F W GUEST MEMORIAL LECTURE

OUR CRIMINAL PROCEDURE — A PLEA FOR REVIEW

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The F W Guest Memorial Trust was established to honour the memory of Francis William Guest, MA, LLM, who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

This evening we are assembled to honour the memory of Frank William Guest, the first full-time Professor of Law at the University of Otago. We recall with pride and affection an outstanding teacher, an able practitioner and a leader in Law Society affairs.

The F W Guest Memorial Lecture has become something of a sacrament for this Faculty and for this University. I consider it both an honour and a privilege to be invited to be this year's celebrant.

I pose the question — does our criminal procedure embody the values of our times? Is it producing a system of criminal justice which meets the ideals and the demands of our fellow citizens? That passenger on the Anderson's Bay bus; the ordinary Kiwi bloke; that person who on the one hand champions the right of his fellow citizen to have a fair and impartial trial and yet, on the other hand, cries out for the vigorous pursuit and just punishment of the criminal; that person who on the one hand abhors oppression by the police and yet, on the other hand, disavows any suggestion of going soft on the criminal?

The quest for an acceptable means of achieving criminal justice must take into account these competing considerations.[1] It must strike a balance between the interests of the community and the rights and the liberties of the individual.[2]

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1 As to the relationship between substantive law and procedural law see Salmond, *Jurisprudence* (12th ed 1966) 462: "Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

2 The "concept of a fundamental balance" is discussed in the *Report of the Royal Commission on Criminal Procedure* (1981; Cmnd 8092) (the *Philips Report*) paras 1.11-1.35.

Ideally here in New Zealand we should have a comprehensive review of our criminal procedure to see whether it is achieving that balance.[3] In England, in 1978, criminal procedure was considered to be of such importance as to warrant a Royal Commission under the Chairmanship of Sir Cyril Philips.[4] Unfortunately, we live in times of economic difficulty and it is therefore unlikely that the holding of such an inquiry in this country would be given the priority it deserves.[5] And so, in the meantime, we will have to continue with a piece-meal approach to review and reform in this area of our law.

These realities have accordingly led me to narrow my plea to one particular matter – the question of disclosure. It is a subject which has been crying out for a robust review. It is one of the most important aspects of our criminal procedure, as it fundamentally affects both preparation for trial and the trial itself.

It received prominence before the Thomas Royal Commission.[6] It has been the subject of extensive study by the Law Reform Commission of Canada.[7] It was at the forefront of the recommendations of the Philips Commission.[8] It was discussed at the recent Law Conference at Rotorua.[9]

3 There has been no royal commission or commission of inquiry in New Zealand in respect of criminal procedure only: see Robertson and Hughes, *A Checklist of New Zealand Royal Commissions, Commissions and Committees of Inquiry 1864-1981* (1982). The terms of reference of the Royal Commission on the Courts, which was established in 1976, were primarily directed towards the structure and administration of the courts in New Zealand. While their 1978 Report touched on some matters of criminal procedure, the Royal Commissioners did not undertake a comprehensive review of this area.

4 See *Philips Report,* supra n 2. A short summary of this report can be found in [1981] Crim LR 437.

5 A comprehensive review of our criminal procedure could examine such matters as: (i) whether there should be an independent prosecution agency in New Zealand; (ii) whether the preliminary hearing of an indictable offence should be abolished; (iii) whether majority verdicts should be introduced; (iv) whether the law as to interrogation of suspects requires reform; (v) whether the prosecution should be given the last word to the jury when the defence calls evidence; (vi) whether the prosecution should be entitled to comment on the fact that the accused has not given evidence; and (vii) whether there should be a comprehensive code of conduct for prosecution and defence counsel and, if so, whether such a code should have the force of law or remain only as a matter of professional ethics and discipline.

6 See the *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (the *Thomas Report*) (1980) esp at 100 et seq.

7 See Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (1974); *Report on Disclosure by the Prosecution* (1984; No 22).

8 For a discussion on disclosure see *Philips Report,* supra n 2, paras 8.12-8.23, and *Report of the Working Party on Disclosure of Information in Trials on Indictment* (November 1979) which was referred to the Philips Commission by the Home Secretary.

9 See Cadenhead, "Tensions Within the Criminal Law" (1984) New Zealand Law Conference Principal Papers, vol 2, 97 esp at 99 et seq, and the brief report of discussion in *Triennial Times,* final issue, 11. Pre-trial notice of defence was referred to by C M Nicholson QC at the 1978 New Zealand Law Conference in Auckland: see *Conference Courier,* final issue, 14.

