



STATE OF NEW YORK

---

**Sixth Interim Report**  
**of the**  
**State of New York**  
**Temporary Commission**  
**on Revision of the**  
**Penal Law and Criminal Code**

---

FEBRUARY 1, 1967



**MEMBERS OF THE COMMISSION**

RICHARD J. BARTLETT, *Chairman*  
 TIMOTHY N. PFEIFFER, *Vice Chairman*  
 WILLIAM KAPELMAN, *Secretary*  
 HYMAN BARSHAY  
 EARL W. BRYDGES, JR.  
 JOHN J. CONWAY, JR.  
 JOSEPH R. CORSO  
 JOHN R. DUNNE  
 FRANK S. HOGAN  
 HOWARD A. JONES  
 WHITMAN KNAPP  
 ARCHIBALD R. MURRAY  
 EDWARD A. PANZARELLA  
 BERNARD C. SMITH  
 HERBERT WECHSLER

**Ex-Officio**

SENATOR EARL W. BRYDGES, *Temporary President of the Senate*  
 SENATOR JOSEPH ZARETZKI, *Minority Leader of the Senate*  
 ASSEMBLYMAN ANTHONY J. TRAVIA, *Speaker of the Assembly*  
 ASSEMBLYMAN MOSES M. WEINSTEIN, *Majority Leader of the Assembly*  
 ASSEMBLYMAN PERRY B. DURYEA, JR., *Minority Leader of the Assembly*  
 SENATOR WARREN M. ANDERSON, *Chairman of the Senate Finance Committee*  
 ASSEMBLYMAN HARVEY M. LIFSET, *Chairman of the Assembly Ways and Means Committee*

**Staff**

RICHARD G. DENZER, *Counsel*  
 PETER J. MCQUILLAN, *Chief Assistant Counsel*  
 ARNOLD D. HECHTMAN, *Assistant Counsel*  
 ALBERT A. BLINDER, *Associate Counsel*  
 MATTHEW H. BRANDENBURG, *Associate Counsel*  
 WILLIAM H. MCKEON, *Associate Counsel*  
 STANLEY J. REIBEN, *Associate Counsel*  
 FRANK S. ROSSETTI, *Associate Counsel*  
 ROBERT S. STEWART, *Associate Counsel*  
 HELEN E. GORDON, *Administrative Assistant*

**LETTER OF TRANSMITTAL**

February 1, 1967

To: Hon. Nelson A. Rockefeller, Governor of the State of New York:

The Legislature of the State of New York :

Pursuant to the provisions of Chapter 346 of the Laws of 1961 as amended by Chapter 548 of the Laws of 1962, Chapter 210 of the Laws of 1963, Chapter 251 of the Laws of 1964, Chapter 489 of the Laws of 1965 and Chapter 446 of the Laws of 1966, submitted herewith is a report of the activities of this Commission for the period of February 1, 1966 to January 31, 1967.

Richard J. Bartlett,  
Chairman.

**INTRODUCTORY COMMENTS**

On July 20, 1965, the Revised Penal Law, proposed by the Commission and passed by the Legislature at its 1965 session, was signed by the Governor. Though enacted into law at that time, it bears an effective date of September 1, 1967. The period of more than two years between enactment and effectiveness was designed to permit the Bench and Bar to become familiar with the vast substantive, structural and formal changes from the former Penal Law.

Since the enactment of the Revised Penal Law in 1965, the Commission has addressed itself primarily to two objectives. The first of these entails the formulation of considerable legislation which concerns the Revised Penal Law both directly and indirectly. The "direct" category consists of a number of proposed amendments to the Revised Penal Law itself, intended to improve it generally and to incorporate therein the substance of various 1965 and 1966 amendments to the former Penal Law which perforce could not be included in the revised body as originally submitted. The "indirect" category of prospective legislation consists of two prepared bills amending various other bodies of law to conform them, as of September 1, 1967, to the Revised Penal Law.

Apart from the foregoing Penal Law activity, the Commission has devoted its efforts over the past year mainly to its second major assignment, namely revision of the Code of Criminal Procedure.

This report summarizes the status of the Commission's work in both the Penal Law and Criminal Code areas.

## I

**CONCERNING THE PENAL LAW**

The Commission's activity over the past year with respect to the Revised Penal Law, as indicated, falls into two categories: formulation of legislative proposals to amend (1) the Penal Law itself, and (2) other bodies of law for purposes of conformity.

