

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 96

PROJECT 73

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)**

**Closing date for comments:
30 June 2001**

ISBN: 0 - 621 30683 - 5

INTRODUCTION

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

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PREFACE

This discussion paper (which reflects information gathered up to the end of November 2000) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 June 2001** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is The Honourable Mr Justice LTC Harms.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 The subject of this discussion paper is an investigation into the feasibility of introducing inquisitorial elements into the South African criminal procedure.

It is appropriate to give some background information on the terms of reference of the Commission's investigation into simplification of criminal procedure. 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 a report will be finalised in the course of this year.

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. 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.

1.7 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.

1.8 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. The ambit of the investigation extended to the plea process, and the constitutional provisions were therefore important considerations. In this regard consideration should also be given to plea proceedings in terms of section 119 of the Criminal Procedure Act where proceedings before a magistrate are ignored when the trial proceeds afresh in the High Court.
- * 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; and
 - C how judicial officers should use the information in the docket.
- * Possible ways of enhancing judicial management of trials and case management.

1.9 This discussion paper is 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 Mr 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.

1.10 The discussion paper, therefore, firstly identifies shortcomings in the adversarial process and secondly investigates whether there are ways of adapting the process in the interest of truth-finding, fairness, and efficiency. The discussion paper commences with an outline of the basic elements of the adversarial and inquisitorial modes of criminal procedure. Thereafter an exposition is given of how the operation of the adversarial system in South Africa impedes the realisation of the objectives of the criminal trial. This is 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 are then surveyed. The paper also identifies some aspects of South African criminal procedure which should be addressed, and concludes with proposals and recommendations for legislative intervention.

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:¹ "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

¹ Van Dijkhorst 1998, 138.

PROCEDURE²

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."³ The basic differences between the two modes of criminal procedure are nevertheless useful reference tools for discussing developments in modes of criminal procedure.

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.⁴

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.⁵ 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

² 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.

³ Tulkens 1995, 8.

⁴ Jorg, Field & Brants 1995, 42.

⁵ Albrecht 1996, 90.

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.⁶ 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 result of their efforts. Moreover, they cannot limit the court's field of inquiry through pleadings.⁷ 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.⁸ 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.

⁶ Jorg, Field & Brants 1995, 47.

⁷ McEwan 1998, 4.

⁸ Jorg, Field & Brants 1995, 45; McEwan 1998, 2.

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 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.⁹

2.15 The undefended accused's inability as an adversary is the most acute in the adversarial truth-finding process.¹⁰ Where "we are operating the adversary system without the adversaries",¹¹ 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.

⁹ Steytler 1987, 503-4.

¹⁰ See also McEwan 1998, 15.

¹¹ Telford George, former Chief Justice of Tanzania, quoted in Twaib 1998, 57.

2.16 The same questions emerge in the case of poor defence counsel. The truth may not emerge and rights may not be protected¹² when defence counsel are incompetent or lack commitment.¹³ *S v Siebert*¹⁴ 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 some judicial attention.¹⁵ In *S v Motsasi*¹⁶ 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.¹⁷

2.18 The failure of the prosecutor to be an adversary is amply illustrated in *S v Manicum*¹⁸ 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

¹² See para 4.2 below.

¹³ See *S v Siebert* 1998 1 SACR 554 (A).

¹⁴ 1998 1 SACR 554 (A) 559b.

¹⁵ 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.

¹⁶ 1998 2 SACR 35 (W).

¹⁷ At 68.

¹⁸ 1998 2 SACR 400 (N).

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.¹⁹

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 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.²⁰

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.²¹ This argument has been made most forcefully in respect of sexual offences.²² 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.²³

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.

¹⁹ At 403h-i.

²⁰ At 406a-c.

²¹ McEwan 1998, 14-15.

²² McEwan 1998, 14.

²³ S 170A Criminal Procedure Act.

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 -

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.²⁴

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.²⁵ 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.²⁶

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."²⁷

Efficient administration of justice

²⁴ Young 1997, 365.

²⁵ Young 1997, 367.

²⁶ Young 1997, 406.

²⁷ Young 1997, 366.

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.²⁸ 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.

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.²⁹ While the Constitutional Court has not yet pronounced definitively on the meaning of substantial injustice,³⁰ 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.³¹

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

²⁹ Inserted by s 2 of Act 86 of 1996. See South African Law Commission 1995, § 5.39.

³⁰ *S v Vermaas* 1995 7 BCLR 851 (CC).

³¹ See generally Steytler 1998, 307-313.

financial and political pressures to cut back on the provision of legal aid.³² The result will be that a larger percentage of accused will be undefended.

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.³³ 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.³⁴ 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.³⁵ The rules relating to hearsay illustrate the limits of equipping an undefended accused with legal knowledge.

3.6 In *S v Ngwani*,³⁶ 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 1988,³⁷ the accused, who was unrepresented,

had to have the effect of the subsection fully explained to him, in contrast with the legal

³² Legal aid budgets have also come under strain in Australia, for example. See Giddings, Dewar & Parker 1999, 69.

³³ See generally Steytler 1988, 222.

³⁴ S 35(3)(g).

³⁵ Steytler 1987, 505.

³⁶ 1990 1 SACR 449 (N).

³⁷ Act 45 of 1988.

position where it is not invoked. In particular, he had to be heard on the important one raised by para (vi),³⁸ 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.

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*³⁹ 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.⁴⁰

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*.⁴¹

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

³⁸ "any prejudice to a party which the admission of such evidence might entail".

³⁹ 1995 12 BCLR 1593 (CC).

⁴⁰ 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.

⁴¹ (1991) 68 CCC (3d) 1 (SCC).

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.

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 Act⁴² 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.⁴³ 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;⁴⁴ the role of the court must be inquisitorial in order to establish an appropriate sentence.⁴⁵ In *S v Siebert*,⁴⁶ 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

⁴² Act 51 of 1977.

⁴³ *S v Mayiya* 1997 3 BCLR 386 (C) 395C.

⁴⁴ 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."

⁴⁵ 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.

⁴⁶ 1998 1 SACR 554 (A) 558i-559a.

accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance."⁴⁷

3.13 Appellate proceedings have also been likened to an inquisitorial process,⁴⁸ 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."⁴⁹

3.14 Bail proceedings have also been placed in an inquisitorial mould. Commencing with the decision in *Elish v Prokureur-Generaal, Witwatersrand*,⁵⁰ and followed by Parliament,⁵¹ bail proceedings were cast within an inquisitorial mode. In *S v Dlamini et al*⁵² 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.⁵³

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,

⁴⁷ At 559b.

⁴⁸ Malleson 1997.

⁴⁹ Malleson 1997, 178.

⁵⁰ 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).

⁵¹ S 60(3) Criminal Procedure Act, inserted by s 3 of the Criminal Procedure Second Amendment Act 75 of 1995.

⁵² 1999 7 BCLR 771 (CC) § 10.

⁵³ § 10.

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.

ENSURING AN EFFICIENT PROCESS

3.16 Flowing from recommendations of the South African Law Commission,⁵⁴ recent amendments to the Criminal Procedure Act⁵⁵ have given further legislative form to the presiding officer's management role of court proceedings.⁵⁶ 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."⁵⁷

It is important to note that the court is not merely required to give effect to an accused's constitutional right to a speedy trial⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹ 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

⁵⁴ South African Law Commission 1995.

⁵⁵ Act 86 of 1996.

⁵⁶ See also South African Law Commission's proposal regarding the role of the court in plea bargaining (South African Law Commission 1995, § 10.85.

⁵⁷ S 342A(1).