It is now being considered by the Criminal Law Reform Committee.[10] And so this occasion therefore seemed to me to be a timely one to examine the relevant issues and to enter the disclosure debate.[11]

To see these issues in their proper perspective we must first of all remind ourselves of the principles of the adversary system, which is the foundation of our criminal procedure. In New Zealand, we have adopted the English form of that system. Even here in Otago, where the pioneers aimed to establish an antipodean land of the heather, its citizens have had to conform to the English rather than the Scots version![12]

The presumption of innocence, the onus of proof beyond reasonable doubt, complete protection against self-incrimination – these are the basic principles of the adversary system.

The jargon of war and sport has been used to describe the criminal trial. Lord Devlin said:[13]

> The centre piece of the adversary system is the oral trial and everything that goes before it is preparation for the battle field.

Pollock and Maitland likened the criminal trial to a cricket match, with the judge acting as the umpire and responding to the question "how's that" rather than acting as an inquisitor.[14]

At the trial the respective roles of the prosecutor and the defence are said to be different. The prosecutor is enjoined to be a "Minister of Justice", that is justice in the sense of having regard to the interests not only of the accused, but also of the community. On the other hand, the defence is entitled to obtain an acquittal within the limits of lawful procedure.[15]

10 When the Committee commenced its study in April 1984 it had before it a background paper prepared by its secretary, J S Hammington of the Justice Department. In August 1984 the Institute of Criminology at the Victoria University of Wellington embarked on a survey of prosecution and defence counsel as to current practice and possible changes in the law of disclosure in New Zealand.

11 As to criminal discovery generally see Adams, "Pre-Trial Discovery" [1966] Crim LR 602; Doyle, "Criminal Discovery in New Zealand" (1976) 7 NZULR 23; Elkington, "Discovery Upon Indictment in New South Wales" [1980] Crim LJ 4; Developments in the Law, "Criminal Discovery" [1961] 74 Harv LR 1051. See also Glanville Williams, *The Proof of Guilt* (3rd ed 1963) 100-102; Hall, Kamisar, La Fave and Israel, *Modern Criminal Procedure* (1969) 1015 et seq.

12 Criminal Procedure (Scotland) Act 1887, s 36 (UK). See also *Green's Encyclopaedia of the Law of Scotland* (2nd ed 1910) 61.

13 Devlin, *The Judge* (1979) 55.

14 Pollock and Maitland, *History of English Law* (1895) vol 2, 667.

15 *R* v *Thomas (No 2)* [1974] NZLR 658 (CA) at 659 per Wild CJ; *Richardson* v *R* (1974) 131 CLR 116 (HCA) and the note thereon in (1974) 48 ALJ 226; *R* v *Puddick* (1865) 4 F & F 497; 176 ER 662 at 663 per Crompton J; Humphreys, "The Duties and Responsibilities of Prosecuting Counsel" [1955] Crim LR 739; Kidston, "The Office of Crown Prosecutor" (1958) 32 ALJ 148; 3 *Halsbury's Laws of England* (4th ed 1973-) para 1140; Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 2988 et seq; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (41st ed 1982) para 4.177; Devlin, *Trial by Jury* (1966) 122; Kenny, *Outlines of Criminal Law* (19th ed 1966) 611-612; Council of the Law Society, *A Guide to the Professional Conduct of Solicitors* (1974) 60; Senate of the Inns of Court and the Bar, *Code of Conduct for the Bar of England and Wales* (2nd ed 1983) esp para 159 et seq and para 146 et seq; New Zealand Law Society, *Code of Ethics* (1980) paras 4.12.1, 4.12.3.

The criminal charge which is in the discretion of the prosecutor[16] is contained in an information[17] or in an indictment.[18] That is the limit of formal pleading by the prosecution. No formal pleadings are required from the defence.[19] Indeed, the accused is not bound to give notice of his defence until after the trial commences, except in the case of alibi.[20] He can prepare for his trial in complete secrecy. In trial by jury, an accused is not required to stand his trial, unless a prima facie case has been disclosed on the evidence given at the preliminary hearing.[21] At that hearing, or certainly before the trial, the prosecution must disclose all the evidence upon which it intends to rely at the trial. The prosecutor has an unfettered discretion as to what witnesses he will call and what exhibits they will produce.[22] The prosecutor, and the prosecutor alone, makes the selection from the material brought forth in the investigatory phase. In practice at the preliminary hearing, the accused in most cases will know in advance of the trial the whole of the case which he has to meet.[23] This is not so, however, in a summary trial, where the defendant does not receive as a matter of right any forewarning of the facts to be relied on by the prosecution. This is an obvious defect in our summary trial procedure. The defendant ought to have the option of being able to ask the police for a summary of the facts upon which the prosecution intends to rely.[24] And what of the residue of infor-

16 For an interesting discussion on the discretion in prosecuting see the speech of the Attorney General of the day, Sir Hartley Shawcross, in Parliamentary Debates, Hansard, House of Commons Official Report, vol 483, 29 January 1951, cols 681-688. See also *Moevao* v *Department of Labour* [1980] 1 NZLR 464 (CA); *Connelly* v *DPP* [1964] AC 1254 (HL(E)); *R* v *Humphreys* [1977] AC 1 (HL(E)); *R* v *Sang* [1980] AC 402 (HL(E)).

