Report of the

Trial Efficiency Working Group

Criminal Law Review Division

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Executive Summary

The Trial Efficiency Working Group ("the Working Group") was tasked by the Attorney General of NSW with identifying the causes of unnecessary length of criminal trials and evaluating possible solutions. Unnecessary delays and needlessly long trials place unacceptable burdens on victims, the accused, and jurors and undermines confidence in the jury system.

Recent statistics confirm that NSW courts lead the nation in the timely disposal of criminal cases. However, whilst there has been significant progress in reducing the overall length of time between charge and finalisation of a matter, the average trial duration has been trending upwards over the last 10 years.

Part 1 of the Report provides a background discussion of the issue of trial efficiency, and a summary of the Working Group's recommendations.

Part 2 outlines the legislative schemes that are in place in other jurisdictions to manage trial efficiency, both in Australia and overseas.

Part 3 considers the main contributing factors to trial inefficiency as identified by the Working Group members, and makes various recommendations.

Although the Report discusses many other matters, three issues should be emphasised.

Juries

The Working Group recognised that there are problems with the existing mechanisms for informing and managing potential jurors, particularly in relation to their duties and the process by which they may seek to be excused. Existing legislation provides opportunities for jurors to be excused on appropriate grounds. However there are some shortcomings in the way in which the legislative provisions are implemented, particularly with the different approaches taken by different judicial officers. Recent reviews and reports by the NSW Law Reform Commission and the Criminology Research Council have made a number of recommendations to address this issue, including better informing potential jurors of their responsibilities and avenues for seeking to be excused, encouraging communication between judges and jurors in the orientation period, allowing jurors to submit written applications to the judge rather than requiring an oral application in court, and clearly

defining the types of circumstances in which good cause might be found for excusing a potential juror from service. These reports are discussed in more detail in Part 3.

Recent legislative amendments arising from the recommendations made by the Law Reform Commission, including the discretionary power to discharge individual jurors, are expected to ameliorate some of the problems. However, non-legislative action relating to the management and orientation of jurors will be of equal importance in reducing trial inefficiencies related to the discharge of jurors. The Working Group emphasises that focused efforts must be made to implement the non-legislative recommendations contained in the Commission's reports.

The experience of juries may be useful in identifying preventable inefficiencies in criminal trials. These inefficiencies may not be apparent from statistics. Where, as in NSW, overall disposal times (but not trial durations) for criminal matters have been decreasing, complacency about the efficiency of individual criminal trials may develop. The Working Group endorsed the view that steps should be taken to periodically collect information relating to the experience of jurors.

Recent studies have indicated that criminal trials are not always conducted to best facilitate the understanding of jurors. It is the view of the Working Group that steps should be taken to enhance the comprehension of jurors. It is anticipated that improvements in jury comprehension will follow from other recommendations made in this Report in relation to the pre-trial identification of issues, the way technology is used, and the conduct of counsel.

Managing the trial

The Working Group concluded that the major problem affecting trial efficiency was the management of the trial process. A failure to establish the issues early in the trial has obvious consequences for trial efficiency, including the presentation of evidence which has little or no probative value, and difficulties in managing the trial, especially in ruling on questions of relevance. It is essential that the issues are identified before the trial.

Several jurisdictions, including NSW, have legislative schemes in place which, to varying degrees, seek to achieve some identification of the issues prior to the trial. These are considered in detail in Part 2.

Although there are existing provisions in NSW for pre-trial disclosure and case management in certain cases, the Working Group concluded that they are, and without legislative change,

will continue to be, under-utilised. However, the Working Group does not support a blanket application of all tiers of case management to all matters. The appropriate level of court intervention will depend on how readily the issues can be identified. The majority of criminal cases are relatively straightforward and the application of full pre-trial processes to all matters would introduce inefficiencies.

The Working Group proposes that all parties to a criminal trial take responsibility for the early identification of issues. This will require a significant cultural change from the legal profession. The parties will be required to give early notice of information such as the list of witnesses to be called at trial; the identity of the counsel briefed to appear on behalf of the Crown/accused; whether the Crown intends to adduce evidence in the form of a summary; and whether the defence objects to the presentation of evidence in this way. Fundamental to the Working Group's recommendation is a mechanism to identify the issues to be tried. The court, either on its own initiative or on application from a party, should be able to impose an intensive case management regime where this is considered necessary. This may require the parties to engage in a pre-trial case conference and/or revised form of the existing pre-trial disclosure provisions. This will be directed at the identification of issues and effective presentation of the evidence.

Conduct of counsel

Many members of the Working Group expressed concern that the conduct of counsel is a significant factor contributing to lengthy, inefficient trials. The Working Group does not presently believe that a legislative solution giving judges statutory authority to set time limits on counsel is necessary to address this problem. It is important however that the issue is addressed and that all parties to the trial process assist in rectifying the problems. To this end, the Working Group has recommended that Legal Aid NSW and the NSW Bar Association explore ways to ensure that practitioners comply with minimum practice standards.

The aim of the Working Group has been to identify the causes of delay in criminal trials and to propose solutions that are workable and can be readily adopted. None of the recommendations made by the Working Group are intended to cause inefficiencies or create an added layer of red tape. The success of many of the recommendations made by the Working Group is dependent on the willingness of the legal profession and the judiciary to

embrace new methods in dealing with particular problems. In order to ensure the recommendations are supported by the wider legal community, the Working Party has made recommendations which are practical, realistic and targeted at identifiable results.

Part 1: Introduction

History

The length of criminal trials has increased in the last quarter of the 20th Century. Time standards now considered reasonable would have been regarded as intolerable as recently as 30 years ago. In his speech to the Judicial Conference of Australia, Chief Justice Gleeson referred to the 1952 case of *Stapleton v The Queen*[1], a leading case on the law of insanity. The killing of a police officer, the conviction of the accused for murder, his subsequent acquittal on appeal to the High Court and the High Court's delivery of its reasons all occurred in under 5 months.[2] In 1922, Colin Campbell Ross was wrongly convicted and hanged for murder less than 5 months after the discovery of the victim's body.[3]

There are reasonable explanations for some of the increase in the duration of criminal trials. Advances in technology have resulted in forensic evidence which is greater in volume and complexity than in years gone by. The wide use of electronic communication has resulted in an exponential increase in the amount of electronic evidence adduced in criminal trials.

However when an element of delay represents a correctable inefficiency rather than an immutable 'sign of the times', efforts must be made to address the problem. The impact of inefficient trials reaches beyond mere financial considerations, although the burdens on the limited resources of Government agencies including the Courts, Police, Office of the Director of Public Prosecutions and the Legal Aid Commission should not be underestimated. Unnecessary delays in criminal trials bring the jury trial system into disrepute, while placing intolerable burdens on juries, victims of crime, accused persons, and witnesses.

In NSW, numerous measures have been taken over the last 20 years to create efficiency in the criminal justice system. In 1990 a statutory discount on sentencing for early guilty pleas

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[1] (1952) 86 CLR 358

[2] M. Gleeson, Chief Justice of the High Court, *Some Legal Scenery,* Speech to the Judicial Conference of Australia, 5 October 2007, Sydney, p.3

[3] *Pardoned,* The Age, 27 May 2008

was introduced, giving force to existing common law rules.[4] In the same year, judges were given the discretion in short trials not to summarise the evidence if, in all the circumstances, a summary did not appear necessary,[5] and judge-only trials were introduced.[6] In 1995 a legislative requirement for the audio-recording of confessional evidence was introduced, partly with the hope of reducing the duration of trials.[7] Significantly, in 2001 the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* introduced a process whereby courts could impose pre-trial disclosure obligations on both the prosecution and defence on a case-by-case basis in some trials, in order to reduce delays and complexities in criminal trials.

Despite these measures, concerns have continued over the length of some trials. These concerns prompted the formation of the Trial Efficiency Working Group (the Working Group). The issues of concern are considered in this Report.

Terms of Reference

The Trial Efficiency Working Group met for the first time on 15 May 2008. It was given the following terms of reference by the Attorney General, the Hon John Hatzistergos, MLC:

- Evaluation of the use and efficacy of current provisions aimed at reducing the length of trials, such as pre-trial disclosure, disclosure requirements imposed on investigating police and the prosecution, alibi notices and pre-trial binding directions for sexual assault proceedings (s.130A *Criminal Procedure Act* 1986);

- Examination of whether the provisions of the *Evidence Act* 1995 are sufficiently broad to streamline proceedings in criminal trials;

- Evaluation of the extent to which improved courtroom technology and training of DPP and court staff could save time and resources;

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[4] *Crimes Legislation (Amendment) Act* 1990, now embodied in s.22 *Crimes (Sentencing Procedure) Act* 1999
[5] Section 405AA *Crimes Act* 1900, now s.161 *Criminal Procedure Act* 1986
[6] Now s.132 *Criminal Procedure Act* 1986
[7] Now s.281 *Criminal Procedure Act* 1986

- Development of proposals to curtail time wasting questions, legal argument and addresses whether by bringing about cultural change or by imposing statutory regulations, such as imposing time limits on submissions;

- Consideration of the introduction of a reciprocal disclosure scheme that would be applicable to all cases, similar to the Victorian legislative scheme under the *Crimes (Criminal Trials) Act* 1999 (Vic);

- Development of effective judicial case management practices by ensuring that disclosure obligations have been met and any procedural steps have been resolved prior to the commencement of the trial; and

- Any other relevant matter.

The Working Group met on several occasions and was comprised of the following persons:

- Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of NSW (Chair)

- Justice Megan Latham, Supreme Court of NSW

- Registrar Gabrielle Drennan, Supreme Court of NSW

- Judge Greg Hosking SC, District Court of NSW

- Mr Caleb Franklin, Principal Solicitor and Ms Nell Skinner, Managing Solicitor, Aboriginal Legal Service

- Ms Penny Musgrave, Director and Ms Nicole Lawless, Deputy Director, Criminal Law Review Division, NSW Attorney General's Department

- Mr Craig Smith, Director, Judicial Support, Courts, NSW Attorney General's Department

- Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association

- Mr Neil Adams, In House Counsel, Commonwealth DPP

- Mr Phillip Boulton SC, President of the Criminal Defence Lawyers Association

- Mr Mark Tedeschi QC, Senior Crown Prosecutor, Office of the NSW DPP

- Mr Stephen Kavanagh, Solicitor for Public Prosecutions, Office of the NSW DPP
- Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of NSW
- Mr Tim Game SC, Chair of the National Criminal Law Committee, Law Council of Australia
- Ms Pauline Wright, Chair of the Criminal Law Committee, NSW Law Society
- Mr Brian Sandland, Director, Criminal Law, Legal Aid Commission
- Mr Mark Ierace SC, Senior Public Defender, Office of the Public Defenders

The Terms of Reference directed the Working Group to consider the length of criminal trials. This Report has been prepared on that basis.

The Working Group would like to extend its thanks to Mr Jonathan Lee, Research Officer, Criminal Law Review Division, Attorney General's Department for his invaluable assistance in the researching and drafting of this Report.

Recommendations

1. Material provided to the jury and communications with the jury by the Sheriff's Office should be a standing item on the Jury Taskforce agenda. The Taskforce should annually audit and review material provided to jurors with a view to ensuring that the information is accessible, relevant and current.

2. That the Jury Taskforce oversee the continuing implementation of non-legislative recommendations of the Law Reform Commission Report on Jury Selection.

3. Conduct periodic surveys of juries (by the Bureau of Crime Statistics and Research at 2 yearly intervals) to ascertain their needs and identify shortcomings that impede their understanding of the trial process.

4. Review the existing *Evidence Act* 1995 provisions relating to the admissibility of documents (ss 48, 50) to prove the facts stated therein, with a view to facilitating proof by summaries, charts, schedules and the like. Consideration should be given to extending the application of s.50 to witness evidence. As it is likely that the process for amendment of the *Evidence Act* 1995 will be complex, these provisions

should initially be included in the *Criminal Procedure Act* 1986 and the question be referred to the Standing Committee of Attorneys-General (SCAG) for consideration of introduction into the Uniform Evidence Law.

5. Judges should be encouraged to refer breaches of the Bar Rules by counsel appearing before them to the NSW Bar Association.

6. That Legal Aid NSW –

    a. Create a panel of solicitors for District Court (general crime panel) and Supreme Court (serious crime panel) work and that all practitioners undertaking legally aided work be bound by and subject to audit against minimum practice standards for the conduct of work in those jurisdictions.

    b. Consider, in consultation with the NSW Bar Association and Law Society of NSW, the creation of a panel of barristers to be briefed in District Court and Supreme Court trials of the kind that currently exists for Court of Criminal Appeal and High Court matters.

7. Amend the *Criminal Procedure Act* 1986 to provide for three tiers of case management:

    - compulsory prosecution and defence disclosure of specified matters in all criminal trials;

    - the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and

    - intensive pre-trial case management on the application of the parties or by initiation of the court.

    Statutory powers should be conferred on the courts to make directions concerning the conduct and management of the trial.

8. Statutory power to be conferred on the courts to require the parties in all criminal trials to identify the issues for determination in the trial.

9. Amend the *Criminal Procedure Act* 1986 to enable a party to adduce a summary document of the evidence of a witness or witnesses where admission of the summary would not result in unfair prejudice to any party.

10. Extend the existing rule in section 130A of the *Criminal Procedure Act* 1986 which allows a pre-trial ruling made by a judge in a sexual assault matter to bind a trial judge in all criminal trials.

11. Briefing of Crown Prosecutors, Public Defenders and trial advocates sufficiently in advance of the trial date to allow for participation by that counsel/advocate in pre-trial management proceedings.

12. Attorney General's Department to convene meetings of relevant agencies, including the Police and the DPPs at appropriate intervals to identify likely future technological requirements for trials to facilitate planning of funding and equipment.

13. Attorney General's Department to conduct an audit of technology and technological capacity for all criminal trial courtrooms. This information should be available to NSW courts and online to all court users.

14. Practice notes should require the parties to proceedings to submit for approval to the court, advice of the technological requirements (both hardware and software) for the trial. The submission should be made no later than 20 working days before a trial is to commence. The list of hardware and software should indicate who is to provide it (e.g. in terrorism matters the equipment is supplied by the Commonwealth).

15. The position descriptions of court officers should be reviewed to ensure that the operation of courtroom technology is a required competency.

16. Court officers should be given ongoing training to ensure that they can meet the technology requirements of their role.

17. A single standard procedure should be developed for all NSW courts to require technology to be tested in location within 2 working days of a hearing.

Part 2: NSW and approaches in other jurisdictions

Delay and NSW – significant improvements

In 2000 the NSW Bureau of Crime Statistics and Research (BOCSAR) published a report which discussed delays in criminal justice. It identified the fact that delays had been significant. However a number of measures were adopted in the early 1990s to address the problem. The BOCSAR report observed that in most NSW District Courts, the average duration between committal and trial outcome declined substantially between 1990 and 1994, although it was impossible to tell whether this was attributable to the initiatives undertaken prior to 1994. However the report noted that since 1995, delays had increased.[8]

Since the 2000 report, BOCSAR has identified steady improvement in delays in the higher courts in NSW. Research released in September 2004 examining trial court delay between 1988 and 2003 showed significant improvement in the time that serious criminal cases took to be disposed of in the District Court.[9]

More recent figures show that NSW criminal courts lead the nation in the timeliness of criminal matters, often by very significant margins, based on measures such as the backlog of cases older than 12 and 24 months.[10] However, comparisons on other measures, such as cost per finalisation, are not as favourable.

Despite these figures, there are nevertheless compelling grounds to suggest that the efficiency of criminal trials could be improved. While there have been significant improvements in criminal matter disposal times in NSW District Courts since the 2000 BOCSAR report, average trial lengths in NSW state-wide have been trending upwards over the last 10 years, increasing from approximately 4.6 days in 1996 to 7.25 days in 2007. In Sydney, average trial durations have also been trending upwards, but with greater

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[8] D. Weatherburn and J. Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court,* NSW Bureau of Crime Statistics and Research, 2000

[9] Standing Committee on Law and Justice, Report 26, December 2004, p.32

[10] Productivity Commission, *Report on Government Services 2008*, p.7.26

fluctuations. Average trial durations in Sydney in 1996 were approximately 7 days, rose as high as 10 days in 2006, and in 2007 stood at 8.13 days.[11]

There are two important points to note from the above data. First, the general upwards trend in average trial durations is, to some extent, attributable to factors related to the volume and complexity of certain types of evidence which is the result of technological development. However, such a general trend should not simply be accepted as an inevitable outcome of modern technology and methods of gathering evidence. If steps can be taken to manage such a trend, they should be taken.

Secondly, every year there are a number of trials, which for whatever reason, run for months rather than days. The comparatively low average trial durations when contrasted with these lengthy trials and the significant fluctuations over the years in average trial durations in Sydney District Courts indicate that these trials can have a significant impact on average trial length statistics. In addition to adopting practicable measures for managing the general upward trend of average trial durations, steps should be taken to shorten, where possible, the length of these complex trials which absorb such a significant portion of the court's time.

It is not the intention of the Working Group that the implementation of its recommendations result in excessive and unnecessary pre-trial management of routine, and generally short, criminal trials. There should be sufficient flexibility in the use by trial judges of some, or all, of the proposed and existing pre-trial management tools to cater for every trial within the spectrum. It would be counter-productive to institute a pre-trial management regime that significantly increased demand on judicial resources and/or contributed to delay between committal and trial. There is no reason to suppose that the more straightforward trial management tools, such as the identification of the issues in dispute and directions allowing for the presentation of evidence in summary form, cannot be employed on the morning of the first day of trial. Of course, in more lengthy and complex matters, it may be appropriate to devote judicial resources to pre-trial hearings so that the jury's time is more efficiently utilised.

When considering its recommendations, the Working Group has been aware of the excellent disposition rates for criminal matters that NSW currently enjoys. None of the recommendations are intended in any way to erode the significant achievements that have

[11] District Court of NSW, *Annual Review* (2007) p.24

been made in recent years, particularly in the District Court, with respect to the efficient disposition of matters. The recommendations are not intended to add a further layer of "red tape".

Causes of Inefficiencies

The Working Group identified a number of areas that contributed to inefficiencies in criminal trials, namely:

- Juries;
- Conduct of counsel;
- A lack of early identification of issues in contention;
- The presentation method of some evidence;
- Problems with the use of technology;
- Appeals against interlocutory orders; and
- Continuity of staff.

An overview of these problems is provided below. They will be discussed in much greater detail in Part 3, when potential solutions are considered.

Juries

Two main problems were identified in relation to juries. Firstly, late applications by individual jurors seeking to be excused after empanelment, which could lead to the entire jury being discharged. Secondly, unnecessary barriers to the comprehension of the evidence and legal arguments by jurors.

The Working Group was of the view that late applications by jurors to be excused were common occurrences, (about 20% of trials in the Supreme Court this year have been required to empanel a new jury shortly after the trial commenced) with significant potential to disrupt the efficient running of trials. Managing this problem was not considered to pose significant challenges.

However, assisting a jury in understanding the evidence and legal arguments presented at trial is a complex issue.

Conduct of counsel

Many members of the Working Group were of the view that some counsel were prone to engage in pointless legal argument and prolix cross-examination, while being inadequately prepared for trial. Whether this was attributable to incompetence, tactical considerations or other causes, these members of the Group believed that the conduct of some counsel contributed greatly to the length of trials.

Identification of the issues

Working Group members agreed that insufficient efforts were being made by trial counsel to narrow the issues for trial before empanelment of the jury. This could have a number of flow-on effects, including the presentation of unimportant or uncontested evidence, difficulties for the jury in understanding the issue to which a piece of evidence was relevant, and an inability of the judge to curtail irrelevant lines of questioning or argument.

