WORKING PAPER ON PROPOSALS TO AMEND THE PRACTICE OF CRIMINAL COURTS IN CERTAIN PARTICULARS

CRIMINAL CODE

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CONFIDENTIAL

WORKING PAPER ON PROPOSALS TO AMEND THE PRACTICE OF CRIMINAL COURTS IN CERTAIN PARTICULARS

QLRC W.19

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WORKING PAPER ON PROPOSALS TO AMEND THE PRACTICE OF CRIMINAL COURTS IN CERTAIN PARTICULARS

The second programme of the Law Reform Commission of Queensland as approved by the Governor in Council includes the investigation of anomalies in the practice of the criminal courts. The Commission has investigated aspects of such practice where it thought changes might conveniently be made at the present time. This working paper is the result of that investigation. The Commission has confined its attention to matters of practice, not having ventured on this occasion into matters of substantive law or penology.

The recommendations in the commentary are divided up into twelve parts, as follows :

Part I	Pre-impanelment Proceedings
Part II	Proof by Deposition or Written Statement
Part III	Proof by Formal Admission
Part IV	Corroboration of Accomplices
Part V	Insanity and Diminished Responsibility
Part VI	Evidence on Charge of Receiving
Part VII	Discharge of Juror
Part VIII	Plea of Guilty during Trial
Part IX	Majority Verdicts
Part X	Taking Outstanding Charges into Account
Part XI	Probation without Plea
Part XII	Criminal Appeal Procedure

The Commentary is followed by a Draft Bill that would amend the Criminal Code in accordance with the recommendations made in the commentary. There are also draft amendments to the Justices Act and the Offenders Probation and Parole Act. Neither the commentary nor the proposed legislation represents the final views of the Commission.

The working paper is being circulated to persons and bodies known to be interested in these matters, from whom comment and criticism are invited. It is circulated on a confidential basis and recipients are reminded that any recommendations for the reform of the law must have the approval of the Governor in Council before being laid before Parliament. No inferences should be drawn as to any Government Policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland 4000, so as to be received no later than Friday, 5th May, 1978.

D.G. Andrews

(D.G. ANDREWS)
CHAIRMAN.

Brisbane. 5th December, 1977

COMMENTARY

PART I - PRE-IMPANELMENT PROCEEDINGS

The proposed new s.606A of the Criminal Code, set out in the Draft Bill, would allow certain steps in the trial of an accused person to be taken, if the court thinks fit, before the jury is sworn or before any evidence is tendered on the trial. These steps would be taken at a special proceeding over which a judge, not necessarily the judge who presides over the trial itself, would preside. We suggest that this special proceeding, to be conducted before the jury is impanelled, be called a "pre-impanelment proceeding."

Under the Criminal Code, a trial is deemed to begin when the accused person is called upon to plead to the indictment. If he pleads "not guilty", he is by such plea deemed to have demanded that the issues raised thereby shall be tried by a jury, and is entitled to have them tried accordingly : ss.594 & 604. In the normal course of events after the accused has pleaded, the jury is impanelled before any further step in the trial is taken. After the jury is impanelled, submissions are then quite frequently made to the trial judge in the absence of the jury. These submissions relate to the admissibility of evidence to be adduced at the trial or the sufficiency of the evidence to support the charge or charges set forth in the indictment. To allow the trial judge to determine the admissibility of particular evidence, proceedings as on the voir dire may be conducted in the absence of the jury during which witnesses are called, examined and cross-examined. These submissions and proceedings in the absence of the jury may take hours, or perhaps even days, to complete. During this time the jury, who will not yet have heard any evidence, will take no part in the conduct of the trial.

We think it would often be preferable that the submissions and proceedings abovementioned take place before the jury is impanelled. There may be no useful part for the jury to play until these matters are determined. The proposed new s. 606A would allow this to be done. Paragraphs (b), (c) and (d) of subs. (1) of the proposed section would allow counsel in the pre-impanelment proceeding to indicate what evidence is to be adduced before the jury, to object to any matter being admitted in evidence, and to agree upon conditions subject to which a matter may be adduced in evidence on the trial. Paragraph (a) of subs. (1) would allow the court in such a proceeding to determine, and hear such evidence as is necessary to determine, the admissibility of any matter in evidence on the trial. Paragraph (e) would allow a party to the trial to admit a fact for the purpose of the trial in accordance with s.644 of the Criminal Code. In Part III of this paper, we make a complementary recommendation that the existing provisions of s.644 be amplified.

In a recommendation in favour of what it calls "Pre-trial Proceedings", the Criminal Law and Penal Methods Reform Committee of South Australia comments:

> Unless counsel for the Crown and for the accused confer, however informally the conference may be held, the Crown does not know whether the accused proposes to make any admissions, or whether the accused proposes to object to the admissibility of any evidence led in the committal pro-

> ceedings, nor does the accused know whether the Crown prosecutor proposes to exclude any evidence led in the committal proceedings because he accepts it as inadmissible, or because, for any other reason, it might be unfair to the accused to lead such evidence. ((1975) Third Report at p.113.)

These remarks apply as much to Queensland as they do to South Australia. We hope that the problem envisaged will be overcome by what we call "pre-impanelment proceedings". (We cannot use the term "pre-trial proceedings" used by the South Australian Committee because technically the trial will have already commenced when the accused is called upon to plead to the indictment.) Subsection (2) of the proposed section would empower the court to direct counsel for the Crown and the defence to confer either in or out of the presence of the Court for the purpose of deciding whether any step in the trial should be taken or sought to be taken before the jury is sworn.

Importance to proof by deposition or written statement

Pre-impanelment proceedings will have an important bearing on proof by deposition or written statement. In Part II of this paper, we propose a new s.632 of the Criminal Code that would allow depositions and written statements to be used in lieu of oral testimony at criminal trials in certain circumstances. The proposed section provides that before a deposition or written statement is tendered in evidence by a party a copy of it shall be made available to the other party or each of the other parties. The deposition or statement shall not be admitted in evidence if the other party or any of the other parties objects to its being so admitted. The pre-impanelment proceeding would be a convenient time for a party desiring to object to the admission of a deposition or statement to do so. If such an objection is made at such a proceeding before the jury is impanelled, an adjournment may be granted to the party who sought to adduce the deposition or statement to enable him to call as a witness the person who made the deposition or statement. If the jury had already been impanelled when the objection was made, an adjournment could not be so readily granted in such circumstances. The enactment of the proposed section is therefore an important condition for the adoption of the recommendations made below in Part II of this paper.

PART II - PROOF BY DEPOSITION OR WRITTEN STATEMENT

The proposed new s.632 of the Criminal Code, set out in the Draft Bill, would introduce into Queensland law a general provision allowing depositions and written statements to be used in lieu of oral testimony at criminal trials. (We recommend elsewhere in this paper that the existing s.632, which deals with the quite unrelated matter of accomplices, be repealed). The proposed new section is derived in part from s.9 of the English Criminal Justice Act 1967, which gives effect to the recommendations of the English Criminal Law Revision Committee in its Ninth Report : (1966) Cmnd. 3145. A provision to much the same effect has recently been enacted in Western Australia: W.A. Criminal Code s.635B, introduced in 1976.

Ordinarily, the evidence at a criminal trial is given orally by witnesses who attend in person to give their evidence. It is true that both common law and statute law allow certain statements and depositions made outside the court of trial to be

admitted in evidence. For example, the rules that qualify the general prohibition of hearsay allow statements to be admitted in evidence though made by persons who do not attend at the trial. Such statements are admissible as evidence despite any objection by the party against whom they are tendered. So also are certain depositions that come within the limited provisions of s.111 of the Justices Act. In addition, a deposition is admissible as evidence on the trial of an accused person if he states at the committal proceeding, pursuant to s.4 of the Criminal Law Amendment Act 1892, that he does not require the production at the trial of the witness who made the deposition.

The proposed new s.632 is in a sense wider in scope than any of these provisions. Where the accused person is represented by counsel, it would make any deposition or duly authenticated written statement admissible as evidence at the trial provided the party against whom the deposition or statement is tendered does not object. The proposed rule is essentially a procedural provision rather than a further qualification of the rule against hearsay. It cannot be used in the face of an objection by another party. For this reason, we suggest that it be incorporated into Chapter 63 of the Criminal Code, which is headed "Evidence : Presumptions of Fact", rather than into any new Evidence Act.

The need for a rule of this kind is well expressed by the English Criminal Law Revision Committee in its Ninth Report (see above) paras. 7 and 8:

> 7. In our opinion it would be a great advantage if evidence which was unlikely to be disputed could be given by means of a written statement by the person who under the present law has to be called to give the evidence orally. This would obviously save a great deal of time and money. It would be especially desirable in the case of professional persons such as doctors, who at present may have to give up time, to travel long distances and perhaps alter appointments in order to give evidence about which there is no dispute. In a prosecution for causing death by dangerous driving a whole succession of witnesses through whose hands the victim may have passed, including ambulance men, nurses and doctors, as well as the relative who identified the victim and the policeman in whose presence he did so, may have to be called in order, in the words of a judge, "to prove what everybody knows already that the victim has died as a result of multiple injuries of the kind consistent with being hit by a Jaguar driving at the rate of 90m.p.h.". Sometimes several witnesses, including policemen, have to be called to prove that some object taken from the scene of a crime is the same object as was examined at a forensic science laboratory and is produced in court. Again on a charge of burglary a householder may have to be called to prove that his house was broken into and property stolen from it when the accused has no intention of denying that this happened but only that he was the burglar; and on a charge of receiving stolen property the theft must be proved even though the accused merely disputes the receipt or his knowledge that the property was stolen. The procedure by which the depositions of witnesses in whose case a conditional witness order has been made by the committing magistrates may be read at a trial at assizes or quarter sessions greatly reduces the difficulties caused by the present rules; but there is still in our opinion a strong case for making further provision to lessen the existing burdens on witnesses, especially on policemen.

8. In cases of the kinds mentioned in paragraph 7 it seems to us that provided that the accused does not wish to question the person who can give the evidence, there is no reason why that person's evidence should not be given by means of a written statement. Where the evidence is important, it is no doubt easier for the jury or the magistrates to follow it and assess its value when they see and hear the witness; but this is unnecessary in the case of evidence of the kinds mentioned above, and juries in particular are less likely to be wearied and distracted from the main issues if formal or uncontroversial evidence is read out than if it is given by a succession of witnesses.

They accordingly proposed that in any criminal proceedings, other than committal proceedings (for which separate provision was made), a written statement by a person should be admissible in any case where his direct oral evidence to the like effect would be admissible. This proposal was subject to certain conditions of which the most important are that the party proposing to tender the statement should have served a copy of it on each of the other parties and that none of the other parties objected to the statement being tendered in evidence.

The proposal of the Criminal Law Revision Committee was adopted in England by the enactment of the Criminal Justice Act 1967, s.9, which came into force on 1 January, 1968. This provision does not appear to have caused serious difficulties. We recommend that a similar provision be enacted in Queensland.

The main problem with this kind of provision

The purpose of the proposed new s.632 is to allow formal or uncontroversial evidence to be given by deposition or written statement rather than by oral testimony. In practice, the operation of the proposed section would be limited, as the English Committee puts it, by the unlikelihood that a party will acquiesce in proof by deposition or written statement of important issues in the case. The right of a party to object to such proof will thus limit the operation of the provision to its intended ambit, viz., formal or uncontroversial matters.

However the purpose of the proposed section will be defeated if a party who desires to avail himself of its provisions is not willing to do so for fear that a witness whose deposition or written statement he has obtained will nevertheless be needed at the trial because an objection is made at the last moment. The main problem with this kind of provision, therefore, is to give a party who proposes to prove in the prescribed manner only formal or uncontroversial matters some assurance that an unwarranted objection to his proposed method of proof will not be made at the last moment. For example, where there is a trial on indictment, the prosecution must ordinarily know before the jury is sworn what witnesses must be called to give oral testimony. A procedure whereunder the accused person may object to proof by deposition or written statement at the last moment before such evidence is tendered may be useless to the prosecution, who must know beforehand whether it will be necessary to summon the witness to give oral testimony.