17 Summary Proceedings Act 1957, ss 15-17.

18 Crimes Act 1961, s 329. See also Adams, supra n 15 at para 2586 et seq.

19 But see the following article suggesting pleading points for criminal trials: Grayson, "Crown Court Efficiency: A Plea for Pleading Points in Issue for Criminal Trials" [1981] Crim LR 142.

20 Crimes Act 1961, s 367A. See also New Zealand Law Society, *Code of Ethics* (1980) para 4.12.6; New Zealand Police, *General Instructions* C150A; Garrow and Caldwell, *Criminal Law in New Zealand* (6th ed 1981) 345. The corresponding English provision in s 11 of the Criminal Justice Act 1967 (UK) gives effect to a recommendation in the 9th Report of the Criminal Law Revision Committee (Cmnd 3145). Notice of alibi has also been introduced into New Zealand court martial procedure: see Armed Forces Discipline Rules of Procedure 1983, r 16; Ministry of Defence, *DM 69: Manual of Armed Forces Law* vol 1, 8-93.

21 *R* v *Epping and Harlow Justices* [1973] 1 QB 433. Both the Law Reform Commission of Canada, Study Report, supra n 7 at 72-73, and the *Philips Report,* supra n 2 paras 8.27-8.31, recommended the abolition of the preliminary hearing. On the other hand, the New Zealand Criminal Law Reform Committee has affirmed the need for the preliminary hearing: *Report on Preliminary Hearings of Indictable Offences* (1972). The New Zealand body recommended that witnesses at preliminary hearings should be able to give their evidence in writing, and legislative amendments to this effect were subsequently made: Summary Proceedings Amendment Act 1976, s 17. The Planning and Development Division of the Justice Department has recently published a study on the effect of these changes: *The Effect of Written Depositions at Preliminary Hearings* (1981). See para 11.2 for a discussion of alternative approaches in New Zealand.

22. *Richardson* v *R,* supra n 15.

23 See the report of the Criminal Law Reform Committee, supra n 21, as to the purpose of preliminary hearings.

24 The question of the availability of police summaries of facts was considered in the *Report of the Royal Commission on the Courts* (1978) paras 1022-1027. The Royal Commission recommended that in summary proceedings it would be desirable that the prosecution

mation which the prosecution has retained and which does not form part of its case? Some of that information may be most unhelpful to the accused, but some of it may be very helpful — if he only knows about it. Here lies the problem.

We have no statutory right of criminal discovery. The Code of Civil Procedure limits discovery to civil actions[25] and our courts have not developed a system of criminal discovery by means of judicial decision.[26] Our criminal procedure contains no system of pre-trial review.[27] In contrast, the principle of pre-trial review has been recognised under Part I of the Judicature Amendment Act 1972[28] and soon it will be of general application in civil litigation when the new High Court Rules come into force.[29] The Official Information Act 1982 is as yet an untested aid for the defence. Whether it will be a means of obtaining further information from the prosecution awaits the future decisions of our courts.[30] And so, without any formal system of discovery or review, how does the accused now find out what helpful undisclosed information the prosecution has?

Whether any further information is to be disclosed by the prosecution to the defence is controlled by what has been aptly described as "certain ill defined legal and ethical duties".[31] Disclosure is in the hands of the prosecutor. It is limited to certain types of information only, and as the result we have a system of disclosure which is haphazard, uneven and at times unjust.

should provide the defence with a summary of the facts on which it relied. Reference was also made to the anticipated operation of s 48 of the Criminal Law Act 1977 (UK) which has yet to come into operation. Pending the implementation of s 48, pre-trial reviews have been instituted in some English provincial cities on an experimental basis: see infra p 10. Barnatt, "Section 48 A Viable Alternative" (1983) 147 JP 117 expresses a preference for the pre-trial review procedure.

25 See Judicature Act 1908, s 2; Code of Civil Procedure, rr 155-167C. See further *Bray on Discovery* (1885) 3.

26 Doyle, supra n 11 at 31 et seq, discusses the position in California where a system of criminal discovery has been implemented by judicial decision.

27 Pre-trial call-overs for jury cases are held in the District Courts in New Zealand for the purposes of checking the availability of counsel and settling the date of hearing. Under s 344A of the Crimes Act 1961 where any person is committed for trial either the prosecutor or the accused may at any time before trial apply for an order relating to the admissibility of evidence. This provision is restricted to cases where the applicant, be he the prosecutor or accused, desires to adduce particular evidence at the trial and believes that the admissibility of that evidence may be challenged.

