176.

²⁴⁶ I Dennis ‘Instrumental protection, human right or functional necessity?: reassessing the privilege against self-incrimination’ (1995) *Cambridge Law Journal* 342.

²⁴⁷ Ibid 374.

²⁴⁸ *S v Zuma* 1995 (2) SA 642 (CC); *S v Makwanyane* 1995 (2) SACR 1 (CC).

6.49 The next step is to consider whether drawing an adverse inference from silence at the investigative stage meets the requirements of the limitations clause. Whether or not the limitation will result in greater co-operation from the accused is debatable. Studies in England show that prior to the amendment of the common law (ie when no adverse inference could be drawn from pre-trial silence) a significant proportion of suspects did co-operate. The percentage of suspects exercising their right to remain silent ranged from 2.4% to 9 %, ²⁴⁹ the variation in degree of co-operation appearing to be area specific. Legislation in England permitting an adverse inference from silence to be drawn may have influenced the number of suspects that co-operate and those that don't, but has had no apparent impact on the conviction rate.²⁵⁰ In Argentina, despite an express prohibition on the drawing of adverse inference from silence²⁵¹ “experience shows that defendants rarely choose to stand mute at this stage”.²⁵² Similar findings were made by the New South Wales Law Reform Commission.²⁵³

6.50 Dennis²⁵⁴ commenting on s 34 of the Criminal Justice and Public Order Act 1994 (England), which allows an adverse inference to be drawn from the accused's failure to mention facts when interviewed by the police and then later relies on such facts at trial, notes

²⁴⁹ S Easton *The Case of the Right to Remain Silent* 2 ed (1998) 136-139. See also J McEwan *Evidence and the Adversarial Process - The Modern Law* 2 ed (1998) 168-176.

²⁵⁰ Easton op cit. See also MH Yeo 'Diminishing the Right to Silence: The Singapore Experience' *Criminal Law Review* 89, Yeo reaches a similar conclusion to Easton in respect of studies conducted in Singapore.

²⁵¹ Article 298 The National Code of Criminal Procedure.

²⁵² A Carrie & AM Garbo 'Argentina' in CM Bradley ed *Criminal Procedure a Worldwide Study* (1999) 28.

²⁵³ New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Detention and Investigation After Arrest* (1990) para.5.10 where it was noted that confessions were rendered in over 96% of cases. See also J McEwan *Evidence and the Adversarial Process* 168 et seq; R Leng 'Silence pre-trial, reasonable expectations and the normative distortion of fact-finding' 2001 (5) *International Journal of Evidence & Proof* 240; SJ Odgers 'Police Interrogation and the Right to Silence' (1985) 59 *Australian Law Journal* 78 ; CJ Ayling 'Corroboration Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions' (1984) *Wisconsin Law Review* 1121. At para 5.9 the Commission recommended the retention of the status quote with regard to the prohibition of drawing adverse inferences from silence. See also the report of the Scrutiny of Acts and Regulation Committee of the Parliament of Victoria *Inquiry into the Right to Remain Silent* (March 1999).

²⁵⁴ See I Dennis 'Silence in the Police Station: the Marginalisation of Section 34' 2002 *Criminal Law Review* 25.

that “[t]he section remains a controversial restriction of the common law right to silence”. He argues that “a combination of the Strasbourg jurisprudence²⁵⁵ on Article 6 of the European Convention on Human Rights and increasingly restrictive interpretation by the English courts has resulted in the marginalisation of section 34”. He concludes that “[w]hen inferences from silence in the police station are possible at all, they provide no more than support for an existing (clear) prima facie case”.

6.51 Professor Jackson²⁵⁶ makes the following observations in relation to English legislative restrictions on the right to remain silent:

“At the conclusion of the English study the point is made that while the silence provisions have had a marked impact on both pre-trial and trial practices it is much less clear whether the effect of the changes has been to increase to any noticeable extent the likelihood of defendants being charged and convicted. The England study nevertheless considered that the provisions have led to greater efficiencies as it has become more common for investigating officers to disclose the salient features of the evidence against suspects to their legal advisers and this enables legal advisers to provide suspects with better advice on whether to respond to police questions or not. This in turn meant that stories could be checked out earlier, weak cases could be stopped and the prosecution’s hand could be strengthened in cases that proceeded to court. But any efficiencies at the pre-trial level in terms of taking stronger cases to court have to be balanced against the greater complexity of the trial process where although more defendants appear now to be testifying, judges have to direct juries very carefully on the effect of the legislation in those cases where defendants have refused to answer questions or to testify and where the issues raised have become a frequent target of appellate appeals and Strasbourg jurisprudence.....
What we see here is a traditionally investigatory part of the criminal process becoming entangled with formal legal procedure. Traditionally, the investigatory processes of the police have been separated from legal proceedings against the accused. But the complexity of the cautions issued to suspects under the legislation has subverted the police inquiry into a legal procedure which the European Court of Human Rights has ruled requires at the least access to legal advice. It has been argued, however, that fairness demands that other safeguards are also introduced such as formal disclosure and provision for court-appointed representation which if activated would transform the police interview into a more adversarial procedure. The question then is whether the benefits in terms of greater efficiencies produced by earlier disclosure on the part of the parties are worth the costs in terms of bringing greater complexity into the interview process along with the additional costs already identified in the trial process. To those who cavil at the added complexity there is a

²⁵⁵ See *Murray v United Kingdom* (1996) 22 EHRR 29 discussed at 6.31 above. See also *Condrón v United Kingdom* 2001 31 EHRR 29.

²⁵⁶ J Jackson ‘Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom (2001) *The International Journal of Evidence and Proof* 145.

simple solution - abolish the silence provisions."²⁵⁷

6.52 The utility of drawing such an inference must also be determined according to the reliability of such an inference. There are many possible reasons for the absence of a recorded statement; such as police illiteracy and ineffectiveness rather than from any act or omission on the part of the accused. The Scrutiny of Acts and Regulation Committee of the Parliament of Victoria²⁵⁸ identified the following explanations for silence other than guilt:

- a desire to conceal embarrassing but non-criminal facts, or to conceal offences not under investigation;
- a desire to protect others;
- a negative or distrustful attitude towards the police, including the fear that the police may distort anything the suspect says or may be unwilling to accept the suspect's explanation;
- a belief that allegations are so absurd or offensive that they should not be dignified with a response;
- the fact that the suspect may be shocked or confused by the allegations;
- the fact that the suspect may lack confidence in the use of the English language;
- the fact that the suspect may be tired, intoxicated, under the influence of drugs, suffering from psychiatric illness or intellectual disability, or otherwise in an unfit state to do justice to themselves;
- the fact that the allegations may be vague or unclear;
- the view that the police may be unwilling to disclose to the suspect and/or his or her legal adviser enough of the evidence against the suspect for the suspect to be in a proper position to evaluate and/or answer the case against him or her;
- the fact that the events which have given rise to the allegation may be so factually complex or the issues upon which guilt will turn so fine, that the suspect may take the view that it would be unwise to answer any questions until they have had the opportunity to review their situation with the aid of a lawyer; and

²⁵⁷ At 172-173.

²⁵⁸ *Inquiry into the Right to Remain Silent* (March 1999). See also S Easton *The Case for the Right to Silence* 2 ed (1998) 145; M Colvin & K Akester 'Directions for Silence' (1995) 145 *New Law Journal* 162; I Dennis 'The Evidence Provisions' (1995) *Criminal Law Review* 4.

- the fact that the suspect may have been advised by his or her solicitor to refuse to answer questions, such advice being justified by any of the reasons referred to above.²⁵⁹

6.53 The utility of drawing an adverse inference from silence must also be measured in terms of costs. In England the relevant legislative reforms have led to an increase in the number of people exercising their right to legal aid.²⁶⁰ Permitting such an inference will also no doubt lead to challenges regarding the appropriateness of drawing such an inference in the circumstances. Consequently it cannot be concluded that drawing adverse inference from silences will save time or money.²⁶¹

6.54 For these reasons the view is expressed that drawing an adverse inference from silence during custodial interrogation could infringe the constitutional right to remain silent as well as the privilege against self-incrimination, and have insufficient utility to constitute a justifiable limitation.

Initial Recommendations

6.55 In its discussion paper the Commission made no recommendation on this issue but merely presented the two opposing views for comment.

²⁵⁹ Judge Nugent disputes that the plethora of reasons for silence undermines the reliability of any inference to be drawn from silence as the existence of reasons other than the absence of an innocent explanation would preclude an adverse inference. It is submitted that the very nature of silence inevitably provides an insufficient basis for certainty regarding the reason for silence.

²⁶⁰ Easton op cit 165.

²⁶¹ The ECHR decision in *Murray* supra suggests that the appointment of a legal representative prior to interrogation would be a minimum requirement if drawing an adverse inference is going to pass constitutional muster. Judge Nugent suggests that by not permitting an adverse inference from silence to be drawn (in appropriate circumstances) we place excessive barriers in the way of police questioning which may drive unacceptable police practices underground. Whether placing restrictions on police questioning does or does not have this effect is an open question. Studies conducted by Cassell & Hayman would suggest not. See P Cassell & B Hayman 'Police Interrogation in the 1990s: An Empirical Study of the effects of Miranda' 1996 (43) *UCLA Law Review* 839.

Comments and Workshop Contributions

6.56 The comments that were received, and the views that were expressed at the workshops, were divided between those who supported the proposed amendments (permitting adverse inferences to be drawn from the silence of a suspect when questioned by the police) and those who felt that the status quo should be retained. Before turning to those views it should be noted that it was frequently asserted in the workshops that the law in its present form already permits an adverse inference to be drawn from the pre-trial silence of the accused. In some cases that assertion was relied upon in support of retaining the status quo, while in other cases it was relied upon to support the argument that the proposed amendments were not inherently unconstitutional. In our view that assertion is not correct: the matter has been dealt with briefly in paragraphs 6.16 - 6.17 above.

6.57 Many of the submissions reiterated one or more of the arguments reflected in the discussion document and are thus not repeated in full. What follows is an abbreviated form of the principal submissions that were received.

6.58 Submissions in support of retaining the status quo²⁶² included the following:

- C drawing an adverse inference from pre-trial silence would be unconstitutional;²⁶³
- C “[t]he fact that there are eleven official languages, resulting in questions and charges more often than not being in a language other than the home language of the suspect or accused, militates against the drawing of such inferences;”²⁶⁴
- C the varying levels of sophistication of accused persons makes it inherently

²⁶² Apart from the persons mentioned below, the retention of the status quo was also supported in written submissions received from Regional Magistrate JL Brink and the National Council of Women SA.

²⁶³ CDHO Nel SC, Deputy Director of Public Prosecutions, Port Elizabeth; CLS Committee, this concern was also frequently expressed in the consultative workshops.

²⁶⁴ The Judges of the Natal Provincial Division.

unfair to draw adverse inferences from silence in the face of police questioning;²⁶⁵

C drawing an adverse inference has no utility in the South African context;²⁶⁶

C “such a major change to the right to silence needs to be supported by extensive socio-legal research” and none is presently available;²⁶⁷

C research in the United Kingdom indicates that permitting adverse inferences to be drawn is more costly than beneficial;²⁶⁸

C giving wider powers to the police in questioning the accused broadens the scope for abuse which in turn might jeopardise the subsequent trial;²⁶⁹

C silence does not logically sustain an inference of guilt and the unreliability of drawing such an inference is compounded when the accused does not have legal representation from the time of his or her arrest;²⁷⁰

C there is an inherent contradiction in warning an accused of his or her right to remain silent and then drawing an adverse inference from the exercise of the right;²⁷¹

6.59 Many of the objections that were raised have received the consideration of the Commission and have been dealt with earlier in this report. While many of them have considerable merit they do not necessarily take into account countervailing matters as

²⁶⁵ MW Collins, Chairperson of the Society of Advocates KwaZulu-Natal

²⁶⁶ The Law Society of the Cape of Good Hope Criminal Law and Procedure, Legal Aid and Community Service Committee (the CLS Committee).

²⁶⁷ Dr R Turrell of the Institute of Criminology, University of Cape Town.

²⁶⁸ Dr R Turrell.

²⁶⁹ Adv Slabbert, office of the Director of Public Prosecutions Cape of Good Hope.

²⁷⁰ Workshops.

²⁷¹ Workshops. Note that it is implicit in the proposals that the warning given to suspects will need to be altered to accord with the proposed state of the law.

outlined in other parts of this report. A substantial number of the participants at the workshops, although expressing some concern about the proposed amendments, made it clear that their primary concern was the unreliability of police testimony relating to what was said by the suspect. The view was expressed that if adequate safeguards against that were in place, there would be no objection in principle to the drawing of an adverse inference where it is reasonable to do so in the circumstances.

Discussion and Recommendations

6.60 Although doubt has been cast upon the constitutional validity of the proposal the Commission is of the view that the matter is not so clear that it should be avoided on those grounds alone.

6.61 As indicated at the commencement of this section, the proposal is in three parts, and the same objections do not apply to all of them.

6.62 Two parts of the proposal relate, respectively, to the failure of a suspect to explain his or her possession of objects, substances or marks at the time of arrest, and to the failure of the suspect to explain at the time of arrest his or her presence at the scene of a crime. The Commission can see no substantial objection to a court drawing an adverse inference if the person fails to provide an explanation in either of those circumstances, nor does the Commission believe that to permit a court to do so will open the way to police misconduct. None of the submissions and comments identified any substantial objection to those parts of the proposal but were directed rather to the broader question of police interrogation. The one objection that is relevant to this part of the proposal is that it would be incongruous to warn a person upon arrest that he or she had a right to remain silent but then draw an adverse inference for doing so, but this overlooks the fact that the suspect is required to be informed of the consequences of failing to give an explanation.

6.63 The third part of the proposal concerns the broader question of the failure of a suspect to make disclosures under police questioning. Most of the comments and submissions were based, in one way or another, upon a concern that to encourage the questioning of suspects by the police carried with it the danger that suspects would be overreached. It must be borne in mind, however, that the present proposal does not introduce an innovation in that respect. There is nothing to prevent the police from

questioning suspects, and from thereby securing admissions or confessions, which might be admissible in evidence against the accused if the grounds for such admissibility are established. The proposal does no more than to place the suspect under the risk that if he or she fails to disclose something to the police which is later relied upon in support of the defence, a court might disbelieve the accused. Moreover, a court is not obliged to draw an adverse inference against a suspect, even where it is justified, and it will be open to a court to exclude evidence of what occurred during questioning if it is not satisfied that the accused was fairly treated.

6.64 Nevertheless it is recognised that the proposal might provide a further incentive to the police to question suspects with an additional risk that misconduct might occur. In those circumstances the proposal has been modified to limit its application to questioning which has taken place substantially in accordance with a Code of Conduct promulgated in terms of the Police Act (see in this regard the discussion on that topic below).

6.65 While recognising that the proposal might be subject to constitutional challenge, the consensus is that the proposal should nevertheless be recommended, subject to the modification referred to above. The terms of the recommendation in this regard are contained in Chapter 8.

CODES OF CONDUCT FOR POLICE QUESTIONING

6.66 Following upon what is set out above, the Commission has also considered the question of whether formal recognition should be given to the manner in which suspects are questioned by the police. Our law has tended to leave the issue of the legitimacy of police questioning a little ambiguous. It has relied for control upon the “threshold” rules for the admissibility of admissions and confessions, supplemented by a discretion to exclude objectionable evidence, and more recently, a prohibition upon the admissibility of evidence which renders the trial “unfair” or is “detrimental to the administration of justice.”²⁷²

²⁷²

The admissibility of confessions and admissions is dealt with in s.217 and s.219A of the Criminal procedure Act. In *S v Mushimba* 1977 (2) SA 629 (A) it was affirmed that a court has a discretion to exclude evidence “if the strict rules of admissibility would operate unfairly against the accused,” citing with approval the decision in *Kuruma Son of Kaniu v Reginam* (1955) 1 AllR 236 (PC). See further: *Hoffmann & Zeffertt: The South African Law of Evidence* 4th ed 284ff. The discretion to exclude evidence provided the foundation for the formulation and application of the “Judges’ Rules.” Section 35(5) of the Constitution now expressly requires the exclusion of evidence

6.67 Quite clearly, it is undesirable for suspects to be exposed to police questioning which is controllable only by the subsequent exclusion of evidence and, moreover, upon grounds that neither the suspect nor the police officer concerned can necessarily be expected to know in advance.

6.68 From the time of the formulation in England of the “Judges’ Rules” early in the 20th century, there has been a consistent practice in that country of laying down guidelines for the interaction between the police and suspects which, from about the 1960's, moved steadily in favour of recognising the legitimacy of police questioning.²⁷³ In this country, although similar “Judges’ Rules” were adopted, they largely fell out of use in any meaningful sense.²⁷⁴

6.69 In England, section 66 of the Police and Criminal Evidence Act 1984 (“PACE”) authorises the Secretary of State to issue codes of practice in connection with, inter alia, the detention, treatment, questioning and identification of persons by police officers. The failure to adhere to any such code will not render the police officer criminally or civilly liable, but evidence secured in breach thereof may be rendered inadmissible.²⁷⁵ It is not intended in this paper to analyse those codes in any detail.²⁷⁶ It is sufficient to say that the relevant code currently in use (Code C) requires the suspect to be cautioned before being required to answer questions; the suspect is entitled to take legal advice; an accurate record must be kept of the interview;²⁷⁷ and the interview must not be “oppressive”.²⁷⁸

obtained in a manner which violates any right in the Bill of rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. See generally Schwikkard, Skeen & Van der Merwe *Principles of Evidence* (1997)140 et seq.

²⁷³ The early 1960's represented the peak of judicial protection for suspects with *Miranda v Arizona* in the United States. Since then there has been a steady retreat from that position, both in the US and England.

²⁷⁴ As early as 1963 VG Hiemstra [(1963) SALJ 187 at 206] expressed the view that the judges themselves “emasculated” the rules.

²⁷⁵ S.67(10) of PACE. Archbold: Criminal Pleading, Evidence and Practice 1999 15-8. The foreword of the original codes stated that their purpose was to provide “clear and workable guidelines for the police, balanced by strengthened safeguards for the public.”

²⁷⁶ The terms of the current Code C are set out in Archbold, loc cit, 15-264 ff.

²⁷⁷ Code E provides for the manner in which interviews are to be tape-recorded.

²⁷⁸ Which reflects the condition applicable to the admissibility of admissions and confessions made by the suspect. Section 76(2) of PACE requires as a condition of admissibility that the confession was not obtained “by oppression of the person who

6.70 The introduction of similar Codes of practice in this country will go a long way towards regulating the interaction between suspects and the police and reducing the objection to police questioning of suspects. The South African Police Services, in response to the constitutional entrenchment of the right not to be tortured and the signing of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 have compiled a *Policy on the Prevention of Torture and The Treatment of Persons in Custody of the South African Police Service*.