There are two different ways to overcome this problem. Firstly, a system of notice and counter-notice may be devised to restrict the time during which a party may object to the special mode of proof. Under s.9 of the English Act, a copy of the written statement must be served by the party proposing to tender it on each of the other parties to the proceedings. A party intending to object to the statement being tendered in evidence must do so within seven days from the service on him of the copy of the statement. Otherwise his unconditional right to object

to the statement being tendered is lost. In this way, the party proposing to tender the statement is given adequate warning of any necessity to produce witnesses at the trial.

We do not at present favour this aspect of the English legislation. We think that the admissibility of a deposition or written statement at a trial on indictment should not depend on a failure to respond within a limited period to a service of documents. We recognize that a time might come when criminal proceedings and civil proceedings are so closely assimilated that such a condition of admissibility will be acceptable. However, in our view, it is not acceptable at the present time - at least for trials on indictment.

The alternative is to conduct a proceeding before the jury is impanelled at which any objection to a deposition or written statement being admitted in evidence may be made. This is the method we favour. In Part I of this paper, we have proposed that such pre-impanelment proceedings be held. An objection at such a proceeding would give the other party to the trial adequate warning of any necessity to produce witnesses at the trial. We think such a scheme should be tried before the adoption of the more drastic English provisions is contemplated.

We have therefore not included in the proposed new s.632 any notice and counter-notice provisons of the kind included in s.9 of the English Act. The proposed section provides only that before a deposition or written statement is tendered in evidence by or on behalf of a party a copy of it shall be made available to the other party or each of the other parties. An objection to the deposition or written statement being admitted in evidence may be made at any time before it is so admitted. We expect that any such objection in the course of a trial on indictment would ordinarily be made at the pre-impanelment proceeding.

Detail of the proposed new s.632

Some of the provisions of the proposed new s.632 require further comment, as follows:

(1) Subsection (1) provides that the special mode of proof will be available on the "trial" of an accused person. We recommend that the term "trial", for the purposes of Chapter 63 of the Criminal Code (including any new s.632), be defined by a proposed new s.644A to include proceedings before justices dealing summarily with any offence. See the Draft Bill. Though the proposed s.632 is designed primarily for trials on indictment, we do not see any harm extending it to summary proceedings. We recognize, however, that it may eventually be thought desirable to insert into the Justices Act an analogous provision specially designed for such proceedings. So far as the other sections of Chapter 63 are concerned, they may advantageously be applied, where relevant, to summary proceedings. See especially s.643.

(2) Subsection (2) provides that a deposition or written statement shall not be admitted in evidence pursuant to the proposed section where the accused person is not represented by counsel. Neither the English nor the Western Australian provisions contain any analogous stipulation. In our view, however, such a significant departure from the ordinary course of a criminal trial on indictment should not take place unless the accused person is adequately represented. We recommend that the term "counsel" be defined by an amendment of s.1

of the Criminal Code to include any person entitled to audience as an advocate at the proceeding in question. See the Draft Bill. Cf. the definition of "counsel" in s.616 of the Code, which we propose be repealed.

(3) To be admissible under the proposed section, a written statement (other than a deposition) must be authenticated in the manner specified by subs. (4)(b). That is, it must contain a declaration by the person making it under the Oaths Acts 1867 to 1970 to the effect that the statement is true to the best of his knowledge and belief and that he made the statement knowing that, it it were admitted in evidence, he would be liable to prosecution for a crime if he stated in it anything that he knew to be false. A person making a false statement would be guilty of a misdemeanour and be liable to imprisonment with hard labour for three years under s.194 of the Criminal Code. This would be so whether the statement is admitted in evidence or not. We consider that a person who makes a false statement that is actually admitted in evidence under the proposed section should be guilty of a more serious offence. We therefore recommend that such an offence be created by a proposed new s.194A to be introduced into the Criminal Code. See the Draft Bill. This offence would be a crime and the offender liable to imprisonment with hard labour for seven years. By virtue of a proposed amendment to s.195, a person could not be convicted of this new offence upon the uncorroborated testimony of one witness. Cf. the analogous provisions in the English Criminal Justice Act 1967 s.89 and the Western Australian Justices Act 1902 - 1976 s.69(7).

(4) The term "deposition" is defined by subs. (10)(a). It includes any evidence given under such circumstances that if the witness has knowingly given false testimony he will be liable to prosecution for perjury under s.123 of the Criminal Code. To this end, the wording of para. (a) follows that of s.119 of the Code, which defines "judicial proceeding" for the purposes of s.123. In addition, the term "deposition" is defined to include a written statement admitted at committal proceedings under s.110A of the Justices Act. The practical effect of this is that the original of such a statement need not be produced at the the trial. By virtue of subs. 10(b), it would be sufficient to produce a document purporting to be a copy, record or transcription of the statement.

Related amendments to s.110A of the Justices Act

Section 110A of the Justices Act was introduced into that Act in 1974 to permit the use of tendered statements in lieu of oral testimony in committal proceedings. It follows the scheme of the English Criminal Justice Act 1967 s.2 which, like s.110A of the Queensland Act, applies only to committal proceedings. Somewhat similar provisions are to be found in the Victorian Magistrates (Summary Proceedings) Act 1975 ss. 45 and 46, the South Australian Justices Act 1921 - 1976 s.106, the Western Australian Justices Act 1902 - 1976 s.69, the Tasmanian Justices Act 1959 ss.56A and 57, the Australian Capital Territory Court of Petty Sessions Ordinance 1930 ss.90 and 90AA, and the New Zealand Summary Proceedings Act 1957 s.173A.

Unlike the legislation of the other jurisdictions mentioned above, s.110A of the Queensland Act contains a stipulation, in subs. (4), that a written statement is not to be admitted at committal proceedings under its provisions where the defendant or, where there is more than one defendant, one of the defendants is not represented by counsel or a solicitor. We are now of the view that this requirement is unduly strict. If a defendant is unrepresented at committal proceedings by counsel or a solicitor, he is unlikely to benefit from this special rule, which prevents any witness in such circumstances from giving evidence by means of a written statement.

We therefore recommend that subs. (4) be omitted from s.110A. After such an omission, it will still not be possible for the justices to invoke the special provisions of subs.(6) of s.110A (whereunder they may commit the defendant for trial or sentence without determining the sufficiency of the evidence) unless the defendant is represented by counsel or a solicitor.

We also recommend that the existing subs.(5) be replaced by a provision that applies to written statements tendered at committal proceedings under s.110A of the Justices Act the same rules that will apply to written statements tendered at criminal trials if the proposed new s.632 of the Code is enacted. It is important that the same rules governing the form of these statements should apply at all criminal proceedings. It will also be necessary to make a consequential amendment to subs.(14) of s.110A.

We have set out at the end of this paper the amendments to the Justices Act s.110A that we propose. We should also mention, however, that the Chief Stipendiary Magistrate has transmitted to us a suggestion made by a number of his colleagues that s.110A should be further amended so that where subs.(7) of that section applies (i.e. where the evidence at committal proceedings consists of a combination of written statements and oral evidence) and where counsel or a solicitor for the defendant consents to committal for trial or sentence, the justices be empowered to commit without determining the sufficiency of the evidence. Cf. subsection (6). If s.110A is to be amended, we recommend that this suggestion should also be considered. We further recommend that consideration be given to incorporating into s.110A the provision in s.46(7) of the Victorian Magistrates (Summary Proceedings) Act 1975 that if it appears to the justices that any part of a written statement tendered in evidence is inadmissible the justices shall write against that part "Treated as inadmissible" or "Ruled inadmissible" as the case may be.

PART III - PROOF BY FORMAL ADMISSION

The proposed new s.644 of the Criminal Code, set out in the Draft Bill, would amplify the provisions in the existing s.644 dealing with proof by formal admissions. A formal admission, unlike an informal admission, is made deliberately for the purpose of the proceeding in question. It is made expressly for the purpose of narrowing the issues that are to be tried. Unless it can be withdrawn, it is binding on the party who makes it.

The existing s.644 provides that an accused person may by himself or his counsel admit on the trial any fact alleged against him, and such admission is sufficient proof of the fact without other evidence. The section defines "trial" to include not only trials on indictment but also proceedings before justices dealing summarily with an indictable offence. The section does not extend to summary proceedings for an offence that is not indictable. Section 644 allows the accused to admit any fact alleged against him. A somewhat similar provision in the New South Wales Crimes Act 1900 s.404 has been held to allow admissions of fact not within the personal knowledge of the accused : R. v. Longford (1970) 17 F.L.R. 37.

The proposed new s.644 would adopt in large measure the more detailed provisions of the English Criminal Justice Act 1967 s.10. The latter gave effect to the recommendations of the Criminal Law Revision Committee in its Ninth Report : (1966) Cmnd. 3145 pp. 8-13. In Part II of this paper we have proposed that a new s.644A be enacted that would define the term "trial" for the purposes of Chapter 63 of the Code to include proceedings before justices dealing summarily with any offence. If this proposal is adopted, the new s.644 would then extend to all trials for an offence, whether summary or on indictment. There does not appear to be any convincing reason why the section ought not to extend to proceedings before justices dealing with non-indictable offences.

Unlike the English provision, the new s.644 would not extend to committal proceedings. We are not yet convinced that it should do so. See, for example, the difficulties that arose in R. v. Webb [1960] Qd. R. 443 about certain matters that were not contested and on which evidence had not been given. If our recommendations upon s.110A of the Justices Act are accepted (see Part II of this paper), it should be possible to prove formal and uncontroversial matters at committal proceedings by written statements under that section.

Subsection (5) of the proposed s.644 states that an admission of fact under the section may be made notwithstanding that the party making the admission does not have personal knowledge of the fact admitted. There is no equivalent English provision. Nevertheless we think subs. (5) should be included to remove any doubt about the matter. A formal admission, like a plea of guilty, should be able to extend to matters not within the personal knowledge of the accused person.

PART IV - CORROBORATION OF ACCOMPLICES

Section 632 of the Criminal Code provides that a person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices. We recommend that this provision be repealed. With respect, we support the recommendation to the like effect made by the Committee of Inquiry into the Enforcement of Criminal Law in Queensland in its report (Apr.1977) paras. 289-295.

The Queensland law on the corroboration of the evidence of accomplices differs from that applying elsewhere in Australia. In the other States and Territories of Australia, the common law on this subject, which in general is the same as the common law

of England, continues to apply. In Queensland since 1901 when the Code came into force, s.632 has governed the matter to the exclusion of the common law. An identical section was included in the Western Australian Criminal Code of 1902. However, this section was repealed by the Western Australian Evidence Act of 1906 and never re-enacted. Section 632 of the Queensland Code applies not only to an accomplice who gives evidence for the prosecution but also to one who gives evidence in the defence case or who, as a co-accused, gives evidence on his own account : R. v. Allen & Edwards [1973] Qd. R.395. Moreover, by virtue of s.632 accomplices cannot corroborate one another : R. v. Lamb [1975] Qd. R.296.

At common law, a person may be convicted of an offence on the uncorroborated testimony of an accomplice. Nevertheless, the difference between the common law and Queensland law is not as great as this statement might suggest. It has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting an accused person on the uncorroborated testimony of an accomplice. The main reason for this is the danger that the accomplice may give false evidence against the accused person to minimize his own part in the offence or out of spite. Other reasons can, and have been, suggested. See "The Corroboration of Accomplices" [1973] Crim. L.R. 264 by J.D. Heydon. At common law however, the judge may properly direct a jury that they are entitled, if they choose, to act on such uncorroborated evidence: Davies v. D.P.P.[1954] A.C. 378 at p.395. Provided the jury have been properly warned of the danger, they may validly convict. In Queensland, on the other hand, it is not sufficient for the judge to warn the jury of the danger of acting on such evidence. He must direct them to acquit if there is no evidence on which they can rely other than the uncorroborated testimony of an accomplice. Thus a Queensland jury is not permitted to act on such evidence however convinced they are of its truth.