28 Judicature Amendment Act 1972, s 10.

29 Draft High Court Rules, r 441.

30 However ss 6(c) and 9(2)(r) of the Official Information Act 1982 are likely to be invoked by the police in response to an application under the Act for pre-trial access to evidence and other material on the police file. A case at present awaits hearing to test the Ombudsman's rejection of the police refusal to supply a defendant with the prosecution's briefs of evidence. In *R* v *Patterson* unreported, Court of Appeal, 19 July 1984, 88/84, subsequent to the trial and following an application under the Official Information Act 1982, the defence solicitors were supplied with a statement of a witness whose evidence at trial was at variance with that statement.

31 Doyle, supra n 11 at 27.

Mason is the leading New Zealand case.[32] It lays down that a prosecutor is under a legal duty to make available to the defence material witnesses who have not been called and who can help the defence, whether he believes the witnesses to be credible or not. In practice, this means that their names and addresses only are supplied to the defence, or perhaps as a bonus their telephone numbers, as happened in *Mason*! Generally the prosecution is not under a duty to make available to the defence the *statements* obtained from those witnesses, other than in exceptional circumstances. In those cases the Court will order the prosecution to make the statements available if it considers that a refusal to do so might result in unfairness to the defence and perhaps in a miscarriage of justice. The New Zealand Law Society's Code of Ethics, which applies to prosecuting counsel, but not to police officers who prosecute in the District Court, unhelpfully repeats *Mason* and says nothing more.[33]

Because disclosure is a unilateral decision of the prosecutor, if he commits a breach of that duty, wittingly or unwittingly, his omission might never see the light of day. Prosecutors are certainly not helped by the uncertainty of the boundaries of their discretion. "Material evidence" is testimony which would or might detract from the case of the prosecution or assist the defence or incriminate any other person.[34] For example, a list of convictions of an accomplice. In Australia[35] it has been said that there is no general duty on the part of the prosecution to divulge the prior convictions of its witnesses and yet that former doyen of English prosecutors, Christmas Humphreys, recorded that he would always do so if the evidence of those witnesses was material.[36] Assuming that the prosecutor has read the whole of the police file, he does not necessarily know that a person who has been interviewed by the police can give evidence upon a subject which is "material" – and that is the key word, "material" to the case as seen through the eyes of the defence.[37] The prosecutor might genuinely believe, in the absence of any knowledge of the defence, that what a witness can say is not "material" and that there is no need to make him available to the defence.

32 *R* v *Mason* [1975] 2 NZLR 289 per Moller J; on appeal [1976] 2 NZLR 122 (CA). The relevant English authorities are reviewed by Moller J in the Supreme Court and by McCarthy P who delivered the judgment of the Court of Appeal. See also *R* v *Wallace* unreported, Court of Appeal, 29 November 1983, 303/82. In *R* v *Leyland Justices Ex Parte Hawthorn* [1979] 2 WLR 28 an order for certiorari to quash a conviction was granted in a case where two witnesses to a motor accident who gave statements to the police were not called. The defendant did not know of their existence. Holding that there had been a clear denial of natural justice, the Queens Bench Division found that the defendant had been deprived of the elementary right to be notified of material witnesses known to the police.

33 See New Zealand Law Society, *Code of Ethics* (1980) para 4.12.5; New Zealand Police, *General Instructions* C143. Following the Report of the Working Party on the Forensic Services of the DSIR, the New Zealand Law Society has proposed to amend para 4.12.7 relating to defence access to DSIR examination: *Law Talk,* 1 August 1984, no 200.

34 *R* v *Mason,* supra n 32 at 292 per Moller J.

35 *R* v *Thompson* (1971) 2 NSWLR 213 (CCA).

36 Supra n 15 at 742.

37 See *Thomas Report,* supra n 6, paras 421 and 422. In the case of one piece of information, the Royal Commission found that there was not even a reference to it on the police file: ibid, para 434.

If the prosecution has a statement from a witness which is seriously at variance with the actual or expected evidence of that witness at the trial, it is expected to disclose that statement.[38] This does not always happen. Once again, the defence might not necessarily know whether the prosecution is holding such a statement. How can it ask for it if it does not know of its existence?

An accused can normally obtain a copy of his own written statement; however, the Police General Instructions specifically exclude access by the accused to a written record of an oral statement unless and until it is used in the witness box to refresh the police officer's memory. Whether these Instructions accord with the case law is doubtful.[39] Surely common fairness dictates that an accused should be entitled to know before his trial what he has said to the police when interviewed, irrespective of how that utterance was finally recorded?

Then there is another factor which must be taken into account and which is not a question of law. It is the respective personalities of the prosecutor and the defence counsel. The prosecutor might be co-operative with counsel A, but not with counsel B. Why then should the accused represented by the latter be prejudiced merely because he has instructed him and not counsel A? This quite simply leads to a situation of 'disclosure by personality'.

Is there not more than a mere hint of potential injustice in the way that disclosure by the prosecution now operates? And yet generally there is an almost instinctive reluctance on the part of some — I hasten to add not all — prosecutors to make any disclosure.