Presentation of evidence

Working Group members considered that in some cases, the prosecution had a tendency to 'over prove' matters by calling repetitive evidence, or calling non-contentious witnesses. This problem is tied to the identification of the issues, and may share a common solution.

The absence of aids to increase jury understanding, such as chronologies and summaries of evidence was identified as a problem in the presentation of evidence. This is particularly so in cases involving a large volume of listening device and/or surveillance evidence, where the only contentious issue is the inferences to be drawn from that evidence in combination with other evidence. The Working Group was of the view that such aids could greatly enhance the jury's comprehension of complex or voluminous evidence. However, these aids are seldom used, probably because of the reluctance of the parties to a criminal proceeding to agree to the presentation of evidence in such a fashion or due to gaps in the relevant provisions of the *Evidence Act* 1995.

Technology

The Working Group identified a number of problems related to the use of technology in the courtroom. These included the inadequate training of court staff to operate devices necessary for the presentation of electronic evidence, problems with the compatibility of various electronic evidence formats, and the availability of hardware.

Other

Members of the Working Group also considered that the misuse of appeals against interlocutory orders under s.5F of the *Criminal Appeal Act* 1912 could disrupt the smooth running of a criminal trial. The lack of continuity of staff within the DPP also contributed to inefficiencies.

A recent example

A highly publicised example of how some of the problems identified above can combine to produce, at best, a lengthy trial, and at worst, an aborted trial at a cost of over a million dollars to the state, was the matter of *R v Lonsdale & Holland.* Andrew Daniel Lonsdale and Kane Holland were charged with conspiracy to manufacture a commercial quantity of amphetamines. The trial involved more than 100 witnesses and 66 days of evidence. The playing of a tape recording of the search of the relevant premises took a considerable amount of time during the trial. The accused alleged that the police had acted improperly during the search and that the tape recording would substantiate that claim. The whole of the recording was played by the Crown to rebut the claim. The jurors were consequently made to listen to hours of audiotape, during which there were substantial portions of silence. In addition, there was a large volume of surveillance evidence that would only have been intelligible if presented in documentary form. The Crown prepared a schedule which set out the surveillance evidence chronologically with respect to each accused, but counsel for the accused objected to its tender. The existing *Evidence Act* 1995 provisions (ss 29, 50) are arguably insufficient to allow for the admission of such a document over objection. This, perhaps understandably, took its toll on the jury's attentiveness, and the trial was aborted upon the discovery that several jurors had been playing Sudoku, a logic-based number puzzle, throughout much of the trial.

The unfortunate events of that trial highlight the value of discussion before the trial of issues in dispute and the need to confer legislative power in the trial judge to direct that evidence be adduced in summary form.

Approaches to criminal procedure in NSW and other jurisdictions

History

In the last two decades, there has been significant reform in criminal procedure in several common law jurisdictions. The last ten years in Australia have seen legislative changes in New South Wales, Victoria, Western Australia and South Australia. In addition, the *Criminal Procedure Bill* 2008 has recently been passed in New Zealand which will improve the way in which criminal trials are conducted in that country.

It became clear in the 1980s that the English court system was having difficulties with complex fraud trials.[12] This led to the formation in the UK of the Fraud Trials Committee (known as the Roskill Committee), which published its Report in January 1986.

While the Committee's review was confined to complex fraud trials, the eventual effect of its findings on criminal procedure in general was foreshadowed early in the Report, which stated:

> "…with the exception of the different type of tribunal for complex fraud cases…we have been careful to ensure that we were not proposing changes in law and procedure which we would not be prepared to see applied to other types of criminal case."[13]

The recommendations of the Report included pre-trial disclosure by both the prosecution and defence of the outline of their cases, and the possibility of adverse comment where the accused refused to admit facts "which any reasonable innocent person would have been ready to do", but did not challenge at trial.[14]

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[12] Second Reading speech, *Statutes Amendment (Criminal Procedure) Bill (SA),* Hansard, Legislative Assembly, Parliament of South Australia, 20 September 2005, 3466

[13] Fraud Trials Committee, Report (1986), p.6, quoted in M. Levi, *Reforming the Criminal Fraud Trial: An Overview of the Roskill Proposals,* (1986) 13 J.L. & Soc'y 117, p.121

[14] M. Levi, *Reforming the Criminal Fraud Trial: An Overview of the Roskill Proposals*, (1986) 13 J.L. & Soc'y 117, p.123

The Report led to the enactment of the *Criminal Justice Act* 1987 (UK),[15] which allowed a judge presiding at a preparatory hearing in a serious or complex fraud case to order the prosecution and defence to provide "case statements". In the same year, the *Crown Court (Advance Notice of Expert Evidence) Rules* 1987 (UK) introduced a requirement for an accused to provide advance notice of the findings or opinions of defence experts.[16]

Despite these UK reforms, concerns over criminal procedure continued throughout the 1990s. A number of high profile miscarriages of justice in the 1990s led to very broad disclosure obligations being placed upon the prosecution, which then led to equally high profile cases being abandoned by the prosecution when the Crown was not prepared to disclose sensitive information to the defence. In one case, three members of the Animal Liberation Front were apprehended in possession of incendiary bombs. The defence requested disclosure of information from the prosecution which, if provided, could have compromised future investigations into the Animal Liberation Front. Rather than disclose the information, the prosecution offered no evidence, resulting in the judge directing a formal verdict of not guilty. After the trial, the accused revealed to the media that they had indeed been intending to commit a crime with the incendiary devices.[17]

These cases led to an apprehension that the balance of the criminal justice system had shifted too far in favour of the accused. To address this, general defence disclosure obligations on all accused were introduced in 1996 with the enactment of the *Criminal Procedure and Investigations Act* 1996 (UK).

In Australia, the push for criminal trial reform was also initially driven by unease over the duration and outcome of complex fraud cases. *Wilson and Grimwade v R*[18] was one such case.

Grimwade was an appeal on conviction to the Victorian Court of Criminal Appeal for fraudulently inducing the investment of money. Early in the trial, the Crown suggested that defence counsel refrain from asking rhetorical questions for "…otherwise [they would be] here for two years", prompting the trial judge to guarantee to the jurors that they would not

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[15] (UK), 1987, c.38, ss.7-10

[16] D. Ives, *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program

[17] C. Pollard, *A Case for Disclosure,* (1994) Crim. L.R. 42-43

[18] [1995] 1 VR 163

be required for such a long time.[19] The trial judge was able to keep his promise to the jury, but only by a matter of weeks; the day of the guilty verdict fell on the 294th sitting day in the 96th week and 23rd month after the empanelment of the jury. Some 676 days had passed from arraignment until the verdict.[20]

Due in large part to the duration of the trial, the proceedings were punctuated by numerous periods during which the matter was suspended or the jury was unable to participate, due to factors such as the illness of the trial judge, counsel, witnesses, and jurors. This resulted in the fragmented presentation of evidence. Added to this was the length and detail of the evidence, and the way in which counsel conducted the matter. To take an example, counsels' opening addresses were transcribed, and filled some 5000 pages. With these factors in play, it soon became evident that the basic legal assumption that the jury would decide the case on evidence they had heard was in jeopardy, as they would be unable to recall much of the evidence that had been presented.[21]

The Court of Criminal Appeal ruled that due to the exceptional discontinuity of evidence and the conduct of counsel, there was a danger that the verdict convicting the accused was not a true verdict reached upon proper consideration of the evidence, and quashed the convictions.

The Court stated:

> "Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less. The system, and the community it is designed to serve, cannot easily support the prodigal conduct which was responsible for exacting 22 months' devotion to this re-trial, a disproportionate part of which was due to the conduct of counsel for Wilson. This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interests demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law; and neither privilege nor duty will survive the system of justice of which the court is part. We derive no satisfaction from making these observations save, by doing so, to give public notice of the peril to which, by this re-trial, the system of justice was put."[22]

And, further:

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[19] *Wilson and Grimwade v R* [1995] 1 VR 163, 174
[20] *Wilson and Grimwade v R* [1995] 1 VR 163, 169
[21] *Wilson and Grimwade v R* [1995] 1 VR 163, 176
[22] *Wilson and Grimwade v R* [1995] 1 VR 163, 180

> "Counsel in future faced with a long and complex trial, criminal or civil, will co-operate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this court, appropriate regimentation by the judge - perhaps of a kind not hitherto experienced - designed to avoid the unhappy result that befell this trial."[23]

Cases such as *Grimwade* gave rise to a push for criminal trial reform, which was initially confined to complicated fraud trials, but quickly spread to serious criminal trials in general.[24] The issue was considered by the Standing Committee of Attorneys-General (SCAG) in 1992. The outcome of this meeting was the *Crimes (Criminal Trials) Act* 1993 (Vic), which was soon regarded as having failed in its aims.[25]

The issue was reconsidered by SCAG in 1998, leading to the formation of a committee in 1999 chaired by Mr Brian Martin QC (subsequently Martin J of the South Australian Supreme Court), and with members including the Hon. James Wood AO QC, Chief Judge at Common Law of the Supreme Court of NSW at the time, and the then Commonwealth DPP, Damian Bugg QC. The Committee's initial responsibility was to consider the serious problems presented to the criminal justice system by complex white-collar crime, but this task was enlarged to encompass a review of criminal trial procedure generally.[26] The Committee produced a Report (the "Martin Report") which made a number of recommendations relating to all aspects of criminal procedure, including case management and pre-trial disclosure. The Report and its recommendations were subsequently discussed during a conference held by the Australian Institute of Judicial Administration in 2000, which concluded with a 'Deliberative Forum' made up of judicial officers, lawyers, and policy officers. The Forum considered the Martin Report and produced a report with its own recommendations (some of which did not reflect the Martin recommendations). The Forum's report was subsequently endorsed by SCAG.[27]

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[23] *Wilson and Grimwade v R* [1995] 1 VR 163, 185

[24] Parliament of South Australia, Legislative Assembly, Second Reading Speech, *Statutes Amendment (Criminal Procedure) Bill (SA),* Hansard, 20 September 2005, 3466

[25] Parliament of South Australia, Legislative Assembly, Second Reading Speech, *Statutes Amendment (Criminal Procedure) Bill (SA),* Hansard, 20 September 2005, 3466

[26] Working Group on Criminal Trial Procedure, *Report,* September 1999

[27] Parliament of South Australia, Legislative Assembly, Second Reading Speech, *Statutes Amendment (Criminal Procedure) Bill (SA),* Hansard, 20 September 2005, 3466

The recent developments in criminal trial procedure in Australian jurisdictions have, at least in some degree, been driven by these two reports. Brief overviews of these developments are provided below.

NSW - Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001

Prior to the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001, there was no general statutory requirement for pre-trial disclosure in criminal trials in NSW. The amendments introduced pre-trial disclosure requirements limited to cases deemed to be "complex".

The limited pre-trial disclosure obligations that did exist prior to 2001 were governed by a combination of common law, prosecution policy and guidelines of the NSW and Commonwealth DPPs, rules of the NSW Law Society and NSW Bar Association, directions of the Supreme Court and some statutory provisions.[28] These requirements included:

- Common Law: requirement for the prosecution to disclose its intention to call a witness at trial who was not called at the committal, and to give the defence a copy of the witness statement;
- Solicitors' and Barristers' rules: prosecution required to disclose all material which might be relevant to the guilt or innocence of the defendant, including the names and means of locating potential witnesses, unless to do so would seriously threaten the administration of justice;
- DPP prosecution guidelines: prosecution required to disclose all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise at trial;
- Statutory provisions: requirement for the prosecution to serve a brief of evidence on the defence; requirement for the defence to give notice of alibi defences, and in murder trials, notice of defence of substantial impairment by abnormality of mind;
- Supreme Court Practice Directions: Crown required to disclose a statement of the Crown case, a list of prosecution witnesses and all witness statements before the

[28] Standing Committee on Law and Justice, Report 26, p.3

> arraignment. At the arraignment, the defence was required to inform the court which facts asserted by the Crown were agreed, which facts were in issue, and which prosecution witnesses the defence intended to cross-examine. [29]

As was noted by the Law Reform Commission in Report 95: *Right to Silence,* the Supreme Court directions were largely ignored by defence counsel.[30] As such, pre-trial disclosure requirements for the defence prior to 2001 were limited to notices of alibi evidence, and in murder trials, a requirement to give notice of an intention to raise the defence that the defendant was not guilty due to a substantial impairment by abnormality of the mind.[31]

The Law Reform Commission's *Right to Silence* Report made a number of recommendations supporting increased levels of pre-trial disclosure in trials, including Recommendation 5 which stated:

> "The defendant shall be required to disclose the following material and information, in writing, unless the Court otherwise orders:
>
> (a) In addition to the existing notice requirements for alibi evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge, proposes to raise issues in answer to the charge, eg accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or that the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; in cases involving an intent to defraud, claim of right.
>
> (b) In any particular case, whether falling within Recommendation 5(a) or not, the trial judge or other judge charged with the responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at trial, identifying the issues to be raised, whether by way of denial of the elements of the charge or exculpation, and stating, in general terms only, the factual basis of the case which is to be put to the jury.
>
> (c) All reports of defence expert witnesses proposed to be called at trial. In accordance with the general rule, such reports shall clearly identify the material relied on to prepare them.
>
> (d) Where the prosecution discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.
>
> (e) Whether prosecution expert witnesses are required for cross-examination. In this event, notice within a reasonable time shall be given.

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[29] NSW Law Reform Commission, *Right to Silence* (2000) Report 95, paras 3.5 – 3.25

[30] NSW Law Reform Commission, *Right to Silence* (2000) Report 95, para 3.25

[31] Standing Committee on Law and Justice, Report 26, p.3

(f) Where the prosecution relies on surveillance evidence (electronic or otherwise), whether strict proof is required and, if so, to what extent.

(g) In respect of any proposed prosecution exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.

(h) In respect of listening device transcripts proposed by the prosecution to be used or tendered, whether they are accepted as accurate and, if not, in what respects issue is taken.

(i) Where notice is given that charts, diagrams or schedules are to be tendered by the prosecution, whether there is any issue about either admissibility or accuracy.

(j) Where it is proposed to call character witnesses, their names and addresses. The purpose of this requirement is to enable the prosecution to check on the antecedents of these witnesses. Character witnesses or other defence witnesses identified directly or indirectly by disclosures made by the defence shall not be interviewed by the prosecution without the leave of the court.

(k) Any issues of admissibility of any aspect of proposed prosecution evidence of which notice has been given.

(l) Any issues concerning the form of the indictment, severability of the charges, separate trials or applications for a 'Basha' inquiry."

Many of the recommendations formed the basis of the amendments enacted by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001*,* which commenced on 19 November 2001. The amendments were intended to introduce a process where courts, on a case-by-case basis, could impose pre-trial disclosure requirements on both the prosecution and the defence to reduce delays and complexities in criminal trials. The reforms effected by the Act were the result of the deliberations of a working party composed of representatives from the Director of Public Prosecutions, the Legal Aid Commission, the NSW Bar Association, the Law Society of NSW, Crown Prosecutors, Public Defenders and the police.

The Act created a discretionary three-step reciprocal disclosure regime for complex cases consisting of notice of the prosecution's case, notice of the defence response to that case, and notice of the prosecution's response to the defence response.[32] As enacted in 2001, the court had the discretion to order such disclosure if it was satisfied the trial was sufficiently complex, having regard to the likely length of the trial, the nature of the evidence, and the legal issues likely to arise at the trial.

The notice of the prosecution case is to include an outline of the prosecution case, the statements of intended witnesses along with information relevant to the credibility or

[32] *Criminal Procedure Act* 1986, s.137

reliability of such witnesses, documents and exhibits, expert reports, and any other information relevant to the prosecution or defence case including the accused's credit or credibility.[33]

In response, the accused must indicate whether he or she intends to call evidence relating to a claim of insanity, self-defence, provocation, accident, duress, claim of right, automatism, or intoxication, as well as disclose any expert reports intended to be relied upon at trial, the identity of any character witnesses, and a response to the particulars raised in the notice of the case for the prosecution.[34] This response to the particulars must give, among other things, notice of whether any expert evidence intended to be adduced by the prosecution is disputed, and whether the accused proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the grounds for the objection.[35]

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[33] D. Ives, *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand- The Current State of the Law,* Working Paper, November 2005, p.1. The full requirements are provided under s.138 as follows:

(a) a copy of the indictment,

(b) an outline of the prosecution case,

(c) copies of statements of witnesses proposed to be called at the trial by the prosecutor,

(d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecutor,

(e) if any expert witnesses are proposed to be called at the trial by the prosecutor, copies of any reports by them that are relevant to the case,

(f) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,

(g) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may be relevant to the case of the prosecutor or the accused person, and that has not otherwise been disclosed to the accused person,

(h) a copy of any information, document or other thing in the possession of the prosecutor that is adverse to the credit or credibility of the accused person.

[34] *Criminal Procedure Act* 1986, s.139

[35] The full list of requirements are provided in s.139(2):

a) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecutor and the basis for the objection,

g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.

The prosecution must then respond by indicating matters such as any disputes relating to the defence's expert evidence and the admissibility of evidence.[36]

Sanctions for non-compliance include the refusal by the court to admit the evidence in any criminal proceedings where the party seeking to adduce the evidence failed to disclose it to the other party, or granting an adjournment to the affected party where the other party seeks to adduce evidence that was not disclosed as required by the pre-trial disclosure requirements. The court may also allow evidence to be adduced without formal proof. As in many other jurisdictions, the court (or on application, any other party) may make adverse comment to the jury regarding the party's failure to comply. However, this comment must not suggest that the accused failed to comply because he or she is guilty.[37]

It was intended that pre-trial disclosure would enable the parties to focus on issues that are in contention, allowing more efficient use of court time and less inconvenience to witnesses whose evidence might not be challenged in any event.[38]

Review of the Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001

The operation of the pre-trial disclosure provisions introduced by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act* 2001 was reviewed by the Legislative Council's Standing Committee on Law and Justice in 2004. The review considered submissions from key stakeholders such as the Hon Justice R O Blanch AM, Judge Derek Price (as his Honour then was), Nicholas Cowdery AM QC, and individuals representing organisations such as the Police Association, the Law Society of NSW, the Public Defenders Office, and the Legal Aid Commission

The Committee found that as of March 2004, pre-trial disclosure orders had only been made in six matters in the NSW Supreme Court and in two matters in the District Court. It was impossible to draw any firm conclusions about the type of disclosure orders being made.[39] Nor was it possible to say whether the orders had made any measurable impact on court delays,[40] or whether the availability of sanctions had made any effect.

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[36] *Criminal Procedure Act* 1986 s.140
[37] *Criminal Procedure Act* 1986 s.148
[38] Legislative Council, Hansard, 8 August 2000, p.8288
[39] Standing Committee on Law and Justice, Report 26, p.12
[40] Standing Committee on Law and Justice, Report 26, p.34

Despite the paucity of pre-trial disclosure orders, the Committee noted that some submissions, including the submission from the DPP and the Public Defenders Office, indicated that in the few situations where such orders had been made, there had been positive effects, including time savings.[41] Other positive effects included a narrowing of issues prior to commencement of the trial, attributed mainly to the exchange of expert evidence.[42] Other submissions, however, raised concerns that pre-trial disclosure provisions could slow down the criminal trial process, particularly through an increase in contested pre-trial applications.[43]

The Committee noted that a possible reason for the small number of pre-trial disclosure orders was the gateway provision through which a case must pass before pre-trial disclosure orders could be made. It was thought that some judges considered a trial could only be considered a "complex trial" under s.136(2) of the *Criminal Procedure Act* 1986 if it met all three criteria. That is, the case was likely to be complex having regard to its length, the nature of the evidence to be adduced, and the legal issues likely to arise.[44] The Committee recommended that the legislation be amended to clarify that the court need only be satisfied that a case is likely to be complex having regard to one or more of the three factors.[45] The complex trial provisions were also reviewed by the NSW Attorney General's Department. Section 6 of the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001 required the Attorney General to review the pre-trial disclosure procedures to determine whether they were utilised by the courts, whether they had been effective in reducing delays in complex criminal trials and the cost impacts of the procedures. This review was commenced by BOCSAR in 2002 and completed by the Criminal Law Review Division of the Attorney General's Department in 2004. Submissions were sought and received from a number of key stakeholders. The submissions generally supported the reforms introduced by the Amendment Act, although the majority of submissions received by the Department echoed the findings of the Committee, conceding that because some of the reforms had been utilised in only a small number of cases to date, it was difficult to reach any firm conclusions about the effectiveness of the legislation.