**A. Proposed amendments to the Revised Penal Law**

As indicated in its 1966 or Fifth Interim Report, the Commission has for some time been preparing an omnibus bill, for submission at the 1967 legislative session, proposing numerous amendments to the Revised Penal Law which, hopefully, will thereby be incorporated therein prior to its effective date of September 1, 1967.

This bill, which is now ready for submission, would work some formal and phraseological changes resulting merely from self-critical observations of the Commission and its staff. Its main significance, however, lies in its up-dating of the Revised Penal Law to include the substance of several amendments to the former Penal Law enacted virtually simultaneously with the Revised Penal Law in 1965 and subsequent thereto in 1966. The theory is, of course, that such legislation, representing the recent will of the Legislature, should not be lost in the transition from the old Penal Law to the new one.

Illustrative of the "up-dating" process is a proposed amendment inserting two sections defining the crime of "criminal usury" and a related offense. This stems from a 1965 amendment to the former Penal Law, formulated and sponsored by the State Investigation Commission after considerable study, creating the indicated offenses in an effort to tighten the laws relating to "shylocking." With some language changes designed to accommodate these sections to the new pattern, the bill in question works this legislation into the Revised Penal Law so that it will not be lost in transition on September 1, 1967.

Probably the most important amendment of this type is one which conforms certain homicide provisions of the Revised Penal Law to those of the former Penal Law as amended at the 1965 legislative session. It was in that year that the death penalty was abolished for all crimes except two rather narrow forms of murder. The timing of that amendment prevented its inclusion in the original Revised Penal Law, but the amendatory bill in question adopts and carries over this abolition legislation so that its effectiveness will continue after September 1, 1967.

**B. Proposed amendments conforming other bodies of law**

It is inevitable that any substantial change in an important body of law sends a chain reaction through the entire spectrum of the legislation of the particular jurisdiction. Nowhere is this

more true than in the case of the revision of the New York Penal Law. Both the Consolidated and Unconsolidated Laws of New York are permeated with cross-references to and implementations of the Penal Law, which means, as matters presently stand, the former Penal Law. It is apparent that, in the absence of any rectifying legislation, all such cross-referring statutes would become inaccurate and meaningless upon the demise of the former Penal Law on September 1, 1967. Before that date, therefore, it is essential that New York statutory law as a whole be made to conform to the new Penal Law instead of the old one.

This project is undertaken in two lengthy bills soon to be submitted by the Commission at the 1967 legislative session. One of these deals exclusively with the Code of Criminal Procedure, which requires by far the most amendatory attention because it is so closely related to and interwoven with the Penal Law. The other bill covers the remainder of New York statutory law. The bodies of law most significantly affected thereby include the Correction Law and the New York City Criminal Court Act.

While the vast majority of these proposed changes are of a purely formal nature, the conforming amendments to the Code of Criminal Procedure merit some comment. These, it should be borne in mind, are not a part of, and bear little or no relation to, the Commission's major task of formulating a thoroughgoing revision of the Criminal Code. That assignment, as explained in another part of this report, represents a separate and much more difficult project which is currently being undertaken with a view to submission of a completely revised Code at the 1968 legislative session.

The latter will, of course, mesh with the Revised Penal Law. Even assuming its ultimate adoption, however, the old Code will be in existence and effect until that time and of necessity must be patched up so that it may live in harmony with the Revised Penal Law during the interim period. That is the function of the aforementioned conforming bill addressed exclusively to the Criminal Code.

In view of its narrow function of *conformity*, this bill is confined so far as possible to the purely formal alterations essential to accommodate the existing Criminal Code to the Revised Penal Law. Changes of substance and structure, even where deemed by the Commission to be salutary and ultimately necessary, are studiously avoided and in effect postponed for inclusion in the thorough revision project subsequently to be submitted. This approach is predicated upon the practical considerations that conformity alone is the urgent objective of the moment, namely 1967; that achievement of that objective might be jeopardized by the injection of controversial issues through proposed changes of substance; and that in any event significant proposals of such nature should eventually be presented *in toto* in the genuine revision later to be submitted

rather than incidentally or piecemeal in the course of an ancillary project having a different goal.

Despite this approach, the inclusion of basically new provisions in the conforming Criminal Code bill is in a few instances unavoidable. Most of these appear in the sentencing area where the drastically changed sentencing structure of the Revised Penal Law sometimes requires procedural accommodation and implementation in the Code quite different from that offered by the present Code which, of course, implements the sentencing structure of the former Penal Law. Thus, for example, the Revised Penal Law's abandonment of the so-called Baumes laws, prescribing mandatory increased penalties for multiple felony offenders, and its substitution of a permissive "persistent felony offender" sentence in somewhat comparable cases, necessitates entirely new procedure to implement the new persistent felony offender sentence.