⁵⁸ S 35(3)(d) Constitution.

⁵⁹ See *S v Motsasi* 1998 2 SACR 35 (W).

⁶⁰ S 342A(3).

⁶¹ See recommendation of the South African Law Commission 1995, § 6.37.

of any particular line of examination and may impose reasonable limits" with regard to both the length and line thereof.⁶² While these powers are implicit in the common law,⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.

CONCLUSION

⁶² 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).

⁶³ Pretorius 1997, 256-260.

⁶⁴ Project 106.

⁶⁵ § 9.3.

⁶⁶ § 9.26.

⁶⁷ § 9.1.

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 Nürnberg, 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 instruments⁶⁸ lean toward the adversarial process,⁶⁹ 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.⁷⁰ Hearsay evidence is thus admissible.⁷¹ The tribunals have also some inquisitorial powers. A judge may at any stage put any question to a witness⁷² and "may order either party to produce additional evidence".⁷³ 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

⁶⁸ Universal Declaration of Human Rights of 1948; International Covenant of Civil and Political Rights of 1966.

⁶⁹ Bassiouni 1993, 277.

⁷⁰ 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."
See also Mann 1995, 368.

⁷¹ Jones 1998, 300.

⁷² Rule 85B.

⁷³ Rule 98(A) ICTY, Rule 98(A) ICTR.

certain injuries to the causation of death.⁷⁴ 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.⁷⁵ 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,⁷⁶ 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.⁷⁷ 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 Prosecutor, whether or not the Prosecutor intends to rely on the evidence".⁷⁸ 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."⁷⁹

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.⁸⁰

⁷⁴ *Tadic Opinion and Judgment* Trial Chamber II on 7 May 1997, quoted in Jones 1998, 299.

⁷⁵ Cassese 1999, 168; Sweeney 1998, 254.

⁷⁶ 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.

⁷⁷ See Sweeney 1998, 253.

⁷⁸ Art 27(5)(b).

⁷⁹ Art 27(5)(c).

⁸⁰ Cassese 1999, 168-171.

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.⁸¹ 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.⁸² 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."⁸³

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 divergence."⁸⁴ 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.⁸⁵

In the former systems the jurisprudence of the European Court of Human Rights has had a profound effect; secret pre-trial inquiries have been banned⁸⁶ and "in principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial

⁸¹ Cassese 1999, 168-9.

⁸² See arts 15(3), 18(2), 18(6), 19(6).

⁸³ Art 64(5)(d).

⁸⁴ Jorg, Field & Brants 1995, 54.

⁸⁵ Jorg, Field & Brants 1995, 54.

⁸⁶ *Lamy v Belgium* 30 March 1989 Series A no 151. See Tulkens 1995, 9.

argument".⁸⁷ 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.⁸⁸

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.⁸⁹ This reform was driven by perceived problems of corruption and intimidation of judges and the inefficiency of the Italian legal system.⁹⁰ 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.⁹¹ The system of compulsory prosecution has been relaxed and a system of plea agreement is explicitly accepted.⁹² The trial process has also become more adversarial, ascribing to the 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".⁹³

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."⁹⁴

⁸⁷ Kostovski v the Netherlands 28 Nov 1989 series A no 166 § 20.

⁸⁸ See Sharpe 1999, 278-9; Steyn 1999, 56.

⁸⁹ See generally Cirese & Bertucci 1993.

⁹⁰ 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.

⁹¹ Chiavario 1995, 35.

⁹² Pizzi & Marafioti 1992, 11.

⁹³ Chiavario 1995, 37.

⁹⁴ Chiavario 1995, 38.

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,⁹⁵ 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,⁹⁶ 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 questioning.⁹⁷

4.13 In *Murray v United Kingdom*,⁹⁸ 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*

⁹⁵ Report of the Royal Commission on Criminal Justice, July 1993, cm 2263.

⁹⁶ S 3.

⁹⁷ Ss 34-38. See McEwan 1998, 173ff.

⁹⁸ Decision of 8 Feb 1996, (1996) 22 EHRR 29.

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 Steyn⁹⁹ 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.¹⁰⁰

* **Judicial questioning**

4.14 The judicial questioning of accused soon after arrest was first introduced in Scotland in 1980¹⁰¹ as a result of the Thomson Committee on Criminal Procedure.¹⁰² 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.¹⁰³

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 brought on arrest by the prosecutor before a sheriff (a judicial officer) for judicial examination.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ The

⁹⁹ 1999, 56.

¹⁰⁰ See also Ashworth 1999, 267; Pattenden 1998, 161-4.

¹⁰¹ Criminal Justice (Scotland) Act 1980.

¹⁰² Criminal Procedure in Scotland (Second Report) Cm 6218, October 1975.

¹⁰³ See Scottish Home and Health Department 1994, § 8.18.

¹⁰⁴ S 36(1).

¹⁰⁵ S 36(1).

¹⁰⁶ S 36(2).

questions may thus include those aimed at achieving self-incrimination.¹⁰⁷ The accused may be represented at the examination¹⁰⁸ and may consult with his or her lawyer before answering a question.¹⁰⁹ As the role of the judicial officer is to control the reasonableness of the questioning,¹¹⁰ the lawyer's role is limited to asking questions in clarification.¹¹¹ 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."¹¹² The other side of the coin is that the prosecutor must secure the reasonable investigation of any ostensible defence disclosed by the accused,¹¹³ a duty to which no sanctions are coupled for non-compliance.¹¹⁴

* **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 the defence to cause delays by successive requests for more material.¹¹⁵ To strike a "reasonable balance"¹¹⁶ 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

¹⁰⁷ Bradley & Shiels 1996, 46-50.

¹⁰⁸ S 35.

¹⁰⁹ S 36(6).

¹¹⁰ S 36(5).

¹¹¹ S 36(7).

¹¹² S 36(8).

¹¹³ S 36(10).

¹¹⁴ Brown 1996, 47; Bradley & Shiels 1996, 46-50.

¹¹⁵ Ch 6 § 42.

¹¹⁶ Ch 6 § 50.

the case, whether or not the prosecution intends to rely upon that material";¹¹⁷ 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.¹¹⁸

4.18 It would also keep "ambush defences" to a minimum.¹¹⁹ 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."¹²⁰ As a sanction for non-disclosure, adverse inferences could be drawn.¹²¹ 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.¹²²

4.19 These recommendations were endorsed by the Home Office. In a consultation document¹²³ 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.¹²⁴

¹¹⁷ Ch 6 § 51.

¹¹⁸ Ch 6 § 59.

¹¹⁹ Ch 6 § 59.

¹²⁰ Ch 6 § 66.

¹²¹ Ch 6 § 70.

¹²² Ch 6 § 60.

¹²³ Home Office *Disclosure. A Consultation Document* (1995) cm 2864, quoted in Corker 1996, § 5-02.

¹²⁴ § 27. See also McEwan 1988, 18-9.

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 cases¹²⁵ to all Crown Court trials.¹²⁶ The prosecution duty of disclosure with regard to unused materials is restricted to such material as in its view "might undermine the prosecution case".¹²⁷ 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.¹²⁸ 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."¹²⁹

4.21 The Act provides no sanction against the prosecution for failing to act properly.¹³⁰ For the success of prosecution disclosure, Corker¹³¹ 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 the courts."¹³² In contrast, the sanction of defence failure to disclose is that adverse inferences can be drawn.¹³³ However, a defence statement does not become evidence on which the prosecution case can be built.¹³⁴

¹²⁵ 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.

¹²⁶ S 1 CPIA.

¹²⁷ S 3(1)(a) CPIA.

