Report of the

Trial Efficiency Working Group

Criminal Law Review Division

www.lawlink.nsw.gov.au/clrd

Table of Contents

Table of Contents 2

Executive Summary 5

- Juries 5
- Managing the trial 6
- Conduct of counsel 7

Part 1: Introduction 9

History 9

Terms of Reference 10

Recommendations 12

Part 2: NSW and approaches in other jurisdictions 15

Delay and NSW – significant improvements 15

Causes of Inefficiencies 17

- Juries 17
- Conduct of counsel 18
- Identification of the issues 18
- Presentation of evidence 18
- Technology 19
- Other 19
- A recent example 19

Approaches to criminal procedure in NSW and other jurisdictions 20

- History 20
- NSW - Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001 24
- Review of the Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001 28
- Victoria – Crimes (Criminal Trials) Act 1999 31
  - Case management 32
  - Prosecution disclosure 33
  - Defence disclosure 33
  - Sanctions 33
- South Australia – Criminal Law Consolidation Act 1935 35
  - Notice to admit facts 35
  - Defence disclosure 35
  - Expert evidence 36
- Western Australia – Criminal Procedure Act 2004 37
  - Prosecution disclosure 37
  - Defence disclosure 38
  - Sanctions 38

United Kingdom ... 39
Criminal Procedure and Investigations Act 1996 (UK) ... 39
Prosecution disclosure ... 41
Defence disclosure ... 42
Pre-trial hearings ... 43
Evaluation of the UK disclosure provisions ... 45
Prosecution disclosure ... 45
Defence disclosure ... 46
Judicial attitudes ... 47
Criminal Justice Act 2003 (UK) ... 47
Criminal Justice and Immigration Act 2008 ... 49
United States ... 50
Canada ... 51
Sanctions ... 52
New Zealand – New regime resulting from the *Criminal Procedure Bill* 2008 (NZ) ... 52
Preliminary hearings ... 52
Prosecution disclosure ... 53
Defence disclosure ... 54
Non-party disclosure ... 54
Judge-only trials ... 56

Summary of Approaches ... 57

Part 3: Causes of Delay in NSW and Possible Solutions ... 58

Juries 58
Jury issues contributing to trial inefficiencies ... 58
Discharge of the jury ... 58
Recent reviews and amendments ... 59
Recent amendments ... 62
Recommendations ... 65
The jury's comprehension of the issues at trial ... 67

Conduct of counsel ... 70

Identification of the issues at trial ... 75
Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001 ... 76
The view of the Working Group ... 76
Other existing pre-trial practices ... 77
Options for reforming the pre-trial disclosure provisions ... 78
The proposed pre-trial model ... 79
a) Notice of Intention and exchange of information ... 79
b) Higher level case management ... 81
Option 1 – Pre-trial Conference ... 82
Option 2 – A Pre-trial Case Management Scheme ... 82
Section 130A of the Criminal Procedure Act 1986 ... 84

Summaries of the evidence of witnesses 86
Continuity of staff 86
Sanctions 87
Adverse comment 87
Late service of material by the prosecution 88

Appeals against interlocutory orders (s.5F) 89

Technology 91

Annexure A 96
Criminal Procedure Act 1986: 96
Division 3 Pre-Trial Disclosure and Case Management 96

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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

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