



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 6

**Summary Trial of
Indictable Offences**

REPORT

JUNE 1970

**REPORT
ON
SUMMARY TRIAL OF INDICTABLE OFFENCES**

To: The HON. ARTHUR F. GRIFFITH, M.L.C.,
MINISTER FOR JUSTICE

1. As Project No. 6 of its first programme the Committee was asked -

"To consider the need for further legislation to provide for summary trial of certain indictable offences".

THE PRESENT LAW

2. Offences in Western Australia are of three kinds, crimes, misdemeanours and simple offences. Any offence not otherwise designated is a simple offence. All simple offences are triable summarily. Crimes and misdemeanours are triable on indictment (i.e. by a judge and jury) "unless otherwise expressly stated" (*Criminal Code*, s.3).

3. Of the indictable offences for which summary trial has been expressly provided, some may be so tried at the discretion of the justices and others on the election of the accused. The Code also contains some indictable offences which are similar to offences in other statutes which are triable summarily. In such cases it is the prosecutor who has the discretion to determine the mode of trial: he decides which offence should be charged.

4. The following are the indictable offences in the Code which may be dealt with summarily at the discretion of the justices: the accused has no right to require trial by judge and jury:

- (a) **Obstructing officers of courts of justice** (Code s.151).
- (b) **Poisoning water holes** (Code s.208- see also paragraph 10 below).
- (c) **Keeping or using common gaming or betting houses** (Code ss. 210, 211 - see also paragraph 10 below).
- (d) **Keeping or using premises to run lotteries** (Code s.212).

- (e) **Attempted suicide** (Code s.289) - if the accused person admits that he is guilty of the offence.
- (f) **Simple assault** - i.e. assault unless accompanied by an attempt to commit a crime or the charge is a fit subject for prosecution on indictment (Code ss.319-323).

5. Chapter 44 of the Code contains several simple offences analogous to stealing, including unlawfully using animals (s.428); possession of the skin or carcass of an animal suspected of being stolen (s.429); illegal branding (s.430); and defacing brands (s.431). The magistrate or justices however, are empowered (by s.433) on a charge of any of these four offences "if of opinion that there ought to be a prosecution for an indictable offence ... to abstain from dealing with the case summarily, and [to] commit the defendant" on the indictable offence.

6. The following are the indictable offences which may be dealt with summarily if the accused elects summary trial -

- (a) Petty stealing and the like (Code s.426) including -
 - (1) stealing anything, where the maximum penalty does not exceed three years;
 - (2) killing an animal with intent to steal the skin or carcass, where the maximum penalty does not exceed three years;
 - (3) stealing from the person;
 - (4) stealing by a clerk or servant;
 - (5) making any thing movable with intent to steal it, without circumstances or aggravation;
 - (6) obtaining goods or credit by a false pretence or wilfully false promise;
 - (7) obtaining anything capable of being stolen by a fraudulent trick or device;
 - (8) attempting to commit any of the above;
 - (9) receiving, if the article received has been obtained by an offence which may be tried summarily;

- (10) wilful and unlawful damage to property or wilful and unlawful killing or wounding of animals (Code s.465).

The summary jurisdiction may only be exercised if either -

- (i) the value of the property involved does not exceed three hundred dollars; or
 - (ii) the accused pleads guilty and it appears to the magistrate or justices that the accused may be adequately punished on summary conviction.
- (b) Sexual offences with children (*Child Welfare Act 1947-1969*, s. 20B);
 - (c) Defamation, if "a case had been made out against the accused but ... is of a trivial nature" (Code s.369).

7. The Code also contains the following simple offences which may be dealt with either summarily or on indictment if the accused so elects:-

- (a) Offences relating to trade marks and trade descriptions (s.496);
- (b) Offences of intimidation and annoyance (s.550).

8. Several legislative formulae are used permitting the accused his election:-

- (a) On the petty stealing and like offences, and under the *Child Welfare Act* (see paragraph 6(a) and (b) above) the Court is "**required** to explain to [the accused] that he is entitled to be tried by a jury" and "ask him whether he **objects** to being dealt with summarily". (Code s.427, emphasis added).
- (b) On a trivial defamation charge (see paragraph 6(c) above) the Court "**may** ask [the accused] whether he desires to be tried by a jury, or **consents** to the charge being dealt with summarily". (Code s.369, emphasis added).