6.71 The *Policy* is in the form of instructions which will eventually be incorporated into National Orders and Instructions issued by the Commissioner in terms of s.25 of the SA Police Services Act. In the interim the *Policy* document states that '[u]ntil this is done, it is the responsibility of every station commissioner and other commander to ensure that members under their command at all times adhere thereto'. These instructions constitute a detailed code of conduct and once fully disseminated, should resolve uncertainties regarding the scope of police questioning.

6.72 The instructions clearly permit custodial interrogation and if followed should ensure constitutional compliance.²⁷⁹ By providing a clear and comprehensive set of rules of procedure applicable to police questioning, the instruction should assist in reducing delays and costs in the criminal justice system by reducing the time spent considering challenges to the admissibility of prosecution evidence.

6.73 The question then arises whether it is sufficient that these instructions should constitute National Orders and Instructions, which are subject to amendment by the Commissioner, or whether it is desirable that they have a more formal status. It is the view of the Commission that it would be desirable if the Instructions were incorporated in regulations made by the Minister of Safety and Security in terms of section 24 of the South

made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof."

²⁷⁹ The *Policy on the Prevention of Torture and The Treatment of Persons in custody of the South African Police Service* would also appear to be in line with recent developments in New Zealand and Australia. See for example: Law Reform Commission of Tasmania: Report No 64 *Police Powers of Interrogation and Detention*; New South Wales Law Reform Commission, Criminal Procedure, *Police Powers of Detention and Investigation After Arrest* (1990); New Zealand Law Commission, Report No 31, *Police Questioning* (1994).

African Police Services Act 68 of 1995, which would allow for broader participation in their formulation and amendment.

6.74 If the Instructions are to be given regulatory status, the contents should be the subject of further investigation and consultation to ensure acceptance by all participants in the administration of justice. The terms in which the Instructions have been framed at this stage might also need to be revisited if the recommendation made under option 1 above is adopted.

Initial Recommendation

6.75 In its Discussion Paper the Commission recommended that a Police Code of Conduct for the treatment of persons in custody be incorporated in regulations published in terms of the Police Act, and that the Police Services take responsibility for the formulation of such regulations.

Comments and Workshop Contributions

6.76 The Commission received no objections to this proposal and it was positively supported by many of the participants at the workshops as well as the Judges of the Natal Provincial Division, the CLS Committee, the Chairperson of the Society of Advocates of KwaZulu-Natal and the National Council of Women SA. However, in one of the workshops it was recommended that evidence should not be automatically excluded as a consequence of a breach of the suggested Police Code of Conduct.

Discussion and Recommendations

6.77 It is apparent that this proposal is not controversial and the Commission adheres to its initial recommendation.

ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS

6.78 Our law draws a distinction between admissions (whether by words or by conduct) and confessions in determining the “threshold” requirements for admissibility. The significance of the distinction is that the requirements for admissibility are more onerous for

confessions than for admissions.

6.79 For an admission to be admitted into evidence it must be established that it was made “voluntarily”,²⁸⁰ and that term has been restrictively interpreted. An admission is not voluntary if it has been induced by a promise or threat proceeding from a person in authority.²⁸¹ A confession may be admitted into evidence only if it was “freely and voluntarily” made by the accused in his “sound and sober senses and without undue influence”. If the confession was made to a peace officer other than a magistrate or justice, the confession must be reduced to writing and confirmed in the presence of a magistrate or justice.²⁸²

6.80 The distinction that has been made between admissions and confessions owes its origin to early judicial reaction to the exclusion of “confessions” made to police officers.²⁸³ There is no rational reason for different treatment to be given to various self-incriminatory statements (or conduct), irrespective of whether they are made to the police. In each case the evidence is only relevant because it is incriminatory, and should be admissible on common grounds.

6.81 The reduction of a confession to writing in the presence of magistrate does not appear to have had any significant advantages for the accused.²⁸⁴ The real protection afforded by s 217 is the requirement that the prosecution must establish that the confession was made freely and voluntarily and without undue influence.²⁸⁵

6.82 The distinction may also hamper effective police investigations in that a genuine failure to recognise a statement as a confession may lead to exclusion from evidence if it is not reduced to writing in the presence of a magistrate. The distinction would also appear to inhibit investigating officers from recording confessions themselves.

²⁸⁰ Section 219A of the CPA.

²⁸¹ *R v Barlin* 1926 AD 459 at 462, *S v Yolelo* 1981 (3) SA 1002 (A).

²⁸² Section 217 of the CPA.

²⁸³ See the discussion of the topic in Hoffmann & Zeffert, *op cit*, at 207 ff.

²⁸⁴ AV Lansdown & J Campbell *South African Criminal Law and Procedure vol v Criminal Procedure and Evidence* (1982) 874.

²⁸⁵ The reverse onus arising on confirmation to writing is inoperative since being found to be unconstitutional in *S v Zuma* 1995 (2) SA 642 (CC).

Initial Recommendations

6.83 In its Discussion Paper the Commission recommended that the Criminal Procedure Act be amended to provide common requirements for the admissibility of all statements or conduct of the accused which might be self-incriminatory and which:

- (a) does not distinguish between police officers and others;
- (b) does not require any such statement to be reduced to writing;
- (c) expressly confers a discretion upon a court to exclude any such statement or conduct which is elicited in substantial breach of the Code of Conduct relating to the treatment of persons in custody referred to above.

Comments and Workshop Participation

6.84 Again the comments received and submissions made in the workshops were divided between those in favour of the proposed amendments and those against. However, most were in favour of the recommendation that common requirements for the admissibility of admissions and confession be introduced. The objections received were directed primarily at a concern that a distinction be retained between confessions made to police officers and others.

6.85 The Judges of the Natal Provincial Division commented as follows:

We do not agree with the recommendation that the requirements for admissibility of confessions and admissions should not distinguish between police officers and others. It is our view that only written statements in the home language of a suspect or accused should be admissible where the statements are made to or in the presence of policemen. The danger of misunderstandings on the one hand and undue pressure on the other are ever present and should not be underestimated.

6.86 A similar view was expressed in the following terms:²⁸⁶

²⁸⁶ Adv MT Chidi, Acting Director: State Law Advisory Services, Northern Province.

[Requiring such confessions to be reduced to writing] gives an accused another chance to make a confession or admission before an unbiased officer who has no interest in the matter, unlike with a police officer who might be desperate to conclude his or her investigations. We are of the view that should the “reduced to writing” provision be eliminated, innocent people will be convicted for crimes they did not commit and this is a mockery to the justice system as the real culprits would be at large, busy committing more crimes.

6.87 Another respondent expressed his view on the matter as follows:²⁸⁷

Admissibility of confessions made to police officers gives rise to higher levels of police brutality. (See as well Kreigler *Suid-Afrikaanse Strafproses*, 5th Edition at page 551). In addition, attempts by the prosecution to prove confessions made to police officers will most probably be met with allegations by the accused that he/she had been assaulted by a number of police officers which will result in far lengthier trials. Investigating officers also tend to investigate matters less vigorously as soon as they have obtained a confession.

6.88 Although similar disquiet was expressed in the workshops a number of participants expressed the view that the requirements of voluntariness and the absence of undue influence were sufficient safeguards against police misconduct and that writing should not be a pre-requisite for admissibility. A number of magistrates strongly expressed the view that they ought not to be parties to the process of taking confessions, as it created the perception that they were part of the police investigation team, and undermined their independence and impartiality in the public mind.

Discussion and Recommendations

6.89 That there should be common requirements for the admissibility of confessions and admissions, in whatever form they occur, is largely uncontentious. What is contentious is only whether incriminatory statements made to police officers should be dealt with on a different basis. Bearing in mind that incriminating statements will be admissible only if it is established by the prosecution that the statement was made freely and voluntarily, while the person was in his or her sound and sober senses, and without having been unduly influenced thereto, the Commission is of the view that no purpose is served by an additional requirement that such statements made to the police should be reduced to writing. Accordingly the Commission adheres to its initial recommendation.

EVIDENCE GIVEN IN TRIAL-WITHIN-A-TRIAL

6.90 A related question that has been raised is whether the evidence given by an accused person in a trial-within-a-trial (to determine the admissibility of evidence) should be admissible against him or her in the main proceedings.

6.91 Evidence given in the course of a trial-within-a-trial is, in general, not admissible against the accused in the main proceedings. The reason for this was expressed as follows by the House of Lords in *R v Brophy*:²⁸⁸

“If such evidence, being relevant, were admissible at the substantive trial, an accused person would not enjoy the complete freedom that he ought to have at the *voire dire* to contest the admissibility of his previous statements. It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voire dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the *voire dire*, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called right to silence at the trial.”

6.92 The same considerations apply in this country. In *S v Sithebe*²⁸⁹ Nienaber JA said the following:

“The principle which it exemplifies is that an accused must be at liberty to challenge the admissibility of an incriminating document at a trial within the trial without fear of inhibiting his election at the end of the day - irrespective of whether the document is admitted or not - of not testifying on the issue of his alleged guilt.”

6.93 In *S v K*²⁹⁰ the court said that:

“[t]he trial-within-a-trial procedure is, of course, one designed to cater for the accused's right to a fair trial in order to ensure that questions of admissibility and of guilt are distinguished from each other and decided separately. At the end of the State case an accused is entitled to know exactly what evidence will be put into the scale against him, albeit that he is not entitled to know the weight the Court would attach to the evidence. An accused needs to have the freedom to decide whether he

²⁸⁸ 1981 2 All ER 705 at 709.

²⁸⁹ 1992(1) SACR 347 (A) at 351.

²⁹⁰ 1999 (2) SACR 388 (C) on page 390.

wants to testify on the merits in the main trial and the only mechanism which affords an accused the opportunity to limit his evidence as to questions of admissibility is a trial-within-a-trial (see *S v Mhlakaza en Andere* 1996 (2) SACR 187 (C)).”

6.94 In *S v De Vries*²⁹¹ it was reiterated that the enquiry into the voluntariness of a confession, and the inquiry into guilt, are to be kept separate and distinct, and that “[t]he prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within a trial.” In *S v Nglengethwa*,²⁹² however, it was held that this does not preclude the prosecution from relying in the main case upon evidence advanced by the prosecution in the course of a trial-within-a-trial.

6.95 The Commission recommended that the Criminal Procedure Act be amended to allow an accused to be cross-examined during the main trial on any previous inconsistent statements made during the trial-within-the-trial, thereby allowing for the admissibility in the main trial of evidence given by the accused during the trial within a trial.

Comments and Workshop Participation

6.96 The Judges of the Natal Provincial Division and the Director of Public Prosecutions, Cape of Good Hope favoured the proposed amendment. On the other hand a significant number of workshop participants were against the proposal. It was felt that the proposed amendment was undesirable as it would expose lay assessors to inadmissible evidence and would be a vehicle for allowing inadmissible confessions to be admitted through the back door. It was generally felt that inconsistency between the accused’s evidence given at the trial-within-trial was seldom an issue and did not contribute in any significant way to delays in trials.

Discussion and Recommendations

6.97 It is the Commission’s view, upon reflection, that insufficient reason exists for departing from existing practice. The Commission recognises the point made during the workshop session that it seldom occurs that an accused’s evidence during the trial within a trial differs substantially from his or her evidence during the main proceedings. To pursue

²⁹¹ 1989 (1) SA 228 (A).

²⁹² 1996 (1) SACR 737 (A).

this proposal would, in effect, eliminate the separate proceedings for determining the admissibility of evidence, which is an indispensable inquiry in itself, without offering any material advantage. Accordingly the Commission recommends that no alteration should be made to existing practice.

PART B

DEFENCE DISCLOSURE

FROM THE TIME THE ACCUSED IS INDICTED UNTIL THE PLEA

6.98 There have been suggestions that the defence should be required to make disclosure of its defence at some time after the indictment has been presented, and at least at the time of the plea.

6.99 By the time the accused has been indicted it must be assumed that the investigation is complete, and accordingly the only real purpose that is served by requiring defence disclosure at that stage is to curtail the trial.

6.100 A summary of the approach to defence disclosure in a variety of jurisdictions has been discussed in chapter 4. It suffices to say that in a number of domestic and international tribunals, including England and the United States, there are fairly extensive duties of disclosure resting upon the defence; but there are also a number of countries that do not require defence disclosure²⁹³.

6.101 Following the decision in *Shabalala v Attorney-General, Transvaal*,²⁹⁴ there is a duty upon the prosecution to make extensive disclosure to the defence. However there is no similar general duty upon the accused, although there are certain specific circumstances in which the accused is, in reality, called upon to do so, as for example in the following cases:

* An alibi defence might be considerably weakened if the accused fails to disclose it in advance.²⁹⁵

* The defence of insanity must, in effect, be disclosed in advance.²⁹⁶

²⁹³ See C Bradley ed *Criminal Procedure a Worldwide Study* (1999).

²⁹⁴ 1995 (2) SACR 761 (CC).

²⁹⁵ *R v Mashelele* 1944 AD 571; *S v Zwayi* 1997 (2) SACR 772 (CkHC).

²⁹⁶ Whether this reverse onus will withstand constitutional scrutiny is an open question.

- * There are certain special defences which the prosecution is not required to exclude unless they are “raised” by the accused, whether before the trial or in the evidence.²⁹⁷ For example, an accused should lay a foundation for a defence of sane automatism.²⁹⁸ In *S v Trickett*,²⁹⁹ it was held that although the prosecution has a burden of disproving a defence of automatism not caused by mental illness or mental defect, this burden does not operate until the defence has been put in issue. Similarly, in *S v Delport*³⁰⁰ it was said that the State need not negative provocation unless the evidence indicates that it is a possible factor in the case.³⁰¹

6.102 There are several arguments in favour of a general duty of disclosure:

- (a) if the purpose of a criminal trial is a search for the truth, there is no reason to reject defence disclosure;³⁰²
- (b) the elimination of surprise would enable the State properly and timeously to investigate defence allegations;³⁰³
- (c) now that prosecution disclosure is required, defence disclosure is necessary to maintain balance in the criminal justice system;
- (e) defence disclosure would make the criminal justice system more efficient and effective. Defence disclosure would encourage realistic pre-trial discussion of

²⁹⁷ AV Lansdown & J Campbell *South African Criminal Law and Procedure* vol v *Criminal Procedure and Evidence* (1982) at 910.

²⁹⁸ See generally Schmidt 1973 *SALJ* 329; *S v Potgieter* 1994 (1) SACR 61 (A).

²⁹⁹ 1973 (3) SA 526 (T) at 532.

³⁰⁰ 1968 1 PH H172 (A).

³⁰¹ See also *S v Kalagopoulos* 1993 (1) SACR 12 (A); *S v Cunningham* 1996 (1) SACR 631 (A).

³⁰² See generally GD McKinnon ‘Accelerating Defence Disclosure: A Time for Change’ (1996) 1 *Canadian Criminal Law Review* 59.

³⁰³ See D Tanovich & L Crocker ‘Dancing with Stinchcombe’s Ghost: A Modest Proposal for Reciprocal Defence Disclosure’ (1994) 26 *CR* (4th) 333.

the merits of the charge and this in turn would lead to the early disposal of the case, either by a plea of guilty being entered or a withdrawal of the charges.

- (f) defence disclosure allows counsel to prepare more effectively;
- (g) it saves time, costs and inconvenience by narrowing the issues;
- (h) it prevents the subsequent fabrication of false defences;
- (i) defence disclosure is a modern characteristic of a number of jurisdictions that are essentially adversarial in nature, for example, England, Wales, Scotland, United States; and
- (j) defence disclosure does not necessarily infringe the privilege against self-incrimination. In England the Royal Commission on Criminal Justice commented as follows:³⁰⁴

We do not, as we have said, believe that a requirement on the defence to disclose the substance of their case sooner rather than later infringes the right of defendants not to incriminate themselves. Where defendants advance a defence at trial it does not amount to an infringement of their privilege not to incriminate themselves if advance warning of the substance of such defence has to be given. The matter is simply one of timing. We emphasize that under our proposal defendants may, if they choose, still stay silent throughout the trial.³⁰⁵

6.103 The following are some of the arguments (not all are relevant to the South African situation) that have been advanced against a general duty of disclosure:³⁰⁶

- (a) the arguments requiring prosecution to disclosure do not apply to defence disclosure;
- (b) prosecution disclosure is necessary to enable the accused properly to prepare

³⁰⁴ Report of the Royal Commission on Criminal Justice 1993.

³⁰⁵ At 98.

³⁰⁶ See S Costom 'Disclosure by the Defence: Why Should I tell you' (1996) 1 *Canadian Criminal Law Review* 73.

a defence. This right is essential in ensuring that the innocent are not convicted;

- (c) the roles of the defence and prosecution are conceptually different. The defence is placed in a purely adversarial role and has no duty to assist the prosecution. The prosecution duty is directed towards ensuring that justice is done, and not towards winning or losing;³⁰⁷
- (d) the Bill of Rights confers rights upon the accused. These rights are not conditional upon the imposition of duties on the accused;
- (e) because it is very difficult to ascertain the truth in any circumstances, the rules underlying our criminal justice system are directed at ensuring that the innocent are acquitted, even if this requires the acquittal of persons who are guilty. It is the price we pay to ensure that the rights of the innocent are not eroded;
- (f) defence disclosure will not necessarily lead to an increase in efficiency. In this regard Leng notes:

[D]efence lawyers are unlikely to go out of their way to disclose every last detail. If that is the case, disputes may arise not only about whether disclosure has been made but also about its sufficiency. Where multiple defences are notified, their consistency or otherwise may be disputed and for all cases the nature of the permissible inferences must be decided. If the judge decides many of these issues against defendants, a spate of appeals may be expected. It also seems very improbable that by multiplying the issues to be determined at pre-trial hearings, one can reduce the time spent in court.³⁰⁸

- (g) there is little evidence in other jurisdictions as to the existence of ambush defences and the prosecution in the vast majority of cases is able to predict

³⁰⁷ (1991) 3 SCR 326; 8 CR (4th) 277.

³⁰⁸ R Leng 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure' (1995) *Criminal Law Review* 704 at 705. R Mosteller 'Discovery Against the Defence: Tilting the Adversarial Balance' (1986) 74 *California Law Review* 704 at 705 writing in the American context also notes that increasing the defendants duties of disclosure has resulted in an increase in appeals based on challenges to discovery procedures.

which defences will be raised.³⁰⁹ The Law Reform Commission of Canada noted:

[I]n terms of the ability to investigate and prepare for trial prosecutors are seldom disadvantaged by the lack of discovery of the accused, nor should they be. The human and physical resources of police investigation, the power to search and seize, to question, and access to scientific laboratories, far outmatch the resources available to the defence... In our survey of the profession the great majority of prosecutors acknowledged that they are generally able to prepare to meet the case for the defence by the material contained the prosecution file.³¹⁰

- (h) the imbalance between defence and prosecution resources militates against compelling defence disclosure;³¹¹
- (i) it is wrong in principle: 'The defendant should be required to respond to the case the prosecution makes, not to the case it says it is going to make ... it is not the job of the defendant to be helpful either to the prosecution or to the system.'³¹²
- (j) the unrepresented accused will be disadvantaged by compulsory defence disclosure owing to insufficient skill and knowledge regarding the most advantageous method for compliance or simply not knowing whether to comply at all;
- (k) the prosecution may tailor evidence to meet the defence case;³¹³
- (l) compulsory defence disclosure leads to an increase in the number of people exercising their right to legal aid;

³⁰⁹ Costom op cit 78. S Easton *The Case for the Right to Silence* 2 ed (1998) 53.

