STANDING COMMITTEE OF ATTORNEYS-GENERAL

WORKING GROUP ON CRIMINAL TRIAL PROCEDURE

REPORT

SEPTEMBER 1999

GROUP MEMBERS

Hon. Justice Brian Martin, Judge, Supreme Court of South Australia (Chairman)

Mr Damian Bugg QC, Commonwealth Director of Public Prosecutions

Mr Richard Coates, Director, Northern Territory Legal Aid Commission, Director, National Legal Aid

Mr Robert Cornall, Managing Director, Victoria Legal Aid

Judge Kevin Hammond, Chief Judge, District Court of Western Australia

Mr Michael Rozenes QC, Barrister, Victoria

Mr Bret Walker SC, Barrister, New South Wales

Hon. Justice James Wood, Chief Judge at Common Law, Supreme Court of New South Wales.

Contents

EXECUTIVE SUMMARY

In this report we seek to identify areas in which the existing system of the administration of criminal justice can be improved. Our work has been conducted in the context of the adversarial system and upon the fundamental premise that an accused is not to be compelled to answer questions or assist the prosecution in proving its case. We have sought in a concise manner to identify practical areas of reform which offer the greatest potential to reduce criminal trial delay while not impacting unfairly upon the right of every defendant to a fair trial.

We have identified the need for early and complete prosecution disclosure as an essential feature of the system and we recommend statutory recognition of the duty of disclosure that rests upon both prosecutors and investigators. In our view this is the first step in changing the culture currently attaching to adversarial procedure.

One of the most effective means of reducing the cost of the administration of criminal justice is to identify pleas of guilty at the earliest possible opportunity. With this aim in mind, we have recommended changes in the approach to the provision of legal aid. In our opinion legal aid should adopt a more solution-orientated approach with specific grants for pre-trial dispute resolution and capped grants of aid for trials. In addition, defendants should receive a tangible and publicly identified discount for early pleas of guilty. We have identified the Western Australian process known as the “fast track procedure” as an effective and fair way to promote this objective. Improvement in this area will only be possible if grants of legal aid and prosecution services facilitate the early involvement of practitioners with the

necessary experience and authority required to resolve matters of dispute and negotiate pleas of guilty.

In our view the Director of Public Prosecutions should be involved at the earliest possible stage. In complex matters the DPP should be involved during the course of the investigation in order to assist in focussing the investigation upon appropriate persons and charges. In matters where police lay indictable charges, the DPP should be involved at the earliest possible opportunity in the screening of those charges. All committal proceedings should be conducted by the DPP and the DPP should take responsibility for the material introduced in committal proceedings.

In the context of encouraging early pleas of guilty, we have recommended the adoption of procedures designed to facilitate the efficient transfer of those who wish to plead guilty from the lower courts to the sentencing court. This type of procedure exists in Western Australia and Victoria. Those who make use of this fast track procedure are entitled to a significant and publicly identified discount of sentence.

We have made a number of recommendations concerning pre-trial procedures. They are designed to identify facts and issues that are not in dispute and, in specific areas, to identify in advance of the trial the particular defence to be relied upon. In our opinion, those procedures should begin with a prosecution case statement. Such a statement, in conjunction with complete prosecution disclosure, places a defendant in the best possible position to make decisions as to what facts and issues are not in dispute.

As to compliance with pre-trial procedures, in our opinion the primary concentration should be upon incentives to cooperate, rather than the imposition of sanctions for non-compliance. In particular, a definitive and publicly identified scheme of sentencing discount

should be applied. Legal practitioners should be under an obligation to advise a defendant as to the consequences of both cooperation and a lack of cooperation.

Generally we support increased judicial supervision in the pre-trial and trial processes. We have also sought to emphasise, however, the important role of legal practitioners and the duty of practitioners to cooperate in the efficient administration of justice so that the time of the court is not taken up unnecessarily. We have recommended the introduction of professional conduct rules to underscore this obligation.

We believe that the proposals we have put forward have the capacity to result in significant savings and improvements to the efficiency of the system. Judges must be prepared to take a more active role and courts of appeal must recognise this increased role. There is a limit, however, to what a trial judge can do. Whatever procedures are put in place, ultimately the efficient operation of our system of criminal justice requires adequate funding and the cooperation of members of the legal profession in complying with their duties not only to defendants, but also to the court and the community.

RECOMMENDATIONS MADE IN THIS REPORT

Prosecution Disclosure

1. The prosecution obligation of disclosure should be given a statutory basis.
2. The statutory obligation should be specifically identified as applicable to both prosecutors and investigators.
3. Internal disciplinary sanctions should exist in respect of investigators who fail to comply with their statutory obligations.
4. Disclosure should be required prior to committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter.
5. Recognition should be given to the on-going nature of the obligation.
6. The obligation could be expressed in terms similar to those contained in the policy promulgated by the Commonwealth DPP.

Committal Proceedings

7. A limited opportunity for prosecution witnesses to be examined and cross-examined at committal should be retained.
8. In complex cases the DPP should be involved during the investigative process.
9. In all matters the DPP should be involved in reviewing charges laid by the police at the earliest possible opportunity.
10. The DPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal.
11. A “deposing” procedure similar to those in Western Australia and Victoria should be available to the prosecution.

12. In advance of the committal hearing the prosecution should supply to the Court and the defence a case statement outlining the acts, facts, matters and circumstances being relied upon by the prosecution. Where appropriate the case statement should also outline the manner in which the prosecution will present its case against the defendant.

13. Legal aid should be made available to all persons unable to afford legal representation facing committal on serious indictable offences as soon as possible after charge.

14. Grants of legal aid should be structured to encourage resolution of matters prior to committal.

15. Counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.

16. Both counsel should have the authority to make decisions or be able expeditiously to obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.

17. Both counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.

Encouraging Early Pleas - Fast Track Procedures

18. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and the facts constituting the offence so that the defendant can enter a plea of guilty at committal.

19. A Fast Track System modelled on the system existing in Western Australia be introduced.

20. A similar system be introduced for defendants being committed for trial who consent to the abbreviated procedure.

21. The existing system of discounts for pleading guilty be continued and strengthened by the requirement that sentencing judges publicly state in reasons for sentence what discount has been given for the plea of guilty.

22. Consideration be given to introducing a system of sentence indication.

Post-Committal Conference

23. That the concept of a conference or directions hearing soon after committal be included as part of the pre-trial procedures.

Pre-Trial Procedures

24. Compulsory pre-trial regimes under the control of the court should be instituted.

25. Specific judges should be allocated to supervising pre-trial regimes.

26. A reasonable time before the commencement of the trial, the prosecution be required to serve on the defence and file in court a case statement.

27. After the provision of the final case statement, the prosecution should not be permitted to adduce evidence additional to that disclosed by the required date, unless a reasonable explanation is provided as to why earlier disclosure was not made or the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

28. Pre-trial directions hearings be compulsory.

29. At the time of the filing and the serving of the final case statement, the prosecution be required to file and serve a notice of pre-trial admissions.

30. Following the filing and serving of the final case statement and notice of pre-trial admissions, a defendant should be required to file and serve:

    (i) a response to the notice of pre-trial admissions indicating what evidence, as set out in the notice of pre-trial admissions, is agreed to be admitted without further proof and what evidence is in issue.

(ii) notice of any matters additional to those contained in the notice of pre-trial admissions in respect of which the defendant is willing to make admissions or dispose with formal proof.

(iii) notice as to whether it is proposed to rely upon any of the following defences:

- self defence;
- substantial impairment of mental responsibility;
- automatism;
- claim of right including statutory corporate defences;
- duress (including source); and
- intoxication leading to inability to form the required intention.

