A Case for Abolition

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The criminal justice system that exists today is broadly the same as that inherited from the British. It is recognised that it is evolving continually to adapt to local conditions and requirements. However, it is becoming obvious that the criminal procedures currently in place are in part responsible for the significant delays experienced in the disposition of criminal proceedings.

Initiatives have been taken in the past to reform our system of criminal justice administration in the interests of fairness and efficiency. This trend needs to continue if we are to remain in touch with the needs of the community at large. Many of these reforms have taken the form of attempting to reduce court delays by streamlining procedures and improving case management.

The committal hearing constitutes a substantial part of the caseload in the lower courts. Consequently it needs to be the subject of constant procedural review and reform in the interests of continuing efficiency.

It is appropriate to consider the place of the committal proceeding in contributing to the delays which an accused person currently faces while awaiting trial. One of the resolutions passed by the Australasia and South West Pacific Police Commissioner's Conference in 1988 was:

> That the conference supports any strategies by jurisdictions which would overcome delays associated with committal and superior court proceedings.

To operate efficiently, a criminal trial system must not allow itself to become locked into procedures appropriate to an earlier era.

Initially it will be necessary to state several points:

- there are problems with the present system;
- solutions are available; and that
- the proposals recommended are practical, appropriate and necessary.

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1. This paper was researched and prepared by Sergeant S. M. Wood, Administrative Law Branch, Australian Federal Police.

I do not propose to suggest that we turn the criminal process upon its head but rather to push the concept that some changes can be successfully introduced without wreaking havoc with hallowed traditional ideals.

The objective of this paper is to assist in persuading those operating within the existing criminal judicial system of the desirability of adopting new approaches. Any potential changes in the system will require the investment of substantial effort and commitment by all involved.

It is crucial to develop a climate of efficiency. Because of the time and cost consumed by trials and committal proceedings, there is pressure from government to exercise control and reduce the overall expense of this process.

Willis (1984) stated that:

> the tight budgets allocated to criminal justice demand the best use of those resources . . . there is a clear and pressing need for a thorough reappraisal of the whole committal process.

The prime aim of the courts is justice. The legal system needs to be reminded that it is as accountable as any other publicly funded system as to the time and funds it expends to carry out its functions.

To make significant progress in the direction of shorter, cheaper trials, it is necessary to change the attitudes of the people who operate within the system. Those involved must be made aware that there are serious difficulties existing within the system and that steps must be taken to deal with them. Money and effort expended in reducing unnecessary court time is a healthy community investment.

The value and protection of the rights of the individual bestowed by common law may well be eroded unless serious endeavours are embarked upon to reduce the length and cost of the criminal trial process. Steps must be taken to eliminate wastage in time, effort and costs by achieving fewer delays at the pre-trial stage.

The Victorian Shorter Trials Committee in its *Report on Criminal Trials* (Victorian Bar Council 1985), found that there is an imbalance in the amount of time devoted between the pre-trial deliberations and the trial itself. The area of the pre-trial was found to provide the greatest scope for economies in time, effort and resources.

In another part of the same report the Committee went on to say:

> There is no simple way of shortening the time taken by trials. Reduction will come from the combined effect of a number of changes in different areas . . . People realise that in the conditions of today, many of the approaches, practices and procedures appropriate to criminal trials in earlier centuries have the effect of producing a cumbersome, inefficient and ineffective trial system.

Historical Perspective

The early English trials were shorter than today due to several reasons:

- the proximity of the trial to the time of the offence which maintained fresh recall of events by the witnesses;
- the pre-trial process consisted of a justice who interrogated the accused and witnesses which eliminated all inconsequential testimony;
- there were no legal representatives to offer legal argument or cross-examination;
- the accused spoke in his own defence; and

- the judge gave brief instructions to the jury.

The preliminary hearing before the trial is derived from the same historical origins. These hearings were originally held in private. The accused could be questioned without being informed of his rights. He had no right to legal representation and was not allowed to hear what the witnesses had to say.

We like to think we have progressed somewhat from those times. This system has been modified constantly over the years to the form of committal hearing in use today. The view is to ensure that the rights of the individual are protected in the process. Recently this system has attracted further criticism from law reform bodies and other legal authorities.

Justice Murphy J noted in *Barton v. R*, (1980) 32 ALR 449 that:

> the desirability of committal proceedings in modern times is doubtful . . . . it would be much better to abandon committal proceedings and to protect an accused by discovery than to allow trial by jury to be undermined further.

While dramatic changes have occurred over the years to provide us with the current system, changes equally dramatic, have occurred in the nature and complexity of the cases coming before the courts to be tried. Accordingly, there has developed a more involved and sophisticated approach to the conduct of the criminal trial to cope with these trends.