³¹⁰ Law Reform Commission of Canada, *Working Paper No 4: Criminal Procedure Discovery* (1974) 29-30.

³¹¹ S Easton op cit 53-4.

³¹² M Zander 91993) Note of Dissent, Report of the Royal Commission on Criminal Justice, London, HMSO, Cmnd 2263 at 221-35 as cited in Easton op cit 53.

³¹³ Easton op cit 54.

- (m) defence disclosure has no significant impact on conviction or 'clear-up rates',³¹⁴
- (n) the assumption that silence only favours the guilty is fallacious;
- (o) defence disclosure may infringe the right to remain silent and the privilege against self-incrimination;
- (p) defence disclosure may infringe the presumption of innocence;
- (q) increasing pressure on the accused to speak undermines the right to privacy and dignity. Consequently, if inroads are to be made on such fundamental rights the utilitarian benefits need to be substantial and tangible and they are not;
- (r) there is no appropriate means of compelling defence disclosure; and
- (s) an adverse inference from the failure to disclose a defence has no rational basis.

6.104 It has been pointed out above that the grounds in relation to the unconstitutionality of drawing an adverse inference from silence for non-disclosure at the pre-indictment stage are no doubt diminished at the post-indictment stage, on the premise that the question of defence disclosure does not arise until there has been prosecution disclosure. Nevertheless, it has been suggested that the arguments retain validity, as there is a clear distinction between the establishment of a prima facie case and pre-trial disclosure by the prosecution. Consequently, in line with the argument raised in this regard, it has been said that compelled post-indictment disclosure will also infringe the right to remain silent, the privilege against self-incrimination and probably the presumption of innocence. It is not necessary to revisit these arguments as the view has been expressed that the right to a fair trial would nevertheless be infringed on the basis that drawing such an inference lacks internal rationality.

³¹⁴ Easton op cit at 165 notes that: In Northern Ireland clear up and conviction rates fell between 1988 when the Order curtailing the right to silence was passed and 1992.

6.105 The principal objection to requiring defence disclosure at this stage of the process is that it will not be capable of being enforced in any meaningful way. To expose the accused to any threat of punishment for failing to disclose his or her defence will clearly be in conflict with section 35(3) of the Constitution.

6.106 It has been suggested at times that there would be an incentive to disclose the basis of the defence if the accused were to face the peril that an “adverse inference” might be drawn should he or she fail to do so. It is unhelpful to discuss such a proposal in abstract terms. The question that needs to be asked is what inference a court might draw. Quite clearly a court may not convict the accused (i.e. it may not draw an inference that he or she is guilty) simply because of a failure to disclose the defence, and that proposition requires no elaboration. Nor is there any scope for drawing any other meaningful inference.

6.107 It must be borne in mind that once the accused has been indicted, and certainly by the time of the plea, the accused will most often be aware of every material aspect of the prosecution case. To the extent that the accused intends trimming his or her sails to meet the prosecution case, this will have been done by the time of the plea.

6.108 The problems that occur for the prosecution after the accused has been indicted are twofold: First, the accused might have a defence that has not been anticipated by the prosecution. No doubt it would be desirable for that to be disclosed in advance but there is no means of forcing such a disclosure, nor does the failure to disclose it give rise to any relevant inference that will not in any event be capable of being drawn once the defence is advanced.³¹⁵ Furthermore, it is open to the prosecution to re-open its case in the event of evidence emerging that it could not anticipate; and the court itself has a discretion to call for evidence that might be required in the interests of the administration of justice. Secondly, the prosecution might be put to the trouble of calling evidence that might be unnecessary in that it is not seriously challenged. That might be a matter to take into account in determining the appropriate sentence³¹⁶ but to do so raises questions of principle similar to those which arise in relation to plea agreements, and it is suggested that this possibility should best be

³¹⁵ For example, it is well accepted that evidence of an alibi is “considerably weakened” if it was not disclosed in advance: *R v Mashelele* 1944 AD 571.

³¹⁶ As noted by G McKinnon ‘Accelerating Defence Disclosure: A Time for Change’ (1996) 1 *Canadian Criminal Law Review* 59 at 70 ‘[s]aving the community unnecessary expense through proper defence disclosure should justify discounting a sentence where there has been a trial’.

examined in that context. There is, of course, the inherent possibility that pre-trial procedures might result in some defence disclosure being made, but that will follow naturally from the recommendation made in relation to that topic below.

6.109 Section 115 of the Act facilitates defence disclosure if the defence chooses to make such disclosure. Generally disclosures are made by unrepresented accused but not by represented accused, who recognise that there is little advantage to the defence in doing so. We have already expressed the view that no realistic mechanism exists for compelling an accused to make disclosures.

Initial Recommendation

6.110 The Commission's provisional view was that no legislative intervention should be made in relation to defence disclosure between the time of indictment and the time of plea.

6.111 However, the Commission received alternative proposals in this regard from the National Director of Public Prosecutions and these proposals are considered hereafter. The legislative amendments that were proposed by the NDPP are set out in Appendix A (sections 151A - 151D and sections 104A - 104I as set out in that appendix).

PROPOSAL BY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

6.112 The National Director of Public Prosecutions is of the view that we have reached the time in our criminal justice system where we should no longer cling to procedures steeped in the traditions of the past. Those traditions create delays, waste money and lengthen trials unnecessarily. We need to consider enforcing defence disclosure and should seriously consider and adopt the legislative initiatives of certain foreign jurisdictions. The problem of overloading court rolls, unnecessary delays and lengthy trials is a global problem. It is significant that there are various countries grappling with exactly the same problems and they are at present also considering changes. In this regard reference is made to the following developments:

Australia

6.113 In *R v Ling*³¹⁷ Doyle CJ remarked as follows:

It may be that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of and limiting of issues in criminal proceedings to an extent inconsistent with the maintenance of the right of silence. It is well known that criminal courts in Australia and in other countries are struggling to cope with the volume of work coming before them. It is equally well known that the length of trials is tending to increase. These matters are a cause for real concern. It is equally well known that the effectiveness of current methods of case flow management is limited because, among other things, under rules such as those that exist in South Australia, the court has no power to require the defence to disclose the nature and extent of the defence case.

The appropriate balance between the responsibility of the court for the efficient conduct of cases before it, and so the width of its powers of case management on the one hand, and the operation of the right of silence on the other hand, is an important issue. (Emphasis added)

6.114 At a Conference on Reform of Court Rules and Procedure in Brisbane in July 1998, the Commonwealth Director of Public Prosecutions, Brian Martin, QC, observed that the financial cost to the community of administering the criminal justice system is substantial. He furthermore pointed out that the public has an interest not only in ensuring that the proceedings are fair to an accused but also that the proceedings are efficient. He specifically referred to modification at the investigative stage, and in this regard he remarked as follows:

We should learn from the UK experience over a reasonable period. There are obvious difficulties associated with imposing the obligation at the investigative stage and, if imposed, effective protective mechanisms would be required. In this context it is important to bear in mind that adverse comments can already be made if an accused gives a version in evidence inconsistent with a version given to investigators. It is only if an accused declines to answer questions that adverse comment is not permitted.

6.115 He continued by expressing the opinion that, subject to exceptional cases and the ability to cater for an unrepresented and genuinely disadvantaged accused, the appropriate time for the imposition of the obligation to disclose defence is “in the pre-trial process under the control of the trial court”.

6.116 In October 1998 the Australian Law Council published Draft Principles relating to the Reform of the Pre-Trial Criminal Procedure. Apart from certain proposals in respect of prosecution disclosure, defence inquiry and legal assistance, the Law Council makes the

³¹⁷ (1996) 90 A CRIM R 376 at page 382.

following remarks in respect of defence disclosure:

The public interest in improving the efficiency of criminal proceedings justifies consideration of some degree of pre-trial defence disclosure, whether in the form of answers to questions, responses to notices to admit, disclosure of any defence to the accusation or disclosure of defence evidence to be adduced at trial.

However, an important component of the accusatorial process is the accused person's right to silence. If the state must prove guilt without the assistance of the accused, the accused should not be compelled to answer questions, make admissions, disclose a defence or disclose evidence. Equally, the accused should not be penalised for exercising the right. Consequently:

- the defence should not be precluded from relying on a defence or evidence which was not disclosed pre-trial; and
- adverse inferences should never be drawn from exercise of the right.

These conclusions do not prevent the development of procedures designed to facilitate, and encourage, pre-trial defence disclosure. Incentives to encourage pre-trial defence disclosure might include:

- C first ensuring full prosecution disclosure;
- C encouraging informal resolution of issues by legal practitioners appearing for the prosecution and defence;
- C requiring the prosecution to disclose, at a reasonable time before the trial, the totality of any further material which may be relevant as a consequence of the defence disclosure;
- C where the accused is found not guilty, taking into account defence disclosure in consideration of costs awards; and
- C where the accused is found guilty, taking into account defence disclosure in sentencing proceedings as a mitigating circumstance (although failure to make disclosure should not be regarded as a matter of aggravation).

By the conclusion of the pre-trial process, the defence should be in a position to outline the nature of the defence case. If there is a trial, the defence should be required to provide that outline immediately after the prosecution opening address. (Emphasis added)

6.117 In respect of its proposals above, the Law Council also provides the following additional explanatory notes:

1. "Pre-trial" procedure refers to that part of the criminal process which begins with the charge of the accused and ends when a trial commences or a plea of guilty is entered.

2. There should be legal assistance throughout the pre-trial process.
3. Pre-trial procedures must facilitate defence inquiry.
4. Given the limited resources of the accused, and the desire to minimise the risk of convicting an innocent person, it is essential that the prosecution and investigating authorities assist in obtaining, and then disclosing, evidence which may assist the accused.

6.118 The New South Wales Law Commission has published a discussion paper in May 1998 dealing with the Right to Silence. The NSW Commission was directed to consider, *inter alia* -

- whether there should be any mandatory pre-trial or pre-hearing disclosure of the nature of the defence and of the evidence in support of that defence;
- if so, whether it should be possible to draw inferences from the failure to disclose such defence or evidence, or the manner of such mandatory disclosure, or from any change in the nature of the defence in support of it; and
- whether changes to the current position with regard to prosecution pre-trial disclosure are needed.

6.119 In a comprehensive Discussion Paper the NSW Commission discusses the history of the right to silence, the right to silence when questioned by the police, pre-trial disclosure and the right to silence at trial. The NSW Commission also points out that the right to silence is currently under review in Victoria, Western Australia and the Northern Territory.

Without going into detail regarding the NSW Commission's discussions and conclusions, the Commission makes and reaches, amongst others, the following recommendations and conclusions:

The Right to Silence when Questioned by Police

This right is a necessary protection for suspects, and its modification would undermine fundamental principles. It would tend to substitute trial in the police station for trial by a court of law. A fundamental requirement of fairness in any obligation imposed to reveal a defence when questioned by police is that legal advice is available to suspects at this stage to ensure that they understand the significance of the caution and the consequences of

silence. That requirement is incapable of being satisfied within presently available legal aid funding, and significant increases seem extremely unlikely.

Pre-trial Disclosure

The position regarding pre-trial disclosure in Australia is as follows:

New South Wales

There is no general common-law right to discovery by either party. The common law is modified by statutory disclosure requirements in relation to alibi defence in trials for indictable offences. The defence must give written notice of particulars of intended alibi evidence. If the prescribed procedure is not fulfilled, the proposed alibi evidence cannot be introduced without the leave of the court. In murder trials, the defence is required to give notice of the defendants' intention to raise the defence that he or she is not guilty because of substantial impairment by abnormality of mind. Furthermore, disclosure by the prosecution is regulated by Barristers' and Solicitors' Rules, Prosecution Guidelines issued by the Director of Public Prosecutions and the Supreme Court Standard Directions.

Victoria

Since 1993 a legislative pre-trial disclosure procedure has been introduced in the County Court and Supreme Court. Mutual compulsory disclosure requirements are prescribed. A higher standard of disclosure is required of the prosecution and the defence is required to respond to the presentment by indicating which elements of the offence are admitted. Thereafter, the timetable for disclosure is set by the court at a pre-trial hearing. The prosecution must file in court and serve on the defence a case statement. This includes a summary of the facts and inferences the prosecution will seek to prove at trial, copies of witness statements, including expert witnesses, and a list of exhibits the prosecution intends to produce, etc. The defence is required to file and serve a defence response replying to the matters raised in the prosecution case statement, providing copies of expert witness statements and including statements of law the defence intends to rely on. The defence is not required to disclose the identity of its witnesses, other than expert witnesses. The defence is also required to disclose intended alibi evidence similar to the procedure required in NSW.

Northern Territory, South Australia, Tasmania, Australian Capital Territory

Defence disclosure requirements are similar to those prescribed in NSW in respect of alibi evidence.

Western Australia

Since 1993 a disclosure regime has been introduced by Criminal Practice

Rules. The prosecution is required to provide the defence with a statement of facts and propositions of law on which it intends to rely and copies of prosecution witness statements. The defence, on the other hand, is required to provide disclosure by way of a statement indicating which facts alleged by the prosecution will be admitted and which facts will be disputed, the legal grounds of any defence which will be relied on and copies of statements of any expert witnesses whom the defence proposes to call. In criminal trials for indictable offences the defence is also required by legislation to disclose intended alibi evidence to the prosecution.

Queensland

In criminal trials for indictable offences the defence is required to disclose intended alibi evidence to the prosecution. The particulars are similar to those required in NSW.

6.120 After a detailed discussion and weighing up the arguments for and against compulsory prosecution pre-trial disclosure and defence pre-trial disclosure, the NSW Commission holds the view that the arguments in favour of pre-trial disclosure justify the introduction of compulsory disclosure in criminal trials in the lower and higher court. In respect of compulsory prosecution pre-trial disclosure the NSW Commission recommends specific material to be disclosed by the prosecution; when the prosecution would be required to provide pre-trial disclosure; the position relating to unrepresented accused; protective measures regarding the disclosure of specific material; the confidentiality regarding the material that has been disclosed by the prosecution; and the consequences of non-compliance.

6.121 In respect of compulsory defence pre-trial disclosure, the NSW Commission remarks as follows:

The main emphasis of the right to silence lies in a suspected person's right to refuse to answer questions during the investigative stage, without adverse inference being drawn against the suspect from the exercise of that right, the need for which the Commission fully accepts at this stage notwithstanding the inroads which have been made in relation to that right overseas. The importance of the right to silence after the defendant has been committed for trial does not, however, rest upon the same basis as that which exists before the event. As Lord Mustill said in *R v Director of Serious Fraud Office; Ex p Smith*, *few will dispute that the curtailment of the right to silence is indispensable to the stability of society; the issue is one as to where the line should be drawn, and the resolution of that issue must take into account the fact that the reasons for the right to silence at different stages are themselves different. The privilege against compulsory pre-trial disclosure of the nature of the defence case is of quite recent origin.* (Emphasis added)

6.122 The NSW Commission consequently suggested the following three options:

1 Disclosure of expert evidence

Under this option the defence would be compelled to disclose the names and addresses of proposed expert witnesses, and copies of expert reports upon which the defence proposed to rely at trial.

2 Disclosure of expert evidence and the intention to raise certain “defences”

Under this option, the defence would be required to provide notice of the defence's intention to raise intoxication, provocation, duress or self-defence, in addition to the existing notice requirements in relation to alibi and substantial impairment by abnormality of mind defences. The defence would also be required to disclose the expert evidence upon which it intended to rely at trial.

3 Disclosure of the issues which will be litigated at trial and expert evidence.

This option would require the defence to disclose the general nature of the issues to be raised at trial - whether by denial of the elements of the charge or by way of exculpation. For example, the defence would be required to disclose whether the defendant disputes that he or she did the physical act alleged by the prosecution as an ingredient of the offence charged, whether the defence intends to challenge the admissibility of admissions alleged by the prosecution to have been made, the general nature of the objection to be taken, and whether issues such as intoxication, duress, self-defence or provocation are to be raised.

The principal justification for this option is the argument that the community (on whose behalf the Crown prosecutes) can no longer afford the luxury of defendants simply putting the Crown to proof of its case (where there is no real reason to dispute much of it) and having the right to raise issues for the first time during the trial itself when the Crown will have either no opportunity or only an inadequate opportunity to investigate those issues. According to the Commission this is far less an incursion upon the right to silence than that which Parliament has permitted by questioning under compulsory powers by various special investigative bodies. The Commission does not at this stage support any extension of those powers generally in the investigative stage.

If compulsory pre-trial disclosure of the general nature of the defence is required, the defendant will not be personally interrogated. The whole of the prosecution case will already have been disclosed to the defendant at the time when such disclosure is required, even the statements of its witnesses. The defendant will have had adequate time for reflection, with the benefit of legal advice, upon the material disclosed by the prosecution before having to nominate the issues to be litigated at the trial. The position of the defendant at this stage could not be more removed from that which he or she is in when being interrogated by the police. There is no legitimate prejudice suffered by the defendant in requiring disclosure of the defence at this later stage. The only advantage that will be lost is that of surprise.

The defence would also be required to disclose the expert evidence upon which it intended to rely at trial, as in option 1.

The consequences of non-compliance with the disclosure obligations raised in this option would be the same as the consequences of non-compliance set out in option 1.

Unrepresented defendants are a special case. Where the defendant is unrepresented, the obligation of disclosure should be imposed upon him or her only by order of the court in the particular case, when the court will be in a position to investigate with the unrepresented defendant whether modified disclosure would be appropriate. The fact that the absence of representation results from the defendant's own choice would be relevant to determining the extent of disclosure which would be appropriate.

6.123 The New South Wales Law Reform Commission finalised its final report in July 2000 and made the following recommendations for implementation:³¹⁸

RECOMMENDATION 1 (page 72)

The Commission recommends that s 89 of the Evidence Act 1995 (NSW)³¹⁹ be retained in its current form. Legislation based on s 34, 36 and 37 of the Criminal Justice and Public Order Act 1994 (Eng) should not be introduced in New South Wales.

RECOMMENDATION 2 (page 115)

The Commission recommends that the prosecution must be required to disclose the following material and information, in addition to the existing prosecution pre-trial disclosure requirements:

(a) All reports of prosecution expert witnesses proposed to be called at trial. In accordance with the general rule, such reports must clearly identify the material relied on to prepare them.

(b) Where the defence discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.

(c) Whether defence expert witnesses are required for cross-examination. In this event, notice within a reasonable time must be given.

(d) In respect of any proposed defence exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.

³¹⁸ *"The right to silence"* New South Wales Law Reform Commission report 95 July 2000.

³¹⁹ The section provides that at the hearing or trial the judge or jury is prohibited from drawing adverse inferences, including inferences about the defendants guilt, or credibility as a witness, from evidence that he or she did not answer police questions.