(iv) All reports or statements of expert witnesses proposed to be called at trial or, if no report or statement has been obtained, the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.

(v) notice as to the following:

- Where the prosecution relies on any surveillance evidence, whether it is necessary to call all witnesses and if not, which witnesses are required.
- In respect of exhibits, whether there is an issue as to continuity.
- In respect of listening device transcripts, whether they are accepted as accurate and, if not, in what respects.
- Where charts, diagrams or schedules are to be tendered, whether there is any issue about either admissibility or accuracy.

31. The obligation on the defence should be ongoing. In particular, if after responding to the final case statement and notice of pre-trial admissions, a defendant makes a different decision with respect to relying upon a nominated defence or the calling of an expert

witness, the obligation to give notice as envisaged by recommendation 30 (iii) and (iv) exists and should be complied with as soon as reasonably practicable.

32. If the prosecution fails to comply with its obligations or seeks leave to adduce the additional evidence:

    (i) The Court should be empowered to award adjournment and incidental costs.

    (ii) The Court should more readily be prepared to grant a voir dire examination in connection with the additional evidence.

    (iii) The prosecution should only be entitled to lead the evidence if a reasonable explanation for its late production is provided or the interests of justice otherwise require that the prosecution be permitted to lead the evidence.

33. If a defendant fully cooperates and is convicted, the defendant should be entitled to a discount of sentence to be determined within the discretion of the trial judge, but to be specifically identified by the trial judge.

34. If a defendant fails to cooperate by declining to identify a specific defence relied upon at trial, the defendant should only be permitted to lead the evidence if a reasonable explanation for the failure to identify the defence during the pre-trial process is given or the interests of justice otherwise require that the defendant be permitted to lead the evidence.

35. If a defence has failed to cooperate by failing to identify a specific defence, subject to the overriding consideration of the interests of justice, the trial judge should be empowered to impose restrictions upon cross-examination of Crown witnesses.

36. If a defendant fails to cooperate in a meaningful way or only partially cooperates and is convicted, the sentencing judge should be entitled to adjust the discount.

37. A defendant committed for trial must be fully informed by counsel and the committing magistrate that a failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable.

38. Counsel should be obliged to inform the judge at the first directions hearing that the advice referred to in recommendation 37 has been given.

39. The obligation to give the advice mentioned in recommendation 37 should be included in the rules of professional conduct.

Improving the Quality and Timeliness of Trial Preparation

40. Immediately after the prosecution opening, in a prescribed form of words the trial judge should invite the defence to respond to the Crown opening and to identify issues in dispute.

41. No explanation or remarks should be addressed by the judge or the prosecutor to the jury concerning a failure by the defence to respond to the Crown opening.

42. Immediately after the defence response, the trial judge should usually address the jury for the purpose of summarising the primary issues in the trial that are likely to arise for their consideration.

43. Consideration be given to improving the capacity of a trial judge to dispense with formal proof in circumstances where the Crown has sought an admission or there is difficulty, delay or expense in leading the evidence and the balance of the interests of justice favour dispensing with formal proof.

44. The short form summing up procedure provided in Section 405AA of the New South Wales *Crimes Act 1900* be adopted.

45. All jurisdictions should adopt rules in relation to the presentation of expert evidence such as those promulgated by the Federal Court and the Supreme Court of South Australia.

46. Consideration be given to the following matters:

(i) Empowering the trial judge to impose time limits for examination and cross-examination of witnesses and for addresses of counsel. Considerable experience in this area has now been gained in the United Kingdom and the United States of America.

(ii) Greater use of agreed statements of facts and written statements of witnesses.

(iii) Ensuring that the rules of evidence permit the taking of evidence by video, including evidence from overseas. In this regard the rules of the Federal Court provide an example of how the practical difficulties can be overcome while ensuring appropriate safeguards are in place with respect to the credibility of witnesses, particularly those who give evidence without the sanction of an oath.

(iv) The use of information technology in connection with the provision of briefs of evidence, disclosure and evidence during the trial. While there has been an increased tendency in appropriate cases toward the use of computer technology to manage documents and evidentiary material in the trial, we believe it is important to ensure that courts, investigative agencies, prosecution and defence all have access to common information technology standards to ensure access to material electronically prior to and during the trial. This includes following through the recommendations made in the Victorian Pathfinder Report that a

system be created for the transfer of prosecution files between investigator, prosecutor, defence and the courts by electronic means.

(v) Encouraging the prosecution not to overload indictments.

(vi) Enabling the defendant to elect for trial by judge alone. This option exists in South Australia, New South Wales and Western Australia. Section 80 of the Commonwealth Constitution prevents trial by judge alone in respect of Commonwealth offences. While we recognise the argument that the community should be entitled to participate in all criminal trials through service on a jury, and we have not had an opportunity to research and consider the implications of the capacity that exists in the DPP in New South Wales and Western Australia to veto trial by judge alone, in our view the concept of trial by judge alone at the election of a defendant is worthy of careful consideration.

Unrepresented Accused - *Dietrich* Issues

47. Any response to the decision in *Dietrich* must be related to the common law concern to ensure a fair trial for every defendant.

48. It is inappropriate to link the question of indigence to a legal aid means test. Parliament should not, through a non-judicial administrative agency, seek to deem, in effect, that a trial would be fair regardless of the view of a trial court.

49. All issues, including indigence, should be determined by the trial court as part of pre-trial procedures.

50. Only those who have exhausted the application and appeal processes for seeking legal aid or access to assets seized by the prosecution under confiscation procedures should be entitled to seek a stay on the basis of the principles enunciated in *Dietrich.*

51. Advice of the rule in recommendation no. 50 should be given to each defendant at the time of committal.

52. Consideration should be given to introducing legislation similar to Section 360A of the Victorian *Crimes Act 1958* (as amended).

53. Restrained assets should be available to meet a defendant's reasonable legal expenses, but under strict controls designed to ensure that such assets are not dissipated on unreasonable legal expenses.

Changing Legal Culture

54. It is essential to the fair and efficient administration of justice that legal practitioners comply with their obligations to act diligently and expeditiously.

55. Law schools and practical legal training courses should encourage the attitude of cooperation and compliance with the duty as we have explained it, but within the context and framework of the accusatorial system.

56. Professional conduct rules should exist that reflect the duty of counsel to confine the trial to identified issues which are genuinely in dispute and to conduct matters generally so that the time of the court is not taken up unnecessarily.

1. INTRODUCTION

On 21 May 1999 the Commonwealth Attorney-General announced the establishment of a Working Group in accordance with an agreement reached at the meeting of the Standing Committee of Attorney's-General (SCAG) held in Adelaide in October 1998. The Group was asked to consider the serious problems presented to the criminal justice system by complex white collar crime and to address the following issues:-

"• sanctions for non-compliance with procedural reforms;

- means of bringing about change in the legal culture to facilitate effective reform;
- means of improving the quality and timeliness of the preparation for trials;
- means of improving judicial management of the trial process, including issues related to instructions to the jury, such as length and complexity;
- means of reducing the number of adjournments;
- the so-called "right to silence issues" (for example, in relation to partial disclosure of the defence case to enable the issues in dispute to be identified, and allowing adverse inferences to be drawn from reliance on evidence at the trial which was not previously disclosed);
- means of resolving problems in relation to defence funding arising from the *Dietrich case*,[1] eg. which body (court or Legal Aid Commission) should assess whether a defendant is actually indigent."