No purpose is to be served by extensive comment upon the other conforming bill, comprehensively covering all chapters and bodies of law other than the Code of Criminal Procedure. It is pertinent to note, however, one facet of this bill which is derived from a large "transfer" bill submitted by the Commission in 1965 simultaneously with the Revised Penal Law.

This 1965 "transfer" bill extracts from the former Penal Law and transfers to various other and more appropriate bodies of law (as of September 1, 1967) more than three hundred former Penal Law sections, largely of a regulatory and highly specialized nature, deemed to be ill placed in the Penal Law. While these numerous statutes still appear in the former Penal Law and will continue to do so until September 1, 1967, when it expires, they will on that date be dispersed to various other legislative destinations.

Meanwhile, several amendments to these statutes have been enacted at the 1965 and 1966 legislative sessions. Such amendment has almost invariably been to the section as it presently exists in the former Penal Law without concomitant amendment of the section as it will exist in another body of law after September 1, 1967. The result of such omission or oversight is that, pursuant to legislative mechanics and technicalities, such an amendment, without more, will not carry over into the other body of law on the transfer date. Among other matters, the conforming bill under discussion, by appropriate amendments, rectifies these technical omissions and preserves the indicated legislation.

## II CONCERNING REVISION OF THE CODE OF CRIMINAL PROCEDURE

For the past two years, the Commission has devoted the major share of its effort to revision of the Code of Criminal Procedure. Staff drafts of a proposed new Code — to be re-

named the "Criminal Procedure Law" — have been virtually completed. A substantial portion of this material has been examined by the Commission, extensively discussed and analysed by it at Commission meetings, and remitted to the staff for re-drafting in accordance with Commission recommendations. Much of the current material represents second, third and fourth drafts.

In December of 1966, the Commission issued a "Tentative Draft" of approximately one third of a proposed "Criminal Procedure Law." Hundreds of copies of this informal publication have been distributed to the Legislature, the judiciary, Bar associations and other interested organizations, groups and individuals. The purpose was to accord those most vitally concerned a preliminary view of a portion of the prospective complete proposal in order that they may attain advance familiarity with the new thrusts and techniques employed and with some of the substantive changes contemplated.

The Commission plans to issue its complete proposal during the spring of 1967, either in the form of a study bill submitted to the Legislature or in some other form of publication. Public hearings thereon will be held in the Fall, and a bill embracing the final product will be submitted for passage at the 1968 legislative session.

The embryonic proposed Code, or "Criminal Procedure Law," represents a revision as drastic and thoroughgoing as that effected by the Revised Penal Law. As with the Penal Law project, the Commission concluded at the outset that, owing to the generally deteriorated condition of the existing Code, a satisfactory revisional job could not be achieved by mere renovation or patch-work amendment within the framework of that body of law. Accordingly, the approach adopted again was one of complete reconstruction from the ground up. In structure, form and phraseology, the proposed Criminal Procedure Law will bear little resemblance to the existing Criminal Code. Apart from several uniform acts and interstate compacts which cannot be materially changed, not a single title, article or section of the Criminal Code will be carried over in its present form.

The changes of substance will be numerous and frequently of a fundamental nature. The general obsolescence of the existing Code, often evidenced by its archaic language, extends to many anachronistic procedural concepts having little or no basis in logic or modern reality and supported only by tradition rooted in a nineteenth century atmosphere. The proposed Criminal Procedure Law seeks to re-formulate New York Criminal procedure in a manner rendering it consonant with modern problems, modern thinking and modern institutions.

The partial tentative draft already published contains extensive explanatory notes upon the statutory material contained therein, and the complete proposal soon to be issued will



include similar commentary with respect to every section. Especially under these circumstances, the instant report is not an appropriate vehicle for comprehensive explanation of the proposal and its prolific innovations. It may be of interest, however, to note in brief and general fashion a few of the areas of significant change.

(1) Lower criminal court procedure, both as it relates to preliminary proceedings in a criminal action and to the trial and prosecution of misdemeanors and lesser offenses, is substantially revamped and streamlined. This is partially accomplished by laying a new foundation with a new lexicography which, eliminating the traditional and confusing terms "magistrate" and "court of special sessions" creates precise classifications of the lower courts and blankets them under a new label of "local criminal courts." Among the innovations to be found in this area is the inclusion of the New York City Criminal Court as a "local criminal court" which, like the others, is to be procedurally controlled by the "Criminal Procedure Law" rather than by its own New York City Criminal Court Act, as is largely the case at present.