(e) Where notice is given that charts, diagrams or schedules are to be tendered by the defence, whether there is any issue about either admissibility or accuracy.

(f) Any substantial issues of admissibility of any aspect of proposed defence evidence of which notice has been given.

RECOMMENDATION 3 (page 116)

(a) Where no issue is taken by the defence as to the provenance, authenticity, accuracy, admissibility or continuity of prosecution exhibits, charts, diagrams or Evidence Act schedules, the evidence will be prima facie admissible and ion based on may be tendered without formal proof.

(b) Where no issue is taken by the defence as to the admissibility of expert reports disclosed by the prosecution, this evidence will be prima facie admissible and may be tendered without formal proof.

RECOMMENDATION 4 (page 130)

The Commission recommends that notice of alibi evidence should be required at least 35 days before trial in all indictable matters tried in the Supreme and District Courts.

RECOMMENDATION 5 (page 134)

The defendant shall be required to disclose the following material and information, in writing, unless the Court otherwise orders:

(a) In addition to the existing notice requirements for alibi evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge, proposes to raise issues in answer to the charge, eg accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; in cases involving an intent to defraud, claim of right.

(b) In any particular case, whether falling within Recommendation 5(a) or not, the trial judge or other judge charged with the responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at trial, identifying the issues to be raised, whether by way of denial of the elements of the charge or exculpation, and stating, in general terms only, the factual basis of the case which is to be put to the jury.

(c) All reports of defence expert witnesses proposed to be called at trial in accordance with the general rule, such reports shall clearly identify the material relied on to prepare them.

(d) Where the prosecution discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.

(e) Whether prosecution expert witnesses are required for cross-examination. In this event, notice within a reasonable time shall be given.

(f) Where the prosecution relies on surveillance evidence (electronic or otherwise), whether strict proof is required and, if so, to what extent.

(g) In respect of any proposed prosecution exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.

(h) In respect of listening device transcripts proposed by the prosecution to be used or tendered, whether they are accepted as accurate and, if not, in what respects issue is taken.

(i) Where notice is given that charts, diagrams or schedules are to be tendered by the prosecution, whether there is any issue about either admissibility or accuracy.

(j) Where it is proposed to call character witnesses, their names and addresses. The purpose of this requirement is to enable the prosecution to check on the antecedents of these witnesses. Character witnesses or other defence witnesses identified directly or indirectly by disclosures made by the defence shall not be interviewed by the prosecution without the leave of the court.

(k) Any issues of admissibility of any aspect of proposed prosecution evidence of which notice has been given.

(l) Any issues concerning the form of the indictment, severability of the charges, separate trials or applications for a "Basha" inquiry.

RECOMMENDATION 6 (page 136)

(a) Where no issue is taken by the prosecution as to the provenance, authenticity, accuracy, admissibility or continuity of defence exhibits, listening device transcripts, charts, diagrams or schedules, the evidence will be prima facie admissible and may be tendered without formal proof.

(b) Where no issue is taken by the prosecution as to the admissibility of expert reports disclosed by the defence, this evidence will be prima facie admissible and may be tendered. without formal proof.

(c) Disclosures made pursuant to these requirements, are not admissions and are not admissible into evidence without leave of the judge except for the purpose of determining on the *voire dire* any procedural matter arising from an alleged omission to provide any required disclosure or alleged change of case.

RECOMMENDATION 7 (page 137)

The Commission recommends that, in appropriate cases, the court should be able to invoke the requirements outlined in Recommendations 2 and 5. The parties should also be able to apply to the judge to order compliance with Recommendation 5(a) and disclosure under Recommendation 5(b).

RECOMMENDATION 8 (page 138)

The Commission recommends that the proposed disclosure requirements be applied

in the Supreme Court and District Court. The Commission also recommends the following limited disclosure requirements for the Local Courts:

(a) The defence should be required to give notice of proposed alibi evidence a reasonable time before the hearing, subject to the imposition of a more specific time frame by a magistrate.

(b) Magistrates should also be empowered to order the parties to exchange expert reports.

RECOMMENDATION 9 (page 139)

The Commission recommends that the court be given the power to set a time for compliance with the disclosure requirements set out in Recommendations 2 and 5.

RECOMMENDATION 10 (page 141)

The Commission recommends that judges be given a discretion to impose any of the following consequences for non-disclosure or departure from the disclosed case during the trial:

(a) A discretion to refuse to admit material not disclosed in accordance with the requirements.

(b) A discretion to grant an adjournment to a party whose case would be prejudiced by material introduced by the other party which was not disclosed in accordance with the requirements.

(c) In jury trials, a discretion to comment to the jury or to permit counsel to comment, subject, if appropriate, to any conditions imposed by the trial judge.

(d) In trials without jury, the trial judge may have regard to the failure to comply with the disclosure requirements in the same way as a jury would be entitled to do so.

RECOMMENDATION 11 (page 142)

The Commission recommends that the court should be empowered to make orders concerning the communication, use and confidentiality of material disclosed to the defence.

RECOMMENDATION 12 (page 143)

The Criminal Procedure Act 1986 (NSW) should be amended to insert a provision to permit the Supreme Court and the District Court to make Rules requiring disclosure as recommended and such other similar disclosure as might be appropriate in respect of other offences.

RECOMMENDATION 13 (page 144)

Judges should also be given a discretion to consider compliance with the defence disclosure duties as a mitigating factor when sentencing a defendant who is ultimately convicted.

RECOMMENDATION 14 (page 180) 4

The Commission recommends that, subject to Recommendation 15, the present law concerning the right to silence at trial should not change.

RECOMMENDATION 15 (page 182)

The Commission recommends that prohibition on prosecution comment in s 20(2) of the Evidence Act 1995 (NSW) should be removed. Prosecutors should be permitted to comment upon the fact that the defendant has not given evidence, subject to the restrictions which apply to comment by the trial judge and counsel for the defendant and any co-accused. The prosecution shall be required to apply for leave before commenting.

United Kingdom

6.124 In criminal trials in the UK the court is permitted to draw inferences from the defendant's failure, when questioned by the police or charged, to mention a fact later relied on in defence which the defendant could reasonably have been expected to mention when questioned. The court is however not permitted to draw inferences from the defendant's silence itself. An inference can only be drawn when the defendant relies on a fact, as part of the defence, which the defendant unreasonably failed to tell the police during questioning.

6.125 The court is also permitted to draw adverse inferences when the defendant fails, when requested by the police, to account for objects, substances or marks connected with the defendant which the police reasonably believe are attributable to participation in an offence, and when the defendant fails, when questioned by the police, to account for his or her presence at a place and time which the police reasonably believe is attributable to participation in an offence.

6.126 In 1987, England established a separate scheme for the investigation, charging and trial of serious and complex fraud by the Serious Fraud Office. The Director of the Serious Fraud Office can compel anyone under investigation or any person reasonably believed to have information relevant to an investigation to answer questions. Non-compliance is an offence unless the person has a reasonable excuse. Witnesses are however protected by an immunity in terms of which their answers may only be used in evidence, if they are charged with making a false statement during an investigation, or if they are charged with an offence and give evidence at trial which is inconsistent with the answer given to the Serious Fraud Office.

6.127 Since 1 April 1997 all offences in England, Wales and Northern Ireland into which an investigation has been instituted are subject to a general, legislative pre-trial disclosure

regime. This regime imposes compulsory pre-trial disclosure on both the prosecution and the defence, although a higher standard of disclosure is required by the prosecution. In trials for indictable offences, when the prosecution undertakes primary disclosure, the defence is required to provide the court and the prosecution with a defence statement setting out the general nature of the defence and the matters which the defence will dispute, and giving reasons. If the defence involves alibi evidence, particulars are required. The defence statement must be supplied within 14 days of the defence receiving primary disclosure from the prosecution, although the defence may apply to the court for an extension of this time limit. If either the prosecution or the defence intends to lead expert evidence at trial, it must provide a copy of the expert witnesses' statement to the other party as soon possible.

6.128 In 1987 a separate scheme was also introduced in respect of serious and complex fraud in England, Wales and Northern Ireland. The trial judge is empowered to order that a preparatory hearing be held in relation to cases involving serious or complex fraud. At the preparatory hearing the trial judge may make orders for pre-trial disclosure by both the prosecution and the defence. The judge may, for example, order the defence to supply the court and the prosecution with a defence response stating the general nature of the defence and the propositions of law relied on by the defence, the principal matters in the prosecution case statement which the defence disputes, and any objections taken by the defence.

Canada

6.129 Bart Rosborough (Alberta Gown Attorney Publications Editor), in a Newsletter of July 1995, pointed out that since the accused's rights to full and timely disclosure of the prosecution's case has recently been dramatically changed in Canada, the call for defence disclosure has been renewed in Canada.

6.130 Apart from limited and largely procedural matters, Canadian Law places no disclosure obligation upon the defence. Bart Rosborough refers to the following reasons for supporting defence disclosure:

- C Defence disclosure obligations would help minimize over-utilization of expensive trial proceedings by contributing to realistic pre-trial discussions of the merits of the case. This will lead to a reduction in inconvenience to other participants in the administration of criminal justice.
- C Mandatory pre-trial disclosure by the prosecution prevents the defence from being taken by surprise at the trial. It seems logical to suggest that justice is

not likely to be properly served if one side can be taken by surprise at the trial while the other cannot. Sauce for the goose is sauce for the gander.

- C Defence disclosure would contribute to the overall efficiency of the litigation process. The prosecution's preparation for trial will be more efficient and, when presented in court, more focussed. It is even possible that reassessment of the prosecution's case in light of the accused's defence may well result in its termination.
- C Surprise witnesses and unanticipated defences at trials may confound the prosecution and may also promote adjournments. Adjournments mean delay, expensive cases and inconvenience.
- C Available academic comment suggests that a requirement of defence disclosure would not necessarily violate the accused's right against self-incrimination or his right to silence.
- C Jurisprudence to date has established that the right to silence is brought to bear only in circumstances where the State has exercised some form of compulsion in order to create or secure the evidence. In the case of defence disclosure, however, the evidence will already exist before it is ever made known to the prosecution.
- C If defence disclosure were for example to be extended to providing the prosecution with names and statements of defence witnesses, the opinion is held that such a provision would not run afoul of an accused person's right against self-incrimination. It is unlikely that the statements of witnesses to be called by the defence would incriminate the accused. The right against self-incrimination is personal to the accused person and has not been extended to third parties involved in the litigation process.

6.131 In the light of the above, the National Director of Public Prosecutions recommends that legislation regarding pre-trial disclosure referred to above be introduced. It also recommends that compulsory defence disclosure should be considered and proposed together with comprehensive provisions dealing with compulsory pre-trial disclosure by the prosecution.

6.132 The legislative proposals that were made by the NDPP are set out fully in Appendix A (proposed sections 151A - 151D and proposed sections 104A - 104I). It will be seen that the proposals fall into three distinct groups:

- (a) Disclosure of Specific Defences

The proposals contained in sections 151A - 151D of Appendix A are limited in their scope. Essentially they provide for compulsory pre-trial disclosure by the accused (in most cases only if the accused is legally represented) of:

- (i) an alibi;
- (ii) the intention to allege that the accused was not criminally liable by reason of mental illness or defect;
- (iii) the intention to raise any statutory or other ground of justification, or a defence excluding mens rea;
- (iv) the intention to call an expert witness.

The sanction that is sought to be imposed for failure to make such disclosure is that the accused will not be permitted to raise the particular defence, or call the expert witness, as the case may be, without the leave of the court. The proposal provides specifically, however, that the court may not refuse such leave if the accused was not informed of his or her obligations.

(b) Codification of the Disclosure Duties of the Prosecution

That proposal is reflected in section 104A, and in the alternative proposal for “reciprocal disclosure” (alternative sections 104A - 104I).

(c) Disclosure Generally by the Defence

These proposals are reflected in the “reciprocal disclosure” provisions referred to above (i.e. alternative sections 104A - 104I).

Comments and Workshop Participation

6.134 The majority of respondents supported the retention of the status quo but there was a considerable number in favour of the proposals made by the NDPP.³²⁰

³²⁰ Amongst others, defence disclosure was supported by Regional Magistrate JL Brink and the National Council of Women SA.

6.135 A member of the staff of the NDPP³²¹ noted that while as a general rule the prosecution is required to disclose witness statements, the investigation diary and pocket books, the defence need not disclose anything. He pointed out that often the prosecution learns of the defence version for the first time when the accused gives evidence, as many counsel do not put the accused's version during cross-examination. He noted the following reasons why the accused should be required to disclose his or her defence before the trial:

- (a) failure to disclose leads to delay in the pre-trial investigation of cases since the State does not know which facts are common cause, and the police must thus undertake a full investigation of all aspects of the crime;
- (b) failure to disclose allows the defence to tailor its case as the trial progresses;
- (c) a 'fair trial' extends to the State as well (*Shabalala, supra*, par 52; *AG, Eastern Cape v Dhlabiti* 1997 (7) BCLR 918 (E) at 921F-G; *S v Van der Berg* 1995 (4) BCLR 479 (Nm) at 490B) but the present one sided system of disclosure offends this constitutional principle.
- (d) Failure to disclose offends the spirit of s 115 of Act 51/1977 as defence counsel refuse to disclose the basis of their defence. The same happens in respect of section 119 read with section 122(1) of the Act. He noted that in the Western Cape the prosecution bypasses the procedures provided for in sections 119 and 122(1) completely, as they are found it to be quite fruitless.
- (e) Relying upon *Shabalala, supra*, at par 72 as their authority, defence counsel also consult with State witnesses.
- (f) the defence, despite now having full knowledge of the State's case, still ask for further particulars in terms of section 87 of Act 51 of 1977.

He suggested that an accused person, when asked to plead, should be obliged to reveal his or her defence in broad terms. He submitted that a failure to disclose the basis of the defence at the plea stage must hold some disadvantage for the accused for otherwise he or she could refuse to make the disclosure with impunity, and he supported the view that in

those circumstances an adverse inference should be drawn against the accused. He suggested too that once the prosecution has made full disclosure its obligation to furnish further particulars should fall away. He also questioned why the prosecution should not be entitled to be given a list of defence witnesses, and to be permitted to consult with such witnesses (subject to similar controls to those envisaged in *Shabalala's* case). He concluded that these proposals should apply only to represented accused.

6.136 The Judges of the Natal Provincial Division favoured the Commission's initial recommendation that no legislative intervention was required and noted that "[t]he problems raised by the National Director of Public Prosecutions could be met by setting matters down for plea as soon as possible with directions at a pre-trial conference in terms of Section 149A." The CLS Committee also favoured the Commission's initial recommendation and expressed the view that:

"[d]elays of trials are a result of inefficient prosecutors, incompetence of staff, shortage of staff and a lack of administrative support. This problem is unique to South Africa and needs to be addressed as a matter of urgency. The amendments to the Criminal Procedure Act envisaged in this Discussion paper will require specialist training of magistrates and prosecutors, which will result in extra costs."

The Chairperson of the Society of Advocates, KwaZulu-Natal, similarly felt that the absence of pre-trial disclosure was rarely the cause of delays and that no amendments were necessary.

6.137 In the workshops a substantial number of participants expressed the view that the existing legislation is sufficient and that no amendments are necessary to facilitate defence disclosure. Some participants felt that the NDPP's proposals might create further opportunities for delays in the finalisation of cases and that the proposals complicated rather than simplified existing procedures. Strong reservations were expressed in respect of the distinction drawn between represented and unrepresented accused. It was argued that this in itself could lead to unnecessary complications where unrepresented accused later received representation. The constitutionality and feasibility of forcing defence disclosure was also raised as a concern. Nevertheless, some participants did feel that the State was disadvantaged by the absence of a duty of reciprocal disclosure and there was significant support for the proposal that a duty be imposed on the defence to disclose any special defence that he or she intends raising. It was suggested that although drawing adverse inferences from the absence of such disclosure was not necessarily appropriate, requiring the accused to make application to raise a previously undisclosed defence would provide a

sufficient mechanism for enforcement. It was also suggested by some participants that the prosecution should not be required to provide further particulars to the charge in view of the fact that the entire docket is in any event available to the defence.

Discussion and Recommendations

6.138 Many of the comments and submissions made to the Commission were framed in broad terms. In the view of the Commission the proposals made by the DPP need to be considered in three parts.

(a) Disclosure of Specific Defences and the Intention to Call Expert Evidence

The proposed sections 151A - 151D are confined to specific defences, in respect of which the accused in any event has a duty either to introduce or disclose the defence. Thus it is already well established that an alibi might be regarded with scepticism if it is not disclosed in advance. A defence raising justification for otherwise unlawful conduct, or suggesting that the accused was not criminally capable at the time the offence was committed, must be raised by the defence before the prosecution is required to exclude it. Moreover, there can be little doubt that where such an issue is raised by the defence at a late stage of the trial, the prosecution will be permitted a postponement, or be permitted to reopen its case if necessary, in order to deal with the issue. Similar considerations apply in relation to the calling of expert evidence. Accordingly in that respect the proposals made by the NDPP are not radical and merely seek to ensure that these matters are raised timeously so as to avoid delays in the trial. Insofar as the proposal seeks to enforce disclosure of a "defence that excludes mens rea", however, in the view of the Commission that is too broadly stated to be meaningful in a practical sense.

The Commission is of the view, for reasons that were traversed earlier in this report, that one cannot introduce rules of procedure that are applicable only to persons who are represented. It is not acceptable in principle, apart from the fact that it allows for circumvention of the rules.

Subject to those reservations, the Commission is of the view that there is

indeed merit in the proposal by the NDPP to introduce legislation to allow for a limited form of pre-trial disclosure by the defence along the lines proposed. The Commission accordingly recommends that legislation be introduced as reflected in Chapter 8 (which is a modified form of the NDPP's proposal).

(b) Codification of Prosecution Disclosure

As indicated earlier in this report the prosecution is now required to make disclosure to the defence of information in its possession. The Commission supports the view that it is desirable to codify the law in that regard, and accordingly recommends a legislative amendment in the form set out in Chapter 8 (which accords with the proposal made by the NDPP in that regard).

(c) General Defence Disclosure

The Commission is of the view that the proposal for reciprocal disclosure as proposed by the NDPP would be workable only if a distinction were to be made between those accused who are represented and those who are not.

The view has already been expressed earlier in this report that such a distinction is not desirable, and to make such a distinction would in any event enable the legislation to be circumvented. The Commission is also of the view that the disclosure provisions sought to be introduced would not be capable of being enforced in any meaningful way, and that to attempt to do so by purporting to draw an inference against an accused who does not comply with his or her obligations would be futile. Moreover, the complexity of the provisions and the potential for manipulation could contribute to further delays in the trial. The Commission is accordingly of the view that the proposals made by the NDPP in this regard cannot be recommended. The Commission is also of the view that merely because an accused person has access to the prosecution docket does not obviate the necessity in some cases for the prosecution to provide particulars to the charge. The accused is entitled to know what charge he faces and cannot be expected to glean that from the evidence that is available to the prosecution. Moreover, there might well be circumstances in which the accused will not have access to the full docket. Accordingly the Commission can see no good grounds for deleting

section 87 of the Act.