We think the Queensland rule expressed in s.632 is too rigid and should be repealed. Indeed there is a movement in England even to abolish the more limited rule of practice, now regarded as peremptory, requiring the judge to warn the jury of the danger of convicting an accused person on the uncorroborated testimony of an accomplice. In its report on Evidence, the English Criminal Law Revision Committee expresses the opinion that there should be no special rule (not even a rule requiring the judge to warn the jury) about the evidence of accomplices :(1972) 4991 Cmnd. pp. 110-112. Criticizing the warning rule, the Committee says :

> But a more serious objection in our view is the fact that the rule applies in all cases merely because the witness is an accomplice and irrespective of the circumstances of the particular case. The reason for the rule is supposed to be the danger that the accomplice may be giving false evidence against the accused in order to minimize his own part in the offence or out of spite against the accused. But although it is clearly right that the attention of the jury should be drawn to these possibilities, if they exist, there are many cases where there is no such possibility. For example, it may be obvious that the accomplice has no ill-feeling against the accused, and he may be repentant and clearly trying to tell the truth about his own part. There may also be many other cases where, in the circumstances, there can be no doubt but that the accomplice's evidence may be wholly reliable, yet the judge must still warn the jury that it is dangerous to rely on it.

The Committee goes on to recommend that at a trial on indictment it shall be for the court to decide in its discretion, having regard to the evidence given, whether the jury should be given a warning about convicting the accused on uncorroborated evidence.

We do not go so far as the English Criminal Law Revision Committee. We recommend only that s.632 of the Code be repealed with the intent that the common-law rule of practice for the judge to warn the jury should take its place. However we rely on the arguments advanced by the Committee, which apply more tellingly to the rigid rule in s.632 than to the rule of practice that requires only that a warning be given.

Perhaps the best known criticism of the special rule about corroboration of the evidence of accomplices was made by Henry Joy, Lord Chief Baron of the Court of Exchequer in Ireland, in his book On the Evidence of Accomplices published in 1836. He wrote :

> How the practice which at present prevails could ever have grown into a general regulation, must be matter of surprise to every person who considers its nature. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcileable to the principles of reason. But, that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had even seen that witness; before he had observed his look, his manner, his demeanour; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the contrition with which it was followed; that a judge, I say, should come prepared beforehand to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath.

This passage was quoted with approval by Wigmore in his Evidence (3rd ed.1940) Vol.VII, pp. 322-323, by Glanville Williams in "Corroboration-Accomplices" [1962] Crim. L.R. 588, as well as by the English Criminal Law Revision Committee in its report on Evidence. See also the discussion of Sholl J. in McNee v. Kay [1953] V.L.R. at pp. 523-526. Commenting on s.632 of the Code, the learned author of Criminal Law of Queensland (4th ed. 1974) p. 540 observes that the rigidity of the provision seems illogical in that "juries are absolutely prohibited in every case from acting on the uncorroborated testimony of an accomplice whose testimony they, after a careful warning, are completely satisfied to accept as being truthful and reliable."

In his Draft Code of 1897, Sir Samuel Griffith noted beneath the provision that was to become s.632: "This is said to be a rule of practice, and not a rule of law. It is, however, always acted on, and ought, it is conceived, to be treated as a rule of law." In other words, Griffith was of the view that the rule of practice was always acted upon so that an accused

person would never be convicted on the uncorroborated testimony of accomplices. At about the time the Code was enacted there may have been doubts about the status of the special rule relating to accomplices. In earlier cases in England it had been said that the court had no power to withdraw the case from the jury for want of corroborative evidence. See, for example, In re Meunier [1894] 2Q.B. 415 at p.418. That is, juries were not absolutely prohibited in every case from acting on the uncorroborated testimony of an accomplice. However in R. v. Everest (1909) 2 Cr.App.R. 130, Darling J., speaking for the English Court of Criminal Appeal, said that the rule had long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless the evidence is corroborated.

The rule expressed in s.632 of the Queensland Code was quite consistent with the somewhat unorthodox view expressed in R. v. Everest. However this development in England was checked two years after Everest was decided by the Lord Chief Justice in R. v. Blatherwick (1911) 6 Cr.App.R. 281, who said that Everest went too far. He pointed out that the Court (the English Court of Criminal Appeal) had three times laid down that a case cannot be withdrawn from the jury for want of corroboration unless it is required by statute. "A strong caution is needed", he said, "but where that is given we cannot interfere". This was subsequently confirmed in R. v. Baskerville [1916] 2 K.B.658 at p.668 and has not since been questioned in the common-law jurisdictions.

Section 632 is therefore not consistent with the common law as it is stated today although it may have been consistent with a view that was held for a time in England at about the time the Code was enacted. It is also possible that Griffith may have been influenced by the law in many of the states of the United States. Wigmore tells us that in nearly half of the jurisdictions of the United States a statute has expressly turned the rule of practice into a rule of law: Evidence (3rd ed. 1940) Vol. VII, p.319. See also (1972) 60 Utah Law Review at p.60. However Wigmore (at pp.321-322) offers an explanation for this change which suggests that it came about for reasons peculiar to America:

> At common law the judge was entitled and bound to assist the jury, before their retirement, with an expression of his opinion (in no way binding them to follow it) upon the weight of the evidence. This utterance was made the medium of many useful general suggestions based on experience. The benefit of this experience was thus obtained for them, without any attempt to fetter their judgment by inflexible dogmas unfitted for invariable application as rules of law. One of these general hints was that about accomplices' testimony. But in the United States the orthodox function of the judge to assist the jury on matters of fact was in a misguided moment (except in a few jurisdictions) eradicated from our system. The judge was forbidden to contribute to the jury's aid any expression of opinion upon the weight of evidence in a given case. Unless there was a rule of the law of Evidence upon the subject of an accomplice's testimony, he could not in a given case advise them to refuse to convict upon the uncorroborated testimony of an accomplice. The makers of this innovation upon established trial-methods were thus obliged to turn into a rule of law the old practice as to accomplices, if they wished to retain its benefit at all. This they therefore did.

This explanation, which can have no application in Australia, suggests that little reliance can be placed on American law to retain s.632.

We have therefore concluded that s.632 should be repealed.

PART V - INSANITY AND DIMINISHED RESPONSIBILITY

The proposed amendment to s.304A of the Criminal Code, set out in the Draft Bill, would introduce into Queensland law a statutory provision that has been adopted in England and New South Wales in relation to the defence of diminished responsibility. A person charged with murder may raise an issue relating to his mental capacity in one of two ways. Firstly, he may contend that he is entitled to be acquitted on the ground that he was of unsound mind at the time of the alleged offence. Secondly, he may contend that he is liable to be convicted only of manslaughter on the ground that he was suffering from diminished responsibility at the time of the alleged offence : Criminal Code ss.27, 304A and 647. The proposed amendment would specify that once the defence relies on one of these matters the prosecution may prove the other of them. That is, if the defence relies upon insanity (unsoundness of mind), the prosecution may prove diminished responsibility; and if the defence relies upon diminished responsibility, the prosecution may prove insanity.

The analogous English provision is to be found in the Criminal Procedure (Insanity) Act 1964 s.6. It was enacted upon the recommendation of the English Criminal Law Revision Committee in its Third Report : (1963) Cmnd. 2149 pp. 16-17. The recommendation was made to overcome the conflict of practice referred to by the English Court of Criminal Appeal in R. v. Duke [1963] 1Q.B. 120 at p. 124. A similar provision was enacted in New South Wales in 1974 when the Crimes Act 1900 was amended to allow the defence of diminished responsibility to be relied upon in murder trials in that State. See Crimes and Other Acts (Amendment) Act 1974 (N.S.W.) s.5. The New South Wales provision reads as follows:

> Where, on the trial of a person for murder, the person contends -
>
> (a) that he is entitled to be acquitted on the ground that he was mentally ill at the time of the acts or omissions causing the death charged; or
>
> (b) that he is by virtue of subsection (1) not liable to be convicted of murder,
>
> evidence may be offered by the Crown tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which the evidence may be offered.

We have slightly altered this provision to suit the context of the Queensland Code.

Neither the English nor the New South Wales provision specifies the degree of proof required when the prosecution relies on the provision to offer evidence of insanity or diminshed

responsibility as the case may be. We think this is a gap that should be filled. There is English authority that where the issue of insanity is raised by the prosecution in such cases, the issue must be established beyond reasonable doubt : R. v. Grant [1960] Crim. L.R. 424. In our view this is anomalous. Once the accused has raised his mental capacity at the time of the alleged offence as an issue in the case, the prosecution should not be required to establish either diminished responsibility or insanity to any greater degree of satisfaction than the accused himself would have to do. With both defences, the accused need only show the contention was more probable than not. The same standard should apply to the prosecution. We have added a second paragraph to our provision to bring this about.

The amendment will not endanger the accused person's right of appeal. Section 668 of the Code provides that, for the purpose of appeal, a person acquitted on the ground of insanity, where such insanity was not set up as a defence by him, shall be deemed to be a person convicted. As such, he would have the ordinary right of appeal should he be acquitted on account of insanity proved by the prosecution.

PART VI - EVIDENCE ON CHARGE OF RECEIVING

The proposed new s.643A of the Criminal Code, set out in the Draft Bill, would permit certain evidence to be admitted on the trial of a person charged with receiving to prove he had guilty knowledge. In a receiving case, the prosecution must prove not only that the accused received a thing that had been obtained by means of an act constituting an indictable offence (usually the act of stealing) but also that the accused knew, at the time of the receiving, that it had been so obtained: Code s.433; R. v. Patterson [1906] Q.W.N.32. The proposed s.643A would allow the prosecution to rely on certain evidence, not necessarily admissible under existing law, to prove this guilty knowledge, viz:

(i) evidence that the person charged has, either alone or jointly with some other person, had in his possession, or has aided in concealing or disposing of, some other thing obtained by means of an act constituting an indictable offence done not earlier than twelve months before the offence charged; and

(ii) evidence that the person charged has within the three years preceding the date of the offence charged been convicted of stealing or receiving.

This evidence would be in addition to the evidence at present admissibl to prove guilty knowledge at the time of the receiving.

The prosecution would not be able to rely on evidence made admissible by the proposed s.643A to prove the accused had actually received the thing the subject of the charge or that the thing had actually been obtained by means of an act constituting an indictable offence. These elements of the offence would have to be proved by other evidence. The proposed section would assist the prosecution only with the element of guilty knowledge. Moreover, the proposed section would not make the specified evidence conclusive evidence of guilty knowledge. Nor would it alter the onus of proof.

Proof of guilty knowledge is a notoriously difficult matter in a receiving case: see Cross on Evidence (Aust. ed. 1970) p. 412. Under the existing law, there are certain rules the prosecution can rely on to prove knowledge. Where the person charged has been found in possession of recently stolen property, the jury may be directed that they may infer guilty knowledge if that person offers no explanation of his possession or if they are satisfied beyond reasonable doubt that any explanation offered is untrue: R. v. Schama and Abramovitch (1914) 11 Cr. App. R. 45. Moreover proof of other receivings is admissible under the common-law rules relating to similar-fact evidence where these other receivings show that a particular system has been followed. Such evidence of system may be used, for example, to rebut evidence tending to show the honest intention of the receiver: R. v. Powell (1909) 3 Cr.App.R.1.