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[41] Standing Committee on Law and Justice, Report 26, p.34
[42] Standing Committee on Law and Justice, Report 26, p.34
[43] Standing Committee on Law and Justice, Report 26, p.36
[44] Standing Committee on Law and Justice, Report 26, p.14
[45] Standing Committee on Law and Justice, Report 26, p.18

Further information was requested from the DPP in 2007 in relation to the operation of pre-trial disclosure procedures and the procedures within the office of the DPP for settling indictments and negotiating with the defence at an early stage. The DPP indicated that the system was working effectively and efficiently, and that the arraignment guilty plea rate state-wide had risen from 16% to 36%.

The review concluded that the policy objectives of the Act were valid and that the terms of the Act were appropriate for securing those objectives. However, it recommended a number of minor amendments to improve the operation of the Act, including the amendment of s.136(2) to clarify that the court need only be satisfied of the length of the trial *or* the nature of the evidence to be adduced at the trial *or* the legal issues likely to arise before classifying a case as a complex criminal matter. This recommendation was in line with the 2004 findings of the Standing Committee on Law and Justice.

The *Criminal Legislation Amendment Act* 2007 was introduced into Parliament in October 2007 and received assent on 15 November 2007. This Act implemented the amendments recommended in the legislative review, including:

- amendment of s.136(2) of the *Criminal Procedure Act* 1986 as recommended;
- amendment of s.150 of the *Criminal Procedure Act* 1986 to require the accused to serve alibi notice on the Crown no later than 6 weeks before the date listed for trial. The review accepted that there was a need for greater time to investigate an alibi than was provided for in the legislation;
- amendment of the *Criminal Procedure Act* 1986 to require that any notice that must be served must also be filed. This amendment was intended to assist the court in effectively managing the case; and
- amendment of the *Criminal Procedure Act* 1986 to provide that s.138: (a) does not require the Commonwealth DPP to re-serve anything which has already been included in a brief of evidence served on an accused person pursuant to s.75; and (b) requires the prosecution to give the accused person a list of the statements of the witnesses proposed to be called at the trial.

Victoria – Crimes (Criminal Trials) Act 1999

In enacting the *Crimes (Criminal Trials) Act* 1993 (Vic), which was modelled on the UK serious fraud cases legislation, Victoria became the first jurisdiction in Australia to introduce comprehensive procedural reforms for facilitating efficient criminal trials. However, like the UK legislation it was based on, the legal profession was reluctant to take advantage of the provisions, and the Act was soon regarded as having failed. Meanwhile, there continued to be community pressure for a more accountable criminal justice system, as well as Government concerns about unreasonable delays in the presentation of cases and the efficient conduct of trials.[46]

In light of these concerns a Criminal Trials Consultative Committee, made up of members of the judiciary and senior criminal law practitioners, was formed in 1998 to review proceedings in Victoria. The Committee considered several factors thought to contribute to trial delays, including:

- calling witnesses to prove merely formal matters, or matters which are not substantially contested;
- unnecessary and time consuming cross-examination of witnesses because counsel does not know what issues are in dispute; and
- the way in which evidence is presented.[47]

The Committee's consideration of the issues assisted the development of the *Crimes (Criminal Trials) Act* 1999, which builds upon the initiatives of the former Act. Among other things, the *Crimes (Criminal Trials) Act* 1999 makes provision for case management and mutual disclosure, with some limited sanctions for the failure to comply.

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[46] Legislative Assembly, Second Reading Speech, 6 May 1999 p.812, The Honourable Jan Wade (Attorney General)

[47] Legislative Assembly, Second Reading Speech, 6 May 1999 p.812, The Honourable Jan Wade (Attorney General)

Case management

On the application of a party or of its own motion, the court may conduct a directions hearing at any time between the filing of the presentment and the trial date (s.5(1), *Crimes (Criminal Trials) Act* 1999 (Vic)).

At the first directions hearing the court may require the parties to provide an estimate of the duration of the trial, advise on the estimated number and availability of witnesses, and whether any particular requirements or facilities are needed for the witnesses or interpreters (s.5(4)). Practice Note 5 of 2006 of the Supreme Court also outlines additional information that parties should be prepared to provide, including:

- the anticipated issues at the trial;
- the admissions likely to be sought/offered;
- any potential problems that might prevent a trial from proceeding expeditiously; and
- any problems with legal representation/funding.

At subsequent directions hearings the court may do anything it may do at the first directions hearing as well as, amongst other things:

- request the parties to advise whether there are any questions that require determination before the trial date;
- determine any question of law or procedure that arises or is anticipated to arise at trial; and
- determine any question of fact or mixed fact and law that may be determined lawfully by a judge alone (s.5(5)).

Both the prosecution and defence are required to notify the court of an intention to raise a question of law at least 14 days before the day of the trial, unless the party does not become aware of the question within that time, in which case notification must be made as soon as possible. If such notification is made within the 14 day timeframe and the parties agree, determination of the question may take place on the basis of written submissions (s.10).

Prosecution disclosure

At least 28 days before the trial date, the prosecution must provide the defence with a summary of its opening and a notice of pre-trial admissions (s.6(1)). The summary must outline the manner in which the prosecution will put its case and the facts and matters relied on to support a finding of guilt (s.6(2)). The notice of pre-trial admissions should also contain a copy of the statements of witnesses whose evidence, in the opinion of the prosecution, ought to be admitted without further proof, including evidence that is directed solely to formal matters such as a person's age (s.6(3)).

Defence disclosure

At least 14 days before the trial, the defence must serve on the prosecution a response to the summary of the prosecution's opening and notice of pre-trial admissions (s.7(1)). The response to the opening must identify the facts and matters with which issue is taken and the basis for doing so (s.7(2)). Similarly, the response to the notice of admissions must indicate what evidence is agreed to be admitted without further proof and what evidence is in issue and, if issue is taken, the basis for doing so (s.7(3)).

In addition, if the defence intends to call an expert witness, at least 14 days before the trial the defence must provide the prosecution a copy of a statement of the expert witness including the details and qualifications of the witness as well as the substance of the evidence, including the expert's opinion and the facts and circumstances from which that opinion is formed (s.9).

Unless the court finds exceptional circumstances, when opening their cases the parties must restrict themselves to the matters set out in their disclosure documents (s.8(1)). The other party and the court must be notified in advance of any intention to depart substantially from any matter in its disclosure documents and may be required by the court to notify the other party of the details of the proposed departure (s.8(4)).

Sanctions

With the leave of the court, either party may introduce evidence which was not disclosed pre-trial, and represents a substantial departure from what was presented in their disclosure documents (s.15).

The consequence of such a departure, or of a failure to comply with any requirement under the Act, is that the trial judge, or with the leave of the court, any party, may make any comment the trial judge thinks appropriate on the departure or failure (s.16). However, the comment must not suggest that an inference of guilt can be drawn from the departure or failure, or suggest that the failure be taken into account when evaluating the probative value of the prosecution evidence, with the following exceptions:

- with a departure, such an inference was permitted before the commencement of the Act from a lie told by an accused; and
- with a failure, such an inference was permitted before the commencement of the Act from the failure of an accused to give or adduce evidence from a particular witness.

The Working Group was advised that the adverse comment provision has not been routinely utilised for two reasons. Firstly, practitioners in Victoria have invariably complied with court orders as to trial management, so that the sanctions have not been required.

Secondly, the Victorian judiciary considers that the provision is problematic. Substantial difficulties arise in framing an adverse comment in a manner that does not distract the jury from a proper consideration of the evidence. The Working Group considers these concerns to be valid; the difficulties associated with the use of adverse comments as sanctions are discussed later in this Report.

In addition, where there has been an unreasonable act or omission before the accused was put in the charge of the jury that prolonged the trial, or there has been a departure from the disclosure documents or a failure to comply with a requirement of the Act, the court has the power to award costs against a party, or in some circumstances, against a lawyer acting for a party (ss 24 – 26).

Also, under the ss.5(2C) and (2D) of the *Sentencing Act* 1991 (Vic), the degree to which the accused has complied with his or her disclosure obligations can be taken into account when sentencing the accused.

South Australia – Criminal Law Consolidation Act 1935

Amendments made to the *Criminal Law Consolidation Act* 1935 (SA) in 2005[48] provide for a degree of case management and defence disclosure.

Notice to admit facts

Under s.285BA, on application by the Director of Public Prosecutions (DPP), the court may authorise the DPP to serve on the defence a notice to admit specified facts. An unreasonable failure to comply with such a notice can be taken into consideration in sentencing (s.285BA(6)). An order under this section can only be made at a directions hearing at which the defendant is legally represented, unless the defendant is voluntarily unrepresented or is unrepresented due to reasons attributable to the defendant's own fault (s.285BA(5)).

Defence disclosure

Under s.285BB(1), upon application by the prosecution, the court can require the defence to provide to the DPP written notice of an intention to introduce evidence supporting the following defences:

- mental illness;
- self-defence;
- provocation;
- automatism;
- accident;
- necessity/duress;
- claim of right; and

[48] Did not come into force until March 2007

- intoxication.

The prosecution can only make such an application if it has no existing, unfulfilled disclosure obligations to the defence. Non-compliance with an order made under s.285BB(1) does not make such evidence inadmissible, but the prosecutor or judge (or both) may comment on the non-compliance to the jury (s.285BB(3)).

In addition, a court before which a defendant is to be tried on information may require the defence to notify the DPP in writing whether it consents to dispensing with witnesses proposed to be called to establish the admissibility of specified intended evidence of any of documentary, audio, or audiovisual evidence or exhibits (s.285BB(4)). If the defence fails to comply with such a notice, the accused's consent to the tender of the relevant evidence will be conclusively presumed.

Section 285C requires the defence to give notice of an intention to introduce evidence of alibi. There is no requirement on the prosecution to apply for such a notice; the duty under s.285C lies with the defence. Non-compliance does not render the evidence inadmissible, but the non-compliance may be made the subject of comment to the jury.

Expert evidence

Where the defence intends to introduce expert evidence, written notice of the intention to introduce the evidence must be given to the DPP. The notice must outline the name and qualifications of the expert, and the general nature of the evidence and what it tends to establish (s.285BC). Where this requirement is not complied with, the evidence will not be admissible without the court's permission, and the prosecutor or judge (or both) may comment to the jury on the defence's failure to comply.

Where the defence intends to introduce expert medical evidence concerning the defendant's mental or medical condition at the time of the offence, the court may, on the application of the prosecution, require the defendant to submit to an examination by a court-approved independent expert at the prosecution's expense (s.285BC(4)). Where the defendant fails to submit to the independent examination, the evidence cannot be admitted.

Western Australia – Criminal Procedure Act 2004

Western Australia has a legislated system of case management with some degree of defence disclosure under the *Criminal Procedure Act* 2004 (WA).

Prosecution disclosure

The following procedure applies to indictable offences prosecuted in the superior courts in WA.

As soon as is practicable after a prosecution notice is served on the accused, the prosecutor must serve the accused with:

- a written statement of the material facts of each charge;
- an approved notice of the existence/non-existence of any confessional material of the accused that is relevant to each charge; and
- an approved notice that the accused does/does not have a criminal record (s.35).

Upon an accused entering any plea other than a plea of guilty, the court must adjourn the charge to a disclosure/committal hearing. As soon as is practicable after such an adjournment, the prosecution must serve the accused with:

- any confessional material of the accused which has not already been served on the accused; and
- any evidentiary material which is relevant to the charge (s.42).

This disclosure obligation is an ongoing obligation. Within 42 days of the accused being committed for trial, the prosecution must serve on the accused any of the following that has not already been served:

- a statement of the material facts of the charge;
- any confessional material of the accused that is relevant to the charge;
- any evidentiary material that is relevant to the charge;

- a copy of the accused's criminal record; and
- a certificate signed by an officer who has knowledge of the investigation of the charge, certifying that the disclosure obligations under s.35 and s.42 have been complied with (s.95).

This, too, is an ongoing obligation.

Defence disclosure

At least 14 days before the start of the trial, the defence must disclose the following:

- if the accused intends to rely on an alibi defence, written notice of the details of the nature of the evidence and the name and details of each person the accused intends to call;
- any expert evidence material that relates to the charge, including all statements, reports etc. obtained by the accused of any person the accused intends to call to give expert evidence;
- written notice of the factual elements of the offence that the accused may contend cannot be proved; and
- written notice of any objection of the accused to the prosecution evidence, and the grounds for the objection (s.96).

Unlike the UK legislation, there is no requirement for the accused to provide an explanation for why he or she will contend that factual elements of the offence cannot be proved.[49]

Sanctions

If the court is satisfied that one of the parties has not met its disclosure requirements, it may adjourn the trial for a period that allows the party in breach to meet the requirement, and allows the party affected to investigate any material disclosed by the party in breach in

[49] D. Ives *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program, p.13

fulfilment of the requirement (s.97(2)). Upon resumption of the trial, the party affected by the breach may recall and re-examine witnesses, and adduce evidence in rebuttal of the disclosed evidence (s.97(3)).

Failure by a party to obey a disclosure requirement may also be the subject of adverse comment to the jury by the judge, prosecution or defence (s.97(4)).

United Kingdom

Criminal Procedure and Investigations Act 1996 (UK)

The *Criminal Procedure and Investigations Act* 1996 (UK) ("the CPIA") was enacted to ensure that the criminal justice system is fair towards all those affected by it, efficient in focusing on the issues that matter at trial, and effective in bringing about the acquittal of the innocent and the conviction of the guilty.[50] Its most significant provisions related to a new scheme for prosecution and defence disclosure in criminal trials. The provisions were based on recommendations made by the Royal Commission on Criminal Justice ("the Runciman Commission"), which was established in response to a series of high profile miscarriages of justice in the UK in the late 1980s and early 1990s.[51]

Disclosure of material which has been retained but does not form part of the case for the prosecution against the accused was not required until comparatively recently.[52] The first authoritative ruling on the subject was handed down in 1946,[53] with the prosecution's duty first being codified by the UK Attorney-General's Guidelines in 1982,[54] and the duty being developed by the courts throughout the 1990s.[55] Through this process, it came to be considered that in an adversarial system in which the police and prosecution controlled the investigatory process, an accused's right to disclosure formed an inalienable component of his or her right to a fair trial.[56]

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[50] House of Commons, Hansard, 27 February 1996, column 738, Michael Howard (The Secretary of State for the Home Department)

[51] R. Young and A. Sanders, *The Royal Commission on Criminal Justice: A Confidence Trick?* (1994) 14 Oxford J. Legal Stud. 435

[52] H. Quirk, *Disclosure: Significance of Culture in Criminal Procedure Reform,* (2006) 10 Int'l J. Evidence & Proof 42, p. 43

[53] *R v Bryant and Dickson* (1946) 31 Cr App R 146

[54] (1982) 74 Cr App R 302

[55] Quirk, p.43

[56] Ibid

Under the English common law prior to 1996, the prosecution had an obligation to disclose to the defence any material that could possibly be relevant to an issue in the case, unless the material was sensitive and a court ruled that it may be withheld.[57] Relevance was not limited to issues raised by the prosecution case but to issues which might potentially be raised by the defence.[58] In contrast, with a few specified exceptions, the accused was not required to disclose anything about his or her defence before the trial. This situation led to perceptions by some that the balance of the criminal justice system, and in particular, the balance between defence access to material gathered by police and the protection of sensitive sources of information[59], had shifted too far in favour of the accused.[60] There were also allegations that speculative requests for unused material by the defence were imposing heavy burdens upon the police[61], and concerns that carefully constructed "ambush defences" employed after prosecution disclosure represented an abuse of that disclosure.[62] With this background, and with widespread support from criminal justice circles for some form of mutual pre-trial disclosure[63], the CPIA made provision for pre-trial disclosure to be made by both parties in stages. First, primary disclosure was to be made by the prosecution of material which might undermine their case. This was to be followed within 14 days by a defence case statement outlining the general nature of the accused's defence. If, in the light of the defence case statement, there was additional material in the possession of the prosecution which might assist the accused's defence, then the prosecution was to make secondary disclosure of that material.

These requirements adopted the proposals of the Runciman Commission, but with two important differences. First, the test for prosecution disclosure proposed by the Runciman Commission was wide ranging, and arguably imposed greater burdens on the prosecution and police than under the common law existing at the time. The test embodied in the CPIA is far narrower, focusing on the likely effect of the unused material on the prosecution and defence cases. Secondly, the Runciman proposals only required the defence to give a

[57] Supra n.50
[58] R. Leng, *Defence Strategies for Information Deficit: Negotiating the CPIA,* (1996) 1 Int'l J Evidence & Proof 215
[59] C. Pollard, *A Case for Disclosure,* [1994] Crim L.R. 42
[60] Supra n.50
[61] Supra n.50
[62] Quirk, p.44
[63] R. Leng, *Defence Strategies for Information Deficit: Negotiating the CPIA,* (1996) 1 Int'l J Evidence & Proof 215

general indication of the nature of the accused's case. The CPIA requires more detailed information of the accused. [64]

Prosecution disclosure

Compared to the existing common law at the time of enactment, the CPIA restricts the prosecution's duty of disclosure by separating the disclosure into two phases, with the second phase tied to the issues revealed by the defence disclosure.[65] One justification for this is that under the common law, the prosecution had no way of knowing what the defence case would be, and thus had to apply a broad test of relevance to cover a range of possible defences when considering disclosure.[66]

Primary disclosure by the prosecution is compulsory in all summary and indictable cases, except where a person under the age of 18 is tried for a summary offence.

Section 3(1) of the CPIA requires the prosecution to disclose to the accused any material which has not already been disclosed, which, in the prosecution's opinion, might undermine the case against the accused. If there is no such material, then the defence must be provided with a statement to that effect. "Undermine" for the purposes of the legislation is intended to signify material which would do substantial damage to the prosecution case, thereby excluding peripheral material.[67]

Disclosure is made by providing a copy to the accused, or if this is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and place (ss 3(3), (4) and (5)). Material must not be disclosed if, on application by the prosecutor, the court concludes that it would not be in the public interest to do so (s.3(6)).

In response to primary disclosure, the defence must provide the prosecution with a defence case statement, which will be discussed further below.

In light of the defence case statement, the prosecution is under an obligation to disclose any previously undisclosed material which might reasonably be expected to assist the defence case (s.7(2)).

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[64] House of Commons, Hansard, 27 February 1996, column 739, Michael Howard (The Secretary of State for the Home Department)

[65] M. Redmayne *Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996,* (1997) 60 MLR 79, p.81

[66] Redmayne, p.81-82

[67] Redmayne, p.82

The disclosure obligations imposed on the prosecution by s.3 and s.7 of the CPIA are ongoing obligations which require the prosecutor to continually review whether at any given time there is prosecution material which would undermine the prosecution case, or, where the defence case statement has already been served, would assist the defence case (s.9).