PART C

DEFENCE DISCLOSURE IN THE COURSE OF THE TRIAL

6.139 The Commission in its Discussion Paper noted that it could see no scope for imposing any duties of disclosure upon the accused during the course of the trial which do not already

exist at common law and in the rules and practices of cross-examination.

Comments and Workshop Participation

6.140 The Judges of the Natal Provincial Division are of the view “that there is no necessity for imposing further duties of disclosure during the course of trial”. The same view is taken by the National Council of Women SA.

Discussion and Recommendations

6.141 The Commission recommends that no legislative intervention is required in this regard.

CHAPTER 7

JUDICIAL PARTICIPATION AND TRIAL MANAGEMENT

GREATER JUDICIAL PARTICIPATION IN THE PROCESS OF THE TRIAL

7.1 In the research done on behalf of the Commission by Professor Steytler,³²² he raised the question whether the powers of judicial officers to question and call witnesses should be expanded to ensure better truth finding. He concluded that the truth-finding role of judicial conduct should be emphasised to enable the court to compensate for inadequate effort and skill on the part of the litigants.

7.2 As pointed out by Professor Steytler, the accepted approach to the power and duty of the court to question and call witnesses for the 'just decision in the case' is to be found in the dictum of Curlewis JA in *R v Hepworth*³²³:

By the words 'just decision in the case' I understand the legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied to both sides. A Judge is an administrator of justice, not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done ... The intention of section 247 [s 186 CPA 1977] seem to me to give a Judge in a criminal trial a wide discretion in the conduct of proceedings, so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake of technicality.³²⁴

7.3 There have been many decisions dealing with what that means in practice. A court may exercise its powers where to do so would benefit the defence³²⁵ and judicial intervention to the prejudice of the defence is not per se irregular,³²⁶ provided the judicial officer does not

³²² See chapter 3 paragraphs 3.10 *et seq.*

³²³ 1928 AD 265 at 277.

³²⁴ See also *R v Omar* 1935 AD 230 at 323 where Wessels CJ said when interpreting s 247 of the CPA of 1917 that the task of the judicial officer 'to see that substantial justice is done, to see that an innocent person is not punished and that a guilty person does not escape punishment.' See also *S v Gerbers* 1997 (2) SACR 601 (SCA) 606b.

³²⁵ See *S v Mosoinyane* 1988 (1) SACR 583 (T) 595a-d; N Steytler *The Undefended Accused on Trial* (1988) 150, 175-7.

³²⁶ See *Gerbers* supra in which the following dictum in *R v Hepworth* supra was approved: 'The discretion and power under s 247 [186 of CPA] can be exercised by a Judge, whether the effect thereof be in favour of the Crown or the accused person. I see no reason to distinguish between the exercise of that power on behalf of the accused or

assume the role of the prosecution.³²⁷ Whilst a judicial officer may not call witnesses from the outset in order to prove the allegations contained in the charge sheet,³²⁸ he or she may call evidence which has been omitted by mistake or is necessary in order to rectify some technical deficiency.³²⁹ On the other hand it would be an irregularity for the court to tell the prosecution how to conduct its case.³³⁰ Furthermore, a judicial officer must not by his or her conduct create the impression that he or she is biased in favour of the prosecution.³³¹

7.4 Quite evidently, achieving the appropriate balance between ensuring there has been a full enquiry and not causing prejudice (or apparent prejudice) to the parties is a most delicate process. The real question is whether legislative intervention can assist in achieving that balance.

7.5 In the Commission's view it is most doubtful that legislative intervention can assist in achieving the appropriate balance. None of the judicial pronouncements upon what is required in particular cases is such that they ought to be overridden by legislation, and the Act provides judicial officers with all the powers that might be necessary in order to intervene appropriately. The difficulty lies with the application of those powers in practice, and ultimately that will depend upon the qualities and skills of the particular judicial officer.

7.6 Professor Steytler's views that legislative intervention is required appear to be based largely on the approach that was taken by the court in *S v Matthys*³³², in which it was found that the manner in which a regional magistrate exercised his right to call and examine a witness was grossly irregular. It is clear that the court's objection in that case was not to the calling of the witness, or to judicial questioning, but to the manner in which this was done.

7.7 In the Commission's view the provisions of sections 167 and 186 of the Act provide

of the Crown, provided that the power is the purpose for the purpose of doing justice as between the prosecution and the accused.' See also *S v Van Dyk* 1998 (2) SACR 363 (W).

³²⁷ *S v Manicum* 1998 (2) SACR 400 (N).

³²⁸ *S v Jada* 1985 (2) SA 182 (EC); *S v Kwinika* 1989 (1) SA 896 (W).

³²⁹ *R v Hepworth* supra.

³³⁰ See *S v Matthys* supra.

³³¹ See *S v Matthys* supra.

³³² Supra.

all the powers that a judicial officer requires in order to intervene appropriately in the context of an adversarial process, and no attempt should be made to direct the judicial officer by legislative measures as to how he or she should exercise those powers in particular cases. There is, however, one respect in which the judicial officer could be placed in a more advantageous position to exercise those powers.

7.8 It is not practically feasible for the judicial officer to intervene in the conduct of a trial if he or she has no, or little, knowledge of the ambit of the prosecution or defence case. Clearly there is no basis upon which the judicial officer might enquire into the ambit of the defence case in advance or during the course of the trial, except to the extent that it has emerged during the course of the trial. However, the position is a little different in relation to the prosecution case.

7.9 Since the decision in *Shabalala v Attorney-General of Transvaal*,³³³ the prosecution has been required to disclose to the defence, in advance of the trial, all material information in the docket.³³⁴ Accordingly, both the prosecution and the defence are fully aware of the nature of the evidence that will be advanced by the prosecution in advance of the commencement of the trial.

7.10 There is no good reason why that material should not equally be available to the judicial officer. If it is made available to the judicial officer, it enables him or her to make an informed decision as to what evidence is available to the prosecution; the extent to which witnesses materially depart from previous statements; and the extent to which the power to call witnesses might usefully be exercised. There can be no prejudice to either the prosecution or the defence if the judicial officer is in possession of such information.

7.11 It is not suggested, however, that the information encompassed by that material should become admissible in evidence merely because it has been placed before the judicial officer. To the extent to which there are sound reasons for requiring facts to be proved in accordance with the rules of evidence, none of those reasons is detracted from merely because the contents of the document are made available to the judicial officer. There might, of course, be an objection that the judicial officer may be influenced by information

³³³ 1995 (2) SACR 761 (C).

³³⁴ This report does not purport to analyse precisely what material is required to be disclosed. The comments made in this report apply in relation to the material that is required to be disclosed irrespective of precisely what that encompasses.

that is not capable of being proved. While that objection has some merit, it must be borne in mind that in our system of criminal trial, in which the judicial officer is both judge and jury, it is common for information to come to the knowledge of the fact finder, from which he or she must disabuse the mind in reaching a conclusion. The safeguard to ensure that this is done lies in the requirement that reasons be given for factual conclusions. To have access to the information places the judicial officer in no different position to that in which he or she would be once the prosecution has opened its case fully, as it is permitted to do by section 150 of the Act.

Initial Recommendation

7.12 In its discussion paper the Commission recommended that the Criminal Procedure Act be amended to allow for the material to which the defence has access from the prosecution docket to be placed before the judicial officer to enable him or her properly to exercise the powers provided for in section 186, but that such information shall not constitute evidence unless and until it becomes admissible in the normal course.

Comments and Workshop Participation

7.13 The Judges of the Natal Provincial Division do not support the proposals allowing judicial officers access to the docket and note that “[t]he inherent dangers are obvious and we do not believe it is necessary to introduce such an amendment”.

7.14 The proposals pertaining to judicial access to the docket were also not supported by the CLS Committee. It was of the view that “[a]ccess to the docket has nothing to do with the ability to control the pace of litigation,” and expressed the view that:

the Law Commission appears to envisage that Magistrates will be nothing more than presiding prosecutors. According to the history of Magistrates in South Africa, they are drawn from the ranks of prosecutors. As a result, the Committee believes that there is a strong likelihood that accused persons will be faced with two prosecutors in Court instead of an independent presiding officer and a prosecutor.

It believes that a magistrate who has been involved in an investigation cannot be party to the decision making in relation to that matter since, once he/she has seen the docket, it is impossible for him/her to make an impartial decision. It cautioned against a methodology of drawing ideas from other countries and then seeking to apply parts of their legal systems to a South African system which does not easily align itself to the international systems.”

7.15 The Chairperson of the Society of Advocates of Kwa Zulu-Natal was also opposed to the disclosure of the docket (excluding the accused's statement) to the presiding officer and commented as follows:

To allow a judicial officer in the current circumstances insight into information which he/she may ultimately have to endeavour to disregard places a far too onerous duty on such a judicial officer. It is submitted that no good can come from trying to supplement the quality of the prosecution by handing the management of a trial to the judicial officer. The quality of the prosecution simply has to be improved.

7.16 The National Council of Women SA supports the proposal which allows judicial access to the docket.

7.17 In the workshops divergent views were expressed. Although some of the participants recognised the advantages to be gained from giving the presiding officer access to the docket, they were of the view that it would unduly influence the presiding officer and allow him or her to become too active in the trial with the result that his or her impartiality might be compromised. One of the participants was of the view that section 150 of the Criminal Procedure Act can be used to inform the court of the particulars of the case and that would suffice for the purposes of trial management. However, other participants supported the proposal and felt that a judge would be in a better position to do justice in the case and to control the pace of litigation if he or she had access to the docket. Furthermore, access to the docket would enable judicial officers to assist both the State and the accused. Another participant was of the view that if material detrimental to the accused was removed, judicial access to the docket would be acceptable. It was noted that in terms of the proposal judicial officers would not have access to any statement made by the accused. The view was also expressed that there needed to be a change in mind set which erroneously equated judicial management with partiality and that consequently a process of public education was necessary to enhance the legitimacy of the criminal justice system. The view was strongly expressed that there should be no distinction drawn between represented and unrepresented accused with regard to the application of the proposed legislation and it was also suggested that if the proposal were to be accepted, access to the material should be allowed only to the presiding officer and not to assessors. A substantial number of participants felt that judicial access to the docket would assist the court in its truth seeking function.

Discussion and Recommendations

7.18 The Commission is of the view that some of those who oppose the proposal might

have misunderstood its nature and effect. There is no suggestion that the judicial officer should participate in the investigation of the allegations against the accused, or play any role in the decision to prosecute, as appears to be assumed by the CLS Committee. The proposal is only that the judicial officer should, at the commencement of the trial, be placed in possession of the material that by that stage is in the hands of both parties, which will enable him or her to evaluate how to conduct the trial. It must be borne in mind that one of the functions of the judicial officer is to control the conduct of the trial and the present proposal does not purport to introduce any innovation in that respect: it merely aims at equipping the judicial officer to perform that task more effectively.

7.19 The Commission is of the view that the concerns that were expressed at the fact that the proposal might compromise the impartiality of the judicial officer have been overstated. It is reiterated that the decision of the judicial officer will continue to be required to be based on the admissible evidence placed before him or her and motivated by proper reasons. The Commission is of the view that the proposal will assist in the proper management of the trial and adheres to its initial recommendation. The legislative amendment that is recommended is set out in Chapter 8.

CASE AND TRIAL MANAGEMENT

7.20 It has been pointed out earlier in this report that the desirability of providing for a conference to be held before the commencement of the trial, as occurs in civil litigation, has been recognised in other jurisdictions. The purpose of such a conference is to attempt to limit the issues in the trial and generally to facilitate the efficient disposal of the matter. To some degree section 115 of the Criminal Procedure Act is directed towards that purpose but the difficulty arises when an accused chooses not to co-operate. That difficulty will remain if provision is made for the holding of a pre-trial conference and the accused chooses not to co-operate. It has already been pointed out that there is no effective means of compelling co-operation.

7.21 While section 115 of the Act facilitates defence disclosure if the defence chooses to make it, such disclosure is generally made by unrepresented accused but not by represented accused, whose lawyers recognise that there is little advantage to the defence in doing so. It has been suggested that an accused who chooses not to co-operate in limiting the issues should be penalised when it comes to sentence, or that an accused who does co-operate should be rewarded. Those considerations raise matters of principle that have been dealt

with elsewhere in relation to plea-bargaining.

7.22 While the Commission's view is that no realistic mechanism exists for compelling an accused to co-operate meaningfully in a pre-trial conference, there can be no disadvantage in making express provision for such a procedure in the Act.

7.23 Section 625.1 of the Canadian Criminal Code makes provision for such a procedure. The procedure is mandatory before a jury trial, but optional in other cases. It reads as follows;

Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which , or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior tot he proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matter, and to make arrangement for decisions on those matters.

Initial Recommendation

7.24 In its Discussion Paper the Commission recommended that section 115 of the Criminal Procedure Act be amended to enhance its effectiveness, and that the Act be amended to provide a formal procedure for the holding of pre-trial conferences.

Comments and Workshop Participation

7.25 Flemming DJP submitted that while in principle a pre-trial conference has certain advantages two requirements must be met in order to realise these advantages:

Firstly the pre-trial conference must take place before a judicial officer other than the magistrate or judge who conducts the trial and, obviously, only after the police investigation has been completed. Secondly, it requires that an accused be required to tell the "court" which conducts the pre-trial conference what his answer is on a particular feature and what his reason is for not admitting the fact.

He commented further that:

[t]here is also a possibility to legislate that only the positive results of such a conference will be placed before the trial court and, secondly, that an explanation of a refusal to admit shall not come before the trial court at all or may be placed before

the trial court only by way of a report of the presiding official which is accepted by the defence.

7.26 The Deputy Director of Public Prosecutions, Kwa Zulu Natal expressed the view that whilst providing for a pre-trial conference was “a positive step in the right direction” the fact that it would only take place after plea to a large extent limited the benefit to be derived therefrom. He added that:

I believe that all concerned need to be encouraged to apply a ‘pro active’ approach to criminal trials from the outset. There needs, for example, to be an enquiry as to the intended plea of an accused. In far too many cases a plea of guilty is only recorded after many adjournments with the consequent costs attached thereto. I can see no reason why judicial officers should not be required to enquire of accused persons, what they intend to plead, once they have been informed of the charge. The right not to disclose should be accompanied by an invitation to disclose. I believe that in many cases an accused would disclose his intention to plead guilty if given the opportunity to do so.

7.27 The Judges of the Natal Provincial Division supported the Commission’s recommendations in relation to case and trial management. The National Council of Women SA supported the pre-trial conference proposals but noted that “the presiding officers should be obliged to inform the accused of the rights to silence and its consequences, and to question the accused where there is failure to disclose the basis of the defence”.

7.28 The Chairperson of the Society of Advocates of KwaZulu-Natal was opposed to the proposals on the basis that they would compromise the impartiality of judicial officers in the regional and magistrates’ courts. However, he had no objection to the proposed amendment to s 115(1)(a) provided that should an accused elect to remain silent or refuse to answer any questions no adverse inference would be drawn.

7.29 One respondent³³⁵ noted that the conduct of pre-trial conferences in chambers could create problems in practise if the accused was in custody or was a dangerous criminal. The CLS Committee expressed the view that “[a]t present, Courts cannot progress ordinary trials with any efficiency and are unlikely to be able to conduct pre-trial conferences”. It questioned whether a prosecutor who had been involved in pre-trial proceedings could be allowed to be involved in the trial.

7.30 At the workshops many of the participants were of the view that there may be a need

for pre-trial conferences in long and complicated cases but overall the practicality of these provisions were questioned. They foresaw practical problems if the defence refuses to attend or co-operate in the discussions. A participant suggested that a judge other than the presiding judge, preside over the proceedings of a pre-trial conference and that the defence and prosecution be given the opportunity to disclose everything in an atmosphere free from intimidation and at a place where the proceedings may be recorded. In one of the discussion groups much of the discussion focussed on whether the proposed pre-trial conference provisions should apply equally to both represented and unrepresented accused. Some felt that the section would be to the advantaged of the unrepresented accused whilst others felt that it would place undue pressure on the unrepresented accused. The Group concluded that it would be undesirable to distinguish between represented and unrepresented accused. There was, however, general consensus that the proposal should be included in legislation notwithstanding its limited application.

7.31 With regard to the proposed amendment to section 115 of the Criminal Procedure Act the general view was that once an accused person has clearly elected to exercise his or her constitutional right to remain silent it would be unlawful to continue questioning the accused.

Discussion and Recommendations

7.32 There is considerable merit in most of the submissions and comments received by the Commission relating to the limits upon the effectiveness of provisions for the holding of a pre-trial conference. Nevertheless, there will be some cases at least in which it could be of material assistance in the conduct of the trial. Bearing in mind that the holding of such a conference will not be compulsory, but is in the discretion of the judicial officer, the Commission is of the view that it is desirable to provide a formal structure for that to take place. The Commission accordingly adheres to its initial recommendation that legislation be introduced on this issue as set out in Chapter 8.

7.33 With regard to the proposal to amend section 115 of the Criminal Procedure Act the Commission is of the view that the judicial officer should be obliged to ask the accused whether he or she wishes to make a statement outlining the basis of his or her defence, but if the accused chooses not to do so the judicial officer cannot be obliged to question him or her further: whether or not the judicial officer does so is a matter that should be left in his or her discretion, depending upon the particular circumstances.

7.34 Accordingly the Commission recommends that section 115 be amended only to the extent set out in Chapter 8.

CHAPTER 8

RECOMMENDATIONS

8.1 The recommendations of the Commission have been consolidated in a Draft Bill which

is Appendix B to this report. The Bill reflects the extent to which the recommended amendments alter existing legislation, where applicable.

ADVERSE INFERENCES FROM PRE-TRIAL SILENCE

8.2 It is recommended that the Criminal Procedure Act be amended to permit a court to draw an appropriate inference from the pre-trial silence of a suspect in certain circumstances. It is recommended that the following chapter, which is based upon the provisions of sections 34, 36 and 37 of the Criminal Justice and Public Order Act 1994 (England), be inserted:

CHAPTER 23A INFERENCES FROM ACCUSED'S SILENCE

Effect of accused's failure to mention facts when questioned or charged

- 207A (1) Where in criminal proceedings evidence is given that the accused—
- (a) at any time before he or she was charged with an offence, on being questioned by a police officer substantially in accordance with the provisions of a Code of Police Conduct that has been promulgated in terms of the Police Act No. 7 of 1958, and on being informed of the provisions of subsection (2), in an attempt to determine whether or by whom the offence had been committed, failed to mention any fact relied on in his or her defence in such criminal proceedings; or
 - (b) on being charged with the offence or officially informed by such police officer that he or she might be prosecuted for the offence and that the court might draw an inference contemplated in subsection (2), failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so charged or informed,
- the provisions of subsection (2) shall apply.
- (2) Whenever in criminal proceedings the court has to decide whether -
- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 - (b) the accused is guilty of the offence charged or of another offence which constitutes a competent verdict on the offence charged
- the court may draw such inference from the accused's failure contemplated in subsection (1) as may be reasonable and justifiable in the circumstances.