¹²⁸ S 5(6) CPIA.

¹²⁹ S 7(2)(a) CPIA.

¹³⁰ Corker 1996, § 5-24; Sharpe 1999, 280-1.

¹³¹ 1996, § 5-23.

¹³² 1999, 281. See also Corker 1996, § 5-46.

¹³³ S 10(3) CPIA.

¹³⁴ S 11(5) CPIA. On the evidential difficulties surrounding the defence statement, see Sprack 1998.

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.¹³⁵ 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.¹³⁶ 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.¹³⁷ The obligation does not, however, include the disclosure of the identities of defence witnesses.¹³⁸

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",¹³⁹ others regard it as legitimate in view of full prosecution disclosure.¹⁴⁰ In the light of the European Court's decision in *Murray v United Kingdom*,¹⁴¹ which holds that the right to remain silent is not absolute and silence through the proceedings has implications for the evaluation of inculpatory evidence, the conclusion is that compelled defence disclosure after primary prosecution disclosure will not fall foul of article 6(2) of the Convention.¹⁴²

4.24 Sprack¹⁴³ 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

¹³⁵ S 5(7) CPIA.

¹³⁶ S 29 CPIA.

¹³⁷ S 31(6) CPIA.

¹³⁸ S 33(1) CPIA.

¹³⁹ Sharpe 1999, 277.

¹⁴⁰ Jackson & Doran 1995, 62; McEwan 1998, 18-9.

¹⁴¹ Decision of 8 Feb 1996, (1996) 22 EHRR 29.

¹⁴² 1999, 285.

¹⁴³ 1998, 230.

management."¹⁴⁴ 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.¹⁴⁵

* **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.¹⁴⁶ 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."¹⁴⁷ 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.¹⁴⁸

4.26 It also recommended that the hearsay evidence should be more readily admitted¹⁴⁹ and that presiding officers exercise greater control over cross-examination.¹⁵⁰

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

¹⁴⁴ Sprack 1998, 230.

¹⁴⁵ Sprack 1998, 231.

¹⁴⁶ Study by Zander and Henderson *Crown Court Study*, Royal Commission on Criminal Justice Research Study 19, 1993; Royal Commission Report ch 8 § 18.

¹⁴⁷ Ch 8 § 18.

¹⁴⁸ Recommendation 185.

¹⁴⁹ Recommendation 189.

¹⁵⁰ Recommendations 180, 181 and 182. The recommendation were not dissimilar to those contained in the South African Law Commission's interim report of 1995.

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.

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 case¹⁵¹ has for the past 70 years been expressed in the oft-quoted dictum of Curlewis JA

¹⁵¹ S 167 and 186 Criminal Procedure Act.

in *R v Hepworth*.¹⁵²

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] 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.¹⁵³

5.4 This approach was more recently confirmed by the Supreme Court of Appeal in *S v Gerbers*.¹⁵⁴

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*¹⁵⁵ the court quoted with approval the following passage:¹⁵⁶

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

¹⁵² 1928 AD 265 at 277.

¹⁵³ 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).

¹⁵⁴ 1997 2 SACR 601 (SCA) 606b.

¹⁵⁵ 1998 1 SACR 583 (T) 595a-d.

¹⁵⁶ Steytler 1988, 150.

defence.¹⁵⁷

Assisting the prosecution

5.6 The more difficult question is whether a judicial officer may intervene where it may be to the prejudice of the defence. In the case of *S v Manicum*,¹⁵⁸ 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.¹⁵⁹

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*¹⁶⁰ the Supreme Court of Appeal approved the following dictum from *R v Hepworth*:¹⁶¹

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

¹⁵⁷ Steytler 1988, 175-7.

¹⁵⁸ 1998 2 SACR 400 (N).

¹⁵⁹ At 404b-c.

¹⁶⁰ Supra 606e.

¹⁶¹ At 278.

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 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.¹⁶²

5.10 Questions that show that a witness was false or unconvincing do not indicate that the questions were unfair or partisan.¹⁶³

5.11 There is, however, clear authority that the judicial officer may not assume the role of the prosecution.¹⁶⁴ 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.¹⁶⁵ 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*¹⁶⁶ 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*¹⁶⁷ the court drew a similar distinction. Where no evidence whatsoever is advanced by the prosecution the court was not at liberty to

¹⁶² At 608h-j.

¹⁶³ *S v Van Dyk* 1998 2 SACR 363 (W) 379a.

¹⁶⁴ *S v Manicum supra* 404c.

¹⁶⁵ *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.

¹⁶⁶ 1985 2 SA 182 (EC) 184G.

¹⁶⁷ 1989 1 SA 896 (W).

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.¹⁶⁸

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*¹⁶⁹ 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.¹⁷⁰

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

¹⁶⁸ *R v Hepworth supra* 277.

¹⁶⁹ 1999 1 SACR 117 (C).

¹⁷⁰ At 119f.

prosecution in the face of incriminating evidence and the availability of a crucial witness. It was a clear case for judicial truth-finding.¹⁷¹

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?¹⁷² 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*,¹⁷³ 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.'¹⁷⁴

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

¹⁷¹ 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 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.

¹⁷² Cf *S v Mosoinyane* 1998 1 SACR 583 (T) 594h.

¹⁷³ *Supra* 120i.

¹⁷⁴ At 120c.

Doran¹⁷⁵ 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 have influenced the jury.¹⁷⁶ Furthermore, many of the leading cases on the proper judicial role (for example *Jones v National Coal Board*¹⁷⁷) stem from civil litigation where the role as umpire is most appropriate.¹⁷⁸ Even in England the notion of a passive judicial officer is under scrutiny and a more interventionist role was recommended by the Runciman Commission.¹⁷⁹

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.¹⁸⁰ Furthermore, the length of questioning alone is a relatively neutral factor.¹⁸¹ What is decisive is the manner in which the questioning takes place.¹⁸² 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.¹⁸³

5.20 These may very well be some of the characteristics of cross-examination – questioning

¹⁷⁵ 1995, 109.

¹⁷⁶ 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.

¹⁷⁷ [1957] 2 QB 55, 64 per Lord Denning.

¹⁷⁸ Jackson & Doran 1995, 99.

¹⁷⁹ Recommendation 185.

¹⁸⁰ *S v Gerbers supra* 608i.

¹⁸¹ *S v Gerbers supra* 608h.

¹⁸² *S v Gerbers supra* 608h.

¹⁸³ *S v Gerbers supra* 608h.

from a partisan perspective.¹⁸⁴ It is well-established that judicial questioning may not amount to cross-examination.¹⁸⁵ In contradistinction with the partisan nature of cross-examination, judicial questioning must exhibit "open-mindedness".¹⁸⁶ 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.¹⁸⁷

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.¹⁸⁸

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*¹⁸⁹ 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.

¹⁸⁴ See *S v Sallem* 1987 4 SA 772 (A) 795A; Steytler 1988, 150.

¹⁸⁵ *S v Matthys supra* 120h.

¹⁸⁶ *S v Rall* 1982 1 SA 828 (A) 832H.

¹⁸⁷ *S v Aspeling* 1998 1 SACR 561 (C) 569.

¹⁸⁸ At 607b-c.

¹⁸⁹ 1998 2 SACR 400 (N).

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.

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.¹⁹⁰ In Northern Ireland, for example, the introduction of bench trial did not significantly alter the passive approach required of judges in jury trials.¹⁹¹ 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.¹⁹² 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.

¹⁹⁰ 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.

¹⁹¹ Jackson & Doran 1995. See also Doran, Jackson & Seigel 1995.