However in other jurisdictions these rules have been supplemented by provisions of the kind we now propose. The proposed s.643A is chiefly derived from s.27(3) of the English Theft Act 1968. This re-enacted in a modified form provisions that may be traced back to the English Habitual Criminals Act 1869 (32 & 33 Vic. c.99) s.11. Analogous provisions are to be found in the N.S.W. Crimes Act 1900 s.420, the S.A. Criminal Law Consolidation Act 1935 - 1975 s.200, the W.A. Evidence Act 1906 - 1976 s.46, the Tas. Criminal Code s.258, and the N.Z. Crimes Act 1961 s.258.

Section 27(3) of the English Theft Act 1968 applies where a person is being proceeded against for handling (i.e. receiving) stolen goods "but not for any offence other than handling stolen goods." The precursor of s.27(3), s.43(1) of the Larceny Act 1916, did not make an absence of any other charge a condition of admissibility. Nevertheless the English Court of Criminal Appeal in R. v. Davies [1953] 1.Q.B. 489 held that where there is another charge on which the prosecution relies (other than that of receiving) evidence of previous convictions should not be given under s.43(1) of the Larceny Act. Speaking for the Court, Lord Goddard C.J. said at p.493:

> If the case is substantially one of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted. At the same time, it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then if they include in the indictment a count for either of those offences they must refrain from giving evidence of previous convictions.

As a result of this case, the words we have quoted were inserted into s.27(3) of the 1968 Act. See also N.Z. Crimes Act 1961 s.258(3).

Rather than introduce into the proposed s.643A an express provision that it shall not apply where an offence other than receiving is charged, we have included in subsection (3) a provision that the proposed section does not derogate from the power of the Court to exclude evidence if the Court is satisfied that it would be unfair to the person charged to admit that evidence. There may perhaps be occasions, although they will be rare, where evidence could properly be admitted under the proposed section though an offence other than receiving is also charged. We think s.27(3) of the Theft Act 1968 is too strictly worded in this regard.

Section 27(3) of the English Theft Act permits convictions of theft or handling (i.e. receiving) stolen goods to be proved if they have occurred within the five years preceding the date of the offence charged. In paragraph (ii) of subsection (1) of the proposed s.643A, we have reduced this period to three years. It seems to us that five years is too long. Under the New South Wales law (above), the relevant period is seven years.

PART VII - DISCHARGE OF JUROR

The proposed amendment of s.628 of the Criminal Code, if made, will enlarge the circumstances in which a trial judge may discharge a juror from the jury during the course of a trial. Generally a criminal trial is had before a jury of twelve persons. However s.628 provides that "if at any time during the trial a juror dies, or becomes in the opinion of the Court incapable of continuing to act as a juror" the Court may discharge the juror and direct the trial to proceed with the remaining jurors. The verdict of the remaining jurors, not being less then ten, has the same effect as if all the jurors had been present.

It will be noticed that s.628 refers to a juror who "becomes in the opinion of the Court incapable of continuing to act as a juror". This ground for discharge seems to be too narrowly drawn. In a lengthy trial, circumstances might arise where a juror ought to be discharged though it cannot be said that he is incapable of continuing to act as a juror. In the course of a nineteen day trial in the Supreme Court, for example, a juror was acquainted of the serious illness of his mother. Fortunately, the mother recovered and it was unnecessary for the juror to apply to be discharged from the jury. Had he done so, the terms of s.628 may not have permitted the trial judge to discharge him and to direct that the trial should proceed with the remaining jurors.

In our opinion, s.628 should be widened to give the Court a more liberal discretion in ordering that the trial continue with less than twelve jurors. We recommend an amendment similar to that adopted in Tasmania in 1975: Criminal Code Amendment Act 1975 (Tas.) s.11. This would allow the Court to discharge a juror if at any time during the trial it is of the opinion that the juror "ought not be required to continue to act as a juror."

We have also considered whether courts should be empowered to appoint at the commencement of a criminal trial reserve jurors who may fill the place of any of the original twelve who die or are discharged from the jury during the course of the trial. Provision for such jurors was made in Western Australia by the W.A. Juries Act Amendment Act 1975 s.5. In its report on Court Procedure and Evidence (1975) at p.107, the South Australian Criminal Law and Penal Methods Reform Committee recommended that courts be empowered to impanel such jurors in certain cases.

In our opinion, provision for reserve jurors is not at present necessary in Queensland. A Queensland Court may direct a criminal trial to continue after the discharge of one or two jurors. This may be done without the consent of either the accused person or the Crown: s.628 (as amended by the Jury Act and other Acts Amendment Act 1976). Since the discharge of one or two jurors does not necessarily bring a trial to an end in Queensland,

there is no pressing need for reserve jurors here. The courts of South Australia and Western Australia do not have a similar power to direct a trial to continue after the discharge of jurors in relation to all offences that may be charged.

PART VIII - PLEA OF GUILTY DURING TRIAL

The proposed amendment of s.614 of the Criminal Code, if made, will allow a court, without first taking a verdict from the jury, to act upon a plea of guilty tendered by the accused person after the jury has been sworn. It is designed to avoid the awkward procedure that at present must be followed when an accused changes his plea from Not Guilty to Guilty during the course of the trial. In such circumstances, under existing law, the court is required to take a verdict from the jury though the accused formally pleads Guilty and the court accepts that plea.

When an accused person pleads Not Guilty, a jury is impanelled and the accused is "given in charge of the jury". Section 614 of the Code requires that the jury are to be sworn to give a true verdict according to the evidence upon the issues to be tried by them. It also requires that, when the jury have been sworn, the proper officer of the court is to inform them of the charge set forth in the indictment, and of their duty as jurors upon the trial. A formal plea of guilty tendered by the accused does not relieve the jury of their duty to give a verdict. Once the accused has been given in charge of the jury, only by a verdict of the jury can he be convicted or discharged. A failure by the court to take a verdict after such a change of plea renders the trial a nullity: R. v. Heyes [1951] 1K.B.29; R. v. Paprounas [1970] V.R.865.

The procedure that must at present be followed upon a change of plea does not, in our view, achieve any useful purpose. It is nothing more than an inconvenient consequence of the notion that an accused person is given in charge of the jury after he pleads Not Guilty. The proposed amendment would allow the court to accept a plea of guilty tendered during the course of the trial and to discharge the jury without their giving a verdict.

PART IX - MAJORITY VERDICTS

The proposed new s.625A of the Criminal Code, set out in the Draft Bill, would allow majority verdicts to be given at criminal trials in Queensland in certain circumstances. Queensland has inherited from the English common law the rule that the verdict of a jury must be unanimous. The rule does not apply without exception to civil trials: Jury Act 1929 - 1976 s.42. However it continues to apply without any exception to criminal trials. The time has come, in our opinion, to review it.

It cannot be said that there is an overwhelming case for modifying the rule that the verdict of the jury at a criminal trial be unanimous. Nevertheless, the unanimity rule should be examined to ensure that the jury system remains in good standing within the community. There is nothing sacrosanct about the role played by juries in criminal trials. The jury system will remain only so long as the public has confidence in the way it works. Its survival in the long run may depend upon timely alterations being made to its method of working. In Queensland and elswhere, an increasing emphasis is being placed on trial procedures that do not involve a jury. As an English commentator has remarked, one of the most significant developments in the administration of criminal justice over the last hundred years has been the extension of the trial jurisdiction of the lower courts : D.A. Thomas, "Committals for Trial and Sentence - the Case for Simplification" [1972] Crim.L.R.477. In the last three years, the Queensland Parliament has itself increased the number of occasions when indictable offences may be dealt with summarily by Magistrates Courts. See the Criminal Code and the Justices Act Amendment Act 1975

and the Criminal Code Amendment Act 1976. There is no reason to suppose that the growth of lower-court jurisdicition has come to an end.

These developments are unexceptionable and probably inevitable. However they do call for a close examination of the jury system to see whether any changes are desirable. It would be a pity to see the jury system wither away by default.

The unanimity rule has been an ingredient of the common law for over 600 years. The reasons for its development in England are far from clear. Indeed, the opinion has been expressed that the rule arose more out of accident than by design : D.M. Downie, "And is That the Verdict of Your All?" (1970) 44A.L.J.482 at p.484. The desirability of such a rule would have been more evident in eariler times in England when there were many capital offences and the death penalty was frequently carried out. A reluctance to impose the sentence of death where there had been dissentients on the jury would be understandable. However, the death penalty was virtually abolished in England by the Murder (Abolition of Death Penalty) Act 1965. It seems to us significant that less than two years after the passage of this Act, the English Criminal Justice Act 1967, s.13 allowed majority verdicts to be given by juries in criminal proceedings. Thus the rule requiring unanimity came to an end in its homeland six centuries after it had come into existence.

This change in sentiment toward the unanimity rule is especially significant. Changes in the law of England need not necessarily be adopted in countries that still retain the English rules of law. However, the unanimity rule has been a characteristic feature of the English common law for centuries. It has never thrived in countries whose law is not derived from the common law. (Even in Scotland, majority verdicts have been permitted in criminal proceedings for many years.). The modification of the unanimity rule in England is a striking circumstance that calls for a re-examination of the rule elsewhere to see whether it is thoroughly in keeping with the times.

Changes in sentiment toward the unanimity rule have not been confined to England. Indeed the rule was modified by three Australian States before it was modified in England. South Australia allowed majority verdicts in criminal trials in 1927, Tasmania in 1936 and Western Australia in 1960. Significantly, in each of these three States capital offences were excepted from the general provisions relating to majority verdicts. In the United States, five years after the passage of the English Act, the Supreme Court in Apodaca v. Oregon (1972) 406 U.S.404 held that a state law that allowed a less than unanimous verdict in a non-capital proceeding did not violate the right to trial by jury specified by the United States Constitution.

It is true that expressions of opinion in favour of the unanimity rule have been made by well-known commentators and jurists. H.V. Evatt said "Where there is a dissent in an important criminal case, it is almost impossible to expect silence upon the question after the verdict is pronounced. In other words the dissenters will probably state openly what their opinion is." R.G. Menzies said "When you have a unanimous verdict given by a jury in a proceeding by the Crown against a citizen it induces in the minds of the ordinary citizens a feeling of confidence in the administration of the law, and that is worth a great deal to society. When you depart from that and 10 people out of 12 find a man guilty or innocent you build up a world of uncertainty and speculation." However these views were expressed in 1936 when capital punishment was still an important feature of the criminal law in Australia. See "The Jury System in Australia" (1936) 10A.L.J. Supplement p.49. We suggest that they should not be given the same weight today that they were given then. The same may be said of the views expressed by P. Devlin in his book Trial by Jury (1966). He wrote (at p.57) :

> The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient were overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.

However this was written at the end of the long era of capital punishment in Britain before the changed circumstances could assert

themselves. As things turned out, majority verdicts were introduced in England only one year after this was written.

From the practical point of view, the most important argument in favour of majority verdicts is that they will reduce the number of cases where jury disagreement prevents a verdict being given. In calendar years 1974, 1975 and 1976, 4.1 per cent of criminal trials in the Queensland Supreme Court and District Courts ended in disagreement by the jury. Although this percentage is relatively small, the absolute number of trials that were thus rendered futile during these three years was 51, a substantial figure. Moreover, criminal trials vary greatly in length. In 1976, one criminal trial in a District Court lasted some 25 weeks. Fortunately, a verdict was reached in that case. If there had been a disagreement by the jury at the end of a trial of this length, the consequences could have been serious. The reputation of the jury system would have been damaged if the decision of ten of the jurors could not then have been taken to conclude the case. We believe that it would generally be better to take the verdict of ten jurors in such circumstances rather than insist upon a new trial in an attempt to achieve unanimity.