- (3) Subject to any directions by the court, evidence tending to establish the failure referred to in subsection (1) may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences, or the charging of offenders.
- (5) This section does not–
 - (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct of which he or she is charged, in so far as evidence thereof would be admissible apart from this section; or
 - (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

Effect of accused's failure or refusal to account for objects, substances or marks

- 207B (1) (a) Where a person is arrested by a police officer, and there is–
- (i) on his or her person;
 - (ii) in or on his or her clothing or footwear;
 - (iii) otherwise in his or her possession;
 - (iv) in any place in which he or she is at the time of the arrest.
- any object, substance or mark, or there is any mark on such object, and that police officer reasonably believes that the presence of the object, substance or mark may be attributable to the person arrested in the commission of an offence specified by the police officer, the police officer may inform the arrested person that he or she so believes and requests that person to account for the object, substance or mark.
- (b) If the arrested person referred to in paragraph(a), fails or refuses to account for the object, substance or mark, the provisions of subsection (2) shall apply in any criminal proceedings against that person.
- (2) Whenever in criminal proceedings the court has to decide whether–
- (a) the accused may be discharged at the close of the case for

the prosecution in terms of section 174;

(b) the accused is guilty of the offence charged or of another offence which constitutes a competent verdict on the offence charged

the court may draw such inference from the accused's failure or refusal contemplated in subsection (1), as may be reasonable and justifiable in the circumstances.

(3) Subsections (1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection (1)(a) what the effect of this section would be if he or she failed or refused to comply with the request.

(4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.

(5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for the presence of an object, substance or mark, or from the condition of clothing or footwear, which could properly be drawn apart from this section.

Effect of accused's failure or refusal to account for presence at a particular place

207C (1) Where—

(a) a person arrested by a police officer was found by him or her at a place at or about the time the offence for which the person was arrested is alleged to have been committed; and

(b) the police officer reasonably believes that the presence of the person at that place and time may be attributable to the person's participation in the commission of the offence; and

(c) the police officer informs the person that he or she so believes, and requests the person to account his or her presence; and

(d) the person fails or refuses to do so.

then, if in any criminal proceedings against that person, evidence of those matters is given, the provisions of subsection (2) shall apply.

(2) Whenever in criminal proceedings the court has to decide whether—

(a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;

(b) the accused is guilty of the offence charged or of another offence which constitutes a competent verdict on the offence charged

the court may draw such inference from the accused's failure or refusal contemplated in subsection(1) as may be reasonable and justifiable in the circumstances.

(3) Subsections (1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection(1) what the effect of this section would be if he or she failed or refused to comply with the request.

(4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.

(5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for his or her presence at a place which could properly be drawn apart from this section.

ADMISSIONS AND CONFESSIONS

8.3 It is recommended that the Criminal Procedure Act should be amended by deleting sections 218(2) and 219A, and amending section 217 to read as follows:

Admissibility of confession or admission by accused

(1) Evidence of any confession or admission made orally, in writing or by conduct by any person in relation to the commission of any offence shall, if such confession or admission is proved to have been freely and voluntarily made by such person in his or her sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.

(2) Any confession or admission which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him or her

(a) if he or she adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any statement made by him or her either as part of or in connection with such confession or admission; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

and by amending section 121(5)(aA) to read as follows for purposes of consistency:

- (aA) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and the plea of guilty and any confession or admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea, confession or admission was incorrectly recorded.

DEFENCE DISCLOSURE

8.4 It is recommended that the Criminal Procedure Act be amended by the addition of the following sections:

Notice of intention to raise certain defences and to call expert evidence

- 151A. (1) (a) An accused person may not, without the leave of the court, adduce evidence in support of the defence commonly called an alibi, unless, at any time before or during plea proceedings, the accused has given notice to the prosecution of his or her intention to do so and furnished in such notice particulars of the defence.
- (b) Without derogating from subsection (a), an accused person may not, without the leave of the court, call any other person to give evidence in support of an alibi unless the notice under subsection (a) includes the name and address of such person or, if that information is not known to the accused, such other information as may enable the prosecution to identify and locate such person.
- (c) For purposes of this section "evidence in support of an alibi" means evidence tending to show that, by reason of the presence of the accused at a particular place or in a particular area at a particular time he or she was not at the place where the offence is alleged to have been committed at the time of its alleged commission.
- (2) (a) An accused person may not, without the leave of the court, allege at criminal proceedings that he or she was by reason of mental illness or mental defect not criminally responsible for the offence charged unless, at any time before or during plea proceedings, he or she has given notice to the prosecution of such allegation.
- (b) Where such notice is given, or if the court grants leave under paragraph(a), the court shall direct in terms of section 78(2) that the matter be enquired into and be reported on in accordance with the provisions of section 79.

- (3) An accused person may not, without the leave of the court, rely upon a statutory or other ground of justification for conduct that is alleged to have constituted an offence unless, at any time before or during plea proceedings, the accused has given notice to the prosecution of such ground of justification.
- (4) (a) A notice required to be given to the prosecution under this section shall, where it is given before plea proceedings, be given in writing to the registrar or the clerk of the court concerned, as the case may be.
- (b) Upon receipt of such notice the registrar or clerk of the court, as the case may be, shall forthwith cause it to be delivered to the office of the prosecutor concerned.
- (c) Any notice purporting to have been given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been authorised by the accused.
- (5) (a) A court may not refuse leave under subsection (1), (2) or (3), as the case may be, if it appears to the court that the accused was not informed –
- (i) in the notice referred to in section 144(4)(a)(i); or
- (ii) by the magistrate or regional magistrate committing the accused to the superior court as contemplated by section 144(4)(a)(ii); or
- (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings
- of the requirements of the relevant subsection.
- (b) For purposes of subsection (a) an endorsement on the said notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or magistrate on the record of the plea proceedings, that the accused was informed of those requirements, shall constitute prima facie proof that the accused was so informed.

CODIFICATION OF PROSECUTION DISCLOSURE

8.5 It is recommended that the Criminal Procedure Act be amended by inserting the following Chapter after section 104:

CHAPTER 14A

PROSECUTION DISCLOSURE

Disclosure of material contained in police docket

- 104A. (1) An accused may at any stage request the prosecution to disclose the following material in possession of the prosecution or contained in the police docket:
- (a) Documents which tend to exculpate the accused;
 - (b) statements of witnesses, whether or not the prosecution intends to call such witnesses;
 - (c) any other material that is reasonably required to enable the accused to prepare his or her defence.
- (2) Copies of the documentation or material requested under subsection (1), shall be delivered to the accused or, where impracticable, the accused shall be allowed to inspect such documentation or material at the court: Provided that the accused may be denied access to the requested documentation and material or part thereof where—
- (a) it is not reasonably required in order to enable the accused to exercise his or her right to a fair trial;
 - (b) disclosure could lead to the disclosure of the identity of an informer or state secrets; or
 - (c) there is reason to believe that such disclosure may prejudice the course of justice, whether by interference with evidence or witnesses, or otherwise.

DEFENCE DISCLOSURE DURING THE COURSE OF THE TRIAL

8.6 The Commission recommends that no legislative intervention is necessary with regard to this issue.

JUDICIAL ACCESS TO THE DOCKET

8.7 It is recommended that the Criminal Procedure Act be amended by adding the following provision:

Disclosure of documentation to court

104B (1) The presiding judge, regional magistrate or magistrate may at any

stage of the proceedings, for the purpose of assessing how to conduct the proceedings, require that the prosecution make available to him or her the documentation and material which the accused would be entitled to receive in terms of section 104A: Provided that a statement by an accused in those proceedings shall not be made available to the said presiding officer unless it has been admitted or proved; and provided further that unless the accused has already had access to the said documentation or material the accused shall simultaneously be given access to it.

- (2) The documentation or material received in terms of subsection(1) shall not form part of the record and shall have no evidential value until such time as it has been properly admitted or proved.

TRIAL MANAGEMENT

8.8 It is recommended that the Criminal Procedure Act be amended by amending section 115 to read as follows:

- (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be shall—
- (a) inform the accused—
- (i) that he or she has a right to remain silent;
(ii) of the consequences of not remaining silent;
(iii) that he or she is not compelled to make any confession or admission that could be used in evidence against him or her; and
- (b) ask **[him]** the accused whether he or she wishes to make a statement indicating the basis of his or her defence.
- (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he or she denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
- (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and
- (i) shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty; and
- (ii) may enquire from the accused whether any other allegation,

may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

and by adding the following Chapter after section 149:

CHAPTER 21A

PRE-TRIAL CONFERENCE

Court may direct that pre-trial conference be held

- 149A.** (1) The presiding judge, regional magistrate or magistrate may, on the application of the prosecutor or the accused or at his or her own instance, at any time after the accused has entered a plea of not guilty and before any evidence in respect of any particular charge has been led, direct the prosecutor and the accused and, if the accused is represented, his or her legal adviser, to appear before him or her in chambers to consider—
- (a) the identification of issues not in dispute;
 - (b) the possibility of obtaining admissions of fact with a view to avoiding unnecessary proof;
 - (c) where the accused indicates his or her intention of raising a defence contemplated in section 151A, the disclosure of such defence;
 - (d) where the accused indicates his or her intention of raising an alibi defence, the disclosure of sufficient details to enable the prosecution to investigate such alibi defence;
 - (e) the necessity of calling or disposing of expert evidence;
 - (f) such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner.
- (2) The court shall record in open court the agreements entered into and the concessions made.
- (3) The accused shall be required by the court to declare whether he or she confirms such agreement or concession and if he or she so confirms, such agreement or concession shall be binding, unless retracted at the trial to prevent manifest injustice.
- (4) The failure of an accused to disclose sufficient details of an alibi defence to enable the prosecution to investigate the alibi may be a factor taken into account by the trial court in determining the weight of the alibi defence.

- (5) The accused's co-operation at such pre-trial proceedings may be taken into account as a mitigating factor by the trial court for purposes of sentencing.

APPENDIX A

PROPOSALS OFFERED FOR COMMENT IN DISCUSSION PAPER

REPUBLIC OF SOUTH AFRICA

BILL

To amend the Criminal Procedure Act, 1977, so as to make provision for the disclosure of material in possession of the prosecution or contained in the police docket; to further regulate plea proceedings; to make provision for the holding of a pre-trial conference where an accused pleads not guilty; for an accused to give notice if he or she intends to raise certain defences or to call expert evidence; for the court in criminal proceedings to draw inferences from the accused's failure to mention certain facts when questioned by the police or charged, his or her silence at trial, his or her failure or refusal to account for certain objects, substances or marks, or his or her failure or refusal to account for his or her presence at a particular place; to further regulate the admissibility of admissions and confessions made by an accused; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:–

[PART A]

POLICE QUESTIONING AND DEFENCE DISCLOSURE FROM THE TIME SUSPICION FALLS UPON THE ACCUSED UNTIL THE TIME HE OR SHE IS INDICTED

OPTION 1

1. **Insertion of Chapter 23A in Act 51 of 1977**

- (a) **The following Chapter is hereby inserted in the principal Act after Chapter 23:**

CHAPTER 23A

INFERENCES FROM ACCUSED'S SILENCE

Effect of accused's failure to mention facts when questioned or charged

207A. (1) Where in criminal proceedings evidence is given that the accused–

- (a) at any time before he or she was charged with an offence, on being questioned under warning and on being informed of the provisions of subsection(2) by a police officer in an attempt to determine whether or by whom the offence had been committed, failed to mention any fact relied on in his or her defence in such criminal proceedings; or
- (b) on being charged with the offence or officially informed by such police officer that he or she might be prosecuted for the offence and that the court might draw an inference contemplated in subsection(2), failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed,

the provisions of subsection(2) shall apply.

(2) Whenever in criminal proceedings the court has to decide whether–

- (b) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
- (b) the accused is guilty of the offence charged; or
- (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged.

the court may draw such inference from the accused's failure contemplated in subsection(1), as may be reasonable and justifiable in the circumstances.

(3) Subject to any directions by the court, evidence tending to establish the failure referred to in subsection(1), may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.

(5) This section does not–

- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct of which he or she is charged, in so far as evidence thereof would be admissible apart from this section; or
- (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

Effect of accused's silence at trial

- 207B.** (1) This section applies in criminal proceedings in respect of any accused who has attained the age of 14 years, but does not apply–
- (a) where the accused's guilt is not in issue;
 - (b) where it appears to the court that the physical or mental condition of the accused makes it undesirable for him or her to give evidence;
 - (c) if, at the conclusion of the case for the prosecution, the accused or his or her legal adviser informs the court that the accused will give evidence.
- (2) Where the court has asked the accused whether he himself or she herself intends to give evidence contemplated in section 151(1)(b), and–
- (a) if the accused answers in the negative but decides, after evidence has been given on behalf of the defence, to give evidence himself or herself; or
 - (b) if the accused chooses not to give evidence, or having taken the oath or made an affirmation, without good cause, refuses to answer any question,
- the court may draw such inference from the accused's conduct as may be reasonable and justifiable in the circumstances.
- (3) In determining whether an accused is guilty of the offence charged or of another offence which constitutes a competent verdict on the offence charged, the court may draw such inferences from the accused's decision and failure referred to in subsection(2)(a) and (b), as may be reasonable and justifiable in the circumstances.
- (4) This section does not render the accused compellable to give evidence on his or her own behalf, and he or she shall accordingly not be guilty of contempt of court by reason of his or her failure to do so.
- (5) For the purposes of this section an accused who, having taken the oath or made an affirmation, refuses to answer any question shall be taken to do so without good cause unless–
- (a) he or she is entitled to refuse to answer the question on the ground of privilege; or
 - (b) the court in the exercise of its general discretion, excuses the accused from answering it.

Effect of accused's failure or refusal to account for objects, substances or marks

- 207C.** (1) (a) Where a person is arrested by a police officer, and there is—
- (i) on his or her person;
 - (ii) in or on his or her clothing or footwear;
 - (iii) otherwise in his or her possession;
 - (iv) in any place in which he or she is at the time of the arrest,
- any object, substance or mark, or there is any mark on such object, and that police officer reasonably believes that the presence of the object, substance or mark may be attributable to the person arrested in the commission of an offence specified by the police officer, the police officer may inform the arrested person that he or she so believes and requests that person to account for the object, substance or mark.
- (b) If the arrested person referred to in paragraph(a), fails or refuses to account for the object, substance or mark, the provisions of subsection(2) shall apply in any criminal proceedings against that person.
- (2) Whenever in criminal proceedings the court has to decide whether—
- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 - (b) the accused is guilty of the offence charged; or
 - (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged.
- the court may draw such inference from the accused's failure or refusal contemplated in subsection(1), as may be reasonable and justifiable in the circumstances.
- (3) Subsections(1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection(1)(a), what the effect of this section would be if he or she failed or refused to comply with the request.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for the presence of an object, substance or mark, or from the condition of clothing or footwear, which could properly be drawn apart from this section.

Effect of accused's failure or refusal to account for presence at a particular place

207D. (1) Where—

- (a) a person arrested by a police officer was found by him or her at a place at or about the time the offence for which the person was arrested is alleged to have been committed; and
- (b) the police officer reasonably believes that the presence of the person at that place and time may be attributable to the person's participation in the commission of the offence; and
- (c) the police officer informs the person that he or she so believes, and requests the person to account for his or her presence; and
- (d) the person fails or refuses to do so.

then, if in any criminal proceedings against that person, evidence of those matters is given, the provisions of subsection(2) shall apply.

(2) Whenever in criminal proceedings the court has to decide whether—

- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
- (b) the accused is guilty of the offence charged; or
- (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged.

the court may draw such inference from the accused's failure or refusal contemplated in subsection(1), as may be reasonable and justifiable in the circumstances.

- (3) Subsections(1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection(1), what the effect of this section would be if he or she failed or refused to comply with the request.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for his or her presence at a place which could properly be drawn apart from this section.

- (b) **Section 151 of the principal Act is hereby amended by the substitution for paragraph (b) of subsection(1) of the following paragraph:**

- (b) The court shall also ask the accused whether he himself or she herself intends giving evidence on behalf of the defence, and[-
- (i)] if the accused answers in the affirmative, he or she shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence]; **or**
 - (ii) **if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances].**

(c) **ALTERNATIVE PROPOSAL TO SECTION 151 - Amendment of section 151 of Act 51 of 1977**

Section 151 of the principal Act is hereby amended by the deletion of paragraph (b) of subsection(1).

OPTION 2 - NO ADVERSE INFERENCE FROM FAILURE TO DISCLOSE BY THE ACCUSED

2. **It is recommended that no change be made to the common law position concerning the drawing of inferences from silence.**

QUESTIONING OF SUSPECTS - POLICE CONDUCT

3. **It is recommended that a police code of conduct for the treatment of persons in custody be incorporated in regulations published in terms of the Police Act and that the Police Services take responsibility to develop such regulations.**

ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS

4. (a) **Section 121 of the principal Act is hereby amended by the substitution for paragraph (aA) of subsection(5) of the following paragraph:**

(aA) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and the plea of guilty and any confession or admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea, confession or admission was incorrectly recorded.

(b) The following section is hereby substituted for section 217 of the principal Act:

Admissibility of confession or admission by accused

(1) Evidence of any confession or admission made orally, in writing or by conduct by any person in relation to the commission of any offence shall, if such confession or admission is proved to have been freely and voluntarily made by such person in his or her sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence[: **Provided-**

(a) **that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and**

(b) **that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-**

- (i) **be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and**
- (ii) **be presumed, unless the contrary is proved, to have been freely and voluntarily made by such**

person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection(1).

(3)] (2) Any confession or admission which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him or her

(a) if he or she adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any **[oral or written]** statement made by him or her either as part of or in connection with such confession or admission; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person..

(3) Should an accused give evidence or call a witness in his or her defence, the evidence of the accused or any admission made by or on behalf of the accused and the evidence of any such witness during a trial within the trial relating to the contents of the confession, shall be admissible against the accused if it is relevant to the credibility of the accused.

(c) Section 218 of the principal Act is hereby amended by the deletion of subsection(2).

(d) Sections 219 and 219A of the principal Act are hereby deleted.

DEFENCE DISCLOSURE FROM THE TIME THE ACCUSED IS INDICTED UNTIL THE PLEA

OPTION 1

5. The Commission's provisional view is that no legislative intervention is necessary at this stage in relation to defence disclosure after the accused has been indicted and until the time he or she is called upon to plead.