¹⁹² *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.¹⁹³ 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.¹⁹⁴ It is thus

¹⁹³ *S v Tsabalala* 1999 1 SACR 163 (T).

¹⁹⁴ 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 this Project Committee that defence disclosure should be obligatory.¹⁹⁵ 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 Dijkhorst¹⁹⁶ 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.

¹⁹⁵ South African Law Commission 1995, § 8.43.

¹⁹⁶ Van Dijkhorst 1998, 138.

CHAPTER 6

THE COMMISSION'S EVALUATION

INTRODUCTION

6.1 From the research outlined in the chapters above the Commission has 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. The question of defence disclosure is accordingly discussed with reference to questioning of the suspect in relation to the three separate stages at which the issue might arise: First, from the time that suspicion first falls upon the accused until the time he or she is indicted. Second, from the time the accused is indicted until the time he or she is required to plead. Third, during the course of the trial. Furthermore, there can be no meaningful discussion of defence disclosure without at the same time accounting for the grounds upon which admissions or confessions made by the accused should be admissible in evidence.

6.3 This chapter deals with the question of police questioning and defence disclosure at all three stages in relation to each of those stages. 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. For easy reference the proposals for reform contained in the draft Bill in Annexure A are divided into three parts following the order of discussion in chapters 6 and 7. Part A deals with police questioning and defence disclosure, part B with a greater role for judicial officers and part C with 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

6.4 In the light of different views on the constitutional permissibility of drawing an adverse inference from the failure of a suspect to disclose information during the course of the police investigation, the Commission proposes that alternative options be considered for purposes of this discussion paper.

OPTION 1 - DRAWING AN ADVERSE INFERENCE

6.5 It is important to bear in mind, when considering the question of defence disclosure, that there are material distinctions between the Anglo-American systems of criminal justice and those of European countries. In Anglo-American systems the investigation phase, ie the phase from the time that suspicion first falls upon the accused until the time that he or she is indicted, is under the control of the police (although the prosecuting authority might play some role). In some European systems the judiciary plays a role in that investigative phase. One must thus be careful to guard against assuming that procedures which take place before a judicial officer in some European countries are capable of being transposed to courts in this country, simply on the basis that a judicial officer is involved. One must look at the object which is sought to be achieved by the particular process rather than merely to its form.

6.6 It is important to bear in mind that the object which is served by defence disclosure varies according to the stage at which it is required to be made. Defence disclosure during the investigative phase serves to curtail the investigation, produce evidence that might contribute to a conviction and exclude possible defences (such as an alibi). Defence disclosure after indictment really serves only to curtail the length of the trial, rather than to elicit relevant evidential material. Accordingly, when considering whether there should be defence disclosure, it is as important to ask at what stage such disclosure should be required, for at each stage it will serve a different purpose.

6.7 Questioning by the police of persons suspected to have committed 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.¹⁹⁷

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”¹⁹⁸ and it will be a just excuse if the information required to be disclosed is self-incriminatory.¹⁹⁹

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.²⁰⁰ Second, to object to defence disclosure 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.

¹⁹⁷ 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.”

¹⁹⁸ 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.

¹⁹⁹ *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A); *Nel v Le Roux NO & Others* 1996 (1) SACR 572 (CC).

²⁰⁰ 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.

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.²⁰¹

6.14 It is not intended in this report to deal at any length with the manner in which the efficient

²⁰¹ 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).

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.²⁰² 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.²⁰³ 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 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

²⁰² If they meet the requirements for the admissibility of admissions or confessions, as the case may be.

²⁰³ In accordance with the "cardinal rules of logic" referred to in *R v Blom* 1939 AD 288

in England, and prevents an adverse inference from being drawn.²⁰⁴

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.”²⁰⁵

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.²⁰⁶ 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.²⁰⁷ 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 whether the suspect was given a warning).²⁰⁸

²⁰⁴ See for example *R v Mashелеle & 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.

²⁰⁵ *Hall v R* [1971] 1 WLR 298.

²⁰⁶ 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.

²⁰⁷ See footnote 205 above.

²⁰⁸ 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.

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,²⁰⁹ 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.²¹⁰ 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 Whether it would be unconstitutional to draw such an inference depends upon the content of the rights that are guaranteed by that section. At this early stage of our constitutional jurisprudence it is often difficult to determine what is or is not prohibited. One view is that the Commission cannot afford to be unduly timid in the proposals that it makes, for almost any development in our law can be argued to be in conflict with one or other of the protections afforded by the Bill of Rights. It must also be borne in mind that even in countries in which inferences may not be drawn from silence, the issue has not been uncontroversial, and courts have invariably been divided on the issue. If need be, there are mechanisms in the Constitution to allow for the testing of proposed legislation before it is brought into effect.

6.24 The argument that is presented in favour of the view that to draw an adverse inference against an accused from silence is in conflict with the protection against self-incrimination most often does little more than to build upon and repeat in various forms a process of *a priori*

²⁰⁹ 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.

²¹⁰ 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.

reasoning, without critical analysis of the underlying rationale for such protection. One central consideration is that the rationale for the protection against self-incrimination is to safeguard the innocent from the potential that they might be induced to make false confessions.²¹¹ The inevitable consequence is that 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 from that premise that the principle has no application in circumstances in which there is no potential that innocent persons might be induced to falsely incriminate themselves.

6.25 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.

6.26 The Constitutional Court recently considered the right to silence and the presumption of innocence and the constitutionality of limitations of these rights. In *S v Manamela*²¹² the accused had been convicted of contravening section 37 of the General Law Amendment Act, 62 of 1955. Section 37 provides that any person who in any manner acquires or receives into his possession stolen goods, otherwise than at a public sale, without having reasonable cause, proof of which shall be on such person, for believing at the time of such acquisition that such goods are the property of the person from whom he received them, is guilty of an offence. The trial court declared the reverse *onus* provision contained in the section invalid and the Constitutional Court was requested to confirm the order of the trial court on the constitutionality of the reverse *onus*. The crux of the issue was whether the provision was consistent with the constitutionally entrenched right to a fair trial, and in particular section 35(3)(h) of the Constitution, which guarantees the right to be presumed innocent, to remain silent and not to testify during the proceedings.

²¹¹ This view has been expressed 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).

²¹² 2000 (3) SA 1 (CC).

6.27 The provision requires the prosecution to establish three elements of the offence beyond a reasonable doubt: that the accused was found in possession of goods, other than stock or produce, that the goods were acquired otherwise than at a public sale and that the goods were stolen. Once the prosecution has established these elements the accused is liable to conviction unless he establishes that he believed, at the time of acquiring the goods, the person from whom he received them was indeed the owner thereof or was duly authorised by the owner to dispose thereof and secondly that his belief was reasonable. The accused must discharge this onus on a balance of probabilities. It was argued that the provision therefore imposes a burden on the accused to adduce evidence establishing the reasonableness of his subjective belief and in doing so effectively introduces statutory liability for the negligent, albeit innocent, acquisition of stolen goods. It was argued on behalf of the appellants that the imposition of a full burden of proof upon the accused infringes the right to be presumed innocent, since it creates the risk and indeed the inevitability of a conviction despite the existence of a reasonable doubt as to the guilt of the accused.

6.28 The Constitutional Court confirmed that the right to silence, like the presumption of innocence, was firmly rooted in both our common law and statute and it was inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his trial. The Court, however pointed out that pitted against this time-honoured right was the consideration that dealing in stolen goods is a scourge in our society. It is a practice involving massive corruption and immorality that can permeate and perversely normalise itself in every area of society. With reference to *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schieteka*²¹³ the court warned that one must ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. The court pointed out that it is well established that the Constitution requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. The prevalence of serious crime is therefore not a blank cheque for the legislature to erase all procedural safeguards.