One result is the greatly increased cost of operating the criminal justice system. Another is the increased time consumption of the proceedings. Current developments indicate that this trend toward more complicated cases is going to continue.

Some of the effects of longer trial waiting lists are:

- deterioration of evidence/memory fade;
- prolonged stress on victims of crime;
- unnecessary stress on the accused;
- reduction in deterrent effect of the justice system;
- leniency in sentencing, that is, delays included in penalty;
- inconvenience to witnesses;
- loss of respect for the justice system by society; and
- tendency to rely more on plea bargaining.

Committals Currently

The primary purpose of the committal proceeding is to provide a 'filter' to ensure that no-one stands trial unnecessarily. Its function is to ensure that the defendant is only required to stand trial when a prima facie case has been established against him.

The tests to be applied are:

- the magistrate, after hearing the evidence for the 'prosecution' must be of the opinion that a jury will be satisfied beyond a reasonable doubt that the accused has committed the offence; and

- after hearing the evidence for the 'defence' he should commit the accused for trial unless he or she believes that a jury would not be likely to convict the accused of the offence.

These tests are applied after the Director of Public Prosecutions (DPP) has assessed the available police brief of evidence and determined whether the accused has a case to answer. Thus the first 'filter' stage to sort out the matters which should not proceed is in effect the DPP This area involves some duplication of functions between the DPP and the magistrate.

Coopers and Lybrand W. D. Scott in their report indicated that in New South Wales the average time taken from committal to trial in the Supreme Court was nine months for persons in custody and 12 months for those on bail. The delays in the District Court were even longer. The same report further identifies a lack of adequate case flow management as one of the principle causes of that delay. Shortly after the release of this report, the New South Wales Attorney-General's Department proposed reforms to the justice system in that state.

Both the Coopers and Lybrand (1989) and the New South Wales Attorney-General's (1989) reports recommended replacing the existing committal procedure. The Attorney-General's report recommended that the New South Wales Director of Public Prosecutions be given a greater role in determining whether a matter should go to trial, while Coopers and Lybrand proposed better screening by the prosecution with more emphasis on early discovery and greater use of the 'hand-up brief'. Both reports went on to recommend the adoption of plea bargaining and a system of pre-trial hearings to make preliminary orders. The Attorney-General's report also offered proposals for automatic pre-trial disclosure by both prosecution and defence.

The second purpose of committal proceedings is to test the strength of the prosecution witnesses' evidence.

It is unfortunate that committal proceedings are frequently referred to at the trial for the sole purpose of pointing out discrepancies between the evidence provided by witnesses at the committal and that given by them at the trial. While differences are likely to occur occasionally, they are generally insufficient to affect the jury and can be effectively discounted. Unfortunately this is one area that attracts a disproportionate amount of attention by some counsel who become involved in protracted cross-examination of witnesses which provides little or nothing to assist the jury.

This cross-examination is often used as a 'dress rehearsal' for the actual trial. The process is frequently misused for purposes unrelated to determining whether the accused should be committed or not. The defence conducts exhaustive cross-examination without restriction, as any answer which may be unfavourable will not be heard by the jury. The witnesses are subjected to deliberate aggressive questioning techniques which may not be permitted before the jury and occasionally cause some witnesses to refuse to attend the trial to avoid a repeat performance. While this practice attracts criticism and is discouraged by some magistrates, it persists.

The accused, if legally represented, is presented with proportionally increased costs. A large number of defendants either appear unrepresented or engage legal representation at substantial financial cost to themselves. Effective legal representation is only available in direct proportion to the users' capacity to pay.

The introduction of a system of legal aid has had a large influence on the cost and duration of committal proceedings. The present availability of legal aid is probably one of the greatest contributions towards civil liberties in Australia in recent times. However, its limited availability means that new approaches are necessary to ensure the trial system works efficiently. It is apparent that unfair advantage is provided to some certain sections of the community by this facility.

Accused persons paying for their own legal defence have a strong financial incentive to minimise their legal costs by efficient use of resources. Where the cost of the defence comes from the public purse, that incentive is no longer present. One by-product has been to remove financial incentives to shorten the time taken by the judicial process in some cases.

In view of the Summary Court's workload and the ever-increasing backlog of matters to be heard, magistrates could be better utilised in presiding over these matters. The police investigators are tied up with lengthy court appearances and are unavailable for important investigation duties. Witnesses are inconvenienced and must attend to give evidence which they have already provided in written statements and may be required to present again at some future date before a jury at the actual trial.

Considerable media publicity has been attracted to committal proceedings in many instances, sometimes to the extent of creating difficulty in locating jury members unbiased by preconceptions gained from misguided and sensationalist media coverage.

The third purpose of the committal hearing is to provide the accused with the opportunity of calling evidence to rebut the prosecution case. It is common for this process to be retained by the defence until the actual trial, to avoid being countered by the prosecution.