Liberalisation of disclosure by the prosecution is resisted on several grounds: first, that fuller disclosure would result in such evils as perjured evidence, the suppression, fabrication or retraction of evidence, tampering with witnesses, bribery and intimidation; secondly, that there would be a reluctance on the part of some persons to assist the police if they knew that what they said was going to be later revealed to an accused; thirdly, that the prosecution should not be forced to disclose sensitive information which the public interest requires should not be disclosed.[40] Can these objections be answered? I believe that they can.

As to the first argument, namely perjured evidence, tampering and so on: at the present time in a case to be tried on indictment the prosecution must call its witnesses or make their evidence known at the preliminary hearing. If more liberal disclosure is going to lead to perjured evidence, threats, intimidation or tampering, then one would have expected that these evils would have become evident before now. But they have not. Of course,

38 *R* v *Patterson,* supra n 30.

39 In Australia and England it is settled that where an accused has been subjected to police interrogation he should be furnished with a copy of the record of the interview: *R* v *Dugan* (1970) 92 WN (NSW) 767 (CCA) at 768; *Driscoll* v *R* (1977) 51 ALJR 731 (HCA) at 741; *R* v *Cane* (1975) 65 Cr App R 270 at 274. Compare instruction C 143(1)(c) of the New Zealand Police *General Instructions* and para 4.12.4 of the New Zealand Law Society's *Code of Ethics* (1980). A distinction appears to be drawn in New Zealand between a written statement and a written record of an oral statement.

40 See Doyle, supra n 11 at 36.

you will get the odd case where an accused will try to "get at" a prosecution witness, but this conduct is not common-place. The suggestion that perjured evidence will result from wider discovery has received the following pungent comment, by a distinguished American Judge:[41]

> I cannot be persuaded that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery. I should think rather, its complete fallacy has been starkly exposed through the existence and analogous experience in civil cases where liberal discovery has been allowed and perjury has not been fostered.

The second argument, that members of the public will be reluctant to come forward, is virtually groundless. There is only a small minority of our community who are not prepared to help the police in their fight against crime. Our citizens are not deterred now. Fuller disclosure, I suggest, will not deter them in the future. The third argument relating to sensitive information is valid. But an objection as to part cannot be an objection as to the whole. Not all the information on the prosecution file is sensitive. I agree that sensitive information such as matters of national security, some unusual form of police surveillance, the name of a police informer and other matters of that kind should not be disclosed or that there should be limited disclosure only.[42] Sensitivity, like materiality, is decided by the prosecutor. His decision is not subject to review, but the potential for injustice is ever present.

In my view, the need for a better system of disclosure by the prosecution is patent. The objections in principle to extended disclosure can be effectively answered. Some sceptical and suspicious prosecutors and police officers will undoubtedly resist wider disclosure. That resistance should not, however, stand in the way of reform. Some opponents will suggest that the quid pro quo of prosecution disclosure should be disclosure by the accused. I do not see that the reform of disclosure by the prosecution should necessarily depend upon any corresponding requirement of disclosure by the defence. I shall be later making some suggestions in this regard but I certainly do not see reciprocal disclosure as a condition precedent, at the present time, to the reform of prosecution disclosure.

The next question which then arises is what sort of reform would provide an effective and just disclosure procedure? Assistance in solving this problem can be gained from considering what has happened and what has been said overseas. The Philips Commission affirmed that "any arrangements for disclosure must be consistent with the overriding features of the accusatorial system". It recommended:[43] (i) that the disclosure decision should be left with the prosecutor; (ii) that he should be obliged to make available to the defence, *on request,* statements or documents which have

41 Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth" [1963] Wash ULQ 297.

42 Compare the Attorney General's Guidelines in England: *Disclosure of Information to the Defence in Cases to be Tried on Indictment* (1981) 74 Cr App R 302; [1982] 1 All ER 734.

43 *Philips Report,* supra n 2 para 8.19.

"some bearing on the offences charged or the surrounding circumstances of the case"; and (iii) that he should have a discretion as to whether to make available sensitive material of the kind earlier described. If this material went towards establishing the accused's innocence, it ought to be disclosed or the charge withdrawn. Following the Philips Commission, the Attorney General in England issued Guidelines for cases tried on indictment. These Guidelines were based on the Commission's Recommendations.[44] Now in England, as a general rule, copies of statements held by the prosecution will be made available to the defence. Similar guidelines have not been issued in New Zealand.[45]