A rule that allows less than unanimous verdicts will not eliminate jury disagreements altogether. American statistics suggest that majority verdicts of the kind we contemplate would reduce the number of disagreements by about 45 per cent : Kalven and Zeisel, The American Jury (1966), p.461. Nevertheless, this would be a substantial reduction, especially if it includes a number of complex and protracted trials. With the ever increasing complexity of modern life, it is likely that such trials will increase in number in the years to come. It is important that the jury system should be able to cope with them. If the jury system cannot meet the needs of a more complex world, the jurisdiction of courts functioning without juries is likely to grow.

Detail of the proposed new s.625A

(1) Subsection (1) permits a majority verdict to be taken provided it has been agreed upon by not less than ten of the jurors and provided the other conditions specified are met. In our opinion, the agreement of at least ten jurors should be necessary in all cases. Generally, a criminal trial is had before a jury of twelve : Jury Act 1929 - 1976 s.17; Supreme Court Act of 1867 s.25; District Court Act 1967 - 1976 s.63. Where the twelve have not agreed upon a verdict, subs. (1) would allow the decision agreed upon by eleven or ten of them to be taken as the verdict. It must also be noted that a criminal trial may proceed though the original number of twelve jurors has been reduced by the death of a juror or the incapacity of a juror to continue to act, provided that at least ten jurors remain : Criminal Code s.628. Where a trial proceeds with eleven jurors, who have not agreed upon a verdict, subs. (1) would allow the decision agreed upon by ten of them to be taken as the verdict. We have not allowed for a majority verdict where a trial proceeds with only ten jurors. In such a case, a unanimous verdict would be necessary. In England and South Australia, the decision of nine jurors may be taken as the verdict where the trial has proceeded with ten jurors : Eng. Juries Act 1974 s.17 (which now contains the provisions formerly contained in the Criminal Justice Act 1967 s.13); S.A. Juries Act 1927 - 1976 s.56. In Western Australia and Tasmania, the agreement of at least ten jurors is always necessary : W.A. Juries Act 1956 - 1976 s.41; Tas. Jury Act 1899 s.48.

(2) Subsection (2) provides that the Court shall not accept a majority verdict unless the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case. The Court shall in any event not accept such a verdict unless it appears that the jury have had at least two hours for deliberation. Such a provision is necessary to ensure that a majority of ten, once formed, does not ignore the arguments of the minority. Our provision is derived from the English Juries Act 1974 s.17(4), which slightly modified the earlier provision of the Criminal Justice Act 1967 s.13(3). In South Australia, Western Australia and Tasmania the time prescribed for deliberation is specified as at least four hours, three hours and two hours (in ordinary cases) respectively.

(3) Subsection (3) excludes from the general majority verdict provision the verdicts of guilty of treason, murder and the crimes defined in the second paragraph of s.81 and in s.82 of the Criminal Code. For each of these offences, the Criminal Code specifies the penalty of imprisonment with hard labour for life, which cannot be mitigated or varied under s.19 of the Code. We have reached the conclusion that a person ought not to be convicted of any of these offences upon a majority verdict. However the matter is debatable. Somewhat analogous provisions are to be found in the legislation of South Australia, Western Australia and Tasmania though not that of England (above). It is not necessary to make provision for capital offences. Capital punishment was abolished by the Criminal Code Amendment Act of 1922 of the Queensland Parliament and, in relation the laws of the Commonwealth, by the Death Penalty Abolition Act 1973 of the Commonwealth Parliament.

Amendment of s.626

The introduction of majority verdicts would necessitate a minor amendment of s.626 of the Criminal Code.

PART X - TAKING OUTSTANDING CHARGES INTO ACCOUNT

The proposed new s.650 of the Criminal Code, set out in the Draft Bill, would introduce into Queensland law the substance of statutory provisions that have been enacted in New South Wales, Victoria and Tasmania. See Crimes Act 1900 (N.S.W.) s.447B, enacted in 1955, Crimes Act 1958 (Vic.) s.435A, enacted in 1976, and Criminal Code (Tas.) s.390, enacted in 1973. These provisions allow a court to take outstanding charges into account when passing sentence on a person convicted of an offence. The person is not convicted of the outstanding charges though, under the procedure, they contribute to the penalty imposed on him.

The wording of the proposed section closely follows that of the Victorian provision, which gave effect to a recommendation of the Victorian Law Reform Commissioner in his report on Criminal Procedure (Miscellaneous Reforms) : (1974) Report No.2. The position generally throughout Australia has recently been discussed by S. White in "Taking Offences into Account in Australia" [1976] Crim.L.R.232. The Australian provisions in effect have given statutory form to a practice observed in England for over seventy years. This practice is described in Archbold (39th ed. 1976) paras.635 - 637a and in recent time has been extensively examined by S. White, M. Newark and A. Samuels in "Offences Taken into Consideration" [1970] Crim.L.R.311. The English practice is the creature of convention, having no statutory foundation.

The taking into account of an offence under the proposed section would be a half-way house towards a full conviction. By virtue of subs. (4), if a court takes into account an offence charged against a person convicted of another offence, no proceedings could ordinarily be taken or continued thereafter in respect of the offence taken into account. Yet there would be no conviction for the offence so taken into account : subs. (6). Moreover the sentence imposed could not exceed the maximum applicable to the offence for which there has been a conviction : subs. (2). The outstanding charge would contribute to the sentence imposed though there is no conviction in respect of it. The advantage to the person convicted would be that he emerges from the sentencing process with a clean slate so far as the offences taken into account are concerned and that the sentence imposed cannot exceed the ordinary maximum. The advantage to the state would be that the courts are relieved of the burden imposed when there is a multiplicity of charges against one accused and that the police are able to clear up files on offences which otherwise might never be solved.

It is necessary to point out that the proposed legislation will not enable a sentencing judge to make an order in respect of an

offence taken into account if that order may be made only where there is a conviction for that offence, for example, an order for restitution or compensation under the Criminal Code s.685A. Legislation has been enacted in England and New South Wales to overcome this difficulty in relation to compensation orders. See Powers of Criminal Courts Act 1973 (Eng.) ss.35 (1) and 36 (3) and Crimes and Other Acts (Amendment) Act 1974 (N.S.W.) ss.9(c) and 16(b). However, we do not recommend this type of legislation at the present time although we think it should be kept under review for possible future enactment. At least for the time being, we agree with the Victorian Commissioner (Report p.22) that where special orders are appropriate in relation to a pending charge the prosecution can cover the position adequately by refusing to allow that charge to be one of those that are merely taken into account. If the legislation is enacted in the form we propose, it will be necessary for prosecutors to be aware that they should not consent to allowing a pending charge to be taken into account where a special order may be sought that can be made only where there has been a conviction for that charge.

PART XI - PROBATION WITHOUT PLEA

We recommend that legislation be enacted in Queensland that would empower the courts to admit to probation a person charged with an offence though he has not pleaded to the charge. The Offenders Probation and Parole Act 1959 - 1974 already empowers courts to admit to probation a person convicted of an offence. The newly proposed legislation, which we suggest be introduced by way of amendment of the Offenders Probation and Parole Act, would allow a probation order to be made before the accused person is called upon to plead to the charge. We understand that at the present time not only is the Queensland Act under review but that the States and Territories of the Commonwealth are considering proposed reciprocal legislation for the mutual recognition of probation orders. It therefore seems an appropriate time to discuss legislation of this kind. The amendments of the Offenders Probation and Parole Act that we propose are set out at the end of the paper.

In our view, the proposed legislation would have two advantages. Firstly, where the case is a suitable one for probation, the accused person will not be forced unnecessarily to plead not guilty to the charge. He will not be governed by any unjustified fear that only by pleading not guilty can he hope to avoid prison. Secondly, the legislation will offer such an accused person a way to avoid a public admission or finding of guilt. It is true that there is a rule in s.19 of the Act that the conviction on which probation is granted is to be disregarded for most purposes including the purposes of any enactment imposing, authorizing or requiring the imposition of any disqualification or disability on convicted persons. However once a person has in fact been convicted, it is difficult for him to erase this blot on his record no matter what the formal rules of law might be.

The proposed new s.8A of the Offenders Probation and Parole Act is modelled on the existing s.8 of the Act. The essential conditions for the making of a probation order are set out in subs. (1) of each section. The only substantial difference between the two subsections is that, while s.8(1) specifies a conviction as a necessary condition for the making of an order, s.8A(1) would require only that a charge be made in court. Provided the person charged consents to be dealt with under the proposed section, there need be no plea of guilty, no finding of guilt, nor any conviction to lay the basis for a probation order under that section. The making of the charge and the consent of the person charged would be sufficient.

The consequences of a probation order made under s.8A would be virtually the same as those of an order made under s.8. For example, an order made under s.8A would be discharged according

to the provisions of s.11 in the same way as an order under s.8. By virtue of subs.(3) of s.11 (amended in the manner we propose), the probationer would be released by such a discharge from any further liability in respect of the offence for which the order was made. Furthermore, a probationer under s.8A could be dealt with according to the provisions of ss.15 and 16 for a breach of the probation order (including a breach by conviction for another offence) in much the same way as a probationer under s.8.

If a probation order were made under s.8A, a special position would arise when a court moves to deal with the probationer for the original offence in respect of which the order was made. Under the existing Act, a court may deal with the probationer for the original offence upon a breach of the probation order : s.15 (3)(b) and (5) and s.16(5),(6) and (7). However, if the probation order had been made under the proposed s.8A, the proationer would not have been convicted of the original offence. To provide for this, we propose that before a court deals with a person under s.15 or 16 for the offence in respect of which the probation order was made it shall first enter a conviction against him for that offence. See subs.(4) of the proposed s.8A. Subsection (2) of s.8A would require a court about to make a probation order under that section to explain to the probationer that if he fails to comply with the requirements of the order or commits another offence during the probation period he may be taken to have pleaded that he is guilty of the offence in respect of which the order is made and be liable to be convicted of, and sentenced for that offence accordingly.

It is our intention that upon a breach of a probation order made under s.8A, the probationer ought not necessarily to be convicted of the original offence in respect of which the order was made. It should always be a matter for the discretion of the court whether or not it will convict the probationer of the original offence in such circumstances.

Subsection (5) of the proposed s.8A specifies that an appeal shall lie from a probation order made under that section as if the probation order were a sentence imposed on the person charged in consequence of his being convicted of the offence charged against him. This provision would give the prosecutor as well as the person a right of appeal. Subsections (6) and (7) would govern the occasions when a person's consent to be admitted to probation and the making of a probation order against him under s.8A may be used in evidence in subsequent proceedings.

We have not attempted to revise Part IV of the Offenders Probation and Parole Act to allow for probation orders made without plea. Part IV deals with probation orders made by another State or Territory of the Commonwealth that require or permit probationers to reside in Queensland. Nor have we attempted to design provisions that may be necessary if Queensland probation orders of the kind we now propose are to have effect in a State or Territory that does not allow its own courts to make orders of this kind. Discussion of these matters may be postponed until a decision is made to allow courts in Queensland to make probation orders without plea. It should also be noted that if our proposals are adopted the Offenders Probation and Parole Regulations of 1959 will require amendment.

Finally, we draw attention to the argument that the proposed procedure for probation without plea could be used in an improper way for plea bargaining. An accused person may consent to a probation order without plea (so the argument might run) upon

the understanding that if he insists upon pleading not guilty and is eventually convicted of the charge he will be sentenced to imprisonment rather than be admitted to probation. However this argument is no more cogent in relation to probation without plea than it is in relation to the plea of guilty. An accused person might improperly be given the impression, as was the accused in R. v. Cain [1976] Crim. L.R., that if he persists in his plea of not guilty he will be given a very severe sentence but if he changes his plea that will make a considerable difference to the sentence. However, the existence of this possibility is no argument that the plea of guilty should be abolished. It is for the courts to ensure that pleas of guilty are accepted only when properly made. Similarly, it will be for the courts to ensure that probation orders without plea are made only in a proper way so as not to deny the accused person a free choice about whether he should plead to the charge or consent to probation without plea.