6.29 It was argued on behalf of the State that in the vast majority of cases the State has no information or evidence concerning the circumstances in which the persons from whom the accused acquired the goods in question. In almost all cases the information relevant to the

²¹³ 1999 (4) SA 623 (CC).

determination of reasonable cause is peculiarly within the knowledge of the accused person, which makes it extremely difficult for the State to demonstrate the absence of reasonable cause unless there is evidence emanating from the accused.

6.30 The court concluded that there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely that he had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority to dispose of them. For these reasons the court found that the limitation on the right to silence contained in the challenged provision was justified. The court, however, proceeded to consider and evaluate the standard by which that evidence must be established.

6.31 In terms of the provision the reverse *onus* required the accused to establish on a balance of probabilities reasonable cause for the requisite belief. This means that the court is obliged to convict even if it entertains a reasonable doubt as to the guilt of the accused and even if the version of the accused is likely to be true. The court held that the presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct and it ensures that an accused cannot be convicted until the State proves his or her guilt beyond a reasonable doubt. The right is vital to an open and democratic society committed to fairness and social justice, and where a presumption of guilt is substituted for a presumption of innocence the limitation of the right is extensive and the justification for doing so must be established clearly and convincingly. The court was of the view that if the reverse *onus* had been wrought in a more focussed or nuanced way to eliminate the concern that an accused could be convicted even if his version was reasonably possible, it might have passed constitutional muster.

6.32 However, the court held that the risk of people being erroneously convicted and unjustly sent to jail was too high, and this disturbed the proportional balance between the limitation and its purpose. The court found that the imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of the acquisition, and that it was a less invasive means of achieving the legislative purpose of the provision. At the same time it served to a significant degree to reconcile the conflicting interests present in the case. The court accordingly held that the problem facing the prosecution would be met by requiring the accused to furnish evidence as to the

reasonableness of his or her belief. The court struck down the reverse *onus* clause in the Act and substituted it with the following provision:

In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.

6.33 It may be argued that the premise upon which this conclusion is based (i.e. that the principle exists to protect the innocent) is unsound. It is submitted that there is no alternative principle of justice which might be served by the protection against self-incrimination. The alternative argument is that there are three facets of the modern rationale for the principle in terms of which an adverse inference cannot be drawn, that is: (a) concern for reliability (by deterring improper investigation); (b) protection of privacy and dignity and (c) the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence.²¹⁴ The first will be dealt with more fully below. As to the second, a suspected criminal has no greater claim to privacy and dignity than an innocent member of the public, who is obliged to furnish information. Concerning the third facet, it is argued that it is no more than circular reasoning.

6.34 To return to the first facet referred to above, it really incorporates two separate arguments. As to the first (concern for reliability), it has already been suggested that merely to apply a process of inferential reasoning has no potential to act as an inducement to an innocent person to make a false confession or admission. As to the potential that the wrong inference might be drawn, the danger is no greater than it is when inferential reasoning is applied to other relevant aspects of fact-finding. (See later.) As to the second (deterring improper investigation), 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. Nor is there reason to believe that such abuses that have taken place in the past and still do take place will not continue. It is those abuses that were sought to be avoided by the rules that were laid down in *Miranda v Arizona*.

However, 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

²¹⁴ Paragraph 6.46.

²¹⁵ See footnote 197 above.

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, however, for excluding that evidence when it has not been accompanied by police abuse. Furthermore, 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.

Nevertheless, because of the inherent possibility that suspects in police custody might be subjected to oppression, aimed at eliciting positive self-incrimination (oppression can never produce self-incrimination by silence) and that the fear of an adverse inference being drawn might contribute to succumbing to that oppression, it is submitted that a duty to respond to police questioning (in other words, permitting an inference to be drawn from silence) should only be recognised if, at the same time, adequate provision is made for control to be exercised over the process of police questioning. This topic is dealt with more fully in paragraphs 6.59 - 6.68 of this discussion paper.

6.35 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

²¹⁶ Which reported in 1993.

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

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.

6.36 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:

... 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

6.37 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.

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.

²²⁰ See footnote 209 above.

- * 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 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

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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 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.

advanced by the Royal Commission, and the Victoria enquiry, do not withstand critical scrutiny.

6.38 It has been suggested that none of the arguments which has been advanced in this report (paragraphs 6.42 - 6.66), or in the reports of the Commissions which have been referred to, provides any grounds for believing that the innocent might be at risk if a duty of disclosure were to be recognised. The only risk is that an inference might be drawn when the facts do not warrant it. As mentioned, that is an inherent risk of inferential reasoning, but it has never been suggested that inferential reasoning should for that reason be prohibited. The problem is not unique when applied in this context.

6.39 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).

6.40 If it were considered to be desirable to allow for an appropriate inference to be drawn from the silence of a suspect, it would seem to be desirable that there should be common grounds for the admissibility of all evidence emanating from such questioning. That issue is dealt with more fully in paragraphs 6.69 - 6.74 below.

RECOMMENDATION - OPTION 1

6.41 It is recommended that the Criminal Procedure Act be amended expressly to permit a court to draw an appropriate inference from the pre-trial silence of a suspect in the circumstances contemplated by sections 34, 36 and 37 of the Criminal Justice and Public

²²²

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

Order Act 1994 (England). The Commission submits the following amendment to the Criminal Procedure Act for comment:

1. (a) The following chapter is hereby 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 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—
- (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), 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 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

SUMMARY OF SOUTH AFRICAN LAW

6.42 At common law suspects and accused persons may be questioned by the police but need not reply²²³ and no adverse inference from the exercise of the right to remain silent will be drawn. This common-law right to remain silent has been reinforced by sections 35(1)(a) and 35(3)(h) of the Constitution.²²⁴ Although the Judges' Rules would appear to discourage custodial interrogation there is no formal prohibition of custodial interrogation, and the inquiry in each case should be whether the accused's constitutional rights to remain silent and not to incriminate him/herself have been upheld.

THE CONSTITUTIONALITY OF DRAWING ADVERSE INFERENCES FROM SILENCE

6.43 The right to remain silent can be described as the absence of a legal obligation to speak.²²⁵ The scope of this legal immunity is contentious. Fourteen members of the European Court of Human Rights in *Murray v United Kingdom*²²⁶ 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

²²³ 1966 (2) SA 476 (C) 490-3; *R v Weyer* 1958 (3) SA 467 (G) 470-2.

²²⁴ The Constitution also demands that arrested persons be informed of their right to remain silent, the consequences of not remaining silent and their right to legal representation, and also the right to have a legal practitioner assigned at state expense where substantial injustice would otherwise result. (Ss 35(1)(b)(c)). It would appear that these rights also attach to suspects. See *S v Sebejan* 1997 (1) SACR 626 (W); PJ Schwikkard 'The exclusion of evidence in the absence of an appropriate warning' (1997) 13 SAJHR 446. Non-compliance with these requirements will generally lead to the exclusion of evidence in terms of s 35(5) of the Constitution.

²²⁵ *R v Esposito* (1985) 49 CR (3d) 193 (Ont.C.A).

²²⁶ 1996 (22) EHRR 29.

Articles 6(1) and 3(C) 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.

6.44 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 Busuttill²²⁷ held:

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.

6.45 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.²²⁸ 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*.

6.46 The High Court in *S v Brown*²²⁹ held that whilst the right to remain silent was

²²⁷ At 51.

²²⁸ 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).