The need for the accused to go through a committal proceeding is a major contributor to the extensive delay from the time a charge is actually laid against a person to the time that person arrives before a jury.

In the Australian Capital Territory, the Director of Public Prosecutions in his *Annual Report* of 1987-88 described the current situation as:

> a continuing source of concern in the Australian Capital Territory are court delays, particularly in the Magistrate's Court.

Average times between committal and trial are quoted as:

persons in custody: 3.38 months

persons on bail: 6.28 months.

The same report provides a table indicating the number of persons dealt with on indictable matters for all states. Out of a total of 189 defendants actually committed for trial during the period indicated, only 144 were convicted, which indicates that about 23 per cent of those matters were unsuccessful. The suggestion is that the committal as a 'filter' is particularly inefficient if this proportion should perhaps not have gone to trial stage at all.

More recently, Mr C. Crowley, a past President of the Australian Capital Territory Law Society, in September 1989, drew attention to the serious situation developing in the Australian Capital Territory (Crowley 1989). He pointed out that at that time the delay between committals and trial for accused persons had reached a record high of more than 9.5 months for those on bail and 3.4 months for those in custody. It is obvious that this situation is continuing to deteriorate.

One particular problem peculiar to the Australian Federal Police is dealing with Commonwealth offences interstate and having to fight for lower court time and space in direct competition with the local state jurisdiction's requirements. Perhaps there is need for a separate court system for Commonwealth offences.

The Australian Capital Territory has recently set up a consultative committee presided over by the Chief Magistrate which meets to discuss the specific problem of court delays in the Australian Capital Territory The facility of the 'case status inquiry' has been implemented with the full cooperation of police and prosecutors. These fulfil the role of a directions hearing well before summary and committal hearings. These are generally set for a date about six weeks before each court hearing. Representatives of both prosecution and defence are required to attend and be in a position to provide the court with whatever

relevant information or material the court requires to monitor the progress of any particular case.

After the accused is committed for trial, the judge operates a system of directions hearings which follow after the present committal hearing. At such hearings the judge puts questions to both prosecution and defence with the view to determining the principle points contested and to eliminate debate on matters not pertinent to the case.

While this situation has assisted in clarifying issues and providing an early warning system to the parties of the issues to be contended, it does not prevent further extensive debate over aspects of the witnesses and their evidence at the trial itself. It also goes to support the submission that the committal itself is not successful in screening out the contentious issues at an earlier stage. While it may control the flow up to the committal, it does not have the necessary effect of diminishing the duration of the committal itself or the practices that flourish therein.

In Hong Kong, a committal hearing is conducted for a limited number of serious indictable offences only. There may be deficiencies in a scheme which determines whether to hold a committal on the basis of the nature of the offence alone. The decision on the need for a committal hearing is vested entirely within the discretion of the Director of Public Prosecutions when considering if a particular matter should go to trial.

Japan abolished the committal proceeding prior to World War II. A Public Prosecutors office was established similar to our DPP and it is the responsibility of this office to determine if there is sufficient evidence to support prosecution. The Public Prosecutor if so satisfied, issues an indictment which is then served on the accused. The matter then progresses direct to trial without a preliminary hearing.

The main thrust of this submission is that it is possible for the accused to retain the benefits and protection currently afforded by the committal procedure without incurring the substantial delays inherently attached to the present cumbersome system. There are simpler and more efficient methods of filtering out cases that should or should not proceed to trial than by the present laborious scheme.

Mr Justice Wilson in part of his retirement speech (1984) stated:

> A number of jurisdictions have followed the English precedent in placing the responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having status equivalent to a judge. Other jurisdictions will follow suit. This development should render the committal proceeding unnecessary and pave the way for its abolition.

The Director of Public Prosecutions currently reviews every criminal case whether it is tried before judge and jury or summarily. The DPP also has the present power to file an ex-officio indictment even after the accused has been discharged by the magistrate at the committal.

Further, the DPP may, even at a time after the magistrate has committed an accused for trial, offer a 'no bill' if it is determined that a particular matter should not continue to trial.

With these supervisory powers in existence, the need for the person controlling the assessment of a case for committal to be a magistrate, is further diminished. The position and responsibilities are more 'administrative' rather than 'judicial'.

The DPP should be the sole 'filter' of matters which should or should not proceed to trial. Under such a scheme, a magistrate need not be involved in the decision making process in determining whether a person should be committed for trial. The committal proceeding exists solely to deal with indictable offences and these offences form only a small part of the total number of matters handled by the criminal courts in Australia.

The committing magistrate is in an ambiguous position. Either he must be recognised as an important dispenser of legal functions or be seen as a lesser official completing tasks of minor significance. All the decisions he makes are open to being overridden or changed either by the Director of Public Prosecutions or the trial judge.