Regardless of whether the prosecution has complied (or purportedly complied) with its secondary disclosure obligations, if, after the defence case statement has been provided, the accused has reasonable cause to believe that the prosecution has in its possession material which might reasonably be expected to assist the defence case, the accused may apply to the court for an order requiring the prosecutor to disclose such material (s.8).

Defence disclosure

Defence disclosure obligations are only compulsory in trials for indictable offences, although the defence may elect to provide a defence case statement in summary cases in order to trigger secondary disclosure by the prosecution (s.6). In addition, the defence is precluded from applying to the court for disclosure of prosecution material under s.8 unless the prosecution has received a defence case statement. However, in practice defence disclosure occurs only infrequently in summary matters.[68]

Section 5 of the CPIA specifies that a defence statement is a written statement which does the following:

- sets out in general terms the nature of the accused's defence;
- indicates the matters on which he or she takes issue with the prosecution; and
- sets out, in the case of each such matter, the reason why he or she takes issue with the prosecution.

If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement, such as the name and address of any witness if known at the time of the

[68] J. Plotnikoff and R. Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law,* Home Office: London, 2001 at p.66. The report considered 33 summary cases; defence case statements were provided in only 2 of those matters

statement, and if that information is not known then any information in the accused's possession which may be of assistance in locating any such witness (s.5(7)).

Under s.11 of the CPIA, if the defence fails to give a defence statement, does so late, sets out inconsistent defences, or departs from the disclosed defences, the court (or upon application, one of the parties) may comment on the matter, including comments inviting the jury to draw adverse inferences from the defence's conduct.[69] Subsection 11(5) makes it clear that a person should not be convicted solely on the grounds of such a negative inference.

Section 20 of the CPIA also preserves the obligation under the *Crown Court (Advance Notice of Expert Evidence) Rules 1987* for any party intending to rely on expert evidence to provide the other party a statement of the finding or opinion that is proposed to be adduced, and upon request, to provide the other party with a copy of the report upon which that finding or opinion is based (r.3).

Pre-trial hearings

Part III and IV of the CPIA make provision for "preparatory hearings" in Crown Court matters. Where it appears to the judge that an indictment reveals a case of a sufficient degree of complexity, or likely trial length, such that substantial benefits may accrue from a hearing conducted before the jury is sworn in order to identify the issues which will be material to the verdict of the jury, assist the jury's understanding of such issues, expedite the proceedings before the jury and assist the judge's management of the trial, then the judge may order such a hearing (s.29). Such an order may be made upon application of the parties or of the judge's own motion.

At the preparatory hearing, the judge may make rulings as to the admissibility of evidence, and any other question of law relating to the case (s.31(3)).

The judge may also order the prosecution to provide to the court and the accused:

- a case statement outlining the principal facts of the case for the prosecution, the witnesses who will speak to those facts, any exhibits relevant to those facts, any

[69] Redmayne, p.86

proposition of law on which the prosecutor proposes to rely, and the consequences in relation to any of the counts in the indictment that appear to the prosecutor to flow from these matters;

- prosecution evidence prepared in such a form as seems likely to aid the understanding of the jury; or
- written notice of documents the truth of which in the prosecutor's view ought to be admitted, and any other matters which in the prosecutor's view ought to be agreed (s.31(4)).

Where the prosecution has been ordered to provide a case statement, the judge may order the accused to give to the court and the prosecutor a written statement setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution, any objections to the case statement, any point of law (including the admissibility of evidence) he wishes to take, and any authority on which he intends to rely for that purpose (s.31(6)).

In addition, if the prosecution has been ordered to provide notice of documents and other matters which ought to be agreed, the judge may order the accused to give written notice of the extent to which he agrees with the prosecutor and the reason for any disagreement (s.31(7)).

Any of the orders above may be made before the preparatory hearing (s.32).

The consequence on either party of either failing to comply with one of the orders above or departing from the case disclosed in observance of the orders above is that the judge, or, with leave, another party, may make adverse comment from which the jury may draw such inference as appears proper (s.34).

While the above provisions only apply to potentially complex or lengthy trials, section 40 also permits judges to make binding pre-trial rulings on admissibility and other questions of law.

Evaluation of the UK disclosure provisions

In 2001, the Home Office published a report evaluating the operation of the disclosure laws.[70] Information for the study was obtained from nearly 1000 questionnaires completed by disclosure officers, prosecutors, justice's clerks, judges, barristers and defence solicitors, in addition to interviews with approximately 100 interested organisations and individuals, and a review of case files from 193 prosecutions.[71]

The report found a general dissatisfaction with the operation of the disclosure scheme amongst the majority of barristers, solicitors and judges. Most of the dissatisfaction related to factors such as administration, bad practice, and mistrust between the parties. This suggested problems with the implementation and management of the disclosure provisions, rather than inherent problems with the provisions themselves. The report found that, anecdotally, the average length of trials in the Crown Court had not fallen as hoped.[72]

Some of the key problems identified by the report were:

- competence and or inclination of police to discharge their disclosure obligations;
- inadequacy of defence case statements; and
- judicial attitudes.

The report also indicated that in some areas, practice had moved away from the CPIA and the pre-existing common law scheme was being applied.

Prosecution disclosure

Eighty-two percent of judges thought it was unrealistic to expect police officers to identify material which undermined the prosecution case,[73] and there were concerns that the only

[70] J. Plotnikoff and R. Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law,* Home Office: London, 2001

[71] Ibid p.ix

[72] Ibid p.138

[73] Ibid p.137

person with the knowledge and skill to understand what should be disclosed was the prosecution counsel, and that provision should be made to remunerate them for this work.[74]

There were also concerns that non-sensitive material which should have been disclosed to the defence was being withheld by the prosecution.[75]

Defence disclosure

At the time the provisions were enacted, there was widespread opposition to defence disclosure and the idea that prosecution disclosure should be linked to a statement about the nature of the defence. According to the report, this has been manifested in an unwillingness of the defence to submit meaningful defence case statements and judicial reluctance to deny defence applications for unused prosecution material; defence statements often contained little of substance about how the prosecution evidence would be challenged at trial.[76]

In the view of the writers of the Home Office report, of the matters prosecuted on indictment, 52% of the defence case statements reviewed contained either a bare denial of guilt, or did not meet the requirements of the CPIA.

There also appeared to be little incentive for the defence to act otherwise. Many judges appeared to be as uneasy about the CPIA as the defence and were reluctant to resist defence disclosure requests, regardless of the quality of the defence case statements.[77]

Unsurprisingly, most respondents thought that the defence case statements had not narrowed the issues at trial. The responses received from judges indicated that no judge found defence case statements useful. There were also concerns expressed by disclosure officers that it was impossible to fulfil their secondary disclosure obligations when provided with a defence statement which was without substance.[78]

[74] Ibid p.126
[75] Ibid p.71
[76] Ibid p.131
[77] Ibid p.131
[78] Ibid p.127

Judicial attitudes

While 59% of judges said that they would order a non-compliant defence statement to be amended, only 4% of prosecution and defence practitioners thought that most judges did so.[79] It would seem that although judges complain that defence case statements are without substance, they do not enforce compliance with the requirements of the CPIA.

As mentioned above, judges appeared reluctant to resist defence disclosure requests regardless of the inadequacy of the defence case statements. The report noted that it was hard to see how any legislation could operate effectively if there was judicial reluctance to enforce its provisions.[80]

Criminal Justice Act 2003 (UK)

Following the release of the Home Office report, further changes were made to the UK disclosure regime with the enactment of the *Criminal Justice Act* 2003 (UK), which amended the defence disclosure obligations in three respects.

First, the Act abolished the different tests for primary and secondary prosecution disclosure and replaced them with a single objective test to apply to both stages of disclosure.[81] Previously, the test for primary disclosure had been material that in the prosecutor's opinion might undermine the case against the accused, while the test for secondary disclosure was material which might reasonably assist the defence case in light of their defence case statement. There is now a single objective test requiring disclosure of any material that might reasonably be considered capable of either undermining the case for the prosecution against the accused or assisting the case for the accused. In addition, the continuing nature of the prosecution disclosure obligation has been revised to specifically require the prosecution to review their material in the light of the new test upon receipt of the defence case statement.[82]

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[79] Ibid p.137

[80] Ibid p.137

[81] Explanatory notes to the *Criminal Justice Act* 2003, p.6

[82] D. Ives, *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand - The Current State of the Law*, Working Paper November 2005 p.8

Second, the Act clarified and expanded the scope of the accused's disclosure obligations, imposing greater specificity on the content of the defence case statement.[83] Under the previous s.5 of the CPIA, the defence statement was to set out in general terms the nature of the accused's defence, indicate the matters on which issue was taken with the prosecution, and setting out in each such matter, the reason why issue was taken with the prosecution. Under the new regime, the accused must provide a statement setting out the nature of the defence *including any particular defences that will be relied upon*, and indicating the *matters of fact* that the accused takes issue with and the reasons why, as well as indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which the accused wishes to take, and any authority on which the accused intends to rely for that purpose.[84] Presumably, these amendments were intended to address some of the concerns relating to the use of defence case statements.

In addition, the *Criminal Justice Act* 2003 (UK) will impose a new obligation on the accused to provide a list of all defence witnesses other than the accused who will be called to testify, including their names, addresses and dates of birth. It also expanded the duty to disclose expert evidence by requiring disclosure of the identity of any expert who was retained by the accused to provide an opinion even where the accused did not intend to rely on that expert's opinion at trial.[85]

Third, the list of disclosure faults under s.11 of the CPIA was expanded. In addition to the existing faults,[86] the new list clarifies that faults also occur if the accused:

- relies on a matter that was not disclosed in the defence statement;
- discloses the list of witnesses late or calls a witness at trial who is not included or adequately identified on the witness list; or
- fails to provide an updated defence case statement or provides it late.[87]

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[83] Ibid

[84] *Criminal Justice Act* 2003 (U.K.) s.33(2)

[85] D. Ives, *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program, p.6 Unlike the other amendments under the *Criminal Justice Act 2003,* at the time of writing, these provisions (s.6B, 6C and 6D) have yet to commence.

[86] If the defence fails to give a defence statement, does so late, sets out inconsistent defences, or departs from the disclosed defences

Perhaps most significantly, s.39 of the *Criminal Justice Act* 2003 (UK) removes the requirement that the prosecution seek leave of the court before commenting on a fault with the accused's disclosure, except in situations where the accused relied on a matter that was not disclosed in the defence case statement, raised a point of law that was not previously disclosed, or called a witness who was not properly identified.[88] As with the expanded and clarified defence disclosure requirements, it is likely that by allowing the prosecution in many cases to make adverse comment without the leave of the court, it was intended that the problem of judges' inaction in relation to inadequate defence case statements would be alleviated. As mentioned in the discussion of the Victorian regime, the Working Group considers the use of adverse comments as sanctions to be problematic. This will be discussed later in this Report.

Criminal Justice and Immigration Act 2008

A high profile terrorism case in 2007 resulted in a further amendment to the disclosure obligations in the UK. In approved observations made in an open court following the trial of those responsible for the failed 21 July 2005 bombings in London, Fulford J of the Woolwich Crown Court criticised the way two of the defendants had approached their defence statements, and the effectiveness of the defence statement legislation itself.

Mr Justice Fulford stated that the two defendants in question, Mr Ibrahim and Mr Omar, had deliberately withheld serving adequate defence statements until the last moment, sought extensions of orders the trial judge had made for service, and had sought to blame the staff of Belmarsh prison for the delays.

His Honour noted that the defendants need only have provided very few pages of information, that was wholly within each defendant's own knowledge, representing a simple explanation of their respective defences. Instead, by refusing to supply this information until too late in the history of the case, the defendants had delayed the commencement of the trial to January 2007, when it had initially been set to commence in October 2006, and created difficulties for the prosecution in terms of the scientific tests the prosecution had to conduct in order to refute the defence case, including the requirement for a second round of scientific

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[87] *Criminal Justice Act* 2003 (U.K.) s.39. As noted above in relation to the notification of defence witnesses provisions, those faults that relate to the requirements of s.6B, 6C and 6D will not commence until those provisions have also commenced.

[88] D. Ives, *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand - The Current State of the Law*, Working Paper November 2005 p.9

tests. Upon viewing the final defence statements of the defendants, the trial judge formed the view that they had deliberately sought to manipulate the processes of the court, as the extra time was not required for the simple narrative and factual explanations contained in these statements.

The trial judge urged a review of the existing provisions to ensure that a court could impose an effective sanction if there had been unreasonable delay in providing the details of a defence later relied on. He further criticised the existing defence case statement provisions for not requiring the defendant to reveal his defence save as regards its nature. In his view a more detailed description of the narrative upon which the defendant intended to rely was necessary. He considered that in this case, the defendants had attempted to mould their defences to the scientific evidence once the first and second tests had been completed, rather than providing information which would have enabled useful tests to be conducted from the outset. Under the existing provisions of the CPIA, his honour considered that he had been powerless to give a direction regarding adverse inferences, as in his view the defendants had not breached the existing statutory requirements.

In response, the *Criminal Justice and Immigration Act 2008* inserted a new subsection 6A(ca) into the CPIA, requiring the defendant to set out the particulars of the matters of fact on which he intends to rely for the purposes of his defence. This is in addition to the existing requirements to set out the general nature of the defence, the matters of fact on which he takes issue with the prosecution and why the defence takes issue, and any points of law he wishes to take.[89] The *Criminal Justice and Immigration Act 2008* was passed in May 2008, and the new requirements came into force on 3 November 2008.

United States

With the exception of a few states in which common law rules still apply, most states in the US have comprehensive legislation or court rules governing pre-trial disclosure.[90] In some jurisdictions, the prosecution is only entitled to defence disclosure where the defence has first requested information from the prosecution (reciprocal disclosure), but in many states the prosecution is entitled to a substantial degree of defence disclosure independent of any

[89] *Criminal Justice and Immigration Act 2008, s.60(1)*
[90] K. Dawkins *Defence Disclosure in Criminal Cases,* (2001) 7 NZ L Rev 35, p.57

defence request.[91] While the exact degree of defence disclosure will vary from state to state, the scope is generally very broad, ranging from the nature of any intended defence and the identity of expert witnesses (or even all witnesses), to expert witness reports and defence witness statements, documents, and tangible evidence.[92]

In several states, the prosecution may obtain from the defence:

- a specification of all defences that the defendant will raise;
- the names and addresses of all witnesses that the defendant intends to call at trial; and
- all statements of defence witnesses, including memoranda of unsigned oral statements.[93]

Canada

Canada imposed its first formal defence disclosure obligation in 2002 with the enactment of the *Criminal Law Amendment Act, 2001* (Can), which requires the accused to provide advance notice of expert testimony to be introduced at trial.[94] The provisions require the accused to provide the Crown with the name and qualifications of any defence experts who will testify at trial and a description of their area of expertise, with the description being sufficiently detailed to allow Crown counsel to inform himself or herself about the relevant area. There is no requirement that the actual expert report be disclosed until, at the latest, the close of the prosecution's case at trial. As such, the Canadian requirement is limited when compared to similar provisions in other common law jurisdictions.[95]

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[91] C. Slobogin, *Discovery by the Prosecution in the United States: A Balancing Perspective,* (1994) 36 Crim. L.Q 423, p.424

[92] Dawkins, p. 57

[93] R. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance,* (1986) 74 Cal. L Rev. 1567, p.1570

[94] D. Ives *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program, p.16

[95] D. Ives *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program, p.17

Sanctions

Sanctions in Canada are also limited in comparison to other jurisdictions. Where the accused calls an expert without having met the necessary disclosure requirements, the trial judge must on request of the Crown order the defence to disclose the expert's report and adjourn the proceeding in order to permit the Crown to prepare for cross-examination.[96] The trial judge must also allow the Crown to call or recall witnesses for the purpose of testifying on matters relating to the expert's testimony unless the judge considers that this would be inappropriate. No other sanctions apply.

New Zealand – New regime resulting from the *Criminal Procedure Bill* 2008 (NZ)

In 2005, the New Zealand Law Commission undertook a comprehensive review of pre-trial processes. The review included consultations with police prosecutors, Crown Solicitors, court operations staff, Ministry of Justice policy staff, the New Zealand Law Society, defence counsel, the Public Defence Service pilot, and numerous District Court judges. The Commission found a large degree of consensus about the problems and their solutions, and these consultations substantially shaped its recommendations.[97] These recommendations included replacing preliminary hearings with a statutory pre-trial disclosure scheme governing both prosecution and defence disclosure, and to some degree, non-party disclosure. Consideration was also given to judge-only trials.

The Report of the Commission led to the enactment of the *Criminal Procedure Bill* 2008 (NZ). Numerous amendment Acts have resulted from the Bill, although at the time of writing, most are not yet in force.

Preliminary hearings

The *Criminal Procedure Bill* 2008 (NZ) eliminated preliminary hearings in order to streamline criminal proceedings. The vast majority of persons accused of criminal offences were committed to trial after preliminary hearings, indicating that in most cases the police had

[96] D. Ives *Defence Disclosure in the Commonwealth: England, Australia, Canada and New Zealand,* 7 June 2004, Ontario Court of Justice, University Education Program, p.18

[97] Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency,* June 2005, Wellington, NZ

collected sufficient evidence and the Crown had satisfied the court of the requirement to meet a prima facie case.[98]

Prosecution disclosure

It was recognised that in the absence of preliminary hearings, it became important to ensure that adequate and timely disclosure still occurred. To facilitate this, disclosure obligations were codified in the Bill, which have since been incorporated into the *Criminal Disclosure Act* 2008 (NZ). At the time of writing, the Act is not yet in force, but it is anticipated that it will be in force by the end of 2008.

Under the new provisions, the prosecution is required to disclose to the defence all relevant information, unless there is good reason to withhold it. Defence disclosure obligations, on the other hand, are limited, requiring disclosure of alibi evidence and expert witnesses.[99]

Prosecution disclosure is divided into two phases: initial and full disclosure. No later than 21 days from the beginning of criminal proceedings, the prosecution must provide the defence with a summary of the facts of their case, the maximum penalty for the offence, and a list of the accused's previous criminal convictions (s.12(1)).

In addition to the initial disclosure, at any point after the commencement of criminal proceedings the defence may request disclosure of additional information in the prosecution's possession.

There are provisions in the Act which set out the grounds upon which the prosecution may refuse such a request, such as material relating to an undercover officer, material that would prejudice current investigation or risk the safety of a person, or material that would disclose the address of a witness or informant (ss 15 – 18). Where a request is refused on these grounds, reasons for the refusal must be provided to the defence.

After a not guilty plea, the Act provides for an extensive range of further disclosure (full disclosure) of the "standard information" prescribed under s.13(3), including a list of all relevant exhibits held by the prosecutor, prosecution witness convictions, and expert witness

[98] Explanatory Note to the *Criminal Procedure Bill* (NZ), p.5
[99] Explanatory Note to the *Criminal Procedure Bill* 2008 (NZ), p.5

reports. A defendant can also request information that may be held by persons or agencies other than the prosecution (third party disclosure).

Defence disclosure

The disclosure obligations on the accused are far narrower. If the defence intends to adduce evidence in support of an alibi, within 14 days of pleading not guilty to an offence the defence must give written notice of the particulars of the alibi (s.22).

If the defence proposes to call a person as an expert witness, at least 14 days before the date fixed for the trial the defence must disclose to the prosecutor any brief of evidence to be given, or any report provided by that witness; or if that brief or any such report is not then available, a summary of the evidence to be given and the conclusions of any report to be provided (s.23).

Non-party disclosure

The defence may also apply to the court for an order granting a hearing to determine whether information that is held by a person or agency other than the prosecutor should be disclosed to the defendant.