The Philips Commission considered, but rejected the idea of the defence being able to apply to a Judge to determine whether and if so what additional material should be disclosed. That rejection was based on two grounds: (i) that there were insufficient judicial resources; and (ii) that because a Judge would have to ascertain the nature of the defence, this was inconsistent with the central feature of the adversary system which is that the prosecution must prove guilt without the assistance of the defence.[46] As to the first objection, there is nothing sacrosanct about the judicial establishment. It can always be increased. That, however, would probably not be necessary if compensating savings in judicial time at the trial could be effected. I believe that that result could be achieved as I hope to demonstrate shortly. As to the second objection: the Philips Commission has been somewhat inconsistent. On the one hand, it rejected judicial control of disclosure on the basis that the Judge would have to ascertain the nature of the defence and yet, on the other hand, it recommended some widening of the requirement of pre-trial notice of defence.[47]

So much then for the Philips Commission's view on judicial control of disclosure. Such control actually operates in a number of American State jurisdictions.[48] Lord Devlin has favoured the idea of a judicial intermediary to determine disclosure.[49] Both the American Bar Association[50] and the Law Reform Commission of Canada have supported the concept.[51] For myself, I do not think that the prosecutor should determine the question of disclosure. I favour resolution by a Judge, if he is requested so to do. Unlike the prosecutor, he has no stake in the prosecution. He has no preconceived view of the case. He would impartially assess whether disclosure should be made and, if so, to what extent. Even if the present law relating to disclosure by the accused remains unaltered, he could voluntarily disclose to the Judge the nature of his defence for the purpose of establish-

44 See supra n 42.

45 The Attorney General's Guidelines, supra n 42, were referred to without comment by the Court of Appeal in *R* v *Wallace* unreported, Court of Appeal, 29 November 1983, 303/82. It seems unlikely that the court intended that they should be introduced into New Zealand by a side-wind.

46 The conclusion of the *Philips Report,* supra n 2 para 8.19, leaving decision-making responsibility with the prosecution has been criticised: see [1981] 131 NLJ 77.

47 *Philips Report,* supra n 2 para 8.22.

48 See American Bar Association, *Discovery and Procedure Before Trial* (October 1970) 126.

49 Devlin, supra n 13 at 74.

50 See American Bar Association's *Standards,* supra n 48 at 108-131.

51 See Law Reform Commission of Canada, *Study Report,* supra n 7 at 160.

ing materiality. In effect the accused would hold the key to disclosure by the prosecution.

It is pertinent at this point to note a development which has occurred in England. It started as an experimental procedure, but it is now well established and its continuation has been encouraged by the Philips Commission. In 1974, at the suggestion of the Criminal Bar Association, a pre-trial review procedure was introduced at the Old Bailey.[52] Later it was introduced in the Crown Court on a number of the circuits.[53] The review is presided over by a Judge. It is initiated at the option of a Judge, or counsel if the case warrants such a review. Likewise similar systems of review are now successfully operating in the Magistrates' Courts of some English Provincial Cities.[54]

The purpose of the review is to deal with all matters of pre-trial procedure and to isolate the issues for determination at the trial. Such matters as applications for severance or separate trial, questions of admissibility of evidence and difficult points of law are determined. Admissions for the purposes of trial are obtained, resulting in the release of witnesses whose evidence is undisputed. The exhibits receive attention. Schedules are settled. Unwanted exhibits are dispensed with. The probable length of the trial, the availability of witnesses and the order in which they will be called are discussed. The obvious intent of the Old Bailey Practice Rules and the Magistrates' Courts' practice is that the pre-trial review should be a 'clearing house' prior to the trial. These reviews have produced many beneficial results. The issues for determination at the trial have become clear prior to the trial. Both sides are better prepared. The time of judges, witnesses, police and counsel has been saved. Untenable defences have been abandoned. Pleas of guilty have been forthcoming. Prosecutions have been withdrawn. In short, the trial has become a more efficient and streamlined instrument of criminal justice.

Drawing on this English experience, and recognising the need for a better system of disclosure by the prosecution, I therefore put forward the following suggestions for reform:

(i) an optional system of pre-trial review under the control of a Judge should be introduced in both the High Court and the District Court for the purpose of settling pre-trial procedural matters *including* disclosure and for the better isolation of the issues;

(ii) the scope of disclosure by the prosecution should be widened along the lines of the Attorney General's Guidelines in England; and

52 Du Cann, edited transcript of commentary at the Conference on the Prosecution Process, University of Birmingham, April 1975, 12.

53 Samuels, "Pre-Trial Review in the Crown Court" (1982) 146 JP 677, 686. The Central Criminal Court's Practice Rules of 21 November 1977 are set out at (1982) 146 JP 686.

54 These experimental reviews are described and discussed by Thomas, "Correcting Unwanted Leniency" (1982) 146 JP 284; Barnatt, supra n 24; Baldwin, "Pre-Trial Disclosure in the Magistrates' Court" (1983) 147 JP 499; Hill, "Pre-trial Reviews" (1984) 148 JP 39. Lord Lane LCJ has stated that there is scope for greater use of pre-trial reviews: "Criminal Justice", Papers of the Seventh Commonwealth Law Conference, Hong Kong, 18-21 September 1983, 19 at 23.