- (c) On a charge relating to trade marks or trade descriptions (see paragraph 7(a) above) the accused **must** be informed of his right to be tried on indictment, and if he **so requires**, be tried accordingly (Code s.496).
- (d) On a charge relating to intimidation or annoyance (see paragraph 7(b) above) the accused "**may**, on appearing before such Court, declare that he **objects** to being tried for such offence" summarily, and "the Court **may** deal with the case ... as if the accused was charged with an indictable offence". (Code s.551).

9. There appears to be no particular significance in these variations and if the recommendations in the Committee's report on Project No. 4 are adopted it will become advisable to adopt a uniform formula to fit in with the procedure proposed.

10. The following are instances of indictable offences and simple offences covering similar situations -

- (a) **Keeping places for the purposes of prostitution** (Code s.209; *Police Act 1892-1969*, s.76F).
- (b) **Keeping or using common gaming or betting houses** (Code ss.210, 211; *Police Act* ss.84A-84C).
- (c) **Wilful and unlawful damage to property** (Code ss.465-467; *Police Act*, s.80).
- (d) **Pollution of water supply** (Code s.208; *Health Act 1911- 1968*, s.129) .
- (e) **Selling adulterated food** (Code s.216; *Police Act* s.83; *Health Act*, s.203 et al.).
- (f) **Common nuisance** (Code s.207; *Health Act* ss.181, 182).
- (g) **Unlawful use of motor vehicle** (Code s.390A; *Traffic Act 1919-1969*, s.60).

MOVEMENT FOR REFORM

11. Trials by judge and jury on indictment undeniably take longer and are more costly both to the State and to the individual charged, than summary trials. This would be so even if reforms were introduced into the methods and procedures for committal for trial (see Report on Project No. 4). Apart from the time and cost involved, in many instances an accused would prefer summary trial because of its practical advantages. Because it is speedy his anxieties are sooner resolved and probably with less publicity. Moreover, the maximum penalty that may be imposed is generally less.

12. It is generally accepted that the more serious charges should continue to be dealt with on indictment, but there has been a trend in most jurisdictions (see paragraphs 13 to 21 below) to increase the range of indictable offences that may be tried summarily and to take in the less serious of the more prevalent of the indictable offences. The Hon. Sir Albert Wolff, when he was Chief Justice, suggested that summary courts be given limited jurisdiction to try "simple breaking and entering" cases, and the Police Department has for some time expressed a need for an extension of the existing powers of summary courts. In 1969 the *Criminal Code* was amended by *Act No. 1 of 1969*, to enable the stealing of animals (other than cats and dogs) valued at not more than three hundred dollars in aggregate, to be dealt with summarily.

LAW IN OTHER JURISDICTIONS

13. **Commonwealth Crimes Act:** Except for charges of treason, treachery, sabotage, espionage and breaches of official secrecy (i.e. the offences introduced by *Act No.84 of 1960*) the court may deal summarily with any charges with the consent of the accused, or with charges or offences relating to property not exceeding one hundred dollars on the request of the prosecutor.

14. **Australian Capital Territory:** The *Crimes Ordinance 1951* amends s.476 of the *Crimes Act, 1900* (N.S.W.), which otherwise applies. Under the amending ordinance the jurisdiction of the summary court may be exercised without the consent of the accused unless the offence, "having regard to its seriousness or the intricacy of the facts at the trial, or any other relevant circumstance, ought to be tried by the Supreme Court". This summary jurisdiction extends over the wide range of offences listed in s.477 of the New South Wales

Crimes Act, provided the value of the subject matter or property involved does not exceed one hundred dollars.

15. **New South Wales:** Under the *Crimes Act 1900* the court may, unless the accused otherwise elects, deal summarily with the large number of offences (including "breaking and entering") listed in s.477 provided the value of the subject matter does not amount to two hundred and fifty dollars.

16. **Queensland:** The Western Australian *Criminal Code* is based on the Queensland *Criminal Code* under which the provisions are similar to those at present existing in Western Australia.

17. **South Australia:** The *Justices Act, 1921-1967* gives justices power to deal with certain offences against property when the value does not exceed twenty dollars or with certain misdemeanours punishable by not more than two years' imprisonment. Magistrates have the same power when the value of the property does not exceed four hundred dollars. The assumption of jurisdiction by both justices and magistrates is subject to the accused person electing summary trial and is subject also to the same proviso regarding seriousness, intricacy of facts, questions of law and other relevant circumstances applicable under the Australian Capital Territory Ordinance.