In considering those issues, the Group was asked to have regard to the Best Practice Model for the determination of indictable criminal charges developed jointly by the Directors of Legal Aid and the Directors of Public Prosecutions ("the Best Practice Model"),[2] together

with the draft principles for reform of pre-trial criminal procedure developed by the Criminal Law National Liaison Committee of the Law Council of Australia.[3] Copies of those documents are annexed.

The Group was asked to report by 31 August 1999. It comprised the following:

- Hon. Justice Brian Martin, Judge, Supreme Court of South Australia (Chairman)
- Mr Damian Bugg QC, then Director of Public Prosecutions, Tasmania
- Mr Richard Coates, Director, Northern Territory Legal Aid Commission, Director, National Legal Aid
- Mr Robert Cornall, Managing Director, Victoria Legal Aid
- Judge Kevin Hammond, Chief Judge, District Court of Western Australia
- Mr Michael Rozenes QC, Barrister, Victoria
- Mr Bret Walker SC, Barrister, New South Wales
- Hon. Justice James Wood, Chief Judge at Common Law, Supreme Court of New South Wales.

In announcing the formation of the Group, the Attorney-General acknowledged that substantial advances have been made in dealing with trials concerning white collar crime following a previous SCAG initiative announced in 1992. The National Complex White Collar Crime Conference was held in Melbourne in June 1992. Work in this area has been ongoing and a number of reforms have been introduced in the States and Territories. It is our understanding that our task has been enlarged from complex white collar crime to encompass a review of criminal trial procedure generally. Relatively simple trials are taking longer and provide the largest group of trials heard thus having the greatest impact on resources. Law reform commissions and other bodies in all States and Territories are examining this complex

problem. This is a recognition of the cost to the community brought about by the increased length and complexity of jury trials generally. In addition, an acute need exists to respond to the problems associated with defence funding arising from the High Court decision in *Dietrich*.

We have, therefore, approached our task on the basis that we should consider reforms to criminal trial procedure of general application. This is now reflected in the project title of Criminal Trial Procedure.

We have been asked to report on a number of complex issues within a very short period. In view of that time limitation and the need to avoid unnecessary repetition of the extensive research and work already carried out in reviewing the problems associated with the criminal trial process, our aim has been to provide a tight and practical report which draws together the threads of actual and proposed reforms. We have not had the time or resources to initiate a study project of our own, nor have we embarked upon public consultation. While each member of the group has drawn on their own experience, we emphasise that in this report we are not speaking on behalf of the judges or the legal profession collectively. We have concentrated upon existing State and Territory procedures and proposals with a view to identifying, in a concise form, key recommendations concerning legal culture, judicial management of the trial process and the funding of legal representation for persons accused of serious crimes. We have reported on the understanding that this report may form the basis for wider public discussion.

2. THE ADVERSARIAL SYSTEM

Included in the tasks assigned to the group is consideration of the means of bringing about change in legal culture in order to facilitate effective reform. We comment specifically on that issue later in this report, but we emphasise our commitment to the system of adversary justice and the values which we believe underpin it. We gratefully adopt the description of the context of criminal procedure given in the Best Practice Model which is as follows:

> "Criminal procedure is, and should remain, fundamentally accusatorial, that is the State accuses the citizen of a criminal offence and must prove guilt without the enforced assistance of the accused. While there is a public interest in improving the efficiency of criminal proceedings by reducing delay and costs, this must proceed in the context of the accusatorial framework."[4]

It is in that context that the issues of culture and procedural reform fall to be considered. In our opinion the adversarial system can be improved and procedural reform is necessary. However, we adhere strongly to the fundamental premise that an accused is not to be compelled to answer questions or assist the prosecution in proving its case. In other than isolated instances where the burden of proof shifts to a defendant with respect to specific issues, the burden of proving guilt must always rest with the State.

The Australian Law Reform Commission has published a Discussion Paper on its Review of the federal civil justice system.[5] In relation to civil justice the Commission comments:

> "The Commission considers that the adversarial-non adversarial construct is too elusive to base analysis of the problems or to formulate change to the system. Such debate assumes that borrowing from different political and cultural systems will work in similar ways in our legal system, that such change can be engineered and that it will improve the system."[6]

In a discussion of the state of authorities the Commission concludes with the view that "The clear indication from High Court dicta is that any radical shift to adopt inquisitorial features inconsistent with procedural fairness would be unconstitutional."[7]

In any event we believe it is beyond the terms of reference given to us to embark on a detailed analysis of this issue.

3 DELAY

In our view it is of critical importance that any proposals for reform address the issue of delays that currently occur in identifying pleas of guilty and in disposal of contested charges.

In the most recent report of the Australian Bureau of Statistics ("ABS")[8] on the higher criminal courts released on 26 July 1999 the additional time taken to dispose of all matters is clearly identified as associated with an increased workload nationally for higher courts. The ABS reported that in July 1998 the national median for the time taken from initiation to completion was 24.1 weeks (excluding Queensland). This is a significant increase from the 20.9 weeks that existed at the commencement of the 1997-98 financial year. The range in median waiting times was reported as varying from 12.8 weeks in Tasmania to 34.2 weeks in the ACT. Only South Australia had a fall in the median elapsed time from 18 weeks to 14.1 weeks for the same period.

The ABS cautions that considerable care is needed in making comparisons between jurisdictions given differences in legislation and procedures. There can be no doubt, however, that the volume of work entering the higher courts is a cause for delay and that resourcing of these courts needs to be substantially augmented in order to reduce the delay in the face of

those increasing workloads. Nevertheless we are confident that much can be done with procedural and cultural changes to improve the rate of disposal of cases.

The ABS study shows quite clearly that more than half of the pleas of not guilty first entered in the higher courts were finally resolved as pleas of guilty. The burden on the higher courts will obviously be eased if there is an increase in the early identification of guilty pleas. Incentives for delay should be removed. The system should ensure that an accused does not have an opportunity to "judge-shop".[9] Reducing the delay in listing trials will decrease the opportunity for an accused to seek to delay in the hope that a prosecution will collapse.

In addition, in our view the most effective way of encouraging early pleas is to provide incentives and to ensure early and complete prosecution disclosure. In this context it is essential that an accused be represented by counsel at the earliest possible opportunity. This involves a change of approach to the provision of legal assistance. These matters are discussed later in the report.

4. PROSECUTION DISCLOSURE

4.1 EXISTING POLICIES

Draft guidelines for prosecution disclosure were prepared by the Tasmanian DPP in 1997 and circulated among DPPs nationally. Guidelines for prosecution disclosure have now been promulgated by the Commonwealth DPP and the Directors in all Territories and States. The Commonwealth Guidelines also include guidance for investigative agencies as to their responsibility. Copies of the Guidelines are attached. By way of summary we highlight the following features of the guidelines:

Australian Capital Territory

The Guidelines for Prosecutors are under review. They currently include the following statement:

> "It is not a legitimate forensic tactic for the prosecution to engage in "trial by ambush" and there is a general duty to disclose the whole of the prosecution case to counsel for the accused. This duty is subject only to any overriding demands of justice such as the need to prevent risk to the lives or safety of potential witnesses. Even then it will usually be possible to apprise the defence of the general nature of the Crown case even if such details as the names and addresses of particular witnesses are withheld."

Commonwealth

The Commonwealth Statement on Prosecution Disclosure notes that disclosure usually takes place by way of committal proceedings. Provision is made to provide copies of statements not provided at committal with as much notice as is reasonably practicable. The prosecution is to disclose information in its possession relevant to the reliability or credibility of a prosecution witness. The prosecution must also disclose unused material being information relevant to the charge gathered in the course of the investigation, in the sense that it runs counter to the prosecution case or might reasonably be expected to assist a defendant in advancing a defence.