PART XII - CRIMINAL APPEAL PROCEDURE

Existing criminal appeal procedures in Queensland have given rise to problems. Many appeals to the Court of Criminal Appeal appear to have been quite hopeless from the outset. When instituted by the convicted persons themselves without the benefit of any legal assistance, as often happens, proper grounds of appeal are unlikely to have been formulated for consideration by the Court. In 1975, some 86 per cent of appeals to the Court of Criminal Appeal against conviction were unsuccessful while some 78 per cent of such appeals against sentence were unsuccessful. In 1976, some 74 per cent of appeals to the Court of Criminal Appeal against conviction were unsuccessful while some 80 per cent of such appeals against sentence were unsuccessful. A number of cases have been lengthy and a deal of time and money has been devoted to the preparation as a matter of course of complete transcripts, sometimes running into several volumes. We understand that at one time both the Full Court and the Court of Criminal Appeal were unable to proceed because the whole resources of the Reporting Bureau were devoted to the preparation of transcripts in long criminal cases.

Unfortunately, there are no ready solutions to these problems. In a civil case, an unsuccessful appellant may incur substantial costs. This possibility provides a deterrent against frivolous or vexatious appeals on the civil side. However such a factor would not ordinarily be appropriate to deter appeals to the Court of Criminal Appeal, many of which are supported by legal aid. Admittedly, there is a provision in the Criminal Code that (subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal) the time during which an appellant, if in custody, is specially treated as an appellant, shall not count as part of any term of imprisonment under his sentence : s.671G(3). Standing alone, this provision could be used to deter frivolous appeals. However the Prisons Act 1958 - 1974 s.26(2) allows a prisoner to make application in writing to the Comptroller-General of Prisons to be treated as an ordinary prisoner serving a sentence, and not as an appellant, during such time as may elapse before the determination of any appeal. If the prisoner makes such an application, his sentence is not suspended by reason of the appeal. We understand that such applications are frequently made.

Unless the law is changed so that an unsuccessful appellant's imprisonment is actually lengthened by his appeal

regardless of whether he was specially treated pending the determinatio of the appeal (and we do not here recommend such a change), there is little to deter frivolous appeals to the Court of Criminal Appeal. The efficiency of the appeal system can be improved only by other means. The difficulty is to discover these means.

We have examined a paper on this subject prepared by Mr. Justice Lucas in 1976 as well as material kindly forwarded to us by Master D.R. Thompson, Registrar of Criminal Appeals in England. There have also been discussions with officers of the Registry of the Supreme Court, the Court Reporting Bureau and with the Public Defender. The problems are not peculiar to Queensland as an examination of the following discussions will show : "Legal Advice and Criminal Appeals : A Survey of Prisoners, Prisons and Lawyers" by M. Zander [1972] Crim. L.R. 132; "Legal Advice on Criminal Appeals : The New Machinery" by M. Zander [1975] Crim. L.R. 364; and "Penalising the Appellant in Appeals by Convicted Persons" by F. Rinaldi (1976) 50 A.L.J.9.

Outline of existing procedure and its defects

A convicted person institutes an appeal to the Court of Criminal Appeal by giving notice of appeal or notice of application for leave to appeal within fourteen days of the date of the conviction or sentence appealed against : Criminal Code s.671. (The time within which the notice must be given may be extended by that Court.) Ordinarily, the notice must be signed by the appellant himself : Criminal Practice Rules O.IX, r.5(a). In the notice, the appellant sets out the grounds of appeal and states whether he has applied for legal aid. Under existing practice, once the notice is given the Court Reporting Bureau prepares a set of criminal appeal records for use upon the appeal. A total of six such records is prepared for each appeal where there is one appellant : one for the Court, one for each of the three judges constituting the Court, one for the prosecution and one for the appellant. (A seventh copy is kept on file by the Court Reporting Bureau. An additional copy is prepared for each additional appellant who is separately represented by counsel). Any application by the appellant for legal aid is considered by an officer of the Justice Department. The success of the application depends entirely on the financial means of the appellant (or more accurately his lack of means) and not on the merits of the case. If the application for legal aid is successful, the appellant will be represented in Court by the Public Defender, one of his staff, or counsel instructed by the Public Defender's office. The appeal or application for appeal will ordinarily be heard by a Court of three judges. Although there is provision in the Criminal Code for a single judge of the Court of Criminal Appeal to give leave to appeal (s.671L), applications for such leave are rarely determined by a single judge. If a single judge did refuse such an application, the appellant would still be entitled to have the application determined by a Court of three judges. Although technically there is a distinction between an appeal and an application for leave to appeal (Criminal Code s.668D), the Court usually decides each case upon its merits regardless of the form of the proceeding.

There is no doubt that the appeal procedure described above can be wasteful. A convicted person may institute an appeal without the benefit of legal advice or, indeed, in the face of legal advice that there are no grounds of appeal. In such circumstances, the grounds of appeal prepared by him and set out in the notice of appeal are commonly without substance and indeed may be unintelligible. Nevertheless, once the notice is given a set of six criminal appeal records is prepared for use upon the appeal. If the trial has been a long one, each record may run into several volumes. Legal aid is granted according to the financial means of the appellant and the case is heard by a Court of three judges. It then not infrequently happens that counsel for the appellant (the Public Defender or someone

in his stead) informs the Court that he has been through the record and that he can find nothing to argue.

Ways to make the appeal system more efficient

Three ways may be suggested to make the criminal appeal system more efficient:

(1) Legal aid should be granted to a convicted person to ensure that he is properly advised on instituting an appeal.

(2) Criminal appeal records with the full transcript should not be prepared as a matter of course as soon as a notice of appeal is lodged.

(3) Applications for leave to appeal should in the first instance be determined by a single judge.

Legal aid for advice on instituting appeal

Legal advice to a convicted person intending to institute an appeal to the Court of Criminal Appeal may take one of two forms. Firstly, the convicted person may be advised that there are no grounds of appeal. Such advice, if accurate and if acted upon by the person to whom it is given, will have the beneficial effect of preventing a hopeless appeal. Secondly, he may be advised that there are arguable grounds of appeal and what these grounds are. In such a case, the advice will ensure that proper grounds of appeal are set out in the notice of appeal or application for leave to appeal. Whatever happens, therefore, there is much to be said for ensuring that legal advice is available to any person intending to institute such an appeal. This is so whether he intends to appeal against conviction or sentence or both.

However it remains a question how legal aid should be granted in such circumstances. The English procedure is outlined in a pamphlet Preparation for proceedings in the Court of Appeal Criminal Division issued in June, 1974, and in a revised form in January 1976, by the Registrar of that Court with the approval of the Court. Under this procedure, defence counsel's brief to appear under legal aid contains separate instructions to him to advise or assist on the question of grounds of appeal in the event of conviction or sentence. Counsel is asked to state at the end of the case either that in his view there are grounds or that there are no grounds or that he needs further time for consideration. If either grounds or provisional grounds are thought to exist, counsel is supposed either to draft them or to state that they will follow within 14 days. The instructions are to be endorsed by counsel at the court before he leaves, and handed to his instructing solicitors, together with (where possible) his written advice. See [1975] Crim. L.R. 364 at p.365.

Under this procedure, the advice is given by defence counsel soon after the trial or sentencing has been completed. In support of such a procedure, the English Interdepartmental Committee on the Court of Criminal Appeal (the Donovan Committee) in its report said:

> There are a great number of trials on indictment where counsel for the prisoner knows at the end of the trial whether his client has any grounds

> for appealing or not. If evidence has been wrongly admitted, or wrongly excluded, if the judge has misdirected the jury in some respect, or failed to direct them at all in another, all this must be fresh in counsel's mind. So also if the sentence is manifestly erroneous in law or principle. At the end of the trial no great labour would be involved if counsel wrote out in summary form just what were the grounds for an appeal, e.g. that the evidence of one X was wrongfully admitted or excluded; that the learned judge misdirected the jury by telling them, in effect, etc., etc. If this document were then handed to the prisoner he would have enough, in many cases, to draft his notice of appeal. We think that counsel can fairly be asked to consider it part of their duty to advise their clients in this way whenever it appears to them that reasonable grounds for an appeal exist. ((1965) Cmnd. 2755 p.52).

However a procedure whereunder defence counsel gives the requisite advice upon an appeal has difficulties of its own. Firstly, the convicted person may have lost confidence in the legal adviser who, in his view, has unsuccessfully defended him. In other words, such a person may want a second opinion. Secondly, legal aid granted routinely to every person who is convicted or sentenced may itself be wasteful. In most cases the standard fee will become payable simply on receipt of the advice that there are no grounds of appeal. It is perhaps significant that the introduction of the scheme in England was delayed two years because of disagreement as to the proper level of remuneration for the advice to be given. Moreover the maximum fees eventually permitted for advice and assistance under that scheme were described by one commentator in 1975 as absurdly low. See [1975] Crim. L.R. at pp. 364 and 368. Thirdly, a convicted person may institute an appeal despite counsel's advice against the appeal. Under Queensland law, unlike English law, such a person may have nothing to lose by disregarding the advice given to him. See Prisons Act s.26(2) (referred to above). Fourthly, the English procedure is relatively complex. The pamphlet referred to above contains 12 pages of closely worded instructions as well as two appendices.

Despite these difficulties, however, consideration ought to be given to adopting a system of legal aid whereunder advice on instituting a criminal appeal is given at an early stage by defence counsel to an accused person who is convicted or sentenced. Such legal aid would include advice on appeal and, where appropriate, the settling of the notice of appeal. It would not at that stage go any further. The alternative is to allow a convicted person without means to decide upon instituting an appeal and to draw his notice of appeal without legal advice or assistance. It is true that, if legal aid for the appeal is granted at a later stage, an amended notice with properly drawn grounds of appeal may, in an appropriate case, be filed with the Registrar upon the instructions of the Public Defender. However the former system has much to recommend it and ought to be considered for adoption in Queensland.

Criminal appeal records with the full transcript not to be prepared as a matter of course

Once a notice of appeal or application for leave to appeal is given, a set of criminal appeal records is prepared according to existing practice by the Court Reporting Bureau for use upon the appeal. As stated earlier in this paper, a total of six such records is prepared for each appeal where there is one appellant. The

composition of the record depends on the nature of the appeal, as follows:

(1) Appeal against conviction - a transcript of all evidence of witnesses at the trial (including voir dire evidence, if any), the summing up, verdict, submissions by counsel and sentence.

(2) Appeal against sentence by the Attorney-General - as above.

(3) Application for leave to appeal against sentence after after a trial - a transcript of all evidence of witnesses at the trial (including voir dire evidence, if any), verdict, submissions by counsel and sentence. (The summing up is not included in the record upon an application for leave to appeal against sentence).

(4) Application for leave to appeal against sentence after a plea of guilty - transcript of all proceedings : recital of facts, submissions by counsel and sentence.

In general, the greater part of a criminal appeal record is made up by the transcript of the evidence given by the witnesses at the trial. Ordinarily, each day of a trial at which evidence is given produces some 80 pages of transcript. If evidence is given for five days, some 400 pages of transcript may be produced. The criminal appeal record relating to the trial will consist of this transcript together with the summing up and other material mentioned above. A set of such records will be prepared for use upon the appeal each containing a copy of the transcript. If there is one appellant, six records will be prepared.

The Court of Criminal Appeal is sometimes confronted with a huge transcript running into several volumes in each record. Yet the Court may find it necessary to look at only a small part of the transcript in order to deal with the matters raised by the appeal. It seems a waste of time, effort and money that such a large volume of material should be prepared when only a small part of it is relevant to the appeal.