With this groundwork, and with several other definitional changes, the proposal strives to establish lower criminal court procedure with greater clarity, precision and simplicity than does the existing Code.

(2) In an endeavor to simplify criminal court motion practice, which is presently plagued by a plethora of differently labeled motions addressed to the same or similar kinds of relief, the proposed Criminal Procedure Law employs the omnibus motion. All pre-trial challenges to the validity of an indictment, for example, must be made under a single "motion to dismiss an indictment," rather than by way of demurrer, motion to dismiss on the ground of insufficiency of grand jury evidence, motion to dismiss in the interest of justice, and the like. Similarly, all post-judgment relief now sought through the medium of coram nobis, habeas corpus, motions for new trials on the ground of newly discovered evidence and other procedural vehicles is to be pursued under omnibus motions "to vacate a judgment" and "to vacate a sentence." The same omnibus technique is used at other stages of a criminal action in the form of a motion to suppress evidence, to set aside a verdict, and so on.

(3) Significant changes in the law relating to compulsion of evidence by immunity conferral are proposed. Under existing law, a witness in certain designated types of proceedings may be compelled to give evidence in return for a grant of immunity pursuant to complex procedure whereby he must first raise his privilege against self-incrimination, be ordered to testify notwithstanding, and then comply with the direction (Penal Law §2447). The intricacy of this procedural machin-

ery and the fact that a witness must take careful affirmative action in order to acquire immunity pursuant thereto have led to a myriad of legal and constitutional problems in the operation and application of New York's immunity statutes. The implications of some high appellate court decisions in this area and the general uncertainty pervading this area of law have imperiled the entire immunity statute structure which, especially as it relates to grand jury proceedings, is a vital weapon in the investigation and prosecution of organized crime.

Partially restoring a workable system which long prevailed in this state prior to 1953, the proposal would confer immunity automatically upon any witness called by the people who testifies before a grand jury. The simplicity of this scheme, and the fact that it relieves the witness of currently existing burdens making the operation of the present law constitutionally dubious, should dissipate the haze of confusion surrounding this field and once again render our immunity statute procedure readily and simply operable with respect to grand jury investigations.

For reasons fully set forth in the commentary of the aforementioned tentative draft, this "automatic" immunity system is applied only to grand jury proceedings. Another innovation, however, would broaden the entire immunity statute structure. Under present law, the immunity machinery is, generally speaking, available for purposes of testimonial compulsion only in cases where the proceeding or investigation involved is addressed to one or more of a relatively few specified crimes, such as bribery, conspiracy and gambling. Upon the theory that there is no logic in such restrictive selectivity, and no valid reason why immunity statute procedure should not be generally operative with respect to investigation of virtually all kinds of criminal activity, the proposal extends its application accordingly. In this scheme, a grand jury or trial witness, for example, could be required to testify, pursuant to a statutory offer and conferral of immunity, not only when the investigation or proceeding concerns bribery, gambling or some other presently designated selective offense, but also when the subject of the inquiry or prosecution is murder, robbery, extortion or any other crime.

(4) Another important innovation, involving a device labeled an "appearance ticket," would undoubtedly have a significant and salutary effect in reducing both the number of police arrests and that portion of our prison population which consists of as yet unprosecuted defendants.

The term "appearance ticket" is used to denote the police ticket type of process commonly associated with traffic violations, which is popularly known as a "summons" but is not truly such. A genuine "summons" is issued by a court on the basis of an information filed therewith; an "appearance ticket" is issued by a police officer or other public servant before the

filing of any formal charge with a court, and requires the defendant's future court appearance to answer a charge that will be filed subsequently but before the return date.

Under present law, authorization for the issuance of such tickets is largely confined to traffic cases and violations of certain New York City ordinances and regulations such as those enforceable by the Sanitation, Fire, Building and Markets Departments. In the usual criminal case, a police officer who has observed the commission of an offense, even though it be a minor one, has little or no choice but to arrest the offender and continue with the time-consuming and onerous post-arrest procedures involving booking, fingerprinting, photographing, court arraignment, bail and, perhaps, incarceration.

The proposal in question would authorize a police officer to issue and serve an appearance ticket, in lieu of making an arrest, for any offense other than a felony; and it would also authorize him to issue such a ticket after he has arrested a defendant for a non-felony offense but before he has taken him to court and filed formal charges.

This "appearance ticket" procedure is, of course, not mandatory but purely permissive. As indicated, it applies only to cases of misdemeanors and lesser offenses, and it would presumably be employed where the police officer is satisfied that the defendant's background and roots give assurance that he will honor the direction of the ticket.