New South Wales

The New South Wales Guidelines refer to the Barristers' Rules and the Solicitors Rules. Guideline 11 states:

> "Prosecutors are under a continuing obligation to make full disclosure to the accused of all facts and circumstances and the identity of all witnesses reasonably to be regarded as relevant to any issue likely to arise at trial. Tactical considerations are not to be taken into account when making that assessment. The duty of disclosure extends to any statement by a witness that may be inconsistent with the witness' intended evidence, including any statement made in conference and any victim impact statement. Subject to public interest immunity considerations, the Director will not claim legal professional

> privilege (including client legal privilege) in respect of such statements recording in writing or on tape, provided such records serve a legitimate forensic purpose."

The DPP has directed the police to give notice of, and where required, disclose "all other documentation, material and other information...that might be relevant to the prosecution or defence". The police are also required to certify that the Director has been "notified of all such documentation, material and other information". A DPP lawyer must consult with police regarding the disclosure of sensitive information.

Northern Territory

The Guidelines state:

> "Whilst there is no common law duty imposed upon the prosecution to make full disclosure pre-trial it is inconsistent with a person's right to a fair trial for the prosecution to withhold from or fail to disclose to the defence material in its possession which is relevant and admissible".

Provision is made for the disclosure of the defendant's prior convictions and the provision of copies of any warrants used in the investigation and material or statements of witnesses deemed not credible by the prosecution. The Prosecutor may, after consultation with the Director, make a claim for public interest immunity. It is stated that the prosecution has a continuing obligation to disclose:

> "The prosecutor's duty of disclosure is a continuing obligation but the continuity of that obligation should be seen as also imposing on the defence an obligation to make timely disclosure of any defence or issue, not immediately apparent on the prosecution case, which may make otherwise irrelevant material relevant."

> "There will be many instances where the prosecution should be entitled to rely upon the presumption of regularity unless a contrary indication is given. Until that indication is given the issue of irregularity should be treated as irrelevant and one upon which supporting evidence and material is not required.

Queensland

The Statement of Prosecution Policy and Guidelines states:

> "Anything relevant to the decision of the tribunal of fact whether or not to believe the evidence should be disclosed to the defence."
>
> "The Crown should assist the courts to operate efficiently. Therefore, the Crown's case should be fully disclosed to the defence at the earliest possible opportunity and any evidence that tends to the proof of innocence should also be disclosed at the earliest possible time. Full and early disclosure can reduce the number of late pleas of guilty."

Where a prosecutor is aware that a witness has prior convictions or is indemnified in relation to a matter a duty is created to disclose that information to the defence.

South Australia

The Statement of Prosecution Policy and Guidelines policy of the South Australian DPP was issued in July 1999. It refers to the duty of disclosure as one aspect of the duty to ensure that the Crown case is presented with fairness to the defendant. The guideline refers to the specific statutory requirements set out in Section 104 of the *Summary Procedure Act* 1921 and recognises the wider requirements of the common law. Section 104 provides that the prosecution must file in court and serve upon the defendant statements, documents and other evidentiary material on which the prosecution relies and "any other material relevant to the charge that is available to the prosecution". The guidelines state that the limits of the duty are not precisely delineated, but depend on the circumstances of each case. As to the common law requirements, the guideline does not seek to define those requirements but refers to a number of specific details and documents that should be disclosed subject to questions of public interest immunity and privilege.

Tasmania

The guidelines require full and frank exchange between the investigator and the prosecutor and maintain the underlying theme of all policies that requires disclosure of any material relevant to the defence. Disclosure of details of prior convictions or records of police disciplinary proceedings in relation to prosecution witnesses, is required where the defence has indicated that credibility is a live issue.

Victoria

The Victorian policy draws a distinction between minimum material to be supplied, further material to be supplied and further and better particulars. The minimum material to be provided is the presentment and statements of additional witnesses. The further material is said to depend on the facts and the significance of the material. The policy states:

> "As a rule of thumb, the prosecution should disclose all material which may tend to assist the defence case."

Particulars are to be provided "to enable the accused to prepare his or her case and make an informed view whether to contest the matter or plead guilty."

Western Australia

The guideline states that the Crown has a general duty to disclose the case in-chief for the prosecution to the defence. There is a requirement to disclose the case in-chief prior to trial, except where disclosure would undermine the administration of justice or endanger the life or safety of a witness.

Additionally the prosecution has a general duty to disclose exculpatory matters not to be used by the prosecution. The prosecution must disclose in good time the nature of the information, the identity of the person who possesses it and that persons whereabouts (if

known). The Crown is not obliged to call a non-credible witness, but if requested by the defence should subpoena the person.

A separate guideline has been issued to deal with the disclosure of material additional to the Crown case. In that guideline police are required 'to deliver to the DPP, as soon as possible after committal, all other documentation, material and information held by any police officer concerning any proposed prosecution witness, which might be of assistance or interest to either the prosecution or the defence'. The Crown is under a continuing obligation to disclose this material to the defence on request unless the prosecutor is of the opinion that, in the public interest the material should be immune from disclosure. If the prosecutor forms that view the defence must be so advised and if the claim is disputed, the matter must be submitted to the court for resolution prior to the trial.

4.2 DISCUSSION

The need for complete and early prosecution disclosure of all relevant evidence, whether relied upon by the prosecution or not, is central to the promotion of a fairer and more efficient system of criminal justice. Significant differences as to the extent of disclosure required exist between the various guidelines, although the underlying theme of disclosure to the defence of any material relevant to the defence is consistent across all guidelines. However, the legal profession remains sceptical, and at times distrusting, of investigative agencies in this regard. In order to address those concerns, we believe that the duty should be reinforced by the imprimatur of statutory recognition.[10] If possible, the fundamental obligations should be spelt out in uniform legislation. It is essential that the legislation clearly state that the obligation of disclosure imposed upon the prosecuting authority extends to the

investigative agencies responsible for investigating offences and providing evidence to prosecuting authorities. Statutory recognition of the responsibility imposed upon investigative agencies, including internal disciplinary sanctions for non-compliance, will improve the understanding of investigators as to their responsibilities and assist in overcoming a culture of resistance to disclosure that exists in some investigators. We also believe that over time the operation of a new regime under statutory control will overcome the distrust of the prosecution disclosure process that currently exists among members of the legal profession.

In our view, disclosure by the prosecution should commence prior to the committal proceedings. We recognise that investigations often continue after arrest and that disclosure in many cases will be an on-going process. In our opinion, however, the commencement of disclosure at the earliest possible opportunity has the potential to encourage early pleas of guilty and to assist, at an early stage, in identifying issues in dispute. The well-informed defendant and adviser are well placed to make decisions on these issues, but will often hesitate to do so if left to await disclosure at some time following conclusion of the committal proceedings.

In order to avoid a requirement for prosecution disclosure being imposed when a defendant intends to plead guilty the obligation to provide full disclosure should be subject to a possible waiver by the defendant of full or specific disclosure at the first or subsequent mention of the charge(s) in the summary court.

We note the possibility of a second stage of disclosure. If a defendant identifies particular issues in dispute, the prosecution is in a better position to consider the potential relevance of unused material to those issues. In addition, defence disclosure of results of

defence investigations also has the potential to render relevant unused material that the prosecution previously assessed as not relevant.

4.3 RECOMMENDATIONS

1. The prosecution obligation of disclosure should be given a statutory basis.
2. The statutory obligation should be specifically identified as applicable to both prosecutors and investigators.
3. Internal disciplinary sanctions should exist in respect of investigators who fail to comply with their statutory obligations.
4. Disclosure should be required prior to committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter.
5. Recognition should be given to the on-going nature of the obligation.
6. The obligation could be expressed in terms similar to those contained in the policy promulgated by the Commonwealth DPP.