²²⁹ 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.

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).²³⁰ 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.²³¹ However, the court held that this does not mean that certain adverse consequences will not arise should an accused exercise the right to remain silent.²³² 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.²³³

6.47 Reaching the opposite conclusion (and without reference to *Brown*), the court in *S v Lavehengwa*²³⁴ fully endorsed the view of Trengove²³⁵ 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 indicate 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

²³⁰ See *S v Bhulwana*; *S v Gwadiso* 1995 (2) SACR 748 (CC) at 16.

²³¹ *Brown* supra 62.

²³² At 63.

²³³ 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.

²³⁴ 1996 (2) SACR 453 (W).

²³⁵ W Trengove (Chaskalson et al eds *Constitutional Law of South Africa* (1996) 26-14 - 26-16.

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.²³⁶

6.48 Whilst these two court judgments diverge as to the constitutional permissibility of drawing adverse inferences from silence at trial, both accept that no question of an inference being drawn will arise until the prosecution has established a prima facie case.²³⁷

6.49 In *R v Noble*²³⁸ 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

²³⁶ 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 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.

²³⁷ The following criticisms have been made regarding the approach adopted by Trengove op cit and reflected in *Lavehengwa* 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 context of a non-jury system'. See Schwikkard *Presumption of Innocence* (1999) 120.

²³⁸ (1997) 1 SCR 874, 6 CR (5th) 1.

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.²³⁹

6.50 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,²⁴⁰ 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'.

6.51 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.²⁴¹

6.52 In the South African context this might be equated with only allowing the drawing of an

²³⁹ At 76.

²⁴⁰ P Healy 'Risk, Obligation and the Consequences of Silence at Trial' (1997) 2 *Canadian Criminal Law Review* 385.

²⁴¹ 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.

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.²⁴² 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.

6.53 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.²⁴³

6.54 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-incrimination²⁴⁴ 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.²⁴⁵

6.55 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

²⁴² *R v Blom* 1939 AD 188; *R v De Villiers* 1944 AD 493; *S v Reddy* 1996 (2) SACR 1 (A).

²⁴³ At [29], quoting from *R v P (MB)* 1 SCR 555 at 579, 13 CR (4th) 302.

²⁴⁴ See for example R Nugent 'Self-incrimination in Perspective' 1999 *SALJ* 550.

²⁴⁵ See Schwikkard op cit 122.

discharged its burden of proving a prima facie case and, furthermore, that a negative inference cannot be an automatic consequence of silence.

6.56 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.

6.57 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.²⁴⁶

6.58 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.²⁴⁷ (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.²⁴⁸

6.59 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.

²⁴⁶ Op cit 176.

²⁴⁷ I Dennis 'Instrumental protection, human right or functional necessity?: reassessing the privilege against self-incrimination' (1995) *Cambridge Law Journal* 342.

²⁴⁸ Ibid 374.

6.60 To date the Constitutional Court has favoured a purposive and generous approach to interpretation.²⁴⁹ 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.

6.61 The next step is to consider whether drawing an adverse inference from silence at the investigative stage meets the requirements of the limitations clause. Presumably the purpose of the limitation would be to ensure the accused's pre-trial co-operation and to enhance the truth-seeking function of the court and general efficiency of the criminal justice system.

6.62 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 %, ²⁵⁰ the variation in degree of co-operation appearing to be area specific. Legislation in England permitting an adverse inference from silence to be drawn seems to have made little difference to the number of suspects that co-operate and those that don't, and has had no apparent impact on the conviction rate.²⁵¹ In Argentina, despite an express prohibition on the drawing of adverse inference from silence²⁵² "experience shows that defendants rarely choose to stand mute at this stage".²⁵³ Similar findings were made by the New South Wales Law Reform Commission.²⁵⁴ Empirical research in South Africa would

²⁴⁹ *S v Zuma* 1995 (2) SA 642 (CC); *S v Makwanyane* 1995 (2) SACR 1 (CC).

²⁵⁰ S Easton *The Case of the Right to Remain Silent* 2 ed (1998) 136-139.

²⁵¹ 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.

²⁵² Article 298 The National Code of Criminal Procedure.

²⁵³ A Carrie & AM Garbo 'Argentina' in CM Bradley ed *Criminal Procedure a Worldwide Study* (1999) 28.

²⁵⁴ 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 SJ Odgers 'Police

probably produce similar results.

6.63 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 Victoria²⁵⁵ 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

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).

²⁵⁵ *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.

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

- 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.²⁵⁶

6.64 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.²⁵⁷ 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.²⁵⁸

6.65 Drawing an adverse inference from silence during custodial interrogation will infringe the constitutional right to remain silent as well as the privilege against self-incrimination, and has insufficient utility to constitute a justifiable limitation.

RECOMMENDATION - OPTION 2

6.66 It is recommended that no change be made to the common-law position concerning the drawing of inferences from silence.

QUESTIONING OF SUSPECTS - CODES OF POLICE CONDUCT

²⁵⁶ 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.

²⁵⁷ Easton op cit 165.

²⁵⁸ 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.

6.67 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.”²⁵⁹

6.68 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.

6.69 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.²⁶⁰ In this country, although similar “Judges’ Rules” were adopted, they largely fell out of use in any meaningful sense.²⁶¹

6.70 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

²⁵⁹ 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 & Zeffert: 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 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.

²⁶⁰ 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.

²⁶¹ As early as 1963 VG Hiemstra [(1963) SALJ 187 at 206] expressed the view that the judges themselves “emasculated” the rules.

evidence secured in breach thereof may be rendered inadmissible.²⁶² It is not intended in this paper to analyse those codes in any detail.²⁶³ 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;²⁶⁴ and the interview must not be “oppressive”.²⁶⁵

6.71 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*.

6.72 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.

6.73 The instructions clearly permit custodial interrogation and if followed should ensure

²⁶² 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.”

²⁶³ The terms of the current Code C are set out in Archbold, loc cit, 15-264 ff.

²⁶⁴ Code E provides for the manner in which interviews are to be tape-recorded.

²⁶⁵ 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 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.”

constitutional compliance.²⁶⁶ 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.

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

6.75 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.

RECOMMENDATION

6.76 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

6.77 Our law draws a distinction between admissions (whether by words or by conduct) and confessions in determining the “threshold” requirements for admissibility. The

²⁶⁶ *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).

significance of the distinction is that the requirements for admissibility are more onerous for confessions than for admissions.

6.78 For an admission to be admitted into evidence it must be established that it was made “voluntarily”,²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

6.79 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.²⁷⁰ 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.

6.80 The reduction of a confession to writing in the presence of magistrate does not appear to have had any significant advantages for the accused.²⁷¹ 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.²⁷²

6.81 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

²⁶⁷ Section 219A of the CPA.

²⁶⁸ *R v Barlin* 1926 AD 459 at 462, *S v Yolelo* 1981 (3) SA 1002 (A).

²⁶⁹ Section 217 of the CPA.

²⁷⁰ See the discussion of the topic in Hoffmann & Zeffert, op cit, at 207 ff.

²⁷¹ AV Lansdown & J Campbell *South African Criminal Law and Procedure* vol v *Criminal Procedure and Evidence* (1982) 874.

²⁷² 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).

reduced to writing in the presence of a magistrate. The distinction would also appear to inhibit investigating officers from recording confessions themselves.

6.82 A further aspect which should be considered is the trial-within-a-trial procedure to determine the admissibility of confessions. The function of the trial-within-a-trial procedure (known as *voire dire* in England) was aptly expressed by the House of Lords in *R v Brophy*²⁷³

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.