(iii) police Summaries of Facts should be available to the defence on request.

These proposals would I believe tend to eliminate the potential for injustice which currently exists in our present disclosure procedure. At the same time, they would make our criminal trials more efficient. They would lead to savings in both human and financial resources.

Let us now consider disclosure by the defence. The question here is whether there should be a flow of disclosure in both directions or whether the present one way system should remain unaltered. As I have said earlier, with the exception of alibi, the accused does not have to give advance notice of any defence. This is so even if he assumes a persuasive burden of proof, such as with the defence of insanity. He can adopt an Asquithian policy of 'wait and see'. He does not have to reveal his defence until the last possible moment at the trial itself. This audience will be interested to note that in Scotland pretrial notice of any 'special defence', such as alibi or self defence, together with a list of defence witnesses has been an obligation imposed on the defence since 1887. Dr Glanville Williams has drawn attention to the one-sided nature of the rules as to disclosure in trials on indictment and to the danger that a manufactured defence might succeed because the prosecution is deprived of a proper opportunity of testing it.[55]

In 1971, Mr R C Savage, then Solicitor General and now one of our High Court Judges, drew attention[56] to the provisions in some American Jurisdictions requiring prior notice of the insanity defence.[57] He proposed that every positive defence should be disclosed, such as self defence, provocation and compulsion. As to these defences he observed:

> Justice and truth are ill served by its being permissible to produce them without warning at the trial, like a conjurer producing a rabbit out of an apparently empty top-hat. The innocent gain no disadvantage from it, but to the guilty it is a considerable help in avoiding conviction.

The Philips Commission supported an extension of advance notice to defences depending on medical evidence or expert forensic scientific evidence which the prosecution needs an opportunity to evaluate or on which it might wish to call its own expert witnesses.[58] In 1983, Lord Lane LCJ said that he saw no real objection "to indicating to the prosecution the general nature of the defence, for example provocation, self defence, accident", and he went so far as advocating that defences which are peculiarly within the knowledge of the accused should be disclosed in advance, a principle which had already been accepted in the alibi defence.[59] An example of such a defence would be a claim of right.

55 Glanville Williams, "Advance Notice of the Defence" [1959] Crim LR 548.

56 See Savage, "Criminal Procedure: The Effect of Procedure Upon Justice" in Clark (ed), *Essays on Criminal Law in New Zealand* (1971) 94 at 110.

57 New York, California, Michigan, Florida, Indiana, Iowa, Oregon, Colorado, Arizona, Alabama, Arkansas, Utah and Vermont.

58 See *Philips Report,* supra n 2 para 8.22. However the Commission was not prepared to recommend "any formal requirement of general disclosure" on the part of an accused: ibid, para 8.20.

59 See Lord Lane LCJ, "Criminal Justice", supra n 54.

What then are the arguments in support of pre-trial notice? The most obvious one is that the principle has *already* been recognised with the defence of alibi. Then there is the point made by the late Lord Widgery LCJ when he described the relative pre-trial positions of the prosecution and the defence as "a clear relic from the days when a defendant could not give evidence himself". Lord Widgery felt that it was a deliberate piece of prejudice in favour of the defendant and while totally required when it was proposed and devised it was questionable whether it was still necessary in modern times.[60] Wigmore too has pointed to our law bearing the marks of attitudes which are now anachronistic.[61] Many see the pendulum as having swung too far in favour of the accused. One forthright American Judge, using different imagery, said:[62]

> Our procedure has always been haunted by the ghosts of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

The most telling argument in favour of pre-trial notice is that it would eliminate unfairness to the prosecution arising from surprise. Justice is not one-sided. The community also has a stake in the criminal trial. Is it just that the tactic of surprise can sometimes prevent a jury from reaching a proper verdict? Is it just that a defence theory put forward for the purpose of raising a reasonable doubt cannot be adequately tested simply because of lack of forewarning? Should some piece of fabricated evidence carry the day merely because lack of warning makes it virtually impossible to challenge? A criminal trial is hardly an equal encounter when surprise holds sway.

Another telling argument in support of notice is that the issues at the trial would become more clearly defined. The quality of representation would be improved and a more efficient and expeditious trial would result. Prosecution pretrial effort directed towards defences which are not ultimately pursued would be avoided. Savings in both time and public funds would result.

The main objection offered to advance notice is that it is said to be inconsistent with the fundamental principles of the adversary system in that the accused is being forced to assist the prosecution and that its burden is thereby reduced. But is this correct? It is one thing for the accused to supply material to the prosecution which will strengthen its case. That is 'assistance', but that is not what is involved in advance notice. When an accused indicates his defence at his trial, he is not then regarded as 'assisting the prosecution'. How then does that indication when made *earlier* become transformed into assistance? Is not notice merely a procedural requirement and nothing more, with the substantive rights of the accused being left unaltered? If the accused has to give notice of his defence that is not lessening the burden on the prosecution. It still has to prove guilt beyond reasonable doubt even if the defence assumes a persuasive or an evidential burden.