5. COMMITTAL PROCEEDINGS

5.1 SUMMARY OF CURRENT PROCEDURES

Each of the States and Territories has a system for the conduct of committals through the tendering of sworn statements. Commonwealth cases are dealt with according to the procedural laws of the jurisdiction where the prosecution is being conducted. In New South Wales, South Australia and Victoria, restrictions exist on the right to call witnesses to give oral evidence. In New South Wales the *Justices Act 1902*[11] provides that special reasons must exist in the interests of justice before the victim of an offence involving violence will be required to give oral evidence. Substantial reasons are required before other witnesses can be

called. The South Australian *Summary Procedure Act 1921*[12] provides that special reasons must exist before any witness is called and, if the witness is the victim of an alleged sexual offence or a child under the age of twelve years, the court must not grant leave unless satisfied that the interests of justice cannot be adequately served except by doing so.

A new procedure has been introduced by the Victorian *Magistrates Court (Amendment) Act 1999*.[13] The defence is required to give notice of persons sought to be cross-examined, indicating the scope and purpose of the cross-examination and how it has substantial relevance to the facts in issue. There is no right to cross-examine unless the court is satisfied that the proposed questioning has substantial relevance to the facts in issue. If the witness is under eighteen years of age, the court must also be satisfied that the interests of justice cannot be adequately served without calling the witness. The restrictions on the right to have witnesses called for cross-examination also apply to the right of the Crown to call the witness for examination-in-chief.

In Western Australia neither the Crown or defence are restricted in their right to call witnesses for oral examination or cross-examination. The Chief Justice of Western Australia has recently been reported as expressing the view that the committal procedure should be abolished.[14] However, a useful provision has existed for some time that permits the prosecution to "depose" the witness at a hearing before a Magistrate prior to the commencement of the committal proceedings in circumstances where the witness declines to cooperate with the prosecution.[15] The transcript of the evidence becomes the deposition of the witness tendered at the committal. An accused person has no right to cross-examine the witness at the earlier hearing when the deposition is taken. A similar procedure has been introduced in Victoria by the *Magistrate's Court (Amendment) Act 1999*.[16]

5.2 DISCUSSION

In the attached Best Practice Model, the Directors of Legal Aid and Public Prosecutions have identified that the implementation of an effective procedure of complete and early prosecution disclosure will justify a fresh approach to committals. We agree with the observation of the Directors that the opportunity to cross-examine key prosecution witnesses prior to trial often assists in the early resolution of matters and that some limited opportunity for pre-trial cross-examination of prosecution witnesses should be retained. The system should facilitate and encourage early resolution which benefits both victims and defendants and achieves financial savings.

The importance of the involvement of the DPP at the earliest possible opportunity should not be underestimated. It appears that each jurisdiction is moving toward greater control over committals by the DPP. The Commonwealth DPP is primarily responsible for all committals involving Commonwealth offences. In the ACT, NT and New South Wales all committals in relation to charges commenced by police are conducted by the DPP. The other States have committal units within the DPP with varying degrees of responsibility for the conduct of committals. Presently, only the Commonwealth DPP is routinely involved in the framing or recommending of charges prior to the laying of charges by the Australian Federal Police or other investigative agencies.

The creation of the offices of Director of Public Prosecutions at State and Commonwealth levels was essentially spurred by the desire to depoliticise prosecutions by separating the prosecutorial function previously exercised by the relevant Attorney-General and by vesting it in the hands of an independent prosecuting agency. There remained, however, the need to ensure that a clear separation of the investigation and prosecution

functions was maintained. Professional prosecutors independent of the police must retain complete control over the conduct of prosecutions.

For a variety of reasons, including the requirement at times to act with urgency and the fact that many offenders must be arrested immediately upon detection, police must retain the right to arrest and lay charges without a preliminary reference to a prosecutor. Where an immediate arrest is required it is neither practicable nor appropriate to require that the decision to charge be made by a prosecutor. Unless the prosecutor has been substantially involved in the investigation, in arrest matters it is unlikely that the prosecutor would have the necessary familiarity with the available evidence to be able to decide whether to charge or what charges to lay. In complex cases, and particularly those involving fraud, the DPP should maintain a close and constant involvement in the investigation once it is likely that charges may result. On some occasions it may be appropriate to involve the DPP at an earlier stage. The early involvement of the DPP assists in ensuring that the investigation and subsequent case preparation is focussed in the right directions. Otherwise, there is a real danger that substantial resources will be wastefully committed to what may ultimately not be a prosecutable case and that matters requiring further investigation are missed. In complex cases, the usual practice of prosecutors not involving themselves in the investigative process until after a brief has been delivered to them for prosecution is a recipe for delay and mismanaged resources.

In all matters it is important that procedures be in place which will enable the prosecutor to screen the charges laid by the police at the earliest possible stage. The involvement of an independent prosecuting authority from the outset dramatically increases the opportunity for identification of matters that should not proceed. In our view the early

involvement of the DPP should be encouraged. It will lead to an overall saving in resources devoted to investigation and prosecutions and will lessen the burden on already overstretched court resources.

In our view it is essential that the DPP be responsible for all committals and that DPP officers take professional responsibility for deciding what material to present at the committal. Decisions relating to the conduct of a prosecution must be made dispassionately and the public must have confidence that this is the case. It may be asking too much of human nature for a police prosecutor, who is part of the same organisation that investigated the offence, always to achieve the necessary degree of detachment no matter how honest and conscientious the police prosecutor may be. In addition, if the savings that we believe can be found at the committal stage are to be realised to their fullest, a well prepared and fully briefed DPP prosecutor must have the conduct of the matter.

Statements of witnesses should be prepared in accordance with the standard required for use in court and irrelevant or inadmissible material should be excluded. In advance of the committal hearing, the prosecution should supply to the court and the defence a case statement which outlines the acts, facts, matters and circumstances being relied upon by the prosecution to support a finding of guilt. Where appropriate, the case statement should also outline the manner in which the prosecution will present the case against the defendant, for example, whether as a principal or an accessory. The imposition of this obligation on the prosecution will assist in ensuring better preparation and focus by the prosecution at the earliest possible stage.[17]

In imposing the obligation upon the prosecution to provide such a case statement, we recognise that, in many cases, the statement will be an evolving document. Ongoing

investigations may produce additional evidence and alter both the nature and extent of the Crown case and the manner in which the prosecution will put its case against a defendant. Time constraints imposed once a matter is before a court often leave the prosecution with no alternative but to proceed before investigations are complete and prior to final decisions being made as to the presentation of the case. In Commonwealth matters, particular difficulties can be experienced in some complicated investigations which are carried out by agencies which are relatively inexperienced in conducting investigations in comparison with the Australian Federal Police.

Notwithstanding those limitations, we believe that if the DPP is responsible for the conduct of all committals, many of the difficulties can be overcome. The procedure is akin to the existing requirement in conspiracy cases that the prosecution provide particulars of overt acts. In complex matters, the mere production of relevant material often does not identify the nature of the prosecution case or the manner in which that case will be presented. If early resolution of matters presented for committal is to be encouraged, it is essential that defendants have a full understanding of the extent of the case against them. In our opinion, comprehensive case statements prior to committal will assist in the early resolution of a substantial proportion of matters presented for committal.

Early disclosure of the full extent of the Crown case should be accompanied by practical and effective encouragement for offenders to plead at the earliest possible opportunity. This important issue is discussed later.