6.83 In South Africa the procedure has been considered in a number of cases. In *S v Sithobe*²⁷⁴ Nienaber JA considered the procedure and expressed its function in similar terms:

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.

and in *S v K*²⁷⁵ the court concluded that:

The 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 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)).

²⁷³ 1981 2 All ER 705 at 709.

²⁷⁴ 1992(1) SACR 347 (A) at 351.

²⁷⁵ 1999 (2) SACR 388 (C) on page 390.

6.84 In *S v De Vries*²⁷⁶ the court held that an accused's evidence during a trial within a trial could not be held against him in determining his guilt. This is achieved by insulating the inquiry into the voluntariness of a confession in a compartment separate from the main trial and by determining the admissibility of the confession through a trial within a trial. At such a trial the accused can go into the witness-box and testify on the question of voluntariness of the confession without being exposed to general cross-examination on the issue of his guilt. The prosecution may not, as part of its case on the main issue (the guilt of the accused), lead evidence regarding the testimony of the accused during the trial within the trial. However, during a trial within a trial the accused may dispute that he was the author of the confession in that he may allege that he was instructed by police officers as to the contents of the confession. In other words he may allege that the confession originated from the persons questioning him. In such a case the need arises to cross-examine the accused on the contents of the statement which inevitably may relate to the issue of his guilt. It may therefore necessitate the State to lead evidence in the main trial regarding his testimony in the trial within the trial since it may be relevant to the issue of his credibility. In such cases it becomes necessary for an exception to the rule which excludes evidence from the trial within the trial from the main trial.

6.85 In *S v Nglengethwa*²⁷⁷ the Supreme Court of Appeal considered a case where an interpreter gave evidence in the trial within a trial as to the words which the accused used during a pointing out. The State neglected to repeat his evidence during the proper trial. The Supreme Court of Appeal held that the evidence in the trial within the trial could be used in determining the accused's guilt. The court added that although the judgment deviated from existing practice, the accused was not prejudiced thereby. His advocate throughout the trial accepted that the full pointing out was before the trial court and the appellant also testified during the trial as to the pointing out. The court stated that the decision in *S v De Vries* does not mean that those parts of the State's evidence relevant in respect of the accused's guilt and which have been presented before the full court, cannot also be taken into account. If a trial is conducted by either a judge alone or a magistrate, it is nonsensical and a waste of costs, time and energy to repeat evidence which was presented during the trial within the trial at the end of such trial within a trial. The same principle applies for trials before a judge and assessors where the assessors participate in the trial within a trial. The court emphasised

²⁷⁶ 1989 (2) SA 228 (A).

²⁷⁷ 1996 (1) SACR 737 (A).

that the purpose of a trial within a trial is twofold: provisionally to withhold the contents of a prejudicial statement from the court, and to give the accused the opportunity to testify before the closing of the State's case without fear that his evidence will later be used against him.

RECOMMENDATION

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

The Commission also proposes 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, and thereby allowing for the admissibility of evidence given during the trial within a trial also in the main trial.

6.87 The following amendments are submitted for comment:

- (a) **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 admissibility of evidence against the accused, shall be admissible against the accused or the said witness, as the case may be.

(b) **Section 218 of the principal Act is hereby amended by the deletion of subsection(2).**

(c) **Sections 219 and 219A of the principal Act are hereby deleted.**

DEFENCE DISCLOSURE FROM THE TIME THE ACCUSED IS INDICTED UNTIL THE PLEA

6.88 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.

6.89 As pointed out earlier in this discussion paper, the purpose which is served by requiring defence disclosure will largely be dependent upon the stage at which such disclosure is required. 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.

6.90 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 disclosure²⁷⁸.

²⁷⁸

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

6.91 Following the decision in *Shabalala v Attorney-General, Transvaal*,²⁷⁹ 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.²⁸⁰
- * The defence of insanity must, in effect, be disclosed in advance.²⁸¹
- * 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.²⁸² For example, an accused should lay a foundation for a defence of sane automatism.²⁸³ In *S v Trickett*,²⁸⁴ 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*²⁸⁵ it was said that the State need not negative provocation unless the evidence indicates that it is a possible factor in the case.²⁸⁶

6.92 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

²⁷⁹ 1995 (2) SACR 761 (CC).

²⁸⁰ *R v Mashelele* 1944 AD 571; *S v Zwayi* 1997 (2) SACR 772 (CkHC).

²⁸¹ Whether this reverse onus will withstand constitutional scrutiny is an open question.

²⁸² AV Lansdown & J Campbell *South African Criminal Law and Procedure* vol v *Criminal Procedure and Evidence* (1982) at 910.

²⁸³ See generally Schmidt 1973 SALJ 329; *S v Potgieter* 1994 (1) SACR 61 (A).

²⁸⁴ 1973 (3) SA 526 (T) at 532.

²⁸⁵ 1968 1 PH H172 (A).

²⁸⁶ See also *S v Kalagopoulos* 1993 (1) SACR 12 (A); *S v Cunningham* 1996 (1) SACR 631 (A).

reject defence disclosure;²⁸⁷

- (b) the elimination of surprise would enable the State properly and timeously to investigate defence allegations;²⁸⁸
- (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 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:²⁸⁹

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

²⁸⁷ See generally GD McKinnon 'Accelerating Defence Disclosure: A Time for Change' (1996) 1 *Canadian Criminal Law Review* 59.

²⁸⁸ See D Tanovich & L Crocker 'Dancing with Stinchcombe's Ghost: A Modest Proposal for Reciprocal Defence Disclosure' (1994) 26 *CR* (4th) 333.

²⁸⁹ Report of the Royal Commission on Criminal Justice 1993.

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.²⁹⁰

6.93 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:²⁹¹

- (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 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;²⁹²
- (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

²⁹⁰ At 98.

²⁹¹ See generally S Costom 'Disclosure by the Defence: Why Should I tell you' (1996) 1 *Canadian Criminal Law Review* 73.

²⁹² (1991) 3 SCR 326; 8 CR (4th) 277.

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.²⁹³

- (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 which defences will be raised.²⁹⁴ 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.²⁹⁵

- (h) the imbalance between defence and prosecution resources militates against compelling defence disclosure;²⁹⁶
- (i) it is wrong in principle: 'The defendant should be required to respond to the

²⁹³ 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.

²⁹⁴ Costom op cit 78. S Easton *The Case for the Right to Silence* 2 ed (1998) 53.

²⁹⁵ Law Reform Commission of Canada, *Working Paper No 4: Criminal Procedure Discovery* (1974) 29-30.

²⁹⁶ S Easton op cit 53-4.

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.²⁹⁷

- (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;²⁹⁸
- (l) compulsory defence disclosure leads to an increase in the number of people exercising their right to legal aid;
- (m) defence disclosure has no significant impact on conviction or 'clear-up rates';²⁹⁹
- (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;

²⁹⁷ 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.

²⁹⁸ Easton op cit 54.

²⁹⁹ 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.

- (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.

6.94 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.

6.95 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.

6.96 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. In the Commission's view 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, in the Commission's view, is there any scope for drawing any other meaningful inference.

6.97 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. Without a critical

analysis of the nature of the inference that might be sought to be drawn for failing to disclose the defence at the time of the plea, is in the Commission's view somewhat meaningless, and to expect this to provide an inducement to make disclosure is unrealistic.

6.98 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.³⁰⁰ 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 sentence³⁰¹ 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 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.

6.99 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.

RECOMMENDATION

OPTION 1

³⁰⁰ For example, it is well accepted that evidence of an alibi is "considerably weakened" if it was not disclosed in advance: *R v Mashелеle* 1944 AD 571.