The Australian Law Reform Commission's discussion paper on the role of the Attorney-General in criminal prosecutions, raised the possibility that the determination of indictments proceeding and their prosecution should be transferred to an 'independent non-political officer'. This comment leads me to believe that this function can adequately and properly be fulfilled by the Directorof Public Prosecutions

The preferred option supported by the New South Wales Attorney-General (1989) is that the decision as to whether a person is to be committed for trial should no longer be made by a magistrate, but by the Director of Public Prosecutions.

Recent publicity has attracted considerable attention to the New South Wales Attorney-General's recently announced proposals for reforms to their judicial system along similar lines. The main thrust of those proposals is the elimination of the traditional committal hearing to be replaced by the DPP having the responsibility to determine if a matter should go to trial.

By substituting the DPP in the role currently fulfilled by the magistrate in committal proceedings, the facility to overrule or right any breach of procedure would lie with the superior court during a pre-trial review. One immediate benefit is obvious—magistrates would be freed to address the backlog of summary matters. Shortages of magistrates generally and particularly in the Australian Capital Territory, are causing extensive backlogs and delays in summary matters. This adds to the problems of obtaining court time and space for committal hearings.

There are other areas where benefits would be felt. Witnesses would not be required to give evidence on oath on two separate occasions. The situation could be avoided where some witnesses withdraw from proceedings rather than be subjected to a second stressful cross-examination. Witnesses would also appear at court with better recollection of the facts if delays were avoided.

In addition, there would be a reduced risk of a jury being exposed to adverse publicity surrounding a case prior to the actual trial. This sometimes occurs at present by the media reporting publicly the evidence given at the committal hearing.

Inadequate disclosure of the prosecution case, reluctant disclosure of known alibi by the defence, shoddy and inept cross-examination are all practices which have eroded the effectiveness of the committal proceeding and hence fuelled further argument for its abolition and replacement by more efficient administrative techniques.

The Law Reform Commission of Canada (1974) recommended abolition of the preliminary enquiry. This recommendation coupled with proposals relating to disclosure, in essence, suggested a compulsory meeting between the prosecution and defence. Their submission being that once discovery functions were fulfilled adequately there is no reason to retain the preliminary hearing.

Proponents in favour of the present system argue that a properly conducted committal hearing:

- acts as a screen against poorly based prosecutions;
- avoids needless trials;
- allows early discovery;
- provides an opportunity to cross-examine witnesses; and
- provides a forum for exploration and clarification of issues otherwise to be determined during the trial.

Although emphasis is placed on the need to protect the defendant, it should not be overlooked that both sides have an interest in avoiding unnecessary proceedings. Each side must learn how to improve its case. The prosecution is given a chance to judge the reliability

of its witnesses and to discover weaknesses in its case. The defendant is given the opportunity to hear and test the Crown case.

The British Home Office and Lord Chancellor's Department Consultation Paper on the Future of Committals (1989) predicts the demise of committal proceedings on the basis that they are expensive and ineffective. Cases triable on indictment would go directly to the Crown Court. Should the defence challenge this, the resultant hearing in the Magistrates Court would be on the basis of written submissions and witness statements only, except under exceptional circumstances determined by the magistrate. The aim is to provide greater speed and economy, whilst protecting the defendant and filtering out weak or minor cases. The same proposals involve the transfer of power from the Magistrate's Courts to the Crown Prosecutors.

While the committal proceeding or preliminary hearing is an established part of our present criminal justice system, nowhere is there a statutory provision that requires this as an obligatory stage in the indictable proceeding.

Fox J. in the matter of *R v. Kent, ex parte McIntosh* (1970) 17 FLR 65 at 88 stated:

> Nothing is expressed in any of the legislation about the need to have preliminary proceedings. The fact appears to be, as pointed out in several cases, that whether or not there are preliminary proceedings is a matter of practice. This certainly seems extraordinary in view of the elaborate provisions made everywhere for and concerning preliminary proceedings.

Alternative Proposals

This paper has spent some time drawing attention to some of the ongoing shortcomings of the present system. I will now to move on to some of the alternatives available, being potential replacements for the committal proceeding in its present form as a preliminary hearing, and further, cover some other methods and practices which have the potential to contribute considerable savings in time, effort and costs over the present system.

The disposal of the committal proceeding necessarily involves consideration of other pre-trial procedures to replace or modify the committal function. There are ways other than the committal proceeding to achieve the objectives of enabling the accused to know and test the prosecution case, to review the decision to prosecute and to eliminate undisputed issues. The objective is to reduce the delay in bringing the proceeding to a final result and minimise the cost of the whole process. The legal profession, understandably, has a self-interest to protect and may resist what it sees as a potential threat to its role or livelihood.