If early and complete prosecution disclosure exists together with substantial encouragement for early resolution, we believe that legal aid commissions should consider the adoption of a more solution orientated approach to the grants of assistance rather than

continuing with the traditional approach of funding the various stages of the criminal trial process.

Every person facing indictable charges who is unable to afford legal representation should be entitled to an initial grant of legal aid in order to ensure that appropriate advice is received at an early stage on the future conduct of the matter. Following the initial grant it would be incumbent upon the defendant's legal representative to persuade the provider of legal aid that further representation prior to trial was likely to result in the resolution of specific issues that would otherwise remain alive at trial. In those circumstances, instead of merely granting aid to represent a defendant at committal, the grant would be for Pre-Trial Issues Resolution.

These grants of legal aid could be structured in a way which:

- encourages continuity of representation;
- encourages trial counsel to become involved in confining the issues in dispute at an earlier stage than currently occurs, by either personally conducting the committal or pre-trial negotiations, or at the very least by supervising that process;
- remunerates trial counsel for properly preparing the case and identifying issues prior to committal, on the understanding that there would be a corresponding reduction in the amount of preparation covered by the trial brief fee;
- entitles a legal aid commission to require counsel to refund part or all of the preparation fee if he or she is unavailable for the trial;
- requires practitioners to identify the issues which they proposed to resolve pre-trial (either by representing the client at a committal hearing or through direct negotiations with the prosecutor), with a subsequent obligation that the client enter into a binding

arrangement in respect of issues which have been resolved or are no longer in dispute. Such arrangements can already be recorded in Victoria at a "post-committal conference" conducted pursuant to section 24 of the *Magistrate's Court Act 1989* (discussed later in this report) and in some other jurisdictions at the first arraignment;

- requires practitioners to obtain the prior approval of legal aid to conduct a voir dire, which, if authorised, will wherever possible be held prior to the trial being listed for hearing;

A consequence of confining issues in dispute through pre-trial issues resolution should be to produce more accurate assessments of the duration of trials than is currently the case. Accordingly, lump sum or capped grants of assistance for trials should be more acceptable to the profession.

We recommend the adoption of the recommendations of the Directors of Legal Aid and Public Prosecutions numbered 2-7 in the Best Practice Model. These recommendations are included below.

5.3 RECOMMENDATIONS

7. A limited opportunity for prosecution witnesses to be examined and cross-examined at committal should be retained.
8. In complex cases the DPP should be involved during the investigative process.
9. In all matters the DPP should be involved in reviewing charges laid by the police at the earliest possible opportunity.
10. The DPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal.

11. A “deposing” procedure similar to those in Western Australia and Victoria should be available to the prosecution.

12. In advance of the committal hearing the prosecution should supply to the Court and the defence a case statement outlining the acts, facts, matters and circumstances being relied upon by the prosecution. Where appropriate the case statement should also outline the manner in which the prosecution will present its case against the defendant.

13. Legal aid should be made available to all persons unable to afford legal representation facing committal on serious indictable offences as soon as possible after charge.

14. Grants of legal aid should be structured to encourage resolution of matters prior to committal.

15. Counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.

16. Both counsel should have the authority to make decisions or be able expeditiously to obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.

17. Both counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.

18. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and the facts constituting the offence so that the defendant can enter a plea of guilty at committal.

6.1 ENCOURAGING EARLY PLEAS - FAST TRACK PROCEDURES

As mentioned earlier in this report, and as is recognised in numerous authorities, it is of critical importance that the criminal law provide positive encouragement for offenders to plead guilty at the earliest possible opportunity. The significance of encouraging early pleas is dramatically demonstrated in the ABS Report comparing figures in Western Australia and the Northern Territory. In Western Australia 18.3% of defendants entering the higher courts with a not guilty plea changed their plea to guilty while 75.8% did so in the Northern Territory. In Western Australia 55.2% entered the higher court with a plea of guilty compared with 4.6% in the Northern Territory. Those figures provide strong support for the efficacy of the Western Australian Fast Track Procedure which results in a public and significant discount. That procedure is discussed later in this section.

The benefits associated with early pleas are not limited to the pragmatic issue of costs. Victims and witnesses benefit in a practical and psychological way. It is well recognised that acknowledging responsibility is an important feature of the process of rehabilitation. An efficient legal system commands respect and support.

All jurisdictions now operate on the basis that offenders are entitled to a discount of sentence for a plea of guilty, particularly if the plea is accepted as indicative of remorse. In some jurisdictions there is a statutory requirement to take into account the plea of guilty. The amount of the discount varies according to the circumstances of each case and each offender. Generally speaking, the earlier the plea, the greater the discount. We are strongly of the view that this practice should continue and that sentencing courts should indicate specifically the amount of discount allowed in the reasons for sentence and the basis of the

allowance or lack of allowance[18]. We are also strongly of the view that the amount of discount should be left to the discretion of the sentencing judge and not be prescribed by statute. Statutory prescription is incapable of meeting the infinite variety of circumstances in which consideration to the appropriate discount must be given. In most jurisdictions appellate courts have expressed views for the assistance of sentencing judges.

An example of a statutory provision requiring that a sentencing judge specify the sentence discount for assistance to the authorities is found in the Commonwealth *Crimes Act 1914.* Section 16A (2) (g) requires the court to take into account the fact that a person has pleaded guilty to an offence if that is the case, and section 16A (2) (h) requires the court to take into account the degree of cooperation by the person with law enforcement authorities in the investigation of that offence or of other offences. Section 21E (1) requires the court to specify the reduction in sentence or non-parole period that a court allows for assistance to law enforcement authorities. Where a penalty that is imposed is reduced in anticipation of prospective cooperation with law enforcement authorities, the DPP is given power under section 21E (2) to appeal whilst the person remains under sentence if that cooperation is not forthcoming.

In addition, in our view the scheme of sentence indications which was trialed in New South Wales is worthy of further consideration. There are obvious advantages in providing a defendant with the opportunity to know in advance what penalty might be imposed and some of the problems associated with the trial in New South Wales are capable of being overcome.

In Western Australia the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* instituted a procedure for dealing with persons willing to plead guilty to indictable

offences. From its inception the procedure has been known as the "fast track" procedure, although those words do not appear in the legislation. It was a determined attempt to streamline the procedure for dealing with offenders who had no intention of defending a charge and who wished to plead guilty at the earliest opportunity without going through the full formal processes usually required in respect of indictable offences.

Upon first appearance before the Magistrate there is a short remand for seven or fourteen days and, upon an indication of a plea of guilty, the Magistrate will direct the prosecution to file with the Clerk and serve on the defendant a Statement of Facts material to the charge. The prosecution is also directed to give notice of any tape or video tape recording of conversations between the defendant and any person in authority. Following service of that statement the defendant is told that a plea to the charge may be entered. If the defendant pleads guilty the Magistrate shall, without convicting the defendant, commit the defendant to a court of competent jurisdiction for sentence. This is almost invariably the District Court.

Immediately the plea has been entered, the Magistrate's bench clerk contacts the Criminal Registry of the District Court by telephone and the defendant is remanded to appear on either a Tuesday or a Friday, as nominated by the Registry, before the General Duties Judge in the District Court at about six weeks from the day the request is made. It is common for the Magistrate to order a pre-sentence report at the time of committal and this is on file when the defendant appears in the District Court and normally obviates any further remand in order to obtain such reports. The Fast Track Judge sits on Tuesdays and Fridays and hears approximately ten pleas in mitigation each day.