It would be necessary to make significant changes to existing arrangements in order to effect savings with respect to transcripts of evidence included in criminal appeal records. It would at the least be necessary to appoint an experiencedofficer to assist the Registrar of the Supreme Court in deciding what parts of transcripts should be included in each criminal appeal record. It would also be necessary to ensure that proper notices of appeal or application for leave are drawn so that such an officer can determine what course the appeal is likely to take. Furthermore, a party who is dissatisfied with the record prepared for the appeal should be given the right to have the matter referred to a judge of the Court. It would also be necessary to provide for the case where the Court finds that insufficient material has been included in the record for its purposes, for example, when it is deciding whether to dismiss the appeal under the proviso in s.668E(1) of the Criminal Code though of the opinion that the point raised by the appeal might be decided in favour of the appellant.

Relative to the other costs of administering criminal justic in Queensland, the savings that could be effected by these changes would not be great at the present time. Mr. Rawlings, Chief Court Reporter, estimates that the total cost of copying material for inclusion in criminal appeal records in 1975 - 1976 was of the order of $30,000. In that year, the number of original pages copied for inclusion in such records was approximately 18,000. Even if this number of pages were reduced by 20 per cent by the changes suggested, the saving would amount only to about $6,000, which would almost

certainly be swallowed up by the cost of any new appointment to the office of the Registrar. In Queensland, unlike England and some other jurisdictions, transcripts of evidence are ordinarily prepared for each criminal trial, except short trials in the District Court, at the request of the trial judge. Preparation of such transcripts is therefore not a significant component of the cost of preparing criminal appeal records. The transcript will usually have already been prepared for the trial before the appeal is instituted. It simply has to be copied and made up into a record. Since July, 1975, the Court Reporting Bureau has used a photocopying method that at present costs no more than 20 cents a page.

We therefore think it unlikely that significant savings can at present be made by reducing the amount of transcript in criminal appeal records. However the matter should be kept under review. A large increase in the number of appeals might at some future time make desirable the kind of changes outlined above.

Applications for leave determined by a single judge

As mentioned above, the Criminal Code s.668D makes a distinction between appeals and applications for leave to appeal. A person may appeal to the Court of Criminal Appeal as of right against his conviction on any ground which involves a question of law alone. Otherwise (in the absence of a certificate of the trial judge that it is a fit case for appeal) he may appeal against his conviction or sentence only with the leave of the Court of Criminal Appeal. The power of the Court to give such leave may be exercised by any judge of the Court in the same manner as it may be exercised by the Court itself : s.671L. The Criminal Practice Rules O.IX, r.24(c provide that a judge of the Court of Criminal Appeal sitting under the provisions of s.671L may sit and act wherever convenient. If the single judge refuses an application for leave to appeal, the appellant is entitled to have the application determined by the Court of three or more judges.

Under the existing practice in Queensland, applications for leave to appeal are determined by a Court of three judges rather than a single judge. It may be suggested that, in order to increase the efficiency of the appeal system, such applications should in the first instance be determined by a single judge as is commonly done in England under analogous rules. We have been advised that in about 80 per cent of the appeals heard in England, leave was granted by a single judge. Where leave has been refused by the single judge, there was in 1975 in England a further appeal to a Court of three judge only in 27 per cent of all appeals. This low figure has been described to us by the Registrar of Criminal Appeals in England as "a key feature of the system".

A practice whereunder applications for leave to appeal are first heard by a single judge will make the appeal system more efficient only if a large percentage of applicants whose applications are refused accept the decision of the single judge and refrain from taking their application to the Court. The success of the English practice appears to depend on a high degree of acceptance. However the practice may not be so successful in Queenland. Under the English Criminal Appeal Act 1968 s.29, the English Court of Appeal may direct that the time during which an appellant is in custody pending the determination of his appeal shall not be reckoned as part of the term of any sentence to which he is for the time being subject. This power is something that a disappointed applicant would need to take into account before renewing his application before the Court. See [1975] Crim. L.R. 364 at p.368. In Queensland, however, a disappointed applicant would have nothing to lose by renewing his application before the Court provided he takes advantage of the protective provisions of the Prisons Act s.26(2) (referred to above).

We doubt whether the determination of applications for leave to appeal by a single judge would be successful in Queensland unless the Prisons Act s.26(2) is changed. As we stated earlier in this paper, we do not here recommend such a change. We therefore cannot confidently recommend that such applications be so determined in Queensland.

PROPOSED LEGISLATION

D R A F T B I L L

to amend the Criminal Code

A Bill to amend The Criminal Code in certain particulars and for other purposes

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by authority of the same, as follows :-

1. Short title and citation. (1) This Act may be cited as The Criminal Code Amendment Act 197

(2) This Act shall be read as one with The Criminal Code.

2. Amendment of s.1. Section 1 of The Criminal Code is amended by inserting after the definition of the term "company" the following definition :-

> "The term "counsel" includes any person entitled to audience as an advocate at the proceeding in question;".

3. New s.194A. The Criminal Code is amended by inserting after section 194 the following section :-

> "194A. Written statement in evidence. - Any person who, in a written statement admitted in evidence under section 110A of the Justices Act 1886 - 1975 or under section 632 of The Criminal Code, states anything which, in any material particular, is to his knowledge false is guilty of a crime, and is liable to imprisonment with hard labour for seven years.
>
> The offender cannot be arrested without a warrant."

4. Amendment of s.195. Section 195 of The Criminal Code is amended by omitting the word "two" and substituting the word "three".

5. Amendment of s.304A. Section 304A of The Criminal Code is amended by inserting after subsection (3) the following subsection:-

> "(4) Where, on the trial of a person charged with murder, the person contends -
>
> (a) that he is entitled to be acquitted on the ground that he was of unsound mind at the time when the act or omission constituting the offence of murder took place; or
>
> (b) that he is by virtue of this section liable to be convicted of manslaughter only,
>
> evidence may be offered by the Crown tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceeding at which that evidence may be offered.
>
> In such a case, the burden on the Crown to prove the matter

described by paragraphs (a) or (b) shall be to the same degree of satisfaction as the burden on the person charged to prove such matters in like circumstances."

6. New s.606A. The Criminal Code is amended by inserting after section 606 the following section :-

"606A. Proceedings before jury sworn or evidence tendered.

(a) Any of the following steps in the trial of an accused person may be taken, if the Court thinks fit, before a jury is sworn or before any evidence is tendered on the trial:-

(a) The Court may determine, and may hear such evidence as is necessary to determine, the admissibility of any matter in evidence on the trial;

(b) Counsel for any party to the trial may announce his intention to include any matter in, or to exclude any matter from, the evidence to be adduced for that party on the trial;

(c) Counsel for any party to the trial may object to any matter being admitted in evidence on the trial;

(d) Counsel for the prosecution or the defence may agree upon a condition subject to which a matter is to be adduced in evidence on the trial;

(e) A party to the trial may admit a fact for the purpose of the trial in accordance with section 644; and

(f) The Court may take or allow to be taken any other step which, in its opinion, may properly be taken before the jury is sworn or before any evidence is tendered on the trial.

(2) The Court may direct counsel for the Crown and the defence to confer either in or out of the presence of the Court for the purpose of deciding whether any step should be taken or sought to be taken under subsection (1).

(3) A Judge may preside over the Court in which the trial of an accused person takes place although he did not preside over the Court in which steps in the trial under this section are taken."

7. Amendment of s.614. Section 614 of The Criminal Code is amended by adding at the end thereof the following paragraph:-

"The accused person may plead that he is guilty of the offence charged in the indictment notwithstanding that he has been given in charge of the jury. In any such case the Court may discharge the jury without giving a verdict."

8. Amendment of s.616. Section 616 of The Criminal Code is amended by omitting the sentence commencing with the words "The term" and ending with the words "an advocate".

9. New s.625A. The Criminal Code is amended by inserting after section 625 the following section:-

"625A. Number of jurors required to agree on verdict.

(1) Where the jury on the trial of an accused person have retired to consider their verdict and have not arrived at a unanimous verdict, the decision agreed upon by not less than ten of the jurors shall, subject to this section, be taken as the verdict given by the jury.

(2) The Court shall not accept a verdict given by virtue of subsection (1) unless it appears to the Court that the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case; and the Court shall in any event not accept such a verdict unless it appears to the Court that the jury have had at least two hours for deliberation.

(3) Subsection (1) does not apply to -

(a) a verdict that the accused person is guilty of the crime of treason or murder or any of the crimes defined in the second paragraph of section 81 and in section 82; or

(b) any special finding upon which the accused would be convicted of any such crime.

(4) For the purposes of this section the term "verdict" includes any special finding made by a jury.

10. Amendment of s.626. Section 626 of The Criminal Code is amended by omitting the words "cannot agree as to the verdict to be given" and substituting the words "is unable to give a verdict".

11. Amendment of s.628. Section 628 of The Criminal Code is amended by -

(a) omitting the words "becomes in the opinion of the Court incapable of continuing" and substituting the words "the Court is of the opinion that a juror ought not be required to continue";

(b) omitting the words "the juror, if any, so becoming incapable" and substituting the words "such juror".

12. Repeal of and new s.632. The Criminal Code is amended by repealing section 632 and substituting the following section:-

"632. Use of tendered deposition or written statement in lieu of oral testimony on trial. (1) On the trial of an accused person, a deposition or written statement by any person shall, if the provisions of this section are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by the person who made the deposition or written statement

(2) A deposition or written statement shall not be admitted in evidence pursuant to this section where the accused person or, where there is more than one accused person, one of the accused persons is not represented by counsel.

(3) A deposition shall not be admitted in evidence pursuant to this section unless -

(a) before the deposition is tendered in evidence by or on behalf of a party a copy of it is made available to the other party or each of the other parties; and

(b) the other party does not object or, as the case may be, none of the other parties objects before the deposition is admitted in evidence to the deposition being so admitted.

(4) A written statement (other than a deposition) shall not be admitted in evidence pursuant to this section unless -

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person under The Oaths Acts 1867 to 1960 to the effect that the statement is true to the best of his knowledge and belief and that he made the statement knowing that, if it were admitted in evidence, he would be liable to prosecution for a crime if he stated in it anything that he knew to be false;

(c) before the statement is tendered in evidence by or on behalf of a party a copy of it is made available to the other party or each of the other parties;

(d) the other party does not object or, as the case may be, none of the other parties objects before the statement is admitted in evidence to the statement being so admitted;

(e) where the statement is made by a person under the age of eighteen years, it gives his age;

(f) where the statement is made by a person who cannot read, it is read aloud to him before he signs it, and it is accompanied by a declaration of the person who read the statement to the effect that it was so read; and

(g) where the statement refers to any other document as an exhibit, the copy given to any other party under paragraph (c) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party to whom it is given to inspect that document or a copy thereof.

(5) A deposition or written statement may be admitted in evidence pursuant to this section, if the Court thinks fit, subject to agreement between the prosecution and the defence that a part of the deposition or written statement is not to be admitted in evidence with the remainder thereof, and in such case only the remainder of the deposition or written statement shall be considered on the trial.

(6) A deposition or written statement may be admitted in evidence pursuant to this section subject to agreement between the prosecution and the defence that the person who made the deposition or written statement shall be present when it is tendered to be cross-examined by the other party or parties, as the case requires, and in any such case both the written and oral evidence of that person shall be considered on the trial.

(7) Notwithstanding that a deposition or written statement made by a person is admissible as evidence by virtue of this section, whether it has been admitted in evidence on the trial or not, -

(a) the party by whom or on whose behalf the deposition or written statement is tendered or was proposed to be tendered; or

(b) the Court of its own motion or on the application of any party to the trial,

may require that person to attend before the Court and give evidence, and in any such case both the written and oral evidence of that person admitted on the trial shall be considered.

(8) So much of any deposition or written statement as is admitted in evidence pursuant to this section shall, unless the Court otherwise directs, be read aloud on the trial and where the Court so directs an account shall be given orally of so much of any deposition or written statement as is not read aloud.