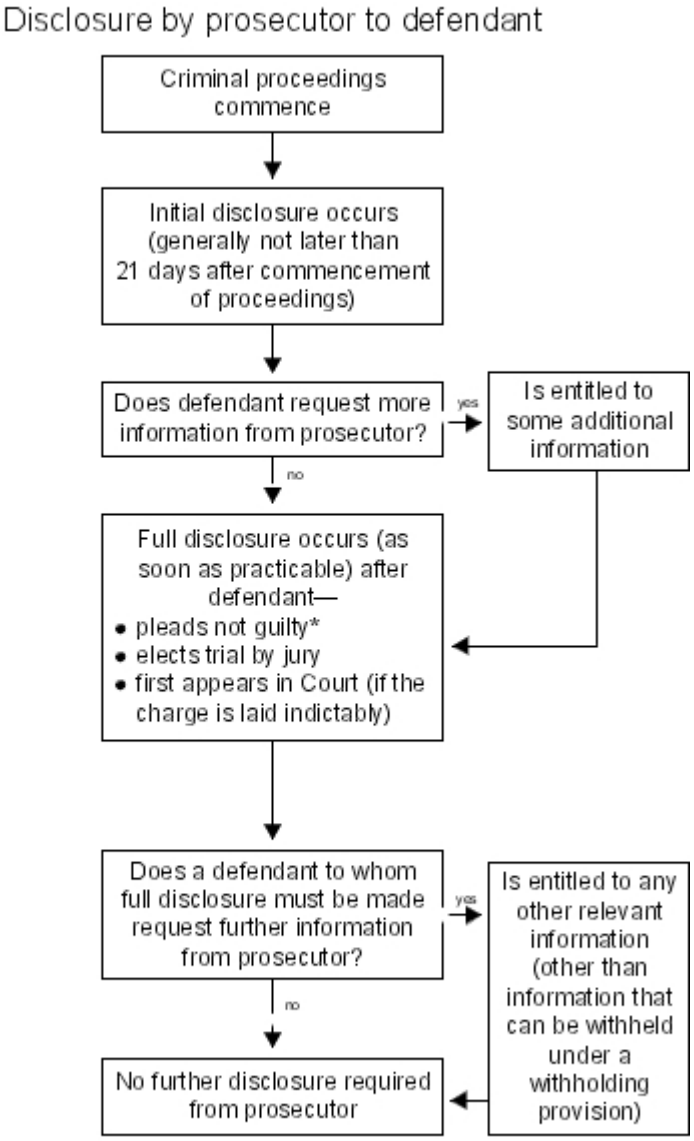
The application must:

a) describe with as much particularity as possible the information that the defendant seeks to have disclosed, and state the name of the person or agency that the defendant alleges holds the information;

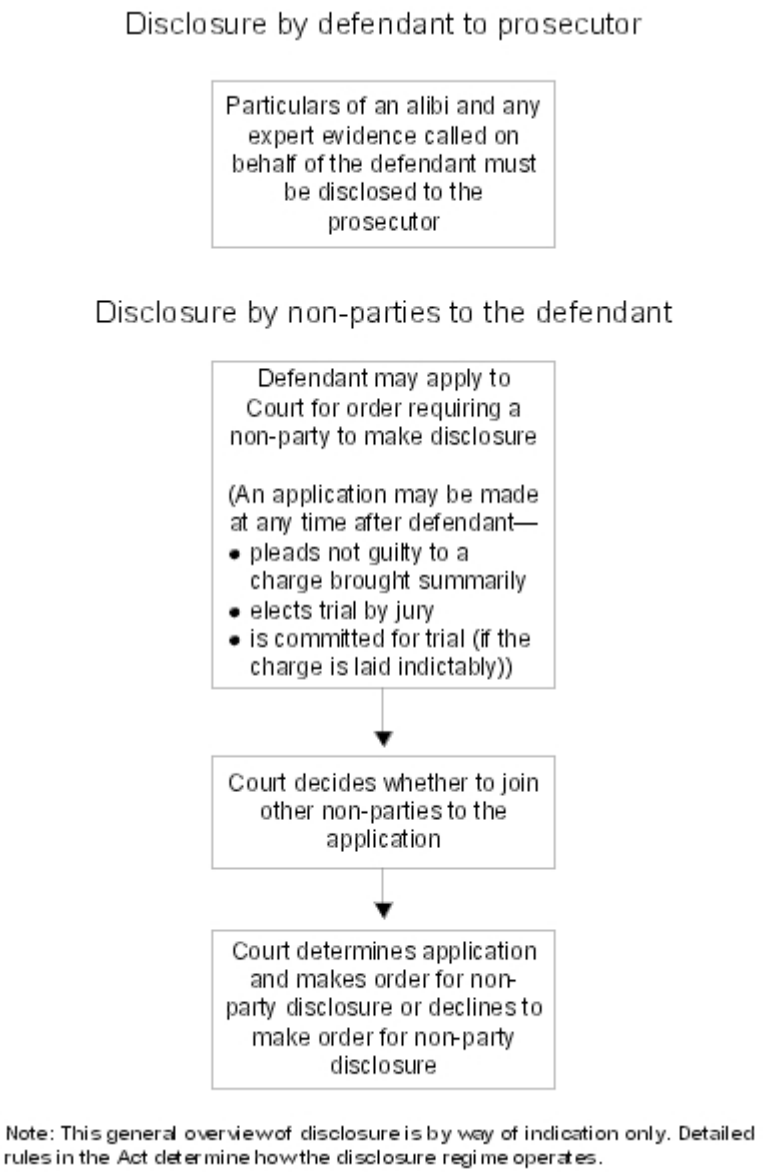
b) set out the grounds on which the defendant relies to establish that the information is relevant; and

(c) contain written evidence indicating that the defendant has made reasonable efforts to obtain the information from the person or agency that the defendant alleges holds the information (s.24).

General Overview of Disclosure



*full disclosure is not required if the defendant pleads guilty instead of not guilty to a charge laid summarily.



*Diagrams taken from s.3 of the *Criminal Disclosure Act* 2008 (NZ)

Judge-only trials

Of particular interest is the *Crimes Amendment Act (No 2)* 2008 (NZ) which will insert s.361D into the *Crimes Act 1961* (NZ) to provide for judge-only trials, on the application of the prosecution, for cases that are likely to be long and complex. These provisions do not apply to offences where the maximum penalty is 14 years imprisonment or more (s.361D(1)). It is beyond the scope of the Terms of Reference but the question of whether juries, at least as currently constituted, remain appropriate for all criminal trials is a matter which will undoubtedly require consideration, probably in the near future. Because many complex trials are likely to relate to Commonwealth offences the issues raises significant issues in relation to the Australian Constitution.

An order for a judge-only trial may only be made if the prosecution and accused have been given a chance to be heard in relation to the application, and the judge is satisfied that:

- all reasonable arrangements/orders have been made to facilitate the shortening of the trial, and the trial appears likely to exceed 20 days; and
- in the circumstances, taking into account factors such as the number and nature of offences with which the accused is charged, the nature of the issues involved and the volume of evidence likely to be presented, the accused's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively (s.361D(3) and (4)).

Under s.361E, the prosecution may also make an application for a judge-only trial in cases where there are reasonable grounds to believe that intimidation of person/s selected as jurors has occurred, is occurring, or may occur, and the effects of this intimidation can only be avoided by ordering a judge-only trial.

Summary of Approaches

The Working Group has reviewed the approaches taken in NSW and other jurisdictions over the past two decades in order to understand the context in which the current problems have occurred, and to determine possible solutions. It is clear that some of these problems, such as the reluctance of defence parties to disclose relevant information, are enduring.

The next Part will consider in depth a number of issues the Working Group considers to be having a negative effect on criminal trials in NSW and make recommendations.

Part 3: Causes of Delay in NSW and Possible Solutions

Juries

Jury issues contributing to trial inefficiencies

In both their submissions and in discussions at meetings of the Working Group, members have expressed concerns about inefficiencies arising from problems with juries. These concerns fall into two broad categories:

1. Discharge of the jury; and

2. The jury's comprehension of the issues at trial.

Discharge of the jury

In their submissions, several members indicated that jurors requesting to be excused after empanelment, and after the trial had commenced, was a common problem which frequently led to inefficiencies. Regardless of whether the juror(s) in question had sought to be discharged on medical or other grounds, it was noted that this frequently resulted in the accused stating that he/she did not wish to be tried by an unwilling juror, and a request that the entire jury be discharged.

The existing legislation provides opportunities for a juror to be excused from jury service after being summonsed where they have "good cause".[100] "Good cause" is not defined in the legislation, but the Office of the Sheriff has developed internal guidelines for determining applications, and also provides some limited guidance as to the procedure which those who seek to be excused must follow.[101]

Where applications to be excused are made on the day of the trial, and there is no doubt about the genuineness or the strength of the claim, they are resolved by a Sheriff's Officer,

[100] *Jury Act* 1977 s.38

[101] NSW Law Reform Commission, *Jury Selection* (2007) Report 117, p.128

or in the Downing Centre in Sydney, by an administrative officer. Where there is doubt, the issue will be reserved for the trial judge.[102]

The Sheriff's internal guidelines indicate that potential grounds for an application to be excused may include university or TAFE commitments, temporary illness, or situations of employment where the applicant cannot be replaced in his or her workplace. While not bound by, nor generally cognizant of these guidelines, judges routinely excuse jurors on similar grounds.[103]

Despite the existence of the requisite mechanisms for excusing persons from jury service, Working Group members identified a need to clearly inform the jury of their obligations once they had been summonsed, including a clear statement about how they may be excused. Delays eventuate when jurors seek to be excused post selection. It should be made clear to them that the appropriate time for such an application is between summons and selection.

The problem is exacerbated by the disparate approaches taken by the judiciary to resolving applications to be excused. Some judges will deal with those applications in chambers in the absence of the parties, while others will only deal with applications in court in the presence of the parties. In the latter circumstance, some judges require the applicant to be sworn or to make an affirmation, while others will allow the application to be made orally from the well of the court, where there could potentially be some 30 other people present. It is obvious that the requirement to make an application to be excused in court could be intimidating to a potential juror, and could be cause for significant stress or embarrassment where the grounds of the application relate to medical or other personal matters.[104]

Recent reviews and amendments

In 2005, the Criminology Research Council commissioned a study of factors affecting juror satisfaction in NSW, Victoria and South Australia.[105]

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[102] NSW Law Reform Commission, *Jury Selection* (2007) Report 117, p.129

[103] Ibid

[104] NSW Law Reform Commission, *Jury Selection* (2007) Report 117, p.130

[105] Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia* (2007) Research and Public Policy Series, No. 87, p.xiii

The study included a comparison of jury legislation in the jurisdictions, an evaluation of documents and information provided to jurors (such as the summons, brochures, video tapes), interviews of stakeholders such as judicial officers and jury administrators, as well as survey responses gathered from 6,441 empanelled and non-empanelled jurors.[106]

The survey found that NSW jurors were significantly less satisfied than their counterparts in Victoria and South Australia with the information provided in advance of jury service and with the orientation. This included:

- information provided with the summons;
- information about their eligibility for jury duty; and
- information they received about their role as a juror.[107]

Only 52% of NSW jurors were satisfied with the orientation videotape, compared to 82% in Victoria.[108]

The report made 31 recommendations, including the following:

- Critically review information provided to jurors to ensure that jury summonses are clear, informative and easy to respond to;
- Disseminate basic information about opportunities to seek deferral of jury duty and about the fundamental terms and conditions of jury service;
- Provide potential jurors with more extensive information in advance of their attendance at court regarding their role, responsibilities and the expected duration of jury duty;
- Streamline jury summonsing procedures to minimise the amount of time non-empanelled jurors are kept waiting at court. For example, summons jurors as needed, and on any given day, call to court only jurors who are needed that day;

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[106] Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia* (2007) Research and Public Policy Series, No. 87, p.xiii

[107] Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia* (2007) Research and Public Policy Series, No. 87, p.134

[108] Ibid

- Ensure information provided to jurors is multimodal, interesting, informative and easy to understand. Preliminary orientation information should cover a range of topics to ensure that jurors are interested and engaged;

- Regularly update orientation videotapes to ensure that they are interesting and engaging, while informing jurors about their role and the part they play in the criminal justice system. Where possible, videotapes should be tailored to the location and type of court;

- Encourage more communication between judges and jurors during the orientation period;

- Provide jurors with additional time to apply for excusal after they hear the list of witnesses and charges in a case;

- Avoid embarrassment or humiliation of individual jurors by allowing them to submit private notes to the trial judge specifying reasons for seeking excusal;

- Allow empanelled jurors sufficient time to settle before the trial commences, as jurors benefit from time to organise their personal affairs to absorb the orientation information, and to adjust to the new task and environment; and

- Foster more communication with jurors at the conclusion of the trial, by establishing procedures to debrief jurors and by informing jurors of the date of the sentencing hearing in cases where the jury convicted the defendant.

The NSW Law Reform Commission recently published a report on *Jury Selection*.

While the focus of the report was on selection, significant consideration was given to the existing avenues for excusing potential jurors from service. The Commission made some 74 recommendations, including recommendations that:

- Jurors seeking to be excused in court on grounds which might cause them embarrassment or might relate to their personal health or circumstances be allowed to document those grounds to be handed up to the judge;

- Clear definitions of “good cause” for being excused be set, and that guidelines be prepared to assist the Sheriff’s exercise of discretion in excusing jurors for good cause or deferring the time at which those who seek to be excused might still be required to serve;

- Express powers be given to the court to discharge a juror without discharging the whole jury in certain circumstances, and to order that the trial continue as long as the number of remaining jurors meets statutory requirements;

- Better and more comprehensive information should be provided to prospective jurors in advance of the date they have been summoned to attend; and

- Judges should consider adopting strategies for debriefing jurors at the conclusion of the trial, so as to recognise their contribution and identify any concerns they may have arising from their jury service, although without venturing into the content of their deliberations.[109]

Recent amendments

The NSW Parliament has made a number of amendments to the *Jury Act* 1977 in recent years, and is currently in the process of reviewing and modernising the jury system in NSW. As already highlighted by the Working Group, one of the key areas of concern is the prevalence of re-trials, and the associated delays and costs. Reforms have been introduced with the aim of enhancing the efficiency of the NSW justice system and avoiding unnecessary re-trials to ensure limited court resources are not needlessly wasted.

Since 2003, the Government has asked the NSW Law Reform Commission to consider a range of jury issues beyond that of selection, including:

- whether majority verdicts should be introduced;

- whether juries should have a role in sentencing;

- whether people who are deaf or blind should be able to serve on juries; and

- a review of the warnings and directions that judges are required to give jurors in criminal trials, including their number and complexity.

Subsequent recommendations made by the Commission have formed the basis of a number of these recent amendments.

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[109] See in particular Recommendations no. 30-35, 52-57, 63-64, NSW Law Reform Commission, *Jury Selection* (2007) Report 117

Majority Verdicts

Legislation allowing a majority verdict of 11 to 1 (or 10 to 1 where there are 11 jurors) was introduced in NSW in May 2006. A majority verdict can only be returned in limited circumstances, where:

- a unanimous verdict cannot be reached after the jurors have deliberated for a reasonable time (not less than eight hours), and
- the court is satisfied that it is unlikely that the jury will reach a unanimous verdict.[110]

Jury Selection

Legislation was introduced in late 2007 that implemented a number of recommendations in the Law Reform Commission's report on *Jury Selection*. These concerned the empanelment of jurors in long trials, and commenced on 1 January 2008. Under these changes, a court may order that up to three additional jurors be empanelled, if the court is satisfied that:

- the trial is expected to last at least three months;
- the selection of additional jurors is an appropriate means of ensuring that there will be sufficient jurors remaining on the jury when it is required to consider its verdict; and
- appropriate facilities to accommodate additional jurors are available.[111]

These provisions have been utilised on a number of occasions.

Discharge

The greatest risk posed by the late application of a juror to be excused is the possibility of the entire jury being discharged, with its attendant financial costs to the State and financial and emotional costs to the victim, defendant and witnesses. This risk has been significantly reduced recently with amendments to the *Jury Act* 1977, made in response to recommendations set out in Chapter 11 of the Law Reform Commission's report on *Jury*

[110] *Jury Act* 1977 s.55F
[111] *Jury Act* 1977 s.19

Selection. The *Jury Amendment Act* 2008 inserted Part 7A into the *Jury Act* 1977*,* which makes provision for the mandatory and discretionary discharge of individual jurors. In addition, where a juror has died or has been discharged, Part 7A gives the court a discretion to either continue the trial with a reduced number of jurors, or to discharge the jury where to continue would give rise to a risk of a substantial miscarriage of justice.[112]

The discretionary power to discharge individual jurors is a broad one, incorporating situations where:

- the juror has become so ill as to be likely to be ineligible to serve as a juror before the jury delivers its verdict, or poses a health risk to the other members of the jury;
- it appears to the court that the juror may be unable to give impartial consideration to the case because of the juror's familiarity with the parties, witnesses, or legal representatives in the trial, or there is a reasonable apprehension of bias or conflict of interest, or any similar reason;
- the juror refuses to take part in the jury's deliberations; or
- it appears to the court that *for any other reason affecting the juror's ability to perform the functions of a juror,* the juror should not continue to act as a juror.*[113]*

Section 22 of the *Jury Act* 1977 permitted the continuation of a trial after the discharge of a juror provided that the number of jurors did not fall below a prescribed number, but there had previously been no specific legislative power for courts to discharge individual jurors; the power had been implied as necessary to give effect to s.22.[114] The new sections are intended to fill this void.

Other amendments clarify that where a mistake has been made in empanelling the jury, or a juror has become disqualified or ineligible from serving during a trial or inquest, the verdict will not automatically be invalidated solely on this basis. This is to overcome a recent Court of Criminal Appeal decision where the existing legislation was interpreted very strictly.[115] Now, where a court or coroner has ordered that a trial or inquest continue with the remaining

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[112] *Jury Act* 1977, s.53A – 53C

[113] *Jury Act* 1977, s.53B

[114] Legislative Council, Second Reading Speech, *Jury Amendment Bill,* 15 May 2008, The Hon John Hatzistergos (Attorney General)

[115] *Petroulias v R* [2007] NSWCCA 134

jurors following the discharge or death of a juror, the jury will still be treated as "persons selected and returned in accordance with the Act".

The *Criminal Appeal Act* 1912 was also amended to allow appeals to the Court of Criminal Appeal, in circumstances where the trial judge has decided to discharge the entire jury. [116]

Recommendations

Despite recent amendments, it is clear that there are additional steps that should be taken in order to reduce the impact of jury issues on criminal trial efficiency.

First, the mechanisms that are currently in place to enable potential jurors to be excused from service are not being utilised early enough. This may be attributable to inadequate information being provided to potential jurors. Problems also lie in the procedures employed by some judges in considering juror applications to be excused, which may dissuade jurors from making timely applications to be excused even when they may have valid grounds for doing so.

The mechanisms currently in place to inform jurors of their rights and obligations, such as brochures, information packages and videos need to be reviewed. This issue was the subject of recommendations in both the Law Reform Commission and the Criminology Research Council's reports. The Attorney General's Department is currently in the process of reviewing all material provided to jurors. The Department has also developed a communication strategy for jury service, which will form the basis of developing a new customer service culture within courts administration in relation to jury service. Amendments to the jury handbook are to be settled in consultation with the judiciary.

It is also clear that non-confrontational opportunities need to be provided for jurors who believe themselves to be unable to participate effectively to identify themselves and the reasons for their belief. In this regard, current problems with late applications by jurors to be excused are problems of administration and management, not problems in need of a legislative solution. However, that does not ameliorate the possible impact these problems can have on the timely running of a criminal trial, and must be addressed.