It is an imperative of the Fast Track System that a significant discount or benefit for pleading guilty at an early stage be granted and that such discount be made publicly and

clearly visible to the offender. This procedure has received the full endorsement and support of the Court of Criminal Appeal which has observed that "for the Fast Track System to work accused persons must be certain that the immediate plea of guilty will carry a definite reward in sentencing"[19]. It has also been recognised by the Court of Criminal Appeal that the early plea of guilty "relieves the complainant of the necessity to give evidence, the prosecution to collate its evidence and prepare for trial and the state of the cost of the trial".[20]

The Fast Track System has been operating in Western Australia for five years. It is successful and provides a good example of an innovation which produces benefits for everyone involved in the criminal justice system.

In our view, a similar system should exist for those defendants who intend to plead not guilty, but who do not require the prosecution to file and serve every possible statement that is relevant to the prosecution. It is not unusual for defendants of relatively straightforward matters to be willing to proceed to the trial court without full documentation. The introduction of prosecution case statements may assist in this regard.

6.2 RECOMMENDATIONS

19. A Fast Track System modelled on the system existing in Western Australia be introduced.

20. A similar system be introduced for defendants being committed for trial who consent to the abbreviated procedure.

21. The existing system of discounts for pleading guilty be continued and strengthened by the requirement that sentencing judges publicly state in reasons for sentence what discount has been given for the plea of guilty.

22. Consideration be given to introducing a system of sentence indication.

7 POST-COMMITTAL CONFERENCE

Section 36 of the Victorian *Crimes (Criminal Trials) Act 1999* ("the 1999 Victorian Act") amends the *Magistrates Court Act 1989* and provides for a post-committal conference. It is envisaged that these conferences will be conducted immediately following the committal at the request of the parties in order that the Magistrate might record details of those issues which will be in dispute in a trial and those facts that the defence is prepared to admit. The provision also enables the parties to identify matters that will require resolution prior to trial and for the Magistrate to make a recommendation to the trial court that a directions hearing is required.

In a similar vein, the Chief Judge of the NSW District Court has issued a Practice Direction applicable to cases committed for trial in the Downing Centre after 1 January 1999. There is now a permanent List Judge in the Downing Centre responsible for arraignments. All cases are listed for a preliminary mention one week after committal to ensure that provision is made at the earliest opportunity for the representation of all defendants and in order that a meaningful arraignment date can be fixed. The NSW and Commonwealth Directors of Public Prosecution have undertaken to ensure that a senior practitioner is briefed to appear at these mentions for the purpose of discussing the future management of all cases with defence counsel.

We can see the potential benefits in procedures which keep the parties focussed on the issues that might be capable of resolution prior to trial at a time when each party has recently

had to assess the strengths and weaknesses of the prosecution case. The suggested procedures are discussed in greater detail in the following section.

7.1 RECOMMENDATION

23. That the concept of a conference or directions hearing soon after committal be included as part of the pre-trial procedures.

8 PRE-TRIAL PROCEDURES

8.1 SUMMARY OF CURRENT PROCEDURES AND PROPOSALS

In almost all jurisdictions the court is empowered to determine matters of law such as issues of admissibility etc. prior to the empanelment of a jury. We support the continued use of such provisions.

For some years South Australia has operated under a regime of mandatory pre-trial conferences at which an attempt is made to resolve various practical issues which include identifying the possibility of facilitating proof of any facts in issue at trial.[21] An attempt is also made to identify the nature and scope of the critical trial issues. While it has improved the efficiency of the listing and trial processes, in 1993 a judge of the Supreme Court observed that the procedure had nevertheless fallen a little short of achieving its aims. In Western Australia draft rules providing for directions hearings based on the South Australian model are in operation.

Although the opportunity has existed for some time to use a similar procedure in Victoria, it was rarely used.[22] The 1999 Victorian Act introduced quite radical changes for that State. In summary, the Act established a system of directions hearings, for matters

committed for trial after 1 September 1999, commenced by an initial First Directions Hearing followed by Subsequent Directions Hearings.

At the First Directions Hearing the following actions must be taken by the parties:

(a) give an estimate of the time required to hear the trial,

(b) advise of witnesses and availability,

(c) advise whether the defendant has legal aid up to and including trial,

(d) advise of particular requirements or facilities required for witnesses and interpreters.

At the Subsequent Directions Hearings the parties are required to do or advise the court of the following:

(a) questions to be determined before trial,

(b) questions of law or procedure to be decided,

(c) questions of fact arising that a judge may determine,

(d) questions of mixed law and fact a judge may determine,

(e) prosecutor to file and serve any further evidence relied on,

(f) a party may be ordered to file and serve such further written or oral material as the court may require.

In the interests of justice, the court may dispense with any of these requirements. In the absence of a post-committal conference under the *Magistrate's Court Act 1989*, not less than 28 days before trial the prosecution is required to serve a summary of the prosecution opening and notice of pre-trial admissions. The notice of pre-trial admissions is to be accompanied by statements to prove formal matters such as continuity, age or accuracy of a plan or the manner or time of taking of photographs. The defence is required to respond to both the summary of the prosecution opening and the notice of pre-trial admissions, not less

than 14 days before trial. The defence must indicate what matters are in issue and the basis for taking issue.

The remaining jurisdictions are all considering proposals for reform. As a general observation, it appears there is a move toward greater judicial management of pre-trial processes designed to improve the efficiency of trials. Under current proposals the extent of judicial management will vary between jurisdictions. For example, the Queensland proposals do not provide for compulsory pre-trial hearings.

8.2 DISCUSSION

Against this background we have endeavoured to identify the key issues we see as particularly important in any attempt to improve both the efficiency of the trial process and the assistance provided to the jury/court while maintaining the integrity of the criminal justice system. At the outset we wish to emphasise two matters of critical importance to the effectiveness of any pre-trial procedural reforms. The first concerns certainty of trial dates. Any attempt at reforms will be ineffective unless courts are able to provide certainty of trial dates well in advance and estimates given for completion dates are realistic. In some jurisdictions, the inability to provide such certainty results in an unwillingness to devote the considerable time required for proper preparation because of the realisation that the trial is unlikely to be reached on the suggested date. While this uncertainty exists, pre-trial procedures will lose much of their effectiveness.

Secondly, the primary aim is to encourage cooperation with pre-trial procedures. There are inherent practical and philosophical difficulties associated with sanctions for non-cooperation. This is not to deny that, in some circumstances, some form of sanction may be

appropriate, but we recognise the fundamental premise that a defendant is not to be required to assist the prosecution in achieving a conviction. In addition, as discussed later in this report, there is great potential for unfairness in the imposition of some of the sanctions that we discuss later in this report.

In the context of pre-trial regimes requiring identification of issues and some defences but particularly in connection with the concept of sanctions for non-compliance with such regimes, much has been written and said about the defendant's "right to silence". Numerous papers have been delivered and the issue has been the subject of a Discussion Paper of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament. The New South Wales Law Reform Commission has completed public consultations on a Discussion Paper on the Right to Silence. The Commission is due to report on the Right to Silence Reference in September of this year. We understand the report will canvass issues that arise under this heading including matters such as adverse comment and pre-trial disclosure regimes. The Law Reform Commission of Western Australia is to present its report on the Right to Silence on 30 September 1999. The Consultation Draft on this reference was circulated in December 1998.

In those circumstances we have taken the view that we should not embark on a detailed consideration of those issues in this report. We believe, however, that our recommendations which involve identification of issues and some defences do not infringe the fundamental integrity of the accusatorial system nor do they require that a defendant assist the prosecution to prove its case. The burden of proof remains unaltered. The reforms we recommend do not infringe any fundamental right of a defendant whether viewed as a "right to silence" or otherwise.