The advantages of this system to defendants, to the police and to the public seem self-evident. Certainly, it should aid in decreasing the number of unconvicted persons who, though excellent risks to appear voluntarily in court when required, are confined in jail in default of bail beyond their means.

(5) The proposal will also contain several recommended changes of law with respect to the subject of bail itself.

One of the current difficulties in this field is that the courses of action available to the court for assuring the defendant's future attendance are quite limited. On the one hand, a judge may commit the defendant to prison or fix bail — which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory.

With this in mind, the Commission proposals insert two intermediate devices, one termed an "unsecured bail bond" and the other a "partially secured bail bond." The unsecured bond is executed by a surety (other than a bonding company) who deposits no security with the court but contracts to pay a designated sum of money in case of the defendant's failure to appear. The "partially secured bail bond" differs only in that the surety deposits a fractional sum of money fixed by the court, not to exceed ten percent of the total undertaking.

The possible advantages of these new devices may be hypothetically illustrated by a case of a young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly modest but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount owing to the seriousness of the crime. If so authorized, however, he might well be satisfied to release the defendant upon his father's undertaking to pay \$1000 (possibly accompanied by a \$100 deposit) in the event of the defendant's failure of appearance.

Another contemplated change relates to the criteria for commitment, fixing of bail or releasing defendants on their own recognizance. Strictly and traditionally speaking, the only reason for bail or commitment is to assure the defendant's future appearance in the action, and the only factors to be considered in determining the amount of bail are those relating to the risk of the defendant's non-appearance. As a practical matter, however, courts invariably consider whether the defendant is likely to be a danger to society during release. In the case of a defendant charged with forcible rape who has a bad record of sex crimes, for instance, it would be a rare judge who would not commit him or fix very high bail regardless of the likelihood of his future attendance; nor, in the opinion of most, could the judge be validly criticized for such action. The proposal candidly recognizes this factor and expressly predicates possible danger to society as one of the criteria to be considered upon the bail determination.

It should be pointed out that the bail proposals have yet to be submitted to the Commission.

(6) A change is also proposed in the New York accomplice corroboration rule, which precludes conviction upon the testimony of an accomplice in the crime charged unsupported by other evidence tending to connect the defendant with the commission thereof (Code Crim. Pro. §399). This is in contrast to the rule prevailing in the federal jurisdiction and in many states, where corroboration is not required but the court is mandated to charge the jury in emphatic terms that the testimony of accomplices is inherently suspect and must be carefully scrutinized before acceptance.

The New York rule is, of course, predicated upon the theory that accomplice testimony is sometimes apt to be unreliable by reason of possible motives of self interest on the part of the witness. The difficulty with this principle lies in its rigidity. It is true that few would favor a criminal prosecution based solely upon the testimony of a single polluted and self-interested source; nor, in general, are prosecutors inclined to initiate or conduct such actions, or juries to convict in such cases. In

many instances, however, the indicated credibility defects are not present and the accomplice testimony may be highly reliable and utterly convincing. Yet, such testimony—indeed the testimony of twenty such witnesses—is arbitrarily stamped insufficient as a matter of law.

The Commission, being of the opinion that the federal rule provides desirable flexibility without sacrificing essential safeguards, proposes a change of New York law accordingly.

(7) Several innovations are proposed with respect to the Youthful Offender Law. While no detailed explanation thereof is attempted in this report, it may be said that the principal changes involve automatic granting of youthful offender treatment in many first offender non-felony cases, and a general streamlining of the present cumbersome procedure by sharply reducing the number of judicial determinations and investigations required under present law.

The foregoing is but illustrative of the kind of revision being undertaken. In conclusion, it is pertinent to note the proposed change in the very name of the Code. The Code of Criminal Procedure is one of the few important bodies of law that is not a chapter of the Consolidated Laws, the titles of which almost invariably conclude with the word "Law" (Insurance Law, General Business Law, Public Health Law, etc.). When such a code undergoes significant revision, the opportunity is usually seized upon to bring it into the fold of the Consolidated Laws with an appropriate change of name. Such was the case in 1909 when the old Penal Code underwent formal revision and was enacted as a chapter of the Consolidated Laws under the title of the Penal Law, and in 1962 when the Civil Practice Act was revised and reenacted as the Civil Practice Law and Rules. It seems natural and equally appropriate to convert this proposed Code revision into a chapter of the Consolidated Laws under the title of the "Criminal Procedure Law."