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[116] *Criminal Appeal Act* 1912, s.5G

Recommendation 30 of the Law Reform Commission report suggested that jurors seeking to be excused in court on grounds which might cause them embarrassment or might relate to their personal health or circumstances be allowed to document those grounds and hand a written document up to the judge. The Chief Justice of the Supreme Court of NSW and the Chief Judge of the District Court of NSW have both expressed their support for Recommendation 30, although the Chief Justice noted that due to literacy or language difficulties, it would not always be possible for a written document to be prepared.

Working Group members also noted that the current Supreme Court practice is to retain the jury panel on call for a defined time period, so that if the jury is discharged, another jury can be empanelled from the balance of the jury panel with minimal delay for the trial.

The recommendations of the Law Reform Commission and the impact of the subsequent amendments will continue to be monitored by the Jury Taskforce. The Taskforce is an advisory body established by the Chief Justice of the Supreme Court to examine and report on the welfare and wellbeing of jurors.

It is the view of the Working Group that jury-related trial efficiency issues identified in this Report have already been the subject of adequate recommendations in the Criminology Research Council and Law Reform Commission reviews. No legislative change is considered to be necessary. However it makes the following recommendations.

Recommendation 1: Material provided to the jury and communications with the jury by the Sheriff's Office should be a standing item on the Jury Taskforce agenda. The Taskforce should annually audit and review material provided to jurors with a view to ensuring that the information is accessible, relevant and current.

Recommendation 2: That the Jury Taskforce oversee the continuing implementation of non-legislative recommendations of the Law Reform Commission Report on Jury Selection.

The jury's comprehension of the issues at trial

The jury's comprehension of the issues at trial is closely tied to other issues that will be considered in greater detail later in this chapter. It will only be briefly discussed here.

It is the view of the Working Group that a primary objective of both parties in a criminal trial should be the conduct of proceedings so as to best facilitate concentration, comprehension and decision-making on the part of the jury. The Group does not consider this to be a departure from its mandate to consider issues related to trial efficiency, for two reasons. First, many of the issues which affect the jury experience are inextricably tied to those that contribute to lengthy trials. Secondly, there are situations where a trial results in a hung jury due to the jury's inability to comprehend complex evidence, or, as was widely reported in recent months, a trial being aborted due to jurors who were distracted while being subjected to voluminous and unfocused evidence.

Improving the trial experience for jurors will require the use, where appropriate, of aids to understanding such as chronologies or summaries bringing together voluminous evidence. The jury's comprehension of complex evidence can present significant problems. Many criminal trials, such as major drug trials, are now complex, and advances in technology have resulted in more sophisticated forensic evidence. It can be difficult for juries to easily comprehend and absorb some of the evidence. This issue must be given further consideration.

A recent study conducted by the New Zealand Law Commission found that, in general, the problems which individual jurors found in comprehending and absorbing evidence during the trial were attributable to the way in which evidence was presented to them rather than any personal incapacity.[117] In particular, it was noted that few jurors had experience in assimilating a large quantity of factual information delivered orally, and that the emphasis on oral evidence was arguably at odds with modern forms of communication and learning.[118] Jurors also noted problems with recall, reporting that they confused witnesses and complainants' accounts, mistook names, dates or times, and sometimes had difficulty in recollecting what evidence related to which charge. These problems were more pronounced

[117] NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2,* (1999) Preliminary Paper 37, para 3.2
[118] NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2,* (1999) Preliminary Paper 37, para 3.3

where the evidence was confused or contradictory, where the sequence of events was unclear, and when there were multiple complainants and charges.[119]

On multiple charge trials, the New Zealand Law Commission noted that while to some degree the difficulties encountered in assessing evidence could be attributed to the personal limitations of individual jurors, the impact of the way in which the cases were conducted was at least as significant, with too many charges being brought, insufficient effort being made to distinguish the various charges to the jury, and the presentation of the evidence in a manner which did not link sufficiently with the charge to which it related.[120]

Section 50 of the *Evidence Act* 1995 permits a party, on application, to adduce evidence of the contents of two or more documents in summary form if the court is satisfied that it would not otherwise be possible to conveniently examine the evidence because of the volume or complexity of the documents in question. The Working Group is of the view that the existing provisions should be extended if they are to be effective in facilitating the use of summary evidence. Consideration should be given to a provision which allows the evidence to be given in summary form including the statement or transcript of evidence of a witness. The provision should allow evidence in summary form where the parties or the judge is satisfied that it is not contrary to the interests of justice including the efficient conduct of the trial.

The trial experience and comprehension of the evidence by jurors would be further enhanced by confining the issues in dispute. There is a continuing need to identify legal issues, including challenges to the admissibility of evidence, in advance of the trial so that they can be resolved before a jury is empanelled. The jury may then hear the evidence without interruptions. It is also important that technical difficulties in the presentation of electronic evidence be managed so as to allow the efficient presentation of such material to the jury.

Topics relating to the issues at trial and the management of technological difficulties are discussed elsewhere in this Report where appropriate recommendations are made. However, it was noted by Working Group members that there were insufficient avenues for juries, after the conclusion of a trial, to flag problems encountered during their service. Consideration was given to potential mechanisms for seeking juror feedback. For example,

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[119] NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2,* (1999) Preliminary Paper 37, para 3.5.
[120] NZ Law Commission, *Juries in Criminal Trials: Part Two, Volume 2,* (1999) Preliminary Paper 37, para 3.13

it was noted that some Victorian judges had the practice of debriefing the jury upon conclusion of a trial. The Working Group did not consider this approach to be appropriate for application in NSW. Members also noted that the Office of the Sheriff operated a help line for jurors, which, while predominantly intended to assist jurors with issues such as the emotional impact of a confronting trial, was not necessarily restricted to such purposes. However, due to the proactive step required of the juror in contacting the help line the Working Group did not consider this to be a useful mechanism for collecting feedback. Instead, it was thought that a survey of jurors upon conclusion of a trial could be useful for gaining feedback on how the jury system could be improved. Members did not consider that feedback should be sought after every criminal trial. Accordingly, the Working Group is of the view that an agency such as BOCSAR should conduct periodic surveys of jurors to identify issues affecting trial efficiency and juror comprehension.

The Working Group also considered the resources that a jury has access to during the course of the trial.

It was noted that some judges do not permit juries copies (edited or otherwise) of transcripts of the trial. Similarly, there was a concern that some juries were not being granted access to the exhibits until the end of the trial when they were sent away to deliberate.

The Working Group acknowledges that if this practice exists, it is not across the board and that most judges allow juries access to a transcript of the proceedings, where appropriate to do so. The majority of courts also permit jurors access to the exhibits soon after they are tendered.

It is not the intention of the Working Group to fetter the discretion of a judge to run his or her court as they see fit, however it is important that jurors are placed in the best position possible to assess the evidence they hear. Providing a jury with a transcript, where one is available, is a way of ensuring that the evidence is recounted accurately in the jury room rather than recalled from memory. Likewise, the contemporaneous examination of an exhibit will give a jury a much greater appreciation for the evidence and ensure that the relevance of the exhibit is better comprehended.

It should be pointed out that juries are not to be provided with copies of tapes of children's evidence following the decision in *R v NZ* [2005] NSWCCA 278; (2005) 63 NSWLR 628 where evidence in chief of a child witness was given by playing a videotape.

Recommendation 3: Conduct periodic surveys of juries (by the Bureau of Crime Statistics and Research at 2 yearly intervals) to ascertain their needs and identify shortcomings that impede their understanding of the trial process.

Recommendation 4: Review the existing *Evidence Act* 1995 provisions relating to the admissibility of documents (ss 48, 50) to prove the facts stated therein, with a view to facilitating proof by summaries, charts, schedules and the like. Consideration should be given to extending the application of s.50 to witness evidence. As it is likely that the process for amendment of the *Evidence Act* 1995 will be complex, these provisions should initially be included in the *Criminal Procedure Act* 1986 and the question referred to the Standing Committee of Attorneys-General (SCAG) for consideration of introduction into the Uniform Evidence Law.

Conduct of counsel

The impact of the conduct of counsel on the efficient running of criminal trials has long been recognised by the courts. In 1974, the High Court commented on a trial that ran for 11 days:

> "Its length was out of all proportion to the nature and difficulty of the issues which should properly have arisen for determination. It needs to be stated clearly and explicity that counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable." [121]

Similar comments were made in *Giannarelli v Wraith*[122], a case in which the issue on appeal was whether a barrister was negligent with respect to the representation of his clients who were tried and convicted of perjury. Mason CJ noted that the public policy justification for a barrister's immunity from liability in negligence was that there was otherwise a real risk that some barristers would become mere agents of their clients to the detriment of the administration of justice. Mason CJ stated:

[121] *Richardson v The Queen* (1974) 131 CLR 116 at p.123
[122] (1988) 165 CLR 543

> "…a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court."[123]

Not only can the conduct of counsel directly impact on the length of a trial, but the attitude of the profession will have profound impacts on the success of any attempts made to increase trial efficiency in other areas. This has been observed in other jurisdictions, for example the failure of the *Crimes (Criminal Trials) Act* 1993 (Vic) and the initial failure of the *Criminal Procedure and Investigations Act* 1996 (UK).

Not all members of the Working Group accepted that the conduct of criminal trials by some members of the legal profession created difficulties. However most, including members of the judiciary, believed that several matters related to practitioner conduct may often lead to significant inefficiencies in trials.

The issues identified included cross-examination by counsel which was repetitive and did not serve a genuine purpose in the trial. Such cross-examination sometimes continued for hours, or in some cases, even days. One of the members has published on the issue in these terms:

> "Any judge, if really honest, would admit that a significant proportion of court time is wasted time; too often, counsel on either side spend inordinate amounts of time examining or cross-examining on matters that never end up being the subject of any addresses or submissions.
>
> We should consider giving judges more extensive powers to prevent counsel on either side from engaging in fruitless, pointless or unduly repetitive examination or cross-examination or overly lengthy or repetitive submissions or addresses. At the moment,

[123] *Giannarelli v Wraith* (1988) 165 CLR 543 at p.556

> despite some recent changes the law, trial judges are still loath to pull up counsel for fear of appellate intervention."[124]

It was suggested that sometimes these time-wasting practices could be attributed to incompetence, while other times they appeared to be borne of tactical considerations. The issue of competence of defence counsel is primarily the responsibility of Legal Aid which funds the provision of counsel for most indictable matters. The Working Group recommends that panels of competent counsel be created in an attempt to overcome these problems. The panel should comprise solicitors and barristers and their performance should be constantly reviewed.

Existing legislation provides trial judges with the authority to disallow certain questions in cross-examination. Section 275A of the *Criminal Procedure Act* 1986 requires a court to disallow a question put to a witness in cross-examination if the question is:

a. misleading or confusing;

b. unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;

c. put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

d. has no basis other than a sexist, racial, cultural or ethnic stereotype.

It is the view of the Working Group that s.275A is inadequate to address the kind of cross-examination which gives rise to the Group's concerns. Section 275A focuses on questioning that involves misconduct (for lack of a better term) on the part of the cross-examining counsel more serious than mere time-wasting or irrelevant questioning.

It was also suggested by some members of the Working Group that some defence practitioners, either through incompetence or for other unacceptable reasons unnecessarily put the Crown to strict proof and raised fallacious legal arguments. The tendency of trial judges in Australian jurisdictions to tolerate such conduct has been observed by a practitioner from England, who noted that defence arguments that would be dismissed in a matter of minutes by English judges were routinely entertained in Australian courts, and that

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[124] M. Tedeschi, *Criminal law and social change in Fiji: Lessons from two criminal trials,* (2007) 81 ALJ 661

repeated defence failures to comply with time limits which would be met with personal cost orders against English Barristers were routinely tolerated or ignored in Australia.[125]

No empirical study of these issues has been conducted in Australia. However a study of jurors conducted by the New Zealand Law Commission found that jurors considered the presentation of evidence to be unsatisfactory because of the way in which counsel, and particularly defence counsel, conducted their case.[126] For example, the studies found questioning by counsel often described as "poor", "difficult to follow", "confusing" and "fumbling", as a result of which jurors found it difficult to determine where the lines of questioning were going or what they sought to achieve.[127] Members of the Working Group, and in particular the judicial members, believed these criticisms were appropriate to some counsel in New South Wales.

Rule 42 of the NSW Barristers' Rules provides as follows:

"A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:-

a) Confine the case to identified issues which are genuinely in dispute;

b) Have the case ready to be heard as soon as possible;

c) Present the identified issues in dispute clearly and succinctly;

d) Limit the evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and

e) Occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case."

There was consensus amongst the Working Group members that the Bar rules were not enforced. It was also observed that frequently breaches of Rule 42 were not being reported. It was suggested by some members that it is difficult for judges to make complaints against

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[125] M. Norman, *Common law? Prosecuting at the Bar of England and Wales: An International Comparison,* Conference of the Australian Association of Crown Prosecutors, Adelaide 5 July 2006

[126] NZ Law Commission, *Juries in Criminal Trials*: *Part Two*, *Volume 2,* (1999) Preliminary Paper 37, para 3.13

[127] Ibid

counsel, particularly in the District Court, as it may disqualify them from presiding over matters in the future that are being conducted by those counsel.

It is nevertheless the view of the Working Group that when misconduct by counsel occurs, judges should be encouraged to report the matter to the Bar Association.

The Working Group also considered whether judges should have the authority to place time constraints on opening and closing addresses by counsel. It is understood that some judges do this on an informal basis. The Working Group acknowledged that from time to time there can be problems with incompetent or inefficient counsel who take an unacceptably long amount of time addressing the jury. However, the view of the Working Group was that this problem would be a difficult one to manage by way of legislation. Instead, and as will be seen below, the Working Group focused on the pre-trial identification of issues, which can reasonably be expected to have direct effects on more manageable and efficient criminal trials. If this proves not to be the case, then the option of empowering judges to set time limits for opening and addresses can be revisited at a later date.

Recommendation 5: Judges should be encouraged to refer breaches of the Bar Rules by counsel appearing before them to the NSW Bar Association.

Recommendation 6: That Legal Aid NSW –

a. Create a panel of solicitors for District Court (general crime panel) and Supreme Court (serious crime panel) work and that all practitioners undertaking legally aided work be bound by and subject to audit against minimum practice standards for the conduct of work in those jurisdictions.

b. Consider, in consultation with the NSW Bar Association and Law Society of NSW, the creation of a panel of barristers to be briefed in District Court and Supreme Court trials of the kind that currently exists for Court of Criminal Appeal and High Court matters.

Identification of the issues at trial

Unlike in civil proceedings, criminal trials do not have a system of pleadings to define the issues. From the prosecution there will be the indictment and the Crown Prosecutor's opening address at the start of the trial. From the defence, there will often be little beyond a declaration that the accused is not guilty. As a result, in many cases it is not until after the jury has been empanelled and the trial commenced that any discussion of the issues can take place. Indeed, in some criminal trials the real issues in dispute may not become apparent until after the close of the prosecution case.

The inefficiencies that can arise from the failure to identify the issues to be determined at trial are obvious, including an increased likelihood that evidence of little or no ultimate relevance will be called. A less obvious, but equally important effect of the failure to narrow the issues is the impact on the ability of the judge to manage the trial. It has already been mentioned that a significant inefficiency of the criminal justice system is the lack of adequate legislative authority enabling judges to curtail irrelevant cross-examination or repetitive legal argument. However, even if such authority were to be introduced, it would be impossible for judges to exercise that authority if the relevant issues have not been identified before the trial.

Related to the failure of parties to define the issues at trial is the calling of non-contentious witnesses. The Commonwealth DPP (CDPP) identified the calling of non-contentious witnesses as a significant contributor to trial inefficiency. These witnesses include those who are being relied upon to support surveillance evidence or to establish the continuity of evidence. This concern was shared by the Working Group which also expressed the view that the prosecution sometimes 'over proved' cases by calling repetitive evidence or evidence of very marginal importance. To some degree this is attributable to the increasing size of police briefs, which in turn reflects the increasing complexity of forensic and other evidence. This increasing complexity only heightens the need for careful management of the trial process given its impact on the length of trials and on the trial experiences of jurors.

As discussed in Part 2, attempts have been made in a number of other jurisdictions to address some of these concerns, predominantly through some form of pre-trial disclosure. Similar attempts have been made in NSW with the passing of the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001.

Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001

The *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001 was introduced to improve the system of pre-trial disclosure in NSW. The Act amended Part 3 of the *Criminal Procedure Act* 1986 which sets out the procedure for trials. Division 3 of that Part established a pre-trial case management regime for complex trials. The legislation imposes an obligation upon the prosecution in every criminal trial to settle and present an indictment within four weeks of committal for trial. This obligation is subject to extension of the prescribed time by regulation, rules of court or by order of the relevant court.

An indictment may not be amended after it is presented without the leave of the court or the consent of the accused. After the indictment is presented the court may order both the prosecuting authority and the accused person to undertake pre-trial disclosure where the court is satisfied that the case falls within the definition of a "complex criminal trial." Sanctions may be imposed for non-compliance with pre-trial disclosure requirements. A sentencing court has a discretion to reduce the sentence imposed on a convicted person having regard to the degree of pre-trial disclosure made by the defence.

Police officers investigating alleged indictable offences have a duty to disclose to the Director of Public Prosecutions (DPP) all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person. The legislation also changed the requirement for the giving of an alibi notice from 10 days after committal for trial to no later than 3 weeks prior to trial.

The view of the Working Group

As already noted, the Standing Committee on Law and Justice considered that the gateway provisions that a case must pass through before being classified as a complex case may have been responsible for the small number of pre-trial disclosure orders, and recommended amendments to the legislation. These amendments were made in 2007. There was a consensus among those making submissions to the Committee that the general trend toward increased length and complexity of criminal cases may give rise to more disclosure orders.[128] However, the Office of the DPP has advised that no applications have been made

[128] Standing Committee on Law and Justice, Report 26, p.30

to the District Court for pre-trial disclosure orders since the beginning of 2006, and that, anecdotally, very few, if any, applications would have been made in the period 2004-05.

While it has only been four years since the Committee's review, and the 2007 amendments have only been in force for a short time, the Working Group is firmly of the view that, without further legislative reform, the pre-trial disclosure provisions will remain largely unused.

Other existing pre-trial practices

In addition to the amendments noted above effected by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act* 2001*,* the Working Group discussed alternative, less formal methods of case management which are currently applied in some NSW courts.

The Working Group noted that in Parramatta District Court, Judge Ellis applies an informal system of case management where he actively manages criminal matters from arraignment, generally resulting in criminal trials proceeding more smoothly.

Mention was also made of the District Court Practice Note on Country Circuit lists. Following this Practice Note the District Court has instituted a telephone callover system which applies in most country venues. On the first Wednesday occurring one month after committal, all parties are required to participate in a telephone conference, at which the prosecution will be encouraged to settle the charges, the defence will be encouraged to determine what the issues are to be at trial, and both parties are encouraged to explore what issues can be resolved before trial. The Practice Note makes it clear that the maximum utilitarian benefit for a plea of guilty (and consequently, the maximum discount for the plea) will be gained where the plea is notified during the telephone callover.

However, the focus of the Working Group is to consider issues affecting the efficient running of criminal trials in NSW as a whole, and there are doubts as to whether these systems could be applied on a much wider scale. The Working Group observed that the system employed at Parramatta is dependent on the size of the court and the comparatively small number of practitioners appearing before that court. It was identified that Judge Ellis is acquainted with all of the local practitioners, and this in large part contributed to the success of the system. Similarly, the telephone callover system employed in Country Circuit lists could not be practicably applied state-wide. It is significant that certain Country Circuit venues based in larger population centres are excluded from the application of the Practice

Note. For these reasons, the Working Group considers that a more formal solution is necessary.