18. **Tasmania:** The 1963 amendment to the *Justices Act, 1959* introduced extensive changes. The court now has power to deal summarily with stealing and similar offences against property without the consent of the accused provided the value of the subject matter does not exceed twenty dollars. If the value does not exceed four hundred dollars the court may proceed summarily if the accused elects summary trial. The jurisdiction extends to "breaking and entering" provided the building was not a dwelling house, no violence or explosives were used, the accused was unarmed, and there was no intent to commit a crime other than stealing.

19. **Victoria:** Under the *Justices Act* (No. 6282, 1958 and No. 6958, 1962), the Court may, unless the accused otherwise elects or the Court is of opinion that the charge should be tried on indictment, deal with the charge summarily provided the value of the subject matter

of the charge does not exceed one thousand dollars. Breaking and entering, other than house-breaking, is included in the summary jurisdiction.

20. **New Zealand:** Under the *Summary Proceedings Act, 1957*, magistrates are given jurisdiction to deal summarily without the consent of the accused with a large number of offences (including robbery and burglary) listed in the Schedule. If the offence is punishable with more than three months' imprisonment, the accused must be put to his election.

21. **England:** The *Magistrates' Courts Act, 1952*, s.19, empowers the Court to deal summarily with indictable offences specified in the Schedule with the consent of the accused, provided the punishment that the Court may inflict is adequate and the circumstances do not make the offence serious or one for other reasons requiring trial on indictment.

WORKING PAPER AND COMMENTS THEREON

22. The Committee published a working paper on 6 December, 1968, copies of which were sent to the Chief Justice and Judges of the Supreme Court, the Law Society, the Magistrates, the Justices Association of Western Australia, the Commissioner of Police, the Under Secretary for Law and other Law Reform Commissions and Committees with which this Committee is in correspondence.

23. The Committee has received comments from the Magistrates, the Commissioner of Police, the Law Society and some members of the legal profession. The consensus of opinion, so far as the Committee has been able to assess it, is that any extension to the power of summary trial of indictable offences should be exercised only by magistrates and should be subject to the restriction that accused persons have the right to elect to be tried by jury if they so desire.

24. Possible areas of extension which have been suggested are -

- (a) Breaking and entering a building other than a dwelling-house (Code ss.403 and 404).

- (b) Offences incidental to breaking and entering - being found armed with intent to break and enter, possession of house-breaking instruments, etc. (Code s.407).
- (c) Assault occasioning bodily harm (Code s.317).
- (d) Gross indecency, i.e. homosexual and indecent practices between males (Code s.184).
- (e) Bringing stolen property into Western Australia (Code s.388).
- (f) Forging and uttering (Code ss. 473, 474, 478, 479).

25. Other points raised were -

- (a) Magistrates (but not justices) should be empowered to impose fines up to five hundred dollars and to imprison for up to one year.
- (b) Magistrates (but not justices) should be permitted to award compensation in excess of the present amount of fifty dollars and some procedure should be created for making proper assessments.

RECOMMENDATIONS

26. The Committee is of opinion that some extension of the jurisdiction to deal summarily with indictable offences is warranted and, together with the changes proposed in committal proceedings (see Report on Project No.4), would result in a better distribution of work between the Supreme and the District Courts on the one hand and the courts of petty sessions, on the other, with a saving of time and expense both for accused persons and for the State. The Committee is satisfied that the limited extension recommended below could be achieved without sacrificing any of the traditional principles associated with the trial of criminal cases.

27. The Committee therefore recommends -

(1) That the following be added to the list of indictable offences which may be dealt with summarily provided the court is satisfied in each case that the charge can be adequately dealt with and punished summarily and the accused elects that it be so dealt with.

- (a) Breaking and entering a building (other than a dwelling-house) and committing a crime against property (usually theft) therein, (Code s.403 - penalty, 14 years) subject to the same provisos as those contained in s.426, relating to stealing and the like, namely, the value of the property does not exceed \$300 (but see sub-paragraph (3) below) or the accused pleads guilty.
- (b) Breaking and entering a building (other than a dwelling-house) with intent to commit a crime therein (Code s.404 - penalty, 7 years).

In either (a) or (b) the court will be prohibited from dealing with the charge summarily if any violence was used or offered to any person, or any firearm, dagger, cosh or other offensive weapon, or explosive, was used to facilitate the commission of the offence.