OPTION 2

Insertion of sections 151A to 151D in Act 51 of 1977

6. The following sections are hereby inserted in the principal Act after section 151:

Notice of alibi

- 151A.** (1) This section shall apply to all trials before any court where the accused is represented by a legal representative.
- (2) An accused may not, without the leave of the court, adduce evidence in support of a defence, commonly called an alibi, unless, at any time before plea proceedings or during plea proceedings, the accused, or his or her legal adviser, gives notice of particulars of the alibi.
- (3) Without limiting subsection(2), the accused may not, without the leave of the court, call any other person to give evidence in support of an alibi unless—
- (a) the notice under subsection(2) includes the other person's name and address or, if the other person's name or address is not known to the accused at the time he or she gives notice, any information in his or her possession that might be of material assistance in finding the other person;
- (b) if the other person's name or address is not included in the notice, the court is satisfied that the accused, before giving notice, took and thereafter continued to take all reasonable steps to ensure that the other person's name and address would be ascertained; and
- (c) if the other person's name or address is not included in the notice, and the accused subsequently discovers the other person's name and address or receives information that might be of material assistance in finding that other person, he or she immediately gives notice of the name, address or other information.
- (4) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed —
- (i) in the notice contemplated in section 144(4)(a)(i);
- (ii) by the magistrate or regional magistrate committing the

- accused to the superior court contemplated in section 144(4)(a)(ii); or
- (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings, of the requirements of subsections(2), (3) and (7).
- (b) For purposes of paragraph(a), an endorsement on the said notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or magistrate on the record of the plea proceedings that the accused was informed of those requirements, is evidence that the accused was so informed.
- (5) Any evidence to disprove an alibi may, subject to any direction by the court, be given before or after evidence is given in support of the alibi.
- (6) Any notice purporting to be given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been given by the authority of the accused.
- (7) (a) A notice under this subsection(2) before plea proceedings, shall be given in writing to the registrar or the clerk of the court concerned, as the case may be.
- (b) The registrar or clerk of the court, as the case may be, shall forthwith hand such notice to the prosecutor concerned.
- (8) For the purposes of this section “evidence in support of an alibi” means evidence tending to show that, by reason of the presence of the accused at a particular place or in a particular area at a particular time, the accused was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Notice of allegation that accused is by reason of mental illness or mental defect not criminally responsible for the offence charged

- 151B.** (1) This section shall apply to all trials before any court.
- (2) (a) The accused or his or her legal adviser may not, without the leave of the court, allege at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged unless, at any time before plea proceedings or during plea proceedings, the accused gives notice of such allegation.
- (b) Where the accused gives notice or if the court grants leave under paragraph(a), the court shall direct in terms of section 78(2) that the matter be enquired into and be reported on in accordance with the provisions of section 79.
- (3) (a) If the accused is not represented by a legal adviser, the court

may not refuse leave under this section if it appears to the court that the accused was not informed –

- (i) in the notice contemplated in section 144(4)(a)(i);
 - (ii) by the magistrate or regional magistrate committing the accused to the superior court contemplated in section 144(4)(a)(ii); or
 - (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings, of the requirements of subsections(2), and (6).
- (b) For the purposes of paragraph(a), an endorsement on the said notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or magistrate on the record of the plea proceedings that the accused was informed of those requirements, is evidence that the accused was so informed.
- (4) Any evidence tendered to disprove an allegation contemplated in this section, may, subject to any direction by the court, be given before or after evidence is given in support of the allegation.
- (5) Any notice purporting to be given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been given by the authority of the accused.
- (6) (a) A notice under this subsection(2) before plea proceedings, shall be given in writing to the registrar or the clerk of the court concerned, as the case may be.
- (b) The registrar or clerk of the court, as the case may be, shall forthwith hand such notice to the prosecutor concerned.

Notice of intention to raise certain defences

- 151C.** (1) This section shall apply to all trials before any court where the accused is represented by a legal adviser.
- (2) An accused or his or her legal adviser may not, without the leave of the court, raise a–
- (a) statutory or any other ground of justification; or
 - (b) defence which excludes *mens rea*
- unless, at any time before plea proceedings or during plea proceedings, the accused gives notice of such ground of justification or defence.
- (3) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed –
- (i) in the notice contemplated in section 144(4)(a)(i);

- (ii) by the magistrate or regional magistrate committing the accused to the superior court contemplated in section 144(4)(a)(ii); or
 - (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings, of the requirements of subsections(2), and (6).
- (b) For the purposes of paragraph(a), an endorsement on the said notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or magistrate on the record of the plea proceedings that the accused was informed of those requirements, is evidence that the accused was so informed.
- (4) Any evidence tendered to disprove the evidence given or statements made by a witness under this section, may, subject to any direction by the court, be given before or after evidence is given by such witness.
- (5) Any notice purporting to be given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been given by the authority of the accused.
- (6) (a) A notice under subsection(2) before plea proceedings, shall be given in writing to the registrar or clerk of the court concerned, as the case may be.
(b) The registrar or clerk of the court, as the case may be, shall forthwith hand such notice to the prosecutor concerned.

Notice to call expert witness

- 151D.** (1) This section shall apply to all trials before any court where the accused is represented by a legal representative.
- (2) An accused or his or her legal adviser may not, without the leave of the court, call an expert witness unless, at any time before plea proceedings or during plea proceedings, the accused discloses the names and addresses of such expert witness, and copies of expert reports upon which the defence proposed to rely on at the trial.
 - (3) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed –
 - (i) in the notice contemplated in section 144(4)(a)(i);
 - (ii) by the magistrate or regional magistrate committing the accused to the superior court contemplated in section 144(4)(a)(ii); or
 - (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings, of the requirements of subsections(2), and (6).
 - (b) For purposes of paragraph(a), an endorsement on the said

notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or magistrate on the record of the plea proceedings that the accused was informed of those requirements, is evidence that the accused was so informed.

- (4) Any evidence tendered to disprove the evidence given or statements made by an expert witness under this section, may, subject to any direction by the court, be given before or after evidence is given by such expert witness.
- (5) Any notice purporting to be given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been given by the authority of the accused.
- (6) (a) A notice under subsection (2) before plea proceedings, shall be given in writing to the registrar or clerk of the court concerned, as the case may be.
(b) The registrar or clerk of the court, as the case may be, shall forthwith hand such notice to the prosecutor concerned.

DEFENCE DISCLOSURE IN THE COURSE OF THE TRIAL

8. The Commission sees no scope for imposing any duties of disclosure upon the accused in the course of the trial which do not already exist at common law and in the rules and practices of cross-examination.

PART B

JUDICIAL PARTICIPATION IN THE PROCESS OF THE TRIAL

OPTION 1

9. (a) The following Chapter is hereby inserted in the principal Act after section 104:

CHAPTER 14A

PROSECUTION AND DEFENCE DISCLOSURE

Disclosure of material contained in police docket

104A. (1) An accused may at any stage request the prosecution to disclose the following material in possession of the prosecution or contained in the police docket:

- (a) Documents which tend to exculpate the accused;
- (b) statements of witnesses, whether or not the prosecution intends to call such witnesses;
- (c) any other material that is reasonably required to enable the accused to prepare his or her defence.

(2) Copies of the documentation or material requested under subsection (1), shall be delivered to the accused or, where impracticable, the accused shall be allowed to inspect such documentation or material at the court: Provided that the accused may be denied access to the requested documentation and material or part thereof where—

- (a) it is not reasonably required in order to enable the accused to exercise his or her right to a fair trial;
- (b) disclosure could lead to the disclosure of the identity of an informer or state secrets; or
- (c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

(b) **Alternative proposal for paragraph(c):**

- (c) there is reason to believe that such disclosure may prejudice the course of justice, whether by interference with evidence or witnesses, or otherwise.

Disclosure of documentation to court

104B (1) The court may at any stage of the proceedings, for the purpose of assessing how to conduct the proceedings, require that the prosecution make available to it copies or permit inspection of the documentation or material which the accused would be entitled to receive in terms of section 104A: Provided that a statement by an accused in those proceedings shall not be made available to the court except where it has been admitted or proved ; Provided further that

unless the accused has already had access to the said documentation or material, the accused shall simultaneously receive the same copies or access .

- (2) The documentation or material received in terms of subsection(1) shall not form part of the record and shall have no evidential value unless it has been properly admitted or proved.

OPTION 2

10. Insertion of Chapter14A in Act 51 of 1977.

CHAPTER 14A

DISCLOSURE

Application of this Chapter and general interpretation

- 104A.** (1) This Chapter shall apply where—
- (a) the accused is charged with a Schedule 1 offence—
 - (i) at a summary trial contemplated in section 75;
 - (ii) in an indictment contemplated in section144;
 - (b) the accused pleads not guilty to the charge; and
 - (c) the accused is represented by a legal adviser.
- (2) Where more than one accused is charged, the provisions of this Chapter shall apply separately in relation to each of the accused.
- (3) References to material are to material of all kind, and includes in particular references to—
- (a) any information; and
 - (b) any object.
- (4) References to recording information are to putting it in a durable or retrievable form.

Disclosure by prosecutor

- 104B.** (1) (a) An accused may at any stage before any evidence of any particular charge has been led, in writing request the prosecution to disclose any prosecution material and the court before which a charge is pending may at any time before any evidence in respect of any charge has been led, direct the prosecutor to-
- (i) disclose to the accused any prosecution material which has not previously been disclosed to the accused

which, in the prosecutor's opinion, might be detrimental to the case for the prosecution against the accused ; or

- (ii) give to the accused a written statement that there is no material of a description mentioned in paragraph(a).
 - (b) The court may, if necessary, adjourn the proceedings for a period determined by the court in order that the prosecutor discloses such material.
 - (c) The court may, on application by the prosecutor and if good reasons exist for doing so, extend the period contemplated in paragraph(b).
- (2) For the purposes of this section prosecution material is material which—
- (a) is in the prosecutor's possession, and came into his or her possession in connection with the case against the accused; or
 - (b) is not in the prosecutor's possession, but which he or she has inspected in connection with the case against the accused.
- (3) (a) Where material consists of information which has been recorded in any form, the prosecutor shall disclose such information—
- (i) by securing that a copy is made of it and that the copy is given to the accused;
 - (ii) if in his or her opinion it is not practicable or desirable, by allowing the accused to inspect such material at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (b) A copy of the material may be in such form as the prosecutor thinks fit and may not be in the same form as that in which the information has already been recorded.
- (4) (a) Where material consists of information which has not been recorded, the prosecutor shall disclose such information by securing that it is recorded in such form as he or she thinks fit and—
- (i) by securing that a copy is made of it and that the copy is given to the accused;
 - (ii) if in his or her opinion it is not practicable or desirable, by allowing the accused to inspect such material at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (b) A copy of the material may be in such form as the prosecutor thinks fit and may not be in the same form as that in which the information has already been recorded.

- (5) Where material does not consist of information, the prosecutor shall disclose such material by allowing the accused to inspect it at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (6) The prosecutor may refuse to disclose material under this section where the court, on application by the prosecutor, orders that—
- (a) the material is not reasonably necessary in order to enable the accused to exercise his or her right to a fair trial;
 - (b) disclosure of the material would lead to the disclosure of the identity of an informer or state secrets; or
 - (c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
- (7) Material shall not be disclosed under this section to the extent that—
- (a) it has been intercepted in obedience to a direction issued under section 3 of the Interception and Monitoring Act, 1992(Act No.127 of 1992); or
 - (b) it indicates that such a direction has been issued or that material has been intercepted in obedience to such a direction.

Disclosure by accused

- 104C.** (1) An accused—
- (a) may on his or her own accord; or
 - (b) shall, where the prosecutor complied or purports to comply with a direction referred to in section 104B,
- give a written defence statement to the court and the prosecutor.
- (2) The accused's defence statement contemplated in subsection(1)(b) shall—
- (a) set out in general terms the nature of his or her defence;
 - (b) indicate the matters on which he or she takes issue with the prosecution; and
 - (c) set out, in the case of each such matter, the reason why he or she takes issue with the prosecution.
- (3) (a) The court may, if necessary, adjourn the proceedings for a period determined by the court in order that the prosecutor

discloses such material.

- (b) The court may, on application by the accused and if good reasons exist for doing so, extend the period contemplated in paragraph(b).

Additional disclosure by prosecutor

- 104D.** (1) This section shall apply where the accused has given a defence statement under section 104C.
- (2) The prosecutor shall–
- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by his or her defence statement under section 104C.
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph(a).

Application by accused for additional disclosure by prosecution

- 104E** (1) If the accused has at any time reasonable cause to believe that–
- (a) there is prosecution material which might be reasonably expected to assist the accused's defence as disclosed by his or her defence statement given under section 104C; and
- (b) that the material has not been disclosed to the accused by the prosecution,
- the accused may apply to the court for an order directing the prosecutor to disclose such material to the accused.
- (2) The provisions of section 104B(2) to(7) apply for the purposes of this section as they apply for purposes of that section.

Continuing duty of prosecutor to disclose

- 104F.** (1) This section shall apply at all times–
- (a) after the prosecutor has complied or purports to comply with section 104B; and
- (b) before–
- (i) the accused is discharged in terms of section 174;
- (ii) the accused is acquitted;
- (iii) the accused is convicted; or
- (iv) the prosecutor decides to withdraw the case against the accused.

- (2) The prosecutor must keep under review the question whether at any given time there is prosecution material which–
- (a) in his or her opinion might be detrimental to the case for the prosecution against the accused or which might be reasonably expected to assist the accused's defence as disclosed by his or her defence statement given under section 104C ; and
 - (b) has not been disclosed to the accused,
- and if there is such material at any time, the prosecutor shall disclose it to the accused as soon as possible.
- (3) The provisions of section 104B(2) to(7) apply for the purposes of this section as they apply for purposes of that section.

Failure or faults in disclosure by accused

- 104G.** (1) Where an accused–
- (a) fails to give a defence statement under section 104C;
 - (b) gives a defence statement under that section after the period or extended period determined in section 104C(3)(a) or(b);
 - (c) sets out inconsistent defences in his or her defence statement given under section 104C;
 - (d) at his or her trial puts forward a defence which is different from any defence set out in his or her defence statement given under section 104C,
- the provisions of subsection(2) shall apply.
- (2) Whenever in criminal proceedings the court has to decide whether–
- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 - (b) the accused is guilty of the offence charged; or
 - (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged,
- the court may draw such inference from the accused's failure contemplated in subsection(1)(a) or the faults in his or her defence statement contemplated in subsection(1)(b), (c) or (d), as may be reasonable and justifiable in the circumstances,
- (3) An accused shall not be convicted of an offence solely on an inference drawn under subsection (2)

Review of decision not to disclose

- 104H.** (1) This section shall apply at all times before–
- (a) the accused is discharged in terms of section 174;
 - (b) the accused is acquitted;
 - (c) the accused is convicted: or
 - (d) the prosecutor decides to withdraw the case against the accused.
- (2) The court may on its own accord or on application by the accused in open court, review its order in terms of section 104B(6) that–
- (a) the prosecution material is not reasonably necessary in order to enable the accused to exercise his or her right to a fair trial;
 - (b) disclosure of the material would lead to the disclosure of the identity of an informer or state secrets; or
 - (c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
- (3) If the court concludes that the requested prosecution material should be disclosed, the court shall so order and the provisions of section 104B(1) to (6) shall apply regarding the disclosure of such material by the prosecutor.

Confidentiality of disclosed information

- 104I.** (1) If the accused is given or allowed to inspect a document or other object under the provisions of this Chapter, then, subject to this section, he or she shall not disclose it or any information recorded in it.
- (2) The accused may only use or disclose the–
- (a) object or information in connection with the criminal proceedings for whose purpose he or she was given the object or allowed to inspect it;
 - (b) object to the extent that the object has been displayed to the public in open court;
 - (c) information to the extent that the information has been communicated to the public in open court.
- (3) If the accused applies to the court for an order granting permission to use or disclose the object or information and the court makes such an order, the accused may use or disclose the object or information for the purposes and to the extent specified by the court.

- (4) Any person who contravenes this section shall be guilty of an offence and liable on conviction to the penalties which may be imposed under the law for the offence of contempt of court.

PART C

CASE AND TRIAL MANAGEMENT

11. **Section 115 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:**

- (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, **[may] shall**—
- (a) inform the accused—
- (i) that he or she has a right to remain silent;
(ii) of the consequences of not remaining silent;
(iii) that he or she is not compelled to make any confession or admission that could be used in evidence against him or her; and
- (b) ask **[him]** the accused whether he or she wishes to make a statement indicating the basis of his or her defence.
- (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he or she denies or admits the issues raised by the plea, the court **[may] shall** question the accused in order to establish which allegations in the charge are in dispute.
- (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and the court—
- (i) shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty; and
- (ii) may enquire from the accused whether any other allegation,

may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

12. The following Chapter is hereby inserted in the principal Act after section 149:

CHAPTER 21A

PRE-TRIAL CONFERENCE

Court may direct that pre-trial conference be held

149A. (1) The presiding judge, regional magistrate or magistrate may, on the application of the prosecutor or the accused or at his or her own

instance, at any time after the accused has entered a plea of not guilty and before any evidence in respect of any particular charge has been led, direct the prosecutor and the accused and, if the accused is represented, his or her legal adviser, to appear before him or her in chambers to consider–

- (a) the identification of issues not in dispute;
 - (b) the possibility of obtaining admissions of fact with a view to avoiding unnecessary proof;
 - (c) where the accused indicates his or her intention of raising an alibi defence, the disclosure of sufficient details to enable the prosecution to investigate such alibi defence;
 - (d) where the accused indicates his or her intention of raising a defence contemplated in section 151C, the disclosure of such defence;
 - (e) the necessity of calling or disposing of expert evidence;
 - (f) such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner.
- (2) The court shall record in open court the agreements entered into and the concessions made.
- (3) The accused shall be required by the court to declare whether he or she confirms such agreement or concession and if he or she so confirms, such agreement or concession shall be binding, unless retracted at the trial to prevent manifest injustice.
- (4) The failure of an accused to disclose sufficient details of an alibi defence to enable the prosecution to investigate the alibi may be a factor taken into account by the trial court in determining the weight of the alibi defence.
- (5) The accused's co-operation at such pre-trial proceedings may be taken into account as a mitigating factor by the trial court for purposes of sentencing.

Transitional arrangements

13. (1) Section 1 does not apply in relation to a failure or refusal by an accused if that failure or refusal occurred before the commencement of that section.
- (2) Section 1 applies–
- (ii) in relation to a criminal trial on indictment as contemplated in section 144(1), only if the accused is arraigned for trial by a superior court after the commencement of that section;

- (b) in relation to a criminal trial in any other court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of that section.

Short title and commencement

14. This Act shall be called the Criminal Procedure Amendment Act, 2001, and shall come into operation on a date determined by the President by proclamation on the *Gazette*.

APPENDIX B

RECOMMENDATIONS OF THE COMMISSION

REPUBLIC OF SOUTH AFRICA

enactments.