Options for reforming the pre-trial disclosure provisions

The objects of the existing Division of the *Criminal Procedure Act* 1986 dealing with pre-trial case management remain valid. However, the combined experience of the Working Group indicates that the existing provisions need to be expanded to ensure the efficient disposition of trials in NSW. A number of strategies are proposed to encourage pre-trial preparation by the parties and discussion of issues well in advance of the trial.

As noted above the current pre-trial disclosure regime in Part 3 Division 3 of the *Criminal Procedure Act* 1986 extends to a criminal trial only if the court concludes that it will be a complex trial based on one or more stipulated matters. The order may be made either on the court's own initiative or on application of either of the parties (s.136(3) *Criminal Procedure Act* 1986). The Working Group agreed that the existing threshold test unnecessarily restricts those matters which could potentially fall within the scope of the provisions. The Working Group proposes that the existing provisions be amended to:

- impose disclosure obligations that do not require a court order;
- make the regime for court-ordered disclosure more generally available in criminal proceedings;
- refocus the requirements of defence disclosure; and
- permit binding pre-trial rulings on evidence.

The amendments proposed by the Working Group extend the pre-trial case management provisions of the *Criminal Procedure Act* 1986 to those cases which can be shown to require case management. In such cases, the provisions will impose disclosure obligations on the defence to require identification of those parts of the prosecution case that are in dispute and the prosecution evidence that will be the subject of an objection. Powers will be conferred on the court to make pre-trial rulings based on such disclosure. The amendments will not impose an obligation on the defence to disclose its case, although in many instances disclosure of those aspects of the prosecution case that are disputed will reveal the defence case. It was the view of the Working Group that the early identification of the issues and evidence in dispute are effective means of addressing the identified problems in the conduct

of trials. Where a case does not justify formal pre-trial management there should be a legislative power in the judge to require the defence to disclose the matters in dispute on the first day of the trial.

A suggested form of legislation reflecting the proposed pre-trial model was drafted by Stephen Odgers and is attached as Annexure "A" to this Report. However further detailed consideration will be required of the appropriate form of any legislation during the drafting process.

The proposed pre-trial model

a) Notice of Intention and exchange of information

It is proposed that the *Criminal Procedure Act* 1986 be amended to insert a requirement that in all matters (that is, without any requirement for a court order):

- When the prosecution files the indictment (s.129 of the *Criminal Procedure Act* 1986 i.e. within 4 weeks of committal for trial), the prosecution must also file and serve a prosecution disclosure document that will:

    a. satisfy the requirements of the current s.138 in respect of prosecution disclosure (which requirements currently are only imposed where there has been a court order for pre-trial disclosure);[129]

    b. identify the prosecutor proposed to appear at trial (or, if no decision in that regard has been made, identify a Crown Prosecutor who can resolve issues with the defence). The purpose of this requirement is to encourage the early

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129 Section 138 requires the notice of the case for the prosecution to contain "(a) a copy of the indictment, (b) an outline of the prosecution case, (c) copies of statements of witnesses proposed to be called at the trial by the prosecutor, (d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecutor, (e) if any expert witnesses are proposed to be called at the trial by the prosecutor, copies of any reports by them that are relevant to the case, (f) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness, (g) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may be relevant to the case of the prosecutor or the accused person, and that has not otherwise been disclosed to the accused person, (h) a copy of any information, document or other thing in the possession of the prosecutor that is adverse to the credit or credibility of the accused person"

briefing of counsel by the prosecution and to identify a representative who is in a position to properly discuss issues with the defence; and

c. indicate whether the prosecution intends to adduce evidence in summary form (for example, surveillance / continuity / telephone interception / listening device or other similar evidence may be usefully reduced to a written summary or chart). This requirement is intended to encourage an early consideration of the way the prosecution is to present evidence at trial and substantially reduce the length of trials.

- The defence will be required within 28 days of the service of the prosecution disclosure document to file and serve a defence response that will:

  a. identify the legal representative proposed to appear on behalf of the accused at trial;

  b. specify which witnesses are required for cross-examination at the trial;

  c. give notice of any consent that the accused proposes to give at the trial under s.190 of the *Evidence Act* 1995 in relation to the admission into evidence of witness statements or documentary summaries; and

  d. comply with the current requirements for defence notice of alibi (s.150) and defence notice of intention to adduce evidence of substantial mental impairment (s.151).

These timeframes reflect the maximum amount of time, not a minimum. They are not intended to provide parties with an excuse to delay their matters from going to hearing.

It is important to note that the requirement to identify the prosecutor who will appear at the trial, or a Crown Prosecutor with sufficient seniority to resolve issues with the defence, will require a significant revision of current briefing practices. Where Crown Prosecutors are briefed late in the process, information is lost, different views can be taken on the evidence, and the availability of the Crown for fruitful discussion with the defence is reduced. No meaningful discussion can occur with the defence until a Crown Prosecutor has been briefed. This is a significant contributor to inefficiencies as highlighted by the 2000 BOCSAR

report on trial case processing.[130] More importantly, no mechanism for facilitating pre-trial identification of the issues can be expected to succeed unless counsel for both sides are appointed sufficiently in advance.

The matter will then be listed before the court. Estimates of likely trial length will be given and, in most cases, a date for the beginning of the trial set if this has not already occurred. Both parties will be required to confirm that the compulsory disclosure has occurred and, in most cases, no additional pre-trial case management will be required. Even if the compulsory disclosure has not occurred, the court may proceed to trial without further management.

Alternatively, non-compliance with the compulsory disclosure requirements, or a view that further disclosure is required in the particular circumstances[131], may lead the court to conclude that a higher level of court-ordered case management is required.

The aim of each of the procedures is to ensure that the parties and the court are fully cognisant of the facts and legal issues by the time the jury is empanelled. This is considered critical if trials are to run efficiently. It is important therefore that judges in all criminal trials, at the commencement of the trial, be given a statutory power to ensure that the parties have identified the issues in dispute.

b) Higher level case management

The court may, on the application of a party or on its own initiative, order:

- a pre-trial conference (**see Option 1 below**); and/or
- pre-trial disclosure under an amended version of the pre-trial case management provisions of the CPA (**see Option 2 below**).

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[130] D. Weatherburn and J. Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, NSW Bureau of Crime Statistics and Research, 2000, p.27

[131] It may be that the content of the notices puts either the parties or the court on notice that there are issues which, in the interests of the proper administration of justice, require the court's intervention

Option 1 – Pre-trial Conference

Experience to date suggests that effective and timely case management is difficult to achieve and that the early participation of both parties is critical to its success. Having identified this as the central issue, consideration was given to the possibility of a pre-trial conference as a means of bringing the parties together to address and resolve case management issues.

Whilst criminal case conferencing is only in a pilot stage in NSW it has achieved significant cultural change and the concept, which only a few years ago was unfamiliar to most practitioners, is now more widely accepted. Clearly the focus of criminal case conferencing is quite different to expected outcomes in case management after committal. However, this is an opportunity to build on practitioners' familiarity with the process.

If it becomes apparent to the court that the parties need to attend a pre-trial conference in order to resolve outstanding issues, then the court can make that order. Such a pre-trial conference is not designed to decide matters regarding the guilt or innocence of the accused. Rather, the idea is to encourage a fair and expeditious trial. The pre-trial conference should be used to attempt to agree such matters as what evidence is to be admitted at trial and what witnesses will be called to testify. The pre-trial conference would be held within 14 days of being ordered.

After the conference, the parties will be required to file a form indicating areas of agreement or dispute. If the parties confirm that agreement on the issues has been achieved then the form is placed on the court file and only becomes relevant at trial if one party departs from it.

If the parties inform the court that they cannot resolve the issues then the matter may require more intensive case management (see Option 2 below). However, it is not intended that the pre-trial conference would be a prerequisite to the application of the amended pre-trial case management scheme. In some cases it will be clear that there will be little to be gained by the exercise and it will be more efficient to move immediately to the pre-trial case management scheme in the *Criminal Procedure Act* 1986. On the other hand, the pre-trial case management scheme will not exclude the possibility of the parties attempting to resolve issues by agreement in a concurrent pre-trial conference.

Option 2 – A Pre-trial Case Management Scheme

The current threshold test ("a complex criminal trial") to enliven the case management provisions of Division 3 of Part 3 of the *Criminal Procedure Act* 1986 is too high. It is

proposed that the test should allow the provisions to be invoked where it is “in the interests of the administration of justice” to do so. In practice, the pre-trial case management scheme will apply:

- after a failure to comply with the compulsory notice provisions;
- after a failed pre-trial conference; or
- in any case where the issues require, in the view of the court, more intensive court intervention.

In relation to court-ordered prosecution disclosure, no additional obligations may be imposed over and above the requirements of compulsory prosecution disclosure. The prosecution will not be required to re-do anything already done. However, the court may order disclosure to accommodate those situations where there is an issue about the prosecution’s compliance with the compulsory requirements.

As regards court-ordered defence disclosure, the court may order disclosure of a range of matters including:

- compliance with the requirements of a defence response under compulsory disclosure;
- disclosure of factual matters in dispute;
- disclosure as to whether any proposed evidence disclosed by the prosecutor will be objected to and the basis for the objection;
- disclosure of issues regarding surveillance / continuity / telephone interception / listening device or other similar evidence; and
- disclosure of any report, relevant to the trial, that has been prepared by an expert witness the defence proposes to call at the trial.

It is the view of the Working Group that court-ordered defence disclosure of those aspects of the prosecution case that are in dispute, along with court-ordered defence disclosure of objections to prosecution evidence, is the most pragmatic and effective solution to the issue

of trial efficiency. It is not proposed to impose an obligation on the defence to disclose its case, although in many instances disclosure of those aspects of the prosecution case that are disputed will indirectly reveal the defence case.[132] However if, upon later review, it is concluded that the suggested changes have not achieved a satisfactory outcome this matter should be reconsidered.

It is further proposed that the court may:

- dispense with formal proof of a fact that is alleged by the prosecution and not disputed by the defence;
- allow evidence to be adduced by the prosecution without compliance with the requirements of the *Evidence Act* 1995 if the evidence was disclosed to the defence and the defence did not give notice that the evidence would be objected to;
- make binding pre-trial rulings on evidence in all cases (see discussion of s 130A of the *Criminal Procedure Act* 1986 below); and
- permit a party to adduce a summary document of the evidence of a witness where admission of the summary would not result in unfair prejudice to any party (see discussion below).

Conferring these new powers on the courts will allow them to take advantage of the enhanced disclosure regime and ensure that the focus of the criminal trial is on issues and evidence that are really in dispute.

Section 130A of the Criminal Procedure Act 1986

Section 130A of the *Criminal Procedure Act* 1986 states that a pre-trial order made by a judge in sexual offence proceedings is binding on the trial judge in those proceedings unless, in the opinion of the trial judge, it would not be in the interests of justice for the order

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[132] Some members of the Taskforce consider that imposition of an explicit obligation on the defence to disclose the defence case conflicts with the fundamental accusatorial system of criminal procedure in this country: *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 at [22] – [28]; *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 at [34]; *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285 at [9] – [10], [52], [191]; *MWJ v R* [2005] HCA 74; (2005) 80 ALJR 329 at [41]

to be binding. This provision was introduced by the *Criminal Procedure Amendment (Sexual Offence Case Management) Act* 2005. As noted in the Second Reading Speech:

> "This bill proposes amendments to the Criminal Procedure Act 1986 to provide that a pre-trial order made by a judge is binding on the trial judge if the proceedings relate to a prescribed sexual offence that is dealt with on indictment. In circumstances where a new trial is ordered or later trial proceedings commence following the discontinuation of an earlier trial, a pre-trial order also will be binding on the trial judge hearing the fresh or later trial proceedings.
>
> Delay in criminal proceedings, in particular sexual assault trials, is always a concern. Delay can cause secondary traumatisation of complainants, who prepare themselves to give evidence on each occasion the matter is fixed for trial. The delay may be caused by legal and procedural issues not determined prior to the hearing date. That is particularly traumatic in sexual assault cases, where there may be multiple offenders or multiple victims. The proposed legislation will serve to minimise the stress and trauma of giving evidence for these witnesses, and is part of the ongoing process of reform in relation to improving the process surrounding sexual assault prosecutions for complainants".

When s.130A was introduced it was limited to sexual assault procedings on the basis that it would be trialed with a view to extending it to all trials if it proved to be effective. The rationale behind this amendment is equally applicable to all criminal trials which involve witnesses and victims.

Aside from sexual assault matters, rulings on the admissibility of evidence, and procedural matters by a judge other than the trial judge are not currently binding on the judge who presides over the trial. This may result in the re-ventilation of matters that have been determined at a prior hearing by a different judge. Not only does this increase the length of a subsequent trial considering issues that have already been determined by another judge, it provides additional opportunities for appeal. The intent of the recommendations in this Report is to put all parties in a position to better understand the issues at trial. As a result practitioners will be put on early notice of the issues that are to be determined and judges given an understanding of them prior to the commencement of the trial. All parties will as a result be put in a better position to identify, argue and resolve pre-trial issues in a timely fashion. It would be counter productive to allow the existing practice of re-ventilating such issues to remain.

The Working Group is of the view that given the improved identification and understanding of the issues generated by these proposals, any pre-trial rulings made by a judge in a trial should bind the judge ultimately hearing that matter. This will require an extension of the existing rule applying to rulings in sexual assault trials to all criminal trials.

Summaries of the evidence of witnesses

The courts may currently permit evidence to be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given (s.29(3) *Evidence Act* 1995). Further, evidence of the contents of two or more documents may be given in the form of a summary if the court is satisfied that "it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question" (s.50 *Evidence Act* 1995). It is proposed that a court should be able to permit a party to adduce a summary document of the evidence of a witness or witnesses where admission of the summary would not result in unfair prejudice to any party in the proceedings. Such a power would be particularly useful in respect of prosecution evidence of, for example, surveillance witnesses or continuity witnesses, where there is no real dispute regarding the evidence which those witnesses give. Even if there is some dispute, admission of a summary would facilitate understanding of the areas in dispute. The summary could be admitted without affecting the right of the defence to cross-examine any witness whose evidence is in dispute. It may be expected that considerable improvements will be made in trial efficiency without any danger of unfairness, so long as the court is satisfied that admission of such a summary would not result in unfair prejudice to any party.

The proposed provision should, ideally, be introduced into the *Evidence Act* 1995. However, the uniform nature of that legislation with other jurisdictions (the Commonwealth, ACT, Tasmania and, soon, Victoria) means that the process of amendment would be laborious. It is proposed that the new provision be included in the *Criminal Procedure Act* 1986 for the time being.

Continuity of staff

The Working Group identified that the inability to brief Crown Prosecutors within the Office of the DPP early gave rise to significant inefficiencies. It was often the case that more senior lawyers had carriage of matters in the Local Court during the committal phase, but then handed the matter over to more junior lawyers to prepare for the trial stage and it was some time before a Crown Prosecutor was able to be briefed.

As noted above, no meaningful discussion can occur with the defence until a Crown Prosecutor has been briefed, and pre-trial case management cannot be expected to succeed without counsel being briefed sufficiently in advance of the trial.

The current briefing practice of the NSW Office of the DPP is to brief as soon as a trial date is set down. However, for a number of reasons, including resourcing, this may not in practice occur. This does occur, particularly in the most serious of matters, however in practice, quite frequently a Crown Prosecutor is not briefed until much closer to trial.

The Office of the DPP noted that following committal all matters are allocated to a Pre-Trial Unit (PTU). This Unit consists of Crown Prosecutors who review and consider each matter that is committed for trial to the District or Supreme Court. The Crown Prosecutors in the PTU have an obligation to ensure that the indictment is a document that alleges *"such charges as the Crown on the existing state of facts believes can be proved beyond reasonable doubt".* At this early stage issues can be resolved between the defence and the DPP or pleas can be accepted. It was however indicated by the Office of the DPP that the Crown Prosecutors in the PTU did not bind the Crown Prosecutor ultimately running the trial. The DPP has advised that if defence counsel are in a position to enter meaningful discussions on the proposed conduct of the trial during the period between arraignment and trial, arrangements can be made for the matter to be allocated to a Crown Prosecutor for the purpose of negotiations.

Sanctions

Adverse comment

A capacity for adverse comment exists in some of the jurisdictions, most notably Victoria and the UK, as a sanction for the failure to comply with disclosure requirements. Whether it has actually been utilised as a sanction is another matter.

It has been anecdotally accepted by the Working Group that the sanction has never been employed in Victoria, for two reasons. First, it appears that the profession in Victoria universally complies with court orders relating to trial management, without the need for a sanction. Secondly, the judiciary are wary of using adverse comment, as there are significant problems in framing such comments in a manner that does not distract the jury from a proper consideration of the evidence.

The situation appears to be similar in the UK. The *Criminal Justice Act* 2003 (UK) removed the requirement, in certain situations, that leave of the court be sought before a party may make adverse comment in reference to a failure to comply with disclosure provisions. The impact of this amendment on the usage of adverse comments is not yet known. However, as

of 2004 there appears to have been only one reported decision dealing with the conditions under which an adverse comment can be drawn from non-disclosure.[133] This would suggest a similar reluctance on the part of the UK judiciary to utilise such comments as sanctions. The perceived reluctance of the UK judiciary to order the amendment of non-compliant defence case statements[134] lends support to this suggestion.

Other than the difficulty of adequately framing such comments, a fundamental problem with the use of adverse comment as a sanction is that it may have the effect of unduly punishing the defendant for a failure that may lie with his legal representative.[135]

The Working Group does not support the use of adverse comments as a sanction for failures to comply with disclosure requirements.

Late service of material by the prosecution

The Working Group considered the sanctions, if any, that should be imposed if the prosecution failed to meet the timeline for disclosure. The Working Group recognised that the prosecution failing to disclose material in a timely manner could be a significant problem, one which in some cases could seriously disadvantage the accused. Accordingly, some members of the Working Group held the view that in such circumstances there should be a statutory prohibition on the prosecution adducing evidence outside the accepted timeframes without the leave of the court. Ultimately, the Working Group recognised that the trial judge has the discretion to refuse admission of evidence tendered outside the approved timeframes if it would unduly prejudice the accused. The model proposed above focuses on the mechanism for a court managed process which will enable disclosure at an early stage. It is the view of the Working Group that the issue of prosecution compliance with disclosure timetables should be reviewed 2 years after the introduction of any legislative changes arising from the recommendations of this Report. If, after that review, problems become apparent in relation to prosecution attitudes towards the late disclosure of evidence, then it may be necessary to introduce a statutory prohibition applying to those circumstances.

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[133] Redmayne, *Criminal Justice Act 2003: Disclosure and its Discontents,* (2004) Crim L.R. 441, p.445

[134] J. Plotnikoff and R. Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law,* Home Office: London, 2001 p.137

[135] Redmayne, *Criminal Justice Act 2003: Disclosure and its Discontents,* (2004) Crim L.R. 441, p.446

Recommendation 7: Amend the *Criminal Procedure Act* 1986 to provide for three tiers of case management:

- compulsory prosecution and defence disclosure of specified matters in all criminal trials;
- the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and
- intensive pre-trial case management on the application of the parties or by initiation of the court.

Statutory powers should be conferred on the courts to make directions concerning the conduct and management of the trial.

Recommendation 8: Statutory power to be conferred on the courts to require the parties in all criminal trials to identify the issues for determination in the trial.

Recommendation 9: Amend the *Criminal Procedure Act* 1986 to enable a party to adduce a summary document of the evidence of a witness or witnesses where admission of the summary would not result in unfair prejudice to any party.

Recommendation 10: Extend the existing rule in section 130A of the *Criminal Procedure Act* 1986 which allows a pre-trial ruling made by a judge in a sexual assault matter to bind a trial judge in all criminal trials.