Time Limits

The imposition of time limits before which an accused person is to be indicted has little to recommend it. The courts have available adequate 'abuse of process' powers that are sufficient to avoid any situation whereby the need for a specific mandatory time limit needs to be imposed by enactment. Time limits are not a tool to oblige the system to operate when there are more satisfactory alternatives available which if utilised appropriately would eliminate any need for any imposed time limit.

The process I propose consists of a prescribed path from charge to trial. Such a system must remain flexible to meet any of a multitude of variable conditions and circumstances which may occur within any particular matter under consideration. These should include:

- a system of pre-trial reviews presided over by a judge;

- electronic recording of interviews;
- the use of the 'hand-up brief' in all indictable matters;
- extensive pre-trial disclosure;
- plea negotiation; and
- election to trial by judge alone.

Pre-Trial Review

The idea of pre-trial review is not new or complex. It involves a prescribed mechanism for assessing the whole process leading up to the trial. It may be formal or informal and may be held at a variety of points in the pre-trial stage of the criminal process. This review is a procedure for determining the state of the preparation already put into a particular matter and is designed to be able to provide an indication of the readiness to proceed at any particular time. The judiciary has a necessary involvement in chairing these hearings as ours being an adversarial system, the parties to the dispute may not otherwise cooperate to the degree necessary to ensure efficient use of available resources.

This review is important as it has the potential to provide the mechanism for bringing the parties together to determine issues, make rulings and give directions with the overall view of creating a more streamlined trial process.

In New South Wales Local Courts, procedures have been introduced in the form of pre-trial conferences to identify issues and provide early discovery. The usefulness of the process has been acknowledged by the parties involved. This is similar to the case status inquiry in use in the Australian Capital Territory

Electronic Recording of Interviews

One of the areas attracting greatest challenge in the committal hearing is the authenticity of any alleged confession or admission. This aspect is generally challenged on principle by the defence and attacked at length in court. It also attracts the most allegations of impropriety by the police investigators. Considerable time at the committal and the subsequent trial is involved in contesting this issue.

A feasible method of reducing the contest of this particular aspect of the proceedings would have the potential to provide considerable savings in time, effort and subsequent cost. One such method which is available, has been in use in certain areas for some time and has been tested at court in several jurisdictions, is the electronic recording of police interviews.

For a confession or admission by a defendant to be admissible before a court it must be seen to have been made voluntarily. That does not mean that it must be volunteered. The issue of whether a confession was made voluntarily is a constant source of debate to contest or determine its admissibility. If these contested issues could be placed beyond dispute, many trials would not take place or be reduced in duration.

The predominant concern of law reform commissions and other committees has been the issues of the reliability of confessional material and fairness to the accused. A comprehensive system of electronic recording of police interviews with suspects, either audio or video, has the potential to have a marked impact on reducing current court time consumed by confrontations over the admissibility issue of confessional material.

In its series of discussion papers on Shortening of Criminal Trials in the Crown Court, the Criminal Bar Association of Victoria (1980) examined the issue of tape-recording and commented:

> It has long been the opinion of this association and indeed any objective commentator that interviews with suspects should be recorded on tape and as a result of the pace of technical developments, the tape should where possible, be videotaped. The arguments in favour of introducing such a system seem to us so overwhelming that it is difficult to understand why it has not been done.

Dr Jacqueline Tombs, head of the Scottish Criminological Research Office, indicated that the Scottish experience with tape-recording police interviews with suspects has shown considerable savings in time in the pre-trial process, most notably in relation to the number of guilty pleas tendered at an earlier stage, further reducing the number of trials within trials over the admissibility of police interviews with suspects (Victorian Bar Council 1985).

The results of her studies indicated benefits in many areas, some of those being:

- police interviews when recorded tended to be much reduced in duration;
- prosecutors found there were increased numbers of guilty pleas and that they were occurring earlier in the proceedings;
- defence lawyers felt there was less chance of abuse by police interviewers; and
- courts found the most significant benefits in that the disputes over authenticity of admissions or confessional material were dramatically reduced.

The Canadian Law Reform Commission (1984), in its working paper on Questioning Suspects, recommended a system of tape recording of all police interviews.

The Committee to Review Commonwealth Criminal Law, established by the Commonwealth Attorney-General, published an interim report in March 1989. Under the section 'Tape Recording of Police Interviews,' the committee said:

> The review committee is strongly of the opinion that the most important safeguard to ensure that questioning is properly conducted and that the results of the questioning are honestly reported would be a requirement that evidence of a confession or admission should be recorded by tape (preferably by videotape).

The same report goes on to describe the benefits of this process:

> A record of that kind protects the accused from a false claim that a confession was made and protects the Police from a false assertion that a confession was fabricated. The use of video or audio recorders will reduce the possibility of dispute regarding confessions and will be likely to considerably reduce the duration and cost of criminal trials.