(9) Any document or object referred to as an exhibit and identified in a deposition or written statement tendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in Court by the maker of the deposition or written statement.

(10) (a) For the purposes of this section, the term "deposition" means the evidence of a witness given in any proceeding had or taken in or before any court, tribunal, or person in which evidence may be given on oath.

Without limiting the generality of subsection (12) of section 110A of the Justices Act 1886 - 1975, the term "deposition" includes a written statement made by a witness and admitted in evidence in accordance with the said section 110A.

(b) Evidence of the deposition of a witness may be given pursuant to this section by the production of a document purporting to be a certified copy, record or transcription of the deposition."

13. New s.643A. The Criminal Code is amended by inserting after section 643 the following section :-

"643A. Evidence on charge of receiving - (1) On the trial of a person charged with an offence of which it is an element that the person knew that a thing had been obtained by means of -

(a) any act constituting an indictable offence; or

(b) any act done at a place not in Queensland which if it had been done in Queensland would have constituted an indictable offence, and which is an offence under the laws in force in the place where it was done,

the following evidence shall, subject to this section, be admissible for the purpose of proving that he knew the thing had been so obtained :-

(i) evidence that he has, either alone or jointly with some other person, had in his possession, or has aided in concealing or disposing of, anything obtained by means of any act of a kind mentioned in paragraph (a) or (b) hereof and done not earlier than twelve months before the offence charged; and

(ii) evidence that he has within the three years preceding the date of the offence charged been convicted of

stealing or receiving.

(2) Evidence shall not be admitted by virtue of paragraph (ii) of subsection (1) unless -

(a) the evidence has been given against the person charged at the proceeding wherein he was committed for trial; or

(b) seven days' notice in writing has been given to him of the intention to prove the conviction.

(3) Nothing in this section -

(a) affects the admissibility of any evidence otherwise than by virtue of this section;

(b) derogates from the power of the Court to exclude evidence if the Court is satisfied that it would be unfair to the person charged to admit that evidence."

14. Repeal of and new s.644. The Criminal Code is amended by repealing section 644 and substituting the following section:-

"644. Proof by formal admission. - (1) Subject to this section, any fact may be admitted for the purpose of a trial by or on behalf of the prosecution or the accused person, and the admission by any party of any fact under this section is against that party conclusive evidence on the trial of the fact admitted.

(2) An admission under this section -

(a) may be made before or at the trial;

(b) if made otherwise than in Court, shall be in writing;

(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;

(d) if made on behalf of an accused person, shall be made by his counsel or solicitor;

(e) if made at any stage before the trial by the accused person, must be approved by his counsel or solicitor or must appear by writing to have been so approved (whether at the time it was made or subsequently) before or at the trial in question.

(3) An admission under this section for the purpose of a trial relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceeding, other than a committal proceeding, relating to that matter (including any appeal or retrial).

(4) An admission under this section may with the leave of the Court be withdrawn at the trial for the purpose of which it is made or any subsequent trial relating to the same matter.

(5) An admission of a fact under this section may be made by a party notwithstanding that the party making the admission does not have personal knowledge of the fact admitted."

15. New s.644A. The Criminal Code is amended by inserting after section 644 the following section:-

"644A. The term "trial". For the purposes of this Chapter the term "trial" includes proceedings before justices dealing summarily with any offence."

16. New s.651. The Criminal Code is amended by inserting after section 650 the following section:-

"650. Taking outstanding charges into account. (1) Where the Court or justices before whom a person is convicted of an offence or offences (not being or including the crime of treason or murder or any of the crimes defined in the second paragraph of section 81 and in section 82) is satisfied that -

(a) there has been filed in court a document in or to the effect of the form contained in the Fifth Schedule to The Criminal Code Act, 1899, signed by an officer appointed by the Governor in Council to present indictments in any Court of criminal jurisdiction or a member of the police force and by the person convicted, showing on the back thereof in the form prescribed by Part C of the said Fifth Schedule a list of other offences (not including the crime of treason or murder or any of the crimes defined in the second paragraph of section 81 and in section 82) in respect of which he has been charged on indictment or by a member of the police force;

(b) a copy of that document has been furnished to the person so convicted; and

(c) in all the circumstances it is proper to do so,

the Court or justices may, with the consent of the prosecution and before passing sentence on the person so convicted, ask him whether he admits having committed all or any of the offences specified in the list and wishes them to be taken into account by the Court or justices when passing sentence upon him for the offence, or all of the offences if more than one, of which he has been so convicted.

(2) If the person so convicted admits, and wishes to have so taken into account, all or any of the listed offences, the Court or justices may, if it or they think fit, take them into account accordingly but the sentence imposed in respect of each of the offences of which he has been so convicted shall not exceed the maximum sentence that might have been passed for it if no listed offence had been taken into account.

(3) Notwithstanding anything in the preceding subsection, though any Court or justices may take into account thereunder charges of simple offences (indictable or not), no Court or justices shall take into account any charge of an indictable offence which it would not have jurisdiction to try even with the consent of the person charged therewith.

(4) The Court or justices shall certify in the form prescribed by Part B of the said Fifth Schedule upon the document filed in court any listed offences that have been so taken into account and the convictions in respect of which this has been done and

thereafter no proceedings shall be taken or continued in respect of any listed offence so certified unless such conviction in respect of which it has been taken into account has been quashed or set aside.

(5) An admission made under and for the purposes of this section of having committed an offence shall not be admissible in evidence in any proceedings taken or continued in respect of that offence.

(6) An offence taken into account under and in accordance with this section in the passing of sentence upon a person shall not by reason of such taking into account be regarded for any purpose as an offence of which he has been convicted.

(7) Whenever, in or in relation to any criminal proceeding, reference may lawfully be made to, or evidence may lawfully be given of, the fact that a person was convicted of an offence, reference may likewise be made to, or evidence may likewise be given of, the taking into account under this section of any other offence or offences when sentence was imposed in respect of the conviction.

17. New Fifth Schedule. The Criminal Code Act, 1899 is amended by inserting after the Fourth Schedule the following schedule :-

"

THE FIFTH SCHEDULE

PART A

To .....

Charged with (1) .....

(2) .....

(3) .....

( ) .....

Before the .....Court of .....

MEMORANDUM FOR THE ACCUSED'S INFORMATION

(1) The list on the back of this form gives particulars of .....other alleged offences with which you are charged.

(2) If you are convicted on the charge(s) set out above you may, before sentence is passed, ask to be allowed to admit all or any of the other offences listed on the back of this form and to have them taken into account by the court in passing sentence upon you.

(3) If at your request any of the other offences listed on the back are taken into account by the court, then -

(a) This does not amount to a conviction in respect of the other offences taken into account;

(b) The sentence that may be imposed on you by the court for each offence of which you have in fact been convicted can not exceed the maximum that might have been imposed for it if there had been no taking into account of other offences listed on the back.

(4) No further proceedings may be taken against you in respect of any other offences taken into account at your request unless your conviction for the offence(s) above is quashed or set aside.

(5) If any proceedings are taken against you in respect of any offence that you have asked to have taken into account your admission of that offence can not be used as evidence against you in those proceedings.

Signature of (officer appointed to present indictments) or (member of police force)

Date ....

Signature of accused acknowledging receipt of a copy of this document

Date ....

PART B

CERTIFICATE

In sentencing ..... for the offence(s) o

(1) .....

(2) .....

(3) .....

.....

this day the court has taken into account the following offences alleged against and admitted by him that is to say the offences numbered ..... on the back hereof.

Date ....

(Judge)
(Stipendiary Magistrate)
or
(Justices of the Peace)

PART C

umber	Place where offence committed	Date of offence	Description of offence (with particulars)
1			
2			
3			
4			
etc.			

PROPOSED AMENDMENTS OF THE JUSTICES ACT 1886 - 1977

(See Commentary Part III)

Amendment of s.110A. Section 110A of the Principal Act to be amended by -

(a) omitting subsection (4);

(b) omitting subsection (5) and substituting the following subsection:-

"(5) A written statement shall not be admitted in evidence pursuant to this section unless it is made in accordance with the conditions of paragraphs (a) to (g) (inclusive) of subsection (4) of section 632 of The Criminal Code";

(c) in subsection (14), omitting paragraph (a).

PROPOSED AMENDMENTS OF THE OFFENDERS PROBATION AND PAROLE ACT 1959 - 1974

(See Commentary Part XI)

1. Amendment of s.3. Meaning of terms. Section 3 of the Act to be amended by omitting from the definition of the term "probation order" the words "section eight" and substituting the words "section 8 or 8A".

2. New s.8A. The Act to be amended by inserting, after section 8, the following section :-

"8A. Probation orders without plea. - (1) Where -

(a) a person is charged in the Supreme Court, or any District Court, or any Magistrates Court with any offence punishable by a term of imprisonment otherwise than in default of payment of a fine;

(b) the Court has jurisdiction to try him for the offence;

(c) the Court is of opinion that having regard to the circumstances including the nature of the offence charged and the character and personal history (inclusive of home surroundings and other environment) of the person it is expedient to deal with him under the provisions of this section; and

(d) the person consents to be so dealt with;

the Court may instead of calling upon the person to plead to the charge make an order requiring him to be under the supervisi of a probation officer for such period being not less than six months and not more than three years, as is specified in the order;

Provided that the provisions of this subsection shall not apply to or with respect to any offence which is a crime the punishment for which cannot be mitigated or varied under section 19 of The Criminal Code.

(2) Before making a probation order under subsection (1) the Court shall explain or cause to be explained in ordinary language to the person consenting to be dealt with thereunder the effect of the order (including any additional requirements proposed to be inserted therein) and that if he fails to comply with the requirements of the order or commits another offence during the probation period he may be taken to have pleaded that he is guilty of the offence in respect of which the order is made and be liable to be convicted of and sentenced for that offence accordingly; and the Court shall not make the order unless the person expresses his willingness to comply with the requirements thereof.

(3) The provisions of subsection (2) to subsection (5B) (inclusive) and of subsection (7) to subsection (8) (inclusive) of section 8 shall apply mutatis mutandis to subsection (1) of this section and any probation order made thereunder.

(4) Before a Court deals with a person under section 15 or 16 for the offence in respect of which a probation order was made under subsection (1), it shall first enter a conviction against that person for that offence.

A conviction so entered shall have effect as if the person to whom it relates had pleaded that he was guilty of the offence and had been convicted of the offence accordingly.

(5) An appeal shall lie from a probation order made under subsection (1) as if the probation order were a sentence imposed on the person in respect of whom it is made in consequence of his being convicted of the offence charged against him.

The Court determining the appeal may -

(a) with the consent of the person in respect of whom the probation order was made, vary the terms of the probation order; or

(b) vacate the probation order and, if it thinks fit, order the person to be tried for the offence in such manner as it may direct.

(6) Upon the trial of a person charged with an offence, evidence of -

(a) any consent by the person to be dealt with under subsection (1) for that offence; or

(b) any probation order made by virtue of subsection (1) in respect of that offence,

shall not be admissible to prove that the person has admitted he was guilty of the offence.

(7) A probation order made by virtue of subsection (1) in respect of a person charged with an offence -

(a) may be taken into account in any subsequent proceedings taken against the person under Part II of this Act for the offence;

(b) shall be admissible as evidence in any proceedings taken against the person for a subsequent offence to prove, where to do so is relevant to any issue in those proceedings, that he committed the offence for which the probation order was made;

(c) may be taken into account in any proceedings wherein the person is to be sentenced or otherwise dealt with for a subsequent offence."

3. Amendment of s.11. Discharge of probation order. Section 11 of the Act to be amended by inserting in subsection (3) after the word "offence" the words "(whether the probationer was convicted of the offence or not)".