60 See Lord Widgery LCJ, "The Balance of the Criminal Law Trial" [1972] NZLJ 478 at 479.
61 *Wigmore on Evidence* (1976) Vol 6 at 495 para 1847.
62 *US* v *Garsson* 291 F 646 at 649 per Justice Learned Hand.

It does not involve any question of self-incrimination. The presumption of innocence still remains. The accused is merely saying earlier, rather than later, "my defence is so and so, that is my answer to the charge and, in any event, it raises a reasonable doubt".

The unrepresented accused is put forward as another objection. With legal aid he is an exception rather than the rule and, in any event, the present committal procedure copes with the unrepresented. He is given a warning now concerning the defence of alibi.[63] This warning could easily be widened to cover any other defences of which notice must be given.

Advance notice is condemned on the basis that it would reduce the accused's flexibility at the trial and that it would force him to point to lines of defence which he might ultimately wish to abandon. This objection could easily be met. There is no reason why a jury should know what was contained in the notice. If this was so the accused would not suffer any injustice.

Fears are expressed that the prosecution will tailor its case once it is forewarned. This is hardly consistent with the "Minister of Justice" stance. The more sinister suggestion of police pressure on prosecution witnesses and, worse still, perjured evidence hardly does justice to the standing of our police force.

The wide power of adjournment and the discretion to allow evidence in rebuttal are put forward as answers to the surprise point.[64] These powers do exist but in practice once a jury trial is under way, there is a reluctance on the part of the prosecution to seek an adjournment. In jury trials an adjournment can only be for a short duration as they can result in injustice. The longer the adjournment, the greater risk of outside influences affecting jurors' minds. In jury trials adjournment is not an adequate answer to surprise. Even if the right to call evidence in rebuttal is granted in a jury trial, it might be well nigh impossible for the prosecution to combat at short notice a defence especially if it has some technical or scientific foundation.

Yet another objection is that an effective sanction cannot be devised. This is hardly a valid objection. The present alibi provisions impose a time limit. They give the Court a discretion to exclude the defence if notice is not given or is not given within time. In practice no difficulties have resulted. Late notification alone has been held not to afford grounds for the court to refuse leave.[65] Each case must be decided on its own facts.[66] Once it is accepted that the purpose of the notice is to give the prosecution an opportunity of making adequate inquiries, and that is inherent in the provision, then a discretionary power to exclude a ground of defence cannot be regarded as unjust. Another sanction could be that late notification or non-notification could be specifically made the subject of comment by the Judge or by the Judge and counsel.

63 Summary Proceedings Act 1957, s 168B.
64 See Adams, supra n 15 paras 2403, 2998-3004.
65 *R* v *Sullivan* [1971] 1 QB 253 (CA).
66 *R* v *Makoare* unreported, High Court, Auckland, 5 December 1983, Chilwell J.

Those then are the main competing arguments for and against notice of defence. In my view the objections which are offered can be answered. There is a good case in support of advance notice. I align myself with those who have called for reform. I therefore put forward a proposal that the accused should be required to give in jury cases advance notice indicating the general nature of the following defences:

(i) those which cast a persuasive burden on the accused;
(ii) positive defences, such as provocation, automatism, drunkenness, self-defence, accident and compulsion;
(iii) those which depend on medical, scientific and technical evidence; and
(iv) those which are peculiarly within the knowledge of the accused.

As well, in judge alone cases, a judge or a prosecutor should have the power to call for a notice if the nature of the case requires it. At this stage, I would not favour an accused being required to supply the prosecution with the names and addresses of his witnesses or with proofs of their evidence, or any other material in support of a notified defence.[67] My proposal would of course dovetail into the pretrial review procedure which I have earlier advocated. It would make that procedure more effective.

I believe that the ideal of our contemporary New Zealander is a criminal trial which is fair and open for *both* sides, a trial in which the guilty are convicted and the innocent are acquitted. In spite of the New Zealander's passion for sport, I apprehend that he does not see the criminal trial as being like some gladiatorial encounter at Carisbrook, but rather as a serious inquiry in which the objects are the ascertainment of both justice and truth. If these premises are correct, then the time has come to revise our thinking on the means to achieve these ends. The time has come to be bold, to discard the outdated notions of the past and to make changes to our procedure so that we then have a system of criminal justice which more truly strikes a balance between the interests of the community and the rights and liberties of the individual.

I am grateful to this Faculty and this University for the opportunity of being able to put forward some ideas for reform which are aimed at achieving that balance.

67 Compare the proposals prepared by the Committee on Evidence of the Justice Society on *Advance Notice of Special Defences* (undated).