There is now a very strong body of informed opinion in favour of the extensive use of tape recorders in the interviewing of suspects. Almost every law reform commission and committee which has examined the subject in recent times has endorsed the idea in principle. There is no doubt that the introduction of a system of tape recording interviews would eliminate the potential for protracted disputes over confessions and admissions and thus directly reduce the duration of the trial process.

In Tasmania, police interviews with suspects have been recorded on videotape for some time. Initial responses indicate that the process is a positive step in overcoming delays

in preliminary proceedings due to an increased tendency towards guilty pleas and a much reduced inclination to challenge the authenticity of the content. Similar trials are in practice in Queensland, however results of the effectiveness of the procedure in that state are not yet available.

The 'Hand-Up Brief'

A system presently used in the situation of a plea of guilty, is that of the 'hand-up brief' of evidence. This involves the supply of a complete copy of the prosecution case material to the presiding magistrate. This procedure is currently in practice in the Australian Capital Territory and New South Wales

The benefit of the 'hand-up brief' in this situation is twofold. The first and most obvious, is that the witnesses do not need to attend and give evidence before the trial. The second, reduces the task of assessing the evidence and determining appropriateness, to a straightforward viewing of the written material by the reviewing judge. This has the accumulative effect of creating a mechanism which can completely replace the committal hearing.

If there are any objections to any particular aspect of the evidence by the defence, it need not necessarily make it inadmissible. The relevant witness may be required to attend and be cross-examined to determine authenticity or demeanour only after a ruling by the judge according to strict necessity. The object is the reduction of court hearing time, the relief of court personnel, substantial economies to the public purse and reduced inconvenience and disruption to witnesses.

Unfortunately this process has been abused by some practitioners who routinely challenge every aspect of a case and require the attendance of all witnesses without relevance to their testimony or benefit to the proceedings. The lack of a firm hand by the judiciary has permitted this practice to continue.

Properly used in conjunction with adequate pre-trial disclosure and prior notice of issues to be contested, the 'hand-up brief' as a matter of course has the capability to contribute considerably to savings of court time.

Pre-Trial Disclosure

To conduct an enterprise as complex as the criminal trial efficiently, heavy dependence upon the amount and quality of preparation beforehand is required. The pre-trial disclosure and review procedures currently in place need to be reviewed to develop a more efficient process of dealing with the multitude of pre-trial issues which otherwise consume unnecessary amounts of the trial court's time. By looking carefully at developing better pre-trial procedures it should be possible and practical to eliminate some issues from the trial altogether.

At present, disclosure is often only achieved by entering into a lengthy committal hearing. This may take the form of an oral presentation of the evidence, a 'hand-up brief' or a combination of both. Few committals are successful in giving a clear indication to the accused of the precise extent of the case against them. There is a tendency at this time, in efforts to streamline the existing committal proceeding, for the net effect to be less disclosure being provided, thus leaving more issues to be contested at the actual trial. If the prosecution case was presented to the defence at an earlier stage and the defence was required to indicate it's defences, the committal as such would no longer be necessary.

It is consistent with the basic philosophy of the criminal trial system that the pre-trial disclosures between the parties should be the fullest possible and at the earliest opportunity. While there is a need to develop the pre-trial disclosure mechanism and introduce it at an

earlier point in the process, care must be exercised that this process does not become so cluttered and cumbersome that any efficiency achieved in the actual trial is lost by protracted pre-trial deliberations. Even though the current practice is that the crown provides a degree of disclosure, it generally occurs in a very inconsistent manner. There is a direct relationship between the extent and nature of disclosure before the trial and the efficient conduct and duration of the trial itself.

The traditional concern of the legal system in relation to disclosure has been fairness, particularly with the need to provide the accused with a fair trial. In recent times, examination of the disclosure question as a whole has increasingly focused on the potential to produce quicker, cheaper and more efficient trials by its increased usage.

The British Royal Commission on Criminal Procedure (1981) commented on pre-trial disclosure as follows:

> The prior disclosure of matters that could take up time at trial can be of great importance in securing the efficient use of resources of the police, prosecutors and the courts. Accordingly it is our view that provision should be made for the fullest disclosure possible . . . (Roberts 1984).

The present circumstances indicate that there is an unnecessarily heavy reliance on prosecutorial discretion. There is a lack of adequate guidelines or formal pressure to develop efficiency in this area. The process of isolating and dealing with the issues is largely left to the trial itself.

Prosecution disclosure needs to be formalised by the production of a clear set of systematic guidelines as to the nature of material to be disclosed by and to whom and on what basis. If advance disclosures were obligatory and automatic in all cases, the defendant would be in a position to make a better informed choice between summary hearing and jury trial. He would also be better informed to assess the likely success of the case against him and be able to determine any potential plea accordingly.