Recommendation 11: Briefing of Crown Prosecutors, Public Defenders and trial advocates sufficiently in advance of the trial date to allow for participation by that counsel/advocate in pre-trial management proceedings.

Appeals against interlocutory orders (s.5F)

Section 5F(3) of the *Criminal Appeal Act* 1912 permits any party to criminal proceedings on indictment in the Supreme and District Courts to appeal to the Court of Criminal Appeal

against an interlocutory judgment or order made in those proceedings, provided that the Court of Criminal Appeal gives leave to appeal, or the trial judge certifies that the judgment or order is a proper one for determination on appeal.

Significant issues relevant to trial efficiency can arise from the use of s.5F appeals. While the necessity of making provision for such appeals is beyond question, their use can have a significant impact on the timely running of trials in the originating court. The impact is increased where such appeals are misused.

The potential for misuse of such appeals has long been recognised. The Second Reading Speech for the *Criminal Appeal (Amendment) Act* 1987 which inserted s.5F into the *Criminal Appeal Act* 1912 noted that the proliferation of similar appeals to the Court of Appeal[136] had resulted in a significant disruption to the criminal justice system, with many instances of the procedure being abused. These abuses included applications with no merit being made on the first day of the trial, with the intention that upon the application being refused the decision would be appealed to the Court of Appeal, causing the trial to abort. In extreme circumstances, it was thought that these tactics were being used to engage in a form of judge-shopping.[137] It was also recognised that regardless of whether applications were made on genuine or spurious grounds, such appeals could lead to trial dates being vacated on short notice and juries that had already been empanelled for the trial being discharged. It was no doubt intended that the requirement under s.5F that the Court of Criminal Appeal must give leave to appeal would prevent the misuse of the procedure.

The impact of s.5F appeals on the timely running of trials can be seen in the case of *R v Natoli.*[138] An application for leave to appeal under s.5F was brought before the Court of Criminal Appeal at a stage in the District Court trial where the closing address of the Crown concluded and the closing address of the defence had commenced. The trial had been briefly adjourned in order to allow the application for leave to appeal to be heard, the application relying on a series of complaints about various aspects of the way the District Court trial had been conducted.

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[136] Until the insertion of s.5F, appeals against interlocutory judgments or orders in the District Court were made to the Court of Appeal under s.48 of the *Supreme Court Act* 1970

[137] Legislative Assembly, Second Reading Speech, *Criminal Appeal (Amendment) Act* 1987*,* 17 November 1987, p.16087, Mr Sheahan (Attorney General)

[138] *R v Natoli* [2005] NSWCCA 292

The application was ultimately refused, with the Court of Criminal Appeal noting that it would not interfere with the progress of a first instance trial without wholly exceptional circumstances. However, the timing of the application in the case illustrates the significant potential for s.5F appeals to disrupt criminal trials.

While the Working Group recognises the potential for s.5F appeals to substantially disrupt the efficient running of trials, the requirement that the party seeks leave to appeal allows the Court of Criminal Appeal considerable control over spurious applications. It is true that even where the Court of Criminal Appeal refuses to grant leave to appeal, the time between commencement of a s.5F appeal and final disposal at the Court of Criminal Appeal can often extend over several weeks. However in most cases where required the court is able to accommodate the urgent disposition of a s.5F appeal. The relatively small number of s.5F appeals recorded,[139] when contrasted with the volume of matters prosecuted at the District Court level, suggests that such appeals do not represent an unacceptable risk to the efficient running of criminal trials as a whole.

Technology

The impact of courtroom technology issues on trial inefficiencies cannot be underestimated. While individual technology-related issues may not have as significant an effect on the efficient running of a trial as other issues discussed in this chapter, cumulatively, their effect on trials can be immense. Further, unlike some of the previously discussed issues which will only arise with certain types of trials or with certain counsel, problems related to technology have the potential to apply to far more cases.

Although this is far from a definitive list, technological issues that can contribute to delay include:

- untrained court staff;
- lack of technical competence of the party presenting electronic evidence;
- poor picture or sound quality of material produced;

[139] There were approximately 61 s.5F appeals made to the Court of Criminal Appeal between February 2007 and June 2008, several of which appear to have been made on behalf of co-defendants in related criminal proceedings

- availability of equipment;
- compatibility issues related to electronic evidence being produced in formats that are not compatible with available courtroom technology; and
- VideoLink evidence and accused's participation.

The playing of electronic evidence is the shared responsibility of the party adducing the evidence, the Court and the Courtroom Technology Group (CTG) of the Attorney General's Department. Standard in-court equipment provided by the CTG is generally adequate for playing Electronically Recorded Interviews with Suspected Persons (ERISPs). The Office of the DPP indicated that where other types of electronic evidence needed to be played, such as CCTV footage, it provided its own laptops for court use, which would be connected to the fixed in-court equipment. Problems frequently arose in such situations as there is no common standard format for CCTV, requiring the correct software to be installed on the laptop in order to play the footage. As representatives of the Office of the DPP and court staff generally lacked technical training, they were often unable to resolve software issues if the appropriate software was not correctly pre-installed on the laptops, leading to delays. The issue of court staff lacking technical training was not only relevant to this particular problem. The Working Group identified that the lack of technical competence of many court officers and other court staff was a systemic problem.

The quality of the footage is also relevant. The courtroom equipment does not enhance the sound or picture quality of the material produced. Trials are delayed where the sound and picture quality of the material to be replayed at trial has not first been tested on the relevant replay equipment. This is of particular relevance to material provided to the Office of the DPP by investigative agencies.

Where evidence, particularly from an overseas witness, is given by VideoLink, the attendant delays, interruptions and scheduling difficulties affect trial efficiency. While the high cost of VideoLink evidence means the evidence is generally only used in matters where the witness is reluctant to enter Australia, its usage in criminal trials is likely to increase in the future, and when combined with the problem of the lack of technical proficiency of court staff is likely to contribute to significant delays.

Some improvements could be gained in this area by increasing the technical training provided to court officers and support staff. In order to emphasise the minimum technical proficiency expected of court officers, and to ensure that court officers employed by the Attorney-General's Department in the future meet a requisite standard, the position

descriptions of court officers should be reviewed to ensure that operation of courtroom equipment is a required competency. Continuing technical training should be provided to existing court officers in operating the new and evolving courtroom technology to help them meet the new standard. However, given the nature of the technical problems affecting modern courtrooms, it may be necessary to supplement any such measures with a dedicated professional attached to a number of courtrooms, to be available on call during the running of criminal trials.

Evidence requiring electronic equipment is being tendered by a number of different agencies. Meanwhile, the technology used in the presentation of evidence is evolving. Rather than merely reacting to such developments, there is a need to focus on how to streamline and maximise the use of technology. There is also a need to anticipate likely technological requirements in the future. This is not to suggest that the Department should attempt to predict future developments in technology. Rather, the goal should be to anticipate the technological requirements of the various agencies and how to react to those needs. There must also be a communication mechanism so as to allow stakeholders in the criminal justice system to remain aware of the court's capacity to meet those needs. Technological resources can vary from courtroom to courtroom, and technological needs of participants in the justice system can be equally varied. Therefore, it is of great importance to avoid delay between matching needs to resources; the two should be matched before the commencement of a trial.

In order to achieve these aims, the Working Group recommends that the Attorney-General's Department should hold meetings of relevant agencies at predefined intervals in order to identify likely future technological requirements for trials. This will facilitate the early planning of funding and allocation of equipment. In addition, the Department should compile information on the technological capacity of all criminal trial courtrooms in NSW, with this information made available to all court users via the internet.

A practice note should be issued dealing with the presentation of electronic evidence, and include a requirement that where a party proposes to present electronic evidence that cannot be replayed on the available courtroom equipment, the party be required to make arrangements with the court for the party to supply, install and test the technology supplied by them prior to the commencement of the trial. Such a practice note exists in the Supreme Court jurisdiction and consideration should be given to reviewing and adopting this so a standard approach can be taken across all jurisdictions. This will reduce inefficiencies and maximize the use of technology as practitioners and the judiciary will become increasingly familiar with one single set of requirements.

Regular meetings of relevant agencies such as the police and the Office of the DPP should assist in anticipating medium to long-term technological needs. It is also necessary to match technological resources to requirements in the short-term, on a trial-to-trial basis. To facilitate this, participants in criminal proceedings should be required to submit for the approval of the court the hardware and software requirements for the trial within a set timeframe before the trial.

It was also noted by the Working Group that practitioners are not provided with sufficient opportunities to test electronic evidence and the equipment that will be used to present that evidence before the trial. It may be necessary to provide parties in trials with access to courtrooms outside sitting times, so that evidence can be tested and prepared for presentation in advance. A requirement that participants to proceedings advise the court of their technological needs will also enable the testing of the requisite equipment in advance of the trial.

While standard equipment is available in courtrooms, the same does not apply to jury deliberation rooms. This causes problems when a judge has directed or permitted the jury to view electronic evidence in the jury deliberation room. The Office of the DPP indicated that these needs were addressed on an ad hoc basis, with neither it nor the CTG being adequately resourced with the equipment and staff required to meet jury deliberation room needs. Again, greater communication regarding technological requirements between the various agencies should, over an intermediate period of time, help to address the resourcing limitations currently experienced in relation to the jury deliberation room to enable them to respond to directions when they are made.

It is acknowledged that the compatibility issues associated with various formats for electronic evidence are not easily fixed, and is currently the focus of attention from various agencies involved in the administration of justice. While the problem exists, however, it is important that as much information be provided to practitioners as is possible on the required standards on the nature and manner of presentation of electronic evidence, and the known issues related to compatibility.

Recommendation 12: Attorney General's Department to convene meetings of relevant agencies, including the Police and the DPPs at appropriate intervals to identify likely future technological requirements for trials to facilitate planning of funding and equipment.

Recommendation 13: Attorney General's Department to conduct an audit of technology and technological capacity for all criminal trial courtrooms. This information should be available to NSW courts and online to all court users.

Recommendation 14: Practice notes should require the parties to proceedings to submit for approval to the court, advice of the technological requirements (both hardware and software) for the trial. The submission should be made no later than 20 working days before a trial is to commence. The list of hardware and software should indicate who is to provide it (e.g. in terrorism matters the equipment is supplied by the Commonwealth).

Recommendation 15: The position descriptions of court officers should be reviewed to ensure that the operation of courtroom technology is a required competency.

Recommendation 16: Court officers should be given ongoing training to ensure that they can meet the technology requirements of their role.

Recommendation 17: A single standard procedure should be developed for all NSW courts to require technology to be tested in location within 2 working days of a hearing.

Annexure A

Criminal Procedure Act 1986:

Division 3 Pre-Trial Disclosure and Case Management

134 The purpose of this Division is to enable the court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in criminal trials

135 Definitions

In this Division:

"court" means the Supreme Court or District Court.

"pre-trial disclosure requirements" means requirements for pre-trial disclosure imposed in accordance with this Division.

136 Prosecution disclosure

(1) On presentation of the indictment in any criminal proceedings, the prosecutor is to give the accused notice of the prosecution case.

(2) Notice of the prosecution case must include the following:

(a) a copy of the indictment,

(b) identification of the prosecutor proposed to appear at the trial,

(c) an outline of the prosecution's case that sets out the facts, matters and circumstances alleged in the prosecution case,

(d) a copy of a statement of a witness whose evidence the prosecutor proposes to adduce at the trial,

(e) a copy of any document, evidence of the contents of which the prosecutor proposes to adduce at the trial,

(f) If the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or outline of any summary to be prepared,

(g) a copy of, or access to, any other exhibit the prosecutor proposes to adduce at the trial,

(h) a copy of any chart or other explanatory material the prosecutor proposes to adduce at the trial,

(i) a copy of any report, relevant to the trial, that has been prepared by an expert witness whose evidence the prosecutor proposes to adduce at the trial,

(j) a copy of any information, document or other thing in the prosecutor's possession that would reasonably be regarded as relevant to the accused's case or the prosecutor's case and that has not otherwise been disclosed to the accused,

(k) a list identifying:

(i) any information, document or other thing not in the prosecutor's possession that would reasonably be regarded as containing evidence that is relevant to the accused's case; and

(ii) for each item of information, and each document or other thing, a place where the prosecutor believes the item, document or thing to be,

(l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused.

137 Defence disclosure

Within 28 days of the presentation of the indictment in any criminal proceedings, the accused is to have given the prosecutor notice of the following:

(a) identification of any legal representative proposed to appear at the trial on behalf of the accused,

(b) notice as to any consent that the accused proposes to give at the trial under section 190 of the Evidence Act 1995 in respect of:

(i) a statement of a witness whose evidence the prosecutor proposes to adduce at the trial, and

(ii) a summary which the prosecutor proposes to adduce at the trial,

(c) if at the trial the accused proposes to adduce evidence in support of an alibi — notice of alibi in accordance with [current s.150],

(d) if at the trial the accused proposes to adduce supporting evidence that the accused was suffering from a mental impairment (within the meaning of section 23A Crimes Act 1900) — notice of particulars of that impairment in accordance with [current s.151].

138 Disclosure requirements are ongoing [see current s.141]

139 Court may waive requirements [see current s.142]

140 Requirements as to notices [see current s.143]

141 Copies of exhibits and other things not to be provided if impracticable [see current s.144]

142 Personal details not to be provided [see current s.145]

143 Requirements as to statements of witnesses [see current s.146]

144 Exemption for matters previously disclosed [see current s.147]

145 Pre-trial hearings

(1) After the indictment is presented in any criminal proceedings, the court may order the prosecutor and the accused to attend one or more pre trial hearings before the court.

(2) the court may make an order under subsection (1) on application by a party or on the court's own initiative.

(3) During a pre trial hearing, the court may make orders and determinations for the efficient management and disposal of a trial on the indictment.

(4) Without limiting subsection (3), the court may do any or all of the following under that subsection:

(a) hear and determine an objection to the indictment,

(b) make an order under s.146 (pre-trial conference),

(c) make an order under s.147 (pre trial disclosure),

(d) determine the admissibility of evidence,

(e) give a ruling or make a finding in relation to a question of the kind specified in s.192A Evidence Act 1995, as if the trial had commenced,

(f) hear and determine a submission that the matter should not proceed to trial for a reason not mentioned in a preceding paragraph of this subsection,

(g) rule on a matter of law that may arise during a trial on the indictment.

(5) If a trial on the indictment starts, an order or determination under subsection (3) applies for the trial unless the court is satisfied that to follow the order would be contrary to the interests of justice.

(6) If a matter covered by paragraph (4)(a) or (f) was not raised during pre trial hearings for an indictment, the matter cannot be raised during the trial unless the court is satisfied that to not allow the matter to be raised would be contrary to the interests of justice.

146 Court may order pre-trial conference

(1) After the indictment is presented in any criminal proceedings, the court may order that a pre-trial conference be held within 14 days of the order to be attended by:

(a) an officer of the prosecutor [see definition under s.3 of the Criminal Procedure Act 1986] and

(b) the accused's legal representative.

(2) The court may order a pre-trial conference only if the court is satisfied that the accused will be represented by an Australian legal practitioner.

(3) The purpose of the pre-trial conference is to determine whether the accused and the prosecution are able to reach agreement regarding the evidence to be admitted at trial.

(4) Within 7 days of the conference, the prosecution is to file in court a pre-trial conference form indicating areas of agreement and disagreement regarding the evidence to be admitted at trial.

147 Court may order pre-trial disclosure

(1) After the indictment is presented in any criminal proceedings, the court may order both the prosecutor and the accused to undertake pre-trial disclosure if the court is satisfied that it is in the interests of the administration of justice.

(2) The court may make an order under subsection (1) on application of any party or on the court's own initiative.

(3) The court may order pre-trial disclosure only if the court is satisfied that the accused will be represented by an Australian legal practitioner.

(4) For the purposes of the pre-trial disclosure requirements, a reference to the accused is to be read as including a reference to the Australian legal practitioner of the accused.

(5) The court may limit pre-trial disclosure to any specified aspect of the proceedings.

(6) Pre-trial disclosure is to be made as follows:

(a) the prosecutor is to give the accused notice of the prosecution case in accordance with sub-section 136(2),

(b) the accused, after having been given notice of the prosecution case, is to give the prosecutor notice of the defence response in accordance with section 148.

(7) Pre-trial disclosure is to be made in accordance with a timetable determined by the court.

148 Defence response

The defence response is to contain the following:

(a) a statement setting out, for each fact set out in the outline of the prosecution's case:

(i) that the accused agrees that the fact is to be an agreed fact for the purposes of section 191 of the Evidence Act 1995 at the trial, or

(ii) that the accused takes issue with the fact,

(b) a statement setting out, for each matter and circumstance set out in the outline of the prosecution's case, whether the accused takes issue with the matter or circumstance,

(c) notice as to whether the accused proposes to object to the admission of any proposed evidence disclosed by the prosecutor and the basis for the objection,

(d) notice as to any consent that the accused proposes to give at the trial under section 190 of the Evidence Act 1995, including in respect of:

(i) a statement of a witness whose evidence the prosecutor proposes to adduce at the trial, and

(ii) a summary which the prosecutor proposes to adduce at the trial,

(e) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(f) notice as to whether the accused proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(g) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(h) notice as to whether the accused proposes to dispute the authenticity of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(i) notice of any significant issue the accused proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges;

(j) any consent that the accused proposes to give at the trial under section 184 of the Evidence Act 1995;

(k) if at the trial the accused proposes to adduce evidence in support of an alibi— notice of alibi in accordance with [current s.150],

(l) if at the trial the accused proposes to adduce supporting evidence that the accused was suffering from a mental impairment (within the meaning of section 23A Crimes Act 1900) — notice of particulars of that impairment in accordance with [current s.151],

(m) a copy of any report, relevant to the trial, that has been prepared by an expert witness whom the accused proposes to call at the trial.

149 Trial disclosure

Any order that might be made by a court pursuant to s.147 in respect of pre-trial disclosure may be made during a trial.

150 Dispensing with formal proof

(1) If a fact, matter or circumstance was alleged in the notice of the prosecution's case and the defence response did not take issue with the fact, matter or circumstance, the court may order that:

(a) a document asserting the alleged fact, matter or circumstance may be admitted at the trial as evidence of the fact, matter or circumstance; and

(b) evidence may not, without leave of the court, be adduced to contradict or qualify the alleged fact, matter or circumstance.

(2) If evidence was disclosed to the accused and the accused did not give notice pursuant to subsection 148(c) in respect of the evidence, the court may order that any one or more of the provisions of:

(a) Division 3, 4, 5 of Part 2.1;

(b) Part 2.2 to 2.3;

(c) Parts 3.2 to 3.8;

in the Evidence Act 1995 do not apply to the evidence if adduced at the trial.

(3) The court may direct that a party may adduce evidence of 2 or more witnesses in the form of a summary if the court is satisfied that:

(a) the summary is not misleading or confusing; and

(b) admission of the summary instead of evidence from the witnesses will not result in unfair prejudice to any party.

(4) The court may make it a condition of a direction under sub-section (3) that one or more of the witnesses be available for cross-examination.

(5) The opinion rule in s.76 Evidence Act 1995 does not apply to evidence adduced in accordance with a direction under sub-section (3).

151 Sanctions for non-compliance with pre-trial disclosure requirements

(1) The court may refuse to admit evidence in any criminal proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with pre-trial disclosure ordered under section 147.

(2) The court may order that a party not be allowed to adduce evidence from an expert witness at the trial if the party failed to give the other party a copy of a report by the expert in accordance with section 147.

(3) The court may grant an adjournment to a party (the first party) if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with pre-trial disclosure requirements and that would prejudice the first party's case.

(4) Without limiting subsection (5), the powers of the court may not be exercised under this section to prevent an accused adducing evidence unless the prosecutor has complied with the pre-trial disclosure requirements.

(5) The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).