³⁰¹ 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'.

6.100 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. The matter should be considered in conjunction with proposals that are being considered in relation to plea bargaining.

OPTION 2

6.101 However, the Commission has received alternative proposals in this regard from the National Director of Public Prosecutions, and these proposals for reform are discussed hereafter.

6.102 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. He is of the view that with regard to defence disclosure we 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

6.103 In *R v Ling*³⁰² 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,

³⁰² (1996) 90 A CRIM R 376 at page 382.

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)

6.104 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.

6.105 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”**.

6.106 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 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:

- S the defence should not be precluded from relying on a defence or evidence which was not disclosed pre-trial; and
- S 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)

6.107 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.

6.108 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 -

- S 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;
- S 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
- S whether changes to the current position with regard to prosecution pre-trial disclosure are needed.

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.

6.109 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.

6.110 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.

6.111 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)

6.112 The NSW Commission consequently suggested the following three options:

Option 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.

Option 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.

Option 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.

6.113 The New South Wales Law Reform Commission finalised its final report in July 2000 and made the following recommendations for implementation:³⁰³

RECOMMENDATION 1 (page 72)

The Commission recommends that s 89 of the Evidence Act 1995 (NSW)³⁰⁴ 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.

³⁰³ "The right to silence" New South Wales Law Reform Commission report 95 July 2000.

³⁰⁴ 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 (UK)

6.114 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.

6.115 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.

6.116 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.

6.117 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.

6.118 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

6.119 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.

6.120 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.

RECOMMENDATION - OPTION 2

6.121 In the light of the above, the National Director of Public Prosecutions supports the proposal put forward in paragraphs 5.30-5.33³⁰⁵ and furthermore recommend that legislation similar to the recommendations of the New South Wales Commission regarding pre-trial disclosure referred to above be introduced. It is also recommended that compulsory defence disclosure should be considered and proposed together with comprehensive provisions dealing with compulsory pre-trial disclosure by the prosecution. The following proposals for legislative amendments are submitted for comment:

Insertion of sections 151A to 151D in Act 51 of 1977

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 adviser.
- (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

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See in this regard also the arguments in support of L Meintjies-Van der Walt in "Pre-trial disclosure of expert evidence: lessons from abroad" SACJ (2000)13 on page 145.

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.
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- (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.

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- (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* {ground for exclusion of culpability}

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.

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- (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 adviser.
- (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).
 - (iv) 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.
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- (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

6.122 The Commission sees 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.

CHAPTER 7

JUDICIAL PARTICIPATION AND TRIAL MANAGEMENT

PART B

GREATER JUDICIAL PARTICIPATION IN THE PROCESS OF THE TRIAL

7.1 In the research done on behalf of the Commission by Professor Steytler³⁰⁶ 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

³⁰⁶ See chapter 3 paragraphs 3.10 *et seq.*

dictum of Curlewis JA in *R v Hepworth*³⁰⁷:

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.³⁰⁸

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 defence³⁰⁹ and judicial intervention to the prejudice of the defence is not per se irregular,³¹⁰ provided the judicial officer does not assume the role of the prosecution.³¹¹ Whilst a judicial officer may not call witnesses from the outset in order to prove the allegations contained in the charge sheet³¹² he or she may call evidence which has been omitted by mistake or is necessary in order to rectify some technical deficiency.³¹³ On the other hand it would be an irregularity for the court to tell the prosecution how to conduct its case.³¹⁴ Furthermore, a judicial officer must not by his or her

³⁰⁷ 1928 AD 265 at 277.

³⁰⁸ 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.

³⁰⁹ See *S v Mosoinyane* 1988 (1) SACR 583 (T) 595a-d; N Steytler *The Undefended Accused on Trial* (1988) 150, 175-7.

³¹⁰ 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 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).

³¹¹ *S v Manicum* 1998 (2) SACR 400 (N).

³¹² *S v Jada* 1985 (2) SA 182 (EC); *S v Kwinika* 1989 (1) SA 896 (W).

³¹³ *R v Hepworth* supra.

³¹⁴ See *S v Matthys* supra.

conduct create the impression that he or she is biased in favour of the prosecution.³¹⁵

7.4 Quite evidently, achieving the appropriate balance between ensuring there has been full a 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*³¹⁶, 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 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.

³¹⁵ See *S v Matthys* supra.

³¹⁶ Supra.

7.9 Since the decision in *Shabalala v Attorney-General of Transvaal*,³¹⁷ the prosecution has been required to disclose to the defence, in advance of the trial, all material information in the docket.³¹⁸ 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 There are no good grounds, however, for the information encompassed by that material to 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 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 187 of the Act.

RECOMMENDATION - OPTION 1

7.12 The Commission recommends that the Criminal Procedure Act be amended to allow

³¹⁷ 1995 (2) SACR 761 (C).

³¹⁸ 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.

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. The Commission submits the following amendments for comment:

- (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.

7.13 Having regard to the discussion on defence disclosure and the arguments put forward by the National Director of Public Prosecutions³¹⁹ and the proposals on defence disclosure contained in option 2, chapter 6, an alternative proposal outlined hereafter, is also submitted with regard to the presiding officer's access to information relating to the case:

RECOMMENDATION - OPTION 2

Insertion of a new 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.

³¹⁹ See Chapter 6 paragraphs 6.101 *et seq.*

- (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; and

(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.

- (1) 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

7.13 To some degree, section 115 of the Criminal Procedure is directed towards assisting to isolate the true issues and enable a trial to be conducted more expeditiously. The difficulty only really arises in relation to an accused who chooses not to co-operate. It has already been pointed out that, while the presumption of innocence remains, there is no means of enforcing co-operation. An accused will always be entitled to call upon the State to prove every element of the offence.

7.14 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. While the Commission's view is that no realistic mechanism exists for compelling an accused to make disclosures, there is scope for enhancing the judicial officer's powers of questioning in terms of section 115 of the Act.

7.15 It has been suggested that the question whether an accused who does so should be penalised when it comes to sentence (which, on the face of it, seems to be impermissible) or whether an accused who provides co-operation should be rewarded, raises matters of principle which are similar to those which arise in relation to plea-bargaining.

7.16 Nevertheless, there is some merit in providing for a formal structure within which, particularly in more complex cases, proper and serious attempts can be made to isolate issues, and generally regulate the conduct of the case.

7.17 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 to the 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.

RECOMMENDATION

7.18 The Commission recommends that provision be made in the Criminal Procedure Act for an amendment of section 115 of the Act which enhances the powers of judicial officers and a procedure for the holding of a conference in appropriate cases before the trial. The following amendments are submitted for comment:

(a) 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.

- (b) 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.

REPUBLIC OF SOUTH AFRICA

**CRIMINAL PROCEDURE
AMENDMENT BILL**

(As introduced)

(MINISTER OF JUSTICE)

[B -2000]

REPUBLIEK VAN SUID-AFRIKA

**STRAFPROSESWYSIGINGS-
WETSONTWERP**

(Soos ingedien)

(MINISTER VAN JUSTISIE)

[W -2000]

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- { } Words in bold type in these brackets indicate an alternative proposal.
- _____ Words underlined with a solid line indicate insertions in existing enactments.
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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; 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

Insertion of Chapter 23A in Act 51 of 1977

1. (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—

(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), 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 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

6. Insertion of sections 151A to 151D in Act 51 of 1977

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 adviser.
- (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* {ground for exclusion of culpability}
- 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 adviser.
- (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

7. 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

8. (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

9. 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

9. **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.

10. 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

- 11. (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

12. 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*.