While it could be argued that any requirement by law on the process of pre-disclosure may tend to compromise the prosecution case, there is a need for the process to be clearly and explicitly set out. The desired effect would be to encourage uniformity and standardise procedures with the ultimate view of increasing the capacity to ascertain issues quickly, and determine pleas early. If the defence was required in advance of the trial to indicate the nature and extent of its defences, there is little doubt that criminal trials would be shorter and there would be fewer of them. The prosecution would be able to direct its attention to the particular issues which it knows are to be contested. In view of the onus on the prosecution to prove its case 'beyond a reasonable doubt' it is realistic to consider a slightly different criteria of disclosure for the defence to that of the prosecution.

The adversary system of trial is supposed to be a contest of approximately equal opponents, so in varying degrees, disclosure should be a two-way street.

There is a present tendency for the defence to attack on all fronts without regard to the real issues in question. A disclosure of defences early in proceedings would enable the judge to rule with the view to confining the argument to the real issues of the trial. This requirement should extend to the declaration of details of the case at the appropriate moment before the trial and should be sufficient to indicate to the prosecution if the matter is worth pursuing.

The provision of disclosure material should only be restricted where the safety of an individual is at risk or where such disclosure would interfere with the administration of justice.

It is currently a regular practice for the prosecution to approach the defence with a view to establishing which issues are to be contested. Unfortunately the frequent response is to reveal nothing of the defence approach. As a result the prosecution is obliged to present an expansive prosecution in an attempt to anticipate all possible avenues likely to be contested by the defence.

This results in the prosecution presentation being considerably longer, and in the most part unnecessary, than if the issues were restricted to those points actually requiring clarification. The net result is greater consumption of vital court time.

Should the defence raise an issue before the trial not previously indicated, the prosecution may be obliged to seek an adjournment to research the newly revealed aspect. The prosecution may also be required to call extra witnesses and or further evidence to counter the points raised. Further time wastage results. Both situations could be avoided with the defence being subject to similar disclosure rules as the prosecution with a subsequent saving of court time.

The argument may be put forward, that if the defence is obliged to disclose, then the principle that it is up to the prosecution to prove its case may be eroded. However, if the defence is not obliged to disclose and chooses not to do so, then the inference may be drawn that the defence is not inclined to have their case dealt with expeditiously.

In supporting a move to oblige disclosure by the defence, this principle may be preserved by specifying the particular nature of disclosure to be complied with. A minimum defence disclosure should include:

- designated specific areas where prosecution is to be disputed;
- the general nature of the defence tack;
- specific medical, forensic or other specialist evidence; and
- indications of alibi, excuse or other explanation.

There is a responsibility on the defence to disclose sufficient details to indicate to the prosecution whether there is a reasonable likelihood of an acquittal should their evidence be accepted by a jury. It must be apparent that if the trial can be avoided by adequate disclosure before the trial then this must be the preferred course, rather than proceeding with secret evidence with the sole view to winning a case before the jury.

A minimum prosecution disclosure should include:

- full details of the charge/indictment;
- copies of all documents/tapes which contain a record of any conversation by the accused with police or witnesses;
- copies of all witness statements taken by police;
- details of all forensic/medical and exhibit material; and
- a copy of the person's criminal record.

This proposal is designed to permit the trial to concentrate on areas of real disagreement and eliminate the majority of short notice adjournments brought about by previously undeclared situations. Without some form of obligation on the defence to disclose, the problems associated with 'surprise' evidence being presented at short notice and the resultant delays will continue.

The Scottish jurisdiction has also been addressing the issue of the high consumption of time and money involved in criminal trials. There are no committal proceedings in Scotland. As of 1980, procedures have been introduced to ensure an increase in the degree of pre-trial disclosure.

The prosecution is now required to provide the defence with a list of witnesses and exhibits. It must also provide copies of all formal statements to be tendered. The system

also provides for the prosecutor to question the accused in the presence of a judicial officer in regard to obtaining any denial, explanation, justification or comment regarding matters averred in the charge. There are restrictions on the manner of question presentation which is controlled by the judicial member.

The main benefits achieved have been to reduce the number of disputes over the admissibility of confessional evidence, the incidents of last minute guilty pleas and the number of witnesses required to attend and give evidence. This system is still under review and while it has attracted criticism as being inquisitorial, it has had the positive effect of reducing the duration of trials and pre-trial delays.

The English courts rely heavily on a system of filtering whereby a magistrate is supplied with a full 'hand-up brief' and makes his decision to commit to trial on the submitted written material alone, unless the defence makes a special submission to the contrary.

As a result, only a very small proportion of these pre-trial proceedings take the form of a full presentation of the evidence with associated cross-examination, the vast majority being content to rely on the magistrate's assessment—perhaps this says something about the quality of the English magistrates.