- (c) Offences incidental to breaking and entering (Code s.407 - penalty, 3 years).
- (d) Assault occasioning bodily harm (Code s.317 penalty 3 years).
- (e) Gross indecency, i.e. homosexual and indecent practices between males (Code s.184 - penalty, 3 years).
- (f) Bringing stolen property into Western Australia (Code s.388 - penalty, the same as if the property were stolen in Western Australia).
- (g) Forgery provided the maximum penalty does not exceed three years (Code s.473 other than the special cases).
- (h) Obliterating crossings on cheques or uttering such cheques (Code s.478 - penalty, 7 years).
- (i) Making documents without authority (Code s.479 - penalty, 7 years).

(2) That the maximum penalty on summary conviction of any of the offences listed in sub-paragraph (1) above be six months or \$500 (i.e. the same as in Code s.426).

(3) That the limitation of summary jurisdiction in property offences, to property not exceeding \$300 in value (Code ss.426 and 465, and sub-paragraph (1)(a) above) be increased to \$500.

Note: In view of the decreasing value of money the Committee is of opinion that such an increase is warranted. When the Code was first enacted in 1902 the amount was 50 pounds. This was increased to \$300 by *Act No. 1 of 1969*.

(4) That the court be empowered to decide the question of whether the charge can be adequately dealt with and punished summarily from the nature and particulars of the charge, supplemented where the court requires it, by an outline of the prosecution case by the prosecutor.

Note: The existing statutory provisions (Code ss.426, 427; *Justices Act*, s.102) seem to contain procedural anomalies and are difficult to follow in practice.

(5) That when the accused is charged with **any** of the offences which the court has decided may be adequately dealt with summarily, and in respect of which the accused has an election (i.e. the offences listed in paragraphs 6 and 7, and sub-paragraph (1) above), after the accused has been informed of his rights (see Annexure to Report on Project No. 4) and been given the opportunity to consider his position, he be put to his election in the following (or the like) terms: "You are now required to elect. Do you wish to be dealt with by the Supreme [or the District] Court and tried by a judge and jury, or do you wish to be dealt with in a Court of Petty Sessions by a magistrate?" (Compare paragraphs 8 and 9 above).

(6) That the jurisdiction to deal summarily with the indictable offences listed in sub-paragraph (1) above (i.e. offences which at present are triable on indictment only) be exercised only by magistrates, and not justices, unless no magistrate is available and the accused expressly consents to the charge being dealt with by justices.

(7) That the jurisdiction to deal summarily with the offences (listed in paragraphs 4, 5, 6 and 7 above) which are at present triable either on indictment or summarily be exercised by magistrates only, and not justices, subject to the restriction in (6) above.

28. Breaking and entering offences constitute about 60% of the cases dealt with in the superior criminal courts. The changes recommended in paragraph 27(1) (a), (b) and (c) above will result in a substantial redistribution of work between the Supreme and District Courts on the one hand and the Courts of Petty Sessions) on the other, and the Committee does not see any need at this stage for a more extensive list of summarily triable indictable offences as in New South Wales (see paragraph 15 above), the Australian Capital Territory (see paragraph 14 above), or New Zealand (see paragraph 20 above).

29. Although not strictly within its terms of reference the Committee is also of opinion that the Magistrate's powers to order payment of compensation be extended. At present any court may "immediately after" a summary conviction order the person convicted to pay up to \$50 compensation for loss of property or expenses incurred to any person aggrieved by the offence (Code s.719). The amount of \$50 seems inadequate particularly as summary convictions include summary convictions for indictable offences when the value of the property in question may be up to \$300. This inadequacy will be aggravated somewhat if the jurisdiction to deal summarily with indictable offences is increased as recommended in paragraph 27 above, and aggravated considerably more if the upper limit of the value of any property in question is raised to \$500 as recommended in sub-paragraph 27(3) above. Local Courts have jurisdiction in claims of up to \$1,000 (*Local Courts Act 1904-1964*, s.30).

30. The Committee therefore recommends -

- (a) That s.719 of the Code be amended and that the court be empowered after a conviction (whether summary or on indictment) to order the person convicted to pay compensation of up to \$500 for loss of property or expenses incurred to any person aggrieved by the offence.
- (b) That the courts also be empowered before making an order for compensation, to take evidence to assist in assessing the compensation to be paid.

31. The Committee has not attempted to draft the statutory provisions that would be necessary to implement its recommendations, but is willing to do so if required.

B.W. Rowland
Chairman

E. Edwards
Member

C. le B. Langoulant
Member

8 June 1970.