BILL

To amend the Criminal Procedure Act, 1977 so as to make provision for the disclosure of material in possession of the prosecution or contained in the police docket; to further regulate plea proceedings; to make provision for the holding of a pre-trial conference where an accused pleads not guilty; for an accused to give notice if he or she intends to raise certain defences or to call expert evidence; for the court in criminal proceedings to draw inferences from the accused's failure to mention certain facts when questioned by the police or charged, his or her failure or refusal to account for certain objects, substances or marks, or his or her failure or refusal to account for his or her presence at a particular place; to further regulate the admissibility of admissions and confessions made by an accused; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:–

1. The following Chapter is hereby inserted in the principal Act after section 104:

CHAPTER 14A

PROSECUTION DISCLOSURE

104A Disclosure of material contained in police docket

- (1) An accused may at any stage request the prosecution to disclose the following material in possession of the prosecution or contained in the police docket:
 - (a) Documents which tend to exculpate the accused;
 - (b) statements of witnesses, whether or not the prosecution intends to call such witnesses;
 - (c) any other material that is reasonably required to enable the accused to prepare his or her defence.
- (2) Copies of the documentation or material requested under subsection (1), shall be delivered to the accused or, where impracticable, the accused shall be allowed to inspect such documentation or material at the court: Provided that the accused may be denied access to the requested documentation and material or part thereof where–

- (a) it is not reasonably required in order to enable the accused to exercise his or her right to a fair trial;
- (b) disclosure could lead to the disclosure of the identity of an informer or state secrets; or
- (c) there is reason to believe that such disclosure may prejudice the course of justice, whether by interference with evidence or witnesses, or otherwise.

104B Disclosure of documentation to court

- (1) The presiding judge, regional magistrate or magistrate may at any stage of the proceedings, for the purpose of assessing how to conduct the proceedings, require that the prosecution make available to him or her the documentation and material which the accused would be entitled to receive in terms of section 104A: Provided that a statement by an accused in those proceedings shall not be made available to the said presiding officer unless it has been admitted or proved; and provided further that unless the accused has already had access to the said documentation or material the accused shall simultaneously be given access to it.
- (2) The documentation or material received in terms of subsection(1) shall not form part of the record and shall have no evidential value unless it has been properly admitted or proved.

2. Section 115 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

- (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, **[may]** ~~shall~~—
 - (a) ~~inform the accused—~~
 - (i) that he or she has a right to remain silent;
 - (ii) of the consequences of not remaining silent;
 - (iii) that he or she is not compelled to make any confession or admission that could be used in evidence against him or her; and
 - (b) ask **[him]** the accused whether he or she wishes to make a statement indicating the basis of his or her defence.
- (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he or she denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

- (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and
 - (i) shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty; and
 - (ii) may enquire from the accused whether any other allegation.

may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

3. Section 121 of the principal Act is hereby amended by the substitution for paragraph (aA) of subsection (5) of the following paragraph:

- (aA) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and the plea of guilty and any confession or admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea, confession or admission was incorrectly recorded.

4. The following Chapter is hereby inserted in the principal Act after section 149:

CHAPTER 21A

PRE-TRIAL CONFERENCE

149A Court may direct that pre-trial conference be held

- (1) The presiding judge, regional magistrate or magistrate may, on the application of the prosecutor or the accused or at his or her own instance, at any time after the accused has entered a plea of not guilty and before any evidence in respect of any particular charge has been led, direct the prosecutor and the accused and, if the accused is represented, his or her legal adviser, to appear before him or her in chambers to consider–
 - (a) the identification of issues not in dispute;
 - (b) the possibility of obtaining admissions of fact with a view to avoiding unnecessary proof;
 - (c) where the accused indicates his or her intention of raising a defence contemplated in section 151A, the disclosure of such

defence;

- (d) where the accused indicates his or her intention of raising an alibi defence, the disclosure of sufficient details to enable the prosecution to investigate such alibi defence;
 - (e) the necessity of calling or disposing of expert evidence;
 - (f) such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner.
- (2) The court shall record in open court the agreements entered into and the concessions made.
 - (3) The accused shall be required by the court to declare whether he or she confirms such agreement or concession and if he or she so confirms, such agreement or concession shall be binding, unless retracted at the trial to prevent manifest injustice.
 - (4) The failure of an accused to disclose sufficient details of an alibi defence to enable the prosecution to investigate the alibi may be a factor taken into account by the trial court in determining the weight of the alibi defence.
 - (5) The accused's co-operation at such pre-trial proceedings may be taken into account as a mitigating factor by the trial court for purposes of sentencing.

5. The following sections are inserted in the principal Act after section 151:

151A Notice of Intention to Raise Certain Defences and to Call Expert Evidence

- (1) (a) An accused person may not, without the leave of the court, adduce evidence in support of the defence commonly called an alibi, unless, at any time before or during plea proceedings, the accused has given notice to the prosecution of his or her intention to do so and furnished in such notice particulars of the defence.
- (b) Without derogating from subsection (a), an accused person may not, without the leave of the court, call any other person to give evidence in support of an alibi unless the notice under subsection (a) includes the name and address of such person or, if that information is not known to the accused, such other information as may enable the prosecution to identify and locate such person.
- (c) For purposes of this section "evidence in support of an alibi" means evidence tending to show that, by reason of the presence of the accused at a particular place or in a particular area at a particular time he or she was not at the place where

the offence is alleged to have been committed at the time of its alleged commission.

- (2) (a) An accused person may not, without the leave of the court, allege at criminal proceedings that he or she was by reason of mental illness or mental defect not criminally responsible for the offence charged unless, at any time before or during plea proceedings, he or she has given notice to the prosecution of such allegation.
- (b) Where such notice is given, or if the court grants leave under paragraph(a), the court shall direct in terms of section 78(2) that the matter be enquired into and be reported on in accordance with the provisions of section 79.
- (3) An accused person may not, without the leave of the court, rely upon a statutory or other ground of justification for conduct that is alleged to have constituted an offence unless, at any time before or during plea proceedings, the accused has given notice to the prosecution of such ground of justification.
- (4) (a) A notice required to be given to the prosecution under this section shall, where it is given before plea proceedings, be given in writing to the registrar or the clerk of the court concerned, as the case may be.
- (b) Upon receipt of such notice the registrar or clerk of the court, as the case may be, shall forthwith cause it to be delivered to the office of the prosecutor concerned.
- (c) Any notice purporting to have been given under this section on behalf of the accused by his or her legal adviser shall, unless the contrary is proved, be deemed to have been authorised by the accused.
- (5) (a) A court may not refuse leave under subsection (1), (2) or (3), as the case may be, if it appears to the court that the accused was not informed –
- (i) in the notice referred to in section 144(4)(a)(i); or
- (ii) by the magistrate or regional magistrate committing the accused to the superior court as contemplated by section 144(4)(a)(ii); or
- (iii) by the presiding judge, regional magistrate or magistrate during plea proceedings
- of the requirements of the relevant subsection.
- (b) For purposes of subsection (a) an endorsement on the said notice, or an endorsement by the magistrate or regional magistrate on the record of the committal proceedings, or an endorsement by the presiding judge, regional magistrate or

magistrate on the record of the plea proceedings, that the accused was informed of those requirements, shall constitute prima facie proof that the accused was so informed.

6. The following Chapter is inserted in the principal Act after Chapter 23:

CHAPTER 23A

INFERENCES FROM ACCUSED'S SILENCE

207A Effect of accused's failure to mention facts when questioned or charged

- (1) Where in criminal proceedings evidence is given that the accused—
- (a) at any time before he or she was charged with an offence, on being questioned by a police officer substantially in accordance with a Code of Police Conduct that has been promulgated in terms of the Police Act No. 7 of 1958, and on being informed of the provisions of subsection(2), in an attempt to determine whether or by whom the offence had been committed, failed to mention any fact relied on in his or her defence in such criminal proceedings; or
 - (c) on being charged with the offence or officially informed by such police officer that he or she might be prosecuted for the offence and that the court might draw an inference contemplated in subsection(2), failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed,
- the provisions of subsection(2) shall apply.
- (2) Whenever in criminal proceedings the court has to decide whether—
- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 - (b) the accused is guilty of the offence charged; or of another offence which constitutes a competent verdict on the offence charged,

the court may draw such inference from the accused's failure contemplated in subsection(1) as may be reasonable and justifiable in the circumstances.

- (3) Subject to any directions by the court, evidence tending to establish the failure referred to in subsection (1) may be given before or after evidence tending to establish the fact which the accused is alleged to

have failed to mention.

(4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.

(5) This section does not–

(b) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct of which he or she is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

207B Effect of accused's failure or refusal to account for objects, substances or marks

(1) (a) Where a person is arrested by a police officer, and there is–

(i) on his or her person;

(ii) in or on his or her clothing or footwear;

(iii) otherwise in his or her possession;

(iv) in any place in which he or she is at the time of the arrest,

any object, substance or mark, or there is any mark on such object, and that police officer reasonably believes that the presence of the object, substance or mark may be attributable to the person arrested in the commission of an offence specified by the police officer, the police officer may inform the arrested person that he or she so believes and requests that person to account for the object, substance or mark.

(b) If the arrested person referred to in paragraph(a), fails or refuses to account for the object, substance or mark, the provisions of subsection (2) shall apply in any criminal proceedings against that person.

(2) Whenever in criminal proceedings the court has to decide whether–

(a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;

(b) the accused is guilty of the offence charged; or of another offence which constitutes a competent verdict on the offence charged.

the court may draw such inference from the accused's failure or refusal contemplated in subsection(1), as may be reasonable and justifiable in the circumstances.

- (3) Subsections (1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection (1)(a), what the effect of this section would be if he or she failed or refused to comply with the request.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for the presence of an object, substance or mark, or from the condition of clothing or footwear, which could properly be drawn apart from this section.

207C Effect of accused's failure or refusal to account for presence at a particular place

- (1) Where—
 - (a) a person arrested by a police officer was found by him or her at a place at or about the time the offence for which the person was arrested is alleged to have been committed; and
 - (b) the police officer reasonably believes that the presence of the person at that place and time may be attributable to the person's participation in the commission of the offence; and
 - (c) the police officer informs the person that he or she so believes, and requests the person to account for his or her presence; and
 - (d) the person fails or refuses to do so.

then, if in any criminal proceedings against that person, evidence of those matters is given, the provisions of subsection(2) shall apply.
- (2) Whenever in criminal proceedings the court has to decide whether—
 - (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 - (b) the accused is guilty of the offence charged; or of another offence which constitutes a competent verdict on the offence charged,

the court may draw such inference from the accused's failure or refusal contemplated in subsection(1), as may be reasonable and justifiable

in the circumstances.

- (3) Subsections(1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection(1), what the effect of this section would be if he or she failed or refused to comply with the request.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for his or her presence at a place which could properly be drawn apart from this section.

7. The following section is substituted for section 217 of the principal Act:

217. Admissibility of confession or admission by accused

- (1) Evidence of any confession or admission made orally, in writing or by conduct by any person in relation to the commission of any offence shall, if such confession or admission is proved to have been freely and voluntarily made by such person in his or her sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence]: **Provided-**
 - (a) **that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and**
 - (b) **that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-**
 - (i) **be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such**

documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection(1).

(3)] (2) Any confession or admission which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him or her

(a) if he or she adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any **[oral or written]** statement made by him or her either as part of or in connection with such confession or admission; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

8. Section 218 of the principal Act is amended by the deletion of subsection(2).

9. Section 219A of the principal Act is deleted.

10. Transitional arrangements

(1) Section 6 does not apply in relation to a failure or refusal by an accused if that failure or refusal occurred before the commencement of that section.

(2) Section 6 applies—

(a) in relation to a criminal trial on indictment as contemplated in section 144(1), only if the accused is arraigned for trial by a superior court after the commencement of that section;

(b) in relation to a criminal trial in any other court, only if the time when the court begins to receive evidence in the proceedings falls after the

commencement of that section.

Short title and commencement

11. **This Act shall be called the Criminal Procedure Amendment Act, 2002, and shall come into operation on a date determined by the President by proclamation on the *Gazette*.**

APPENDIX C

LIST OF RESPONDENTS

1. C J Eksteen, Regional Court President, Johannesburg. Comment prepared by Regional Magistrate JL Brink.
2. Deputy Judge President Flemming, High Court Johannesburg

3. Judges of the High Court Durban. Comment by Judge President VEM Tshabalala
4. F W Kahn SC, Director of Public Prosecutions, Cape of Good Hope. Comment prepared by Adv Slabbert.
5. The Law Society of the Cape of Good Hope. Comment prepared by by CLS Criminal Law and Procedure; Legal Aid and Community Service Committee.
6. National Council of Women SA. Comment prepared by Dr JC Beenhakker.
7. Adv CDHO Nel SC, Deputy Director of Public Prosecutions, Port Elizabeth.
8. Office of the Premier, Northern Province. Comment prepared by Adv MT Chidi, Acting Director: State Law Advisory Services.
9. Society of Advocates of KwaZulu-Natal. Comment, prepared by MW Collins, MB Pitman and RG Mossop
10. R Stuart SC, Deputy Director of Public Prosecutions, KwaZulu-Natal.
11. Dr R Turrell, Institute of Criminology, University of Cape Town.
12. V S van der Walt, Chief Magistrate, Pretoria North, District of Wonderboom.

List of workshop participants

1. Mr C Allers Magistrate's Officer, Vanderbijlpark
2. Judge E Bertelsmann, High Court, Pretoria
3. Mr W Booth, Attorney, Cape Town
4. Capt AM Brink, SAPS Guguletu, Cape Town
5. Judge A Cachalia, High Court, Johannesburg
6. Mrs Z Carelse, Magistrates Court, Mitchcell's Plain
7. Mr TH Carstens, Regional Court, Johannesburg
8. Mr SH Cele, Regional Court Magistrate, Durban
9. Adv MA Chauke, Chief Prosecutor Vaal Triangle, (NDPP), Johannesburg
10. L H Claasen, Regional Court Magistrate, Tzaneen
11. Mrs DM Clark, SA Law Commission
12. Mrs M Clark, Constituency Parliament Office, Somerset West
13. Inspector R Cloete, SAPS, Hout Bay

14. Ms JR Cohen, Parliamentary Officer, SA Human Rights Commission, Cape Town
15. Supt J Conradie, SAPS Guguletu, Cape Town
16. K Cooney Regional Court Magistrate, Port Elizabeth
17. F M de Viliers, Vice Chairperson, Residence Association Blue Downs, Cape Town
18. Mrs NE Denge Magistrate's Office, Brakpan
19. Ms ZAS Dlamini, Prosecutorial Services, Goodwood Magistrates Office, Cape Town
20. Mrs L du Toit, Justice, Goodwood, Cape Town
21. Capt BJB Engelbrech, SAPS, Grassy Park
22. Capt L Evans, SAPS, Serious Violent Crime Unit, Pretoria
23. Deputy Judge President Flemming, High Court, Johannesburg
24. Ms L Friester, Magistrate's Office, Wynberg
25. Ms DO Fritz, Norhtern Suburbs Cape Forum, Cape Town
26. A S Fritz, Senior Magistrate, Springs
27. Supt PJS Galant, SAPS Elsie's River
28. Mr JB Gresse. Law Society of the Northern Province
29. Ins F Greef, SAPS, Hout Bay
30. Mr JHJ Greyenstein, Magistrate's Office, Bloemfontein
31. Mrs J Grobbelaar, Magistrate's Office, Witbank
32. A Hamied, Magistrate, Cape Town
33. Judge LTC Harms, Supreme Court of Appeal
34. D J Hattingh, Deputy Commissioner Correctional Services, Pretoria
35. Ms PC Heynes, ANC PCO, Cape Town
36. Dr Hildebrandt, GTZ
37. Mrs T Illsley, Faculty of Law, University of Pretoria
38. Mr EP Jansen, SAPS, Cape Town
39. Mr TD Khathi, Free State A Cluster, Brandfort
40. Ms CP Kimble, SA Law Commission

41. Mr BJ King, Justice College, Pretoria
42. Detective Inspector Klein, SAPS, Cape Town
43. Adv L Kock, Specialized Consumers Court Unit
44. Prof DJL Kotze, Faculty of Law, University of Pretoria
45. Justice JC Kriegler, Constitutional Court
46. Adv LJ Krige, Cape Bar Council, Cape Town
47. A A Lamprecht, Regional Court Magistrate, Lydenburg
48. Mr AP Ledwaba, Attorney, Tramshed
49. D/SGT A Lotter, SAPS, Cape Town
50. Mr KA Mahumam, Senior Magistrate, Nylstroom
51. Mr KR Makola, Regional Office, Bloemfontein
52. Adv AZE Malindi, Correctional Services: Legal Services, Pretoria
53. Mrs MC McDonald, ANC Constituency Office, Blue Downs, Cape Town
54. Adv LT Mkansi, Specialised Commercial, Pretoria,
55. Adv M Mnyatheli, IDSEO (DSO), Pretoria
56. Mr HP Mohosho, Free State A Cluster, Phuthaditjhab
57. Mr KJ Moima, Department of Correctional Services, Pretoria
58. Adv MS Mokamu, Magistrate's Office, Benoni
59. S B Mosaka, Magistrate, Germiston
60. Ms AM Motlou, Law Society, Pretoria,
61. Mr TP Mudau, Magistrate's Office, Johannesburg
62. Mr RJ Nagel, Department of Justice, Pretoria
63. Capt AM Naidoo, SAPS, Hout Bay
64. Mr SG Nel, Office of the National Director of Public Prosecutions, Pretoria,
65. Adv BS Nkosi, University of the North, Pietersburg
66. Ms T Nocklear, NDPP, Goodwood, Cape Town
67. Adv JP Nordier, Pretoria

68. DS V Nthangase, Regional Court President, Durban
69. Judge RW Nugent, Supreme Court of Appeal
70. Mr M Parker, Law Society Cape of Good Hope, Cape Town
71. Mr R Pfaff, GTZ, Pretoria
72. Ms K Pillay, Regional Court Magistrate, Durban
73. Mr JP Rademeyer, Senior Public Prosecutor, Magistrates Office, Springs
74. Adv N Rajakumar, Magistrates Office, Witbank
75. Mr G Ramoroka, Magistrate's Office, Alberton
76. T W Levitt, Regional Court Magistrate, Durban
77. Mr JF Riley, Attorney, Cape Town
78. Prof PG Rudolph, School of Law, Wits
79. Mr M Schonteich, Institute for Security Studies
80. S D Schutte, SAPS Serious Violent Crime Unit, Pretoria
81. Professor PJ Schwikkard, Faculty of Law, University of Cape Town,
82. Adv J Slabbert, Office of the Director of Public Prosecutions, Cape Town
83. Judge President Steenkamp, High Court, Northern Cape
84. Capt GS Theron, SAPS, Bellville Fraud, Bellville
85. Mr JSR Tsatsi, Attorney, Arcadia
86. Adv W van Vuuren, SA Law Commission
87. Mr R van Rooyen, Free State A Cluster, Bloemfontein
88. Ms JF van Schalkwyk, Magistrates Office Mitchell's Plain,
89. Mr RL Venkatsamy, Regional Office, Durban
90. Adv MJ Venter, Magistrates Office, Witbank
91. Supt J Weitz, SAPS Training College, Paarl
92. Magistrate PN Wessel, Magistrate's Office, Pretoria North
93. Mrs SJ Wilson, Wynberg Court, Cape Town