Under the Magistrates Court Rules (United Kingdom), an accused person is prevented from adducing evidence in support of an alibi at his trial unless he has given notice of the particulars therein at the pre-trial stage. He is required to provide that notice to the prosecution and the court.

This same English system provides the trial judge with powers to direct disclosure by the defence in certain specified serious fraud matters. While it may be considered unfair to place conditions on certain offence categories, it does indicate a trend towards measures being instituted to oblige greater disclosure in the interest of shortening the pre-trial process and the trial itself.

After publication of the paper, *Discovery in Criminal Cases*, by the Canadian Law Reform Commission (1974), Montreal adopted an experimental system in 1975. This comprised a disclosure conference between both counsel followed by a short hearing before a member of the judiciary. This system was considered to be sufficiently successful to be adopted by most other provinces. In Ottawa, this procedure is presided over by a separate disclosure court. While this style of procedure was not introduced successfully in all areas of Canada the main stumbling blocks described were due to a lack of cooperation by the legal profession.

The American Bar Association in its 1970 report, *Discovery and Procedure Before Trial*, indicated there was a necessity for a three-stage process to pre-trial procedure:

- an explanatory stage between parties;
- a procedural stage involving the rulings and directions applicable to be supervised by a member of the judiciary; and
- a trial plan supervised by the trial judge where specific rulings are made to bind both parties on issues to be contested.

The report set out a number of general principles to govern pre-trial procedure with particular emphasis on the need to oblige greater pre-trial discovery. The report also recommended considerable disclosure by the defence.

Plea Negotiation

In any particular criminal matter presented before the courts for determination, it may serve the public interest better if the certainty of a conviction for a slightly lesser or varied charge is

secured, rather than the uncertainty of a conviction of the original offence actually being obtained before a contested trial. This becomes particularly relevant when multiple charges are likely to attract concurrent penalties.

The New South Wales judicial system provides for a process of charge negotiation. The ultimate decision as to the nature of the charge lies with the Director of Public Prosecutions. The other Australian states have similar systems with charge decisions also being determined by DPPs. This process has several benefits:

- early indication of plea;
- greater likelihood of 'guilty plea';
- avoidance of some jury costs; and
- definite conviction vs likely or acquittal.

This practice needs to be controlled and operated in an open forum to prevent abuses.

The Scottish criminal justice system allows for a process of plea negotiation; in fact the practice is encouraged by a preliminary informal meeting which provides early opportunity for plea adjustment. This may take the form of negotiation with regard to:

- charge reduction;
- alternate charge;
- deletion of some charges; or
- amendment of charge wordings.

The success of this system rests heavily on the degree of cooperation between the prosecution and defence.

Election to Trial by Judge Alone

When a person is charged with a serious crime they are, under the present rules, entitled to a trial before a jury. There are distinct benefits in such a person being able to elect to have a trial by judge alone. The main benefits are:

- there is no need to instruct the jury on points of law or give directions;
- there is no risk of jury contamination by media or other influences;
- the process is much more streamlined and shorter in duration resulting in a cheaper trial; and
- the committal hearing would be unnecessary as there is no jury to mislead.

New Zealand has allowed the accused to elect trial by judge alone since 1979, other than in special cases where a judge has ruled that a particular matter is to proceed before a jury. Estimates in that country indicate that the duration of this type of trial is reduced by half compared to an equivalent jury trial.

Canada has had the right to elect trial by judge alone for more than 30 years. Estimates indicate that in that country this type of trial has been reduced in duration to about one-fifth that of a full trial by jury.

This facility has been available in New South Wales since 1979 for certain fraud offences. Indications on time savings there are not yet available.

South Australia has had this option since 1984, the only condition being that the accused must have had legal advice before making that choice.

Conclusion

There is no simple method of reducing the time involved in criminal trials and their lead-up. Change must and will come from many sources. These changes will not occur unless all parties involved are receptive to the concept in principle.

Any new system needs to be flexible enough to do the job without imposing undue restrictions. With care, we can avoid the establishment of a rigid, expensive apparatus that may have the potential to be more trouble than the existing procedures.

The legal fraternity and government agencies together need to be convinced that any new system will work or is worth trying. It is realised that because attitudes have become entrenched through the years it may be difficult to convince the profession that change is necessary and so will require the goodwill and cooperation of the whole legal profession.

A more cooperative attitude needs to be developed on the basis that greater efficiency is in the interests of all concerned. The changes recommended will involve changes in the way work is approached with those affected by any new system needing to be convinced of its value.

While not to be adopted automatically, a change which works well in one system may be adapted to another more readily, especially in the Australian community with its relatively uniform political approach that exists between the states and territories.

The intention is to set in motion a profound change in the manner of operation of Crown cases. These changes will require time, care and substantial effort.

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