We believe that compulsory pre-trial regimes should be in place under the control of the trial court. This requires that each defendant be brought into such a regime within a relatively short time of being committed for trial. We envisage a regime of compulsory pre-trial conferences and directions hearings commencing soon after committal. Such hearings should be conducted outside court hours if necessary, to enable counsel briefed for the trial to attend.

As mentioned earlier, we encourage procedures which keep the parties focussed on the matter soon after committal. We perceive advantages in commencing the pre-trial process with a relatively informal conference involving counsel under the auspices of a judge from the trial court. A conference at an early time prior to the finalisation of the indictment presents a good opportunity for negotiation about various issues, including the possibility of a plea, before the prosecution has finalised its position with the formal filing of an indictment. This conference would require provision to the judge of the file of depositions from the committing court, including the prosecution case statement. The judge should be empowered to give administrative orders for future directions hearings and matters of that nature, but not to make formal orders affecting the conduct of the trial which could, prior to the filing of an indictment, give rise to questions of jurisdiction to make such orders. All such conferences should be without prejudice.

In our view, the initial conference should be followed within a reasonable time by the filing of an indictment and progress through compulsory pre-trial directions hearings.

We support the concept contained in the 1999 Victorian Act that a reasonable time before the commencement of the trial the prosecution serve on the defence and file in court a 'final' case statement which must outline the manner in which the prosecution will put its case against a defendant and the acts, facts, matters and circumstances being relied upon to

support a finding of guilt. This case statement is likely to be based on the case statement prepared for the committal. Between committal and trial the ongoing nature of disclosure may result in changes to the nature of the prosecution case and the evidence in support of that case, but it is important that a defendant know the extent of the prosecution case with certainty a reasonable time in advance of the trial. Additionally, after provision of the final case statement, the prosecution should not be permitted to adduce evidence other than that disclosed by the required date, unless a reasonable explanation is provided as to why earlier disclosure was not made or the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

While the practical realities dictate that the final case statement not be required until, for example, approximately one month prior to the commencement of the trial, we believe that the pre-trial regime of directions hearings should be implemented much further in advance of the trial. This view is taken on the assumption that the recommended regime of disclosure and case statements prior to committal will be in operation and in the knowledge that the ongoing nature of disclosure will require that the prosecution disclose additional material as soon as practicable after it comes into possession of that material. In this way the defendant, although without a final case statement, is able with a reasonable degree of certainty to see what changes, if any, are occurring in the nature and extent of the Crown case.

There are many relatively simple but important practical matters that can be resolved in the pre-trial directions hearings prior to the delivery of the final case statement. They can be found in a combination of the South Australian, Victorian and Western Australian pre-trial procedures. Of particular importance is the requirement that notice be given of any question of law or procedure that either party wishes to raise and which should be raised in the

absence of the jury prior to the commencement of the trial. We have in mind matters such as objections to the form of the indictment, applications for separate trials and the objection to the admission of evidence. Notice of these matters enables the court to plan for the most efficient operation of the trial and for jury requirements.

Generally speaking, we expect that relatively few pre-trial directions hearings will be needed prior to the delivery of the final case statement. The number and content of the hearings required both before and after the final case statement is delivered will vary according to the circumstances of each case and must be left within the discretion of the judge to meet the infinite variety of possible circumstances. Allowance must be made for short and simple matters to ensure that unnecessary costs and time are not incurred by reason of inflexible pre-trial procedures.

We agree with the thrust in section 6(3) of the 1999 Victorian Act that requires the prosecution, at the time of filing and serving the final case statement, to file and serve a notice of pre-trial admissions. The notice should identify the statements of witnesses whose evidence, in the opinion of the prosecutor, ought to be admitted as evidence without further proof and any other facts or documents, including photographs, in respect of which the prosecutor believes the defence should agree or consent to admission.

The delivery of the final case statement places a defendant in the best possible position to determine whether to contest the charge and, if contested, to identify both what facts to admit and the live issues. If allowance is made for unrepresented defendants and for variations in exceptional or special cases or circumstances, the risk of unfairness to a defendant in imposing proposed obligations at this stage in the process is minimised.

Bearing in mind that the aim of pre-trial procedures is, consistent with fairness to defendants, to narrow the issues in dispute, to facilitate the proof of matters not in dispute and to ensure that the trial will proceed with the least possible disruption, following the filing and serving of the final case statement and a reasonable period before trial, a defendant should be required to identify particular defences and issues that are not in dispute. The critical features of the disclosures that we propose be made by the defence are the requirements that the defence disclose what is not in dispute and respond with regard to specific defences. Such requirements relieve the Crown of the need to prove matters not in dispute, but do not detract from the essential character of the accusatorial system. Other than alibi and expert evidence, we do not suggest that the defence should be required to disclose the evidence which it proposes to call. It must be recognised that a defendant should not be expected to identify the defence case to the same depth and breadth as the Crown.

A moment's reflection upon the purpose of pre-trial directions hearings and the content of matters to be discussed and determined at those hearings quickly reveals that a number of delicate issues and difficult practical problems will arise. In addition, notwithstanding the existence of encouragement or sanctions, difficult defendants and uncooperative counsel will always exist. Experience in the United Kingdom and in Australia also demonstrates very clearly that not all judges are suited to supervising the pre-trial regime. The role requires not only an appreciation of the difficulties and sensitivities from the perspective of a defendant, but also the firmness required to insist on appropriate compliance. We recommend that the control and supervision of the pre-trial regimes be allocated to specific judges rather than being left to random allocation.

8.3 ENCOURAGING COMPLIANCE/DISCOURAGING NON-COMPLIANCE

If the prosecution fails to comply with its obligations or seeks leave to adduce additional evidence, a number of possible conditions are worthy of consideration. If an adjournment is required following the late production of evidence or through some other non-compliance by the prosecution, the court should be empowered to award costs of the adjournment and any other incidental costs against the prosecution. In addition the court should more readily be prepared to grant a voir dire examination in the absence of the jury in connection with the additional evidence. As mentioned, the prosecution should only be entitled to lead the evidence if a reasonable explanation for its late production is provided or the interests of justice otherwise require that the prosecution be permitted to lead the evidence. We are firmly of the view that if refusal of a request by the prosecution to lead such evidence might result in an acquittal, in the absence of special circumstances such as incurable unfairness to a defendant or gross failings by the prosecution, the interests of justice would almost inevitably require that the court permit the evidence to be led.

The most difficult and contentious area is the issue of sanctions against a defendant for non-compliance with the pre-trial regime. As mentioned previously, we are of the view that the primary concentration in this area should be on incentives to cooperate, rather than sanctions for non-compliance. While we do not favour any attempt to fix a specific figure, in our view those who cooperate fully with the pre-trial regime should be entitled to a sentence discount if convicted. It should be left to the sentencing judge to determine the extent of the discount to be allowed. If a defendant fails to cooperate in any meaningful way, or only partially cooperates, the sentencing judge should be entitled to reduce the amount of discount

or to decline to allow any discount. Trial judges should be required to identify the specific credit given and to explain why, notwithstanding cooperation, no allowance by way of discount has been made.

If such a scheme is put in place, every defendant must be fully informed that a failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable. In order that every defendant be made well aware of this form of encouragement, we recommend that a specific obligation rest with counsel to advise a defendant of the consequences of cooperation and lack of cooperation. That obligation should be fulfilled prior to committal for trial. The committing Magistrate should obtain an assurance from counsel that the advice has been given. In addition, the Magistrate should formally advise each defendant of the implications of cooperation and lack of cooperation in a set form of words. Finally, at the first directions hearing or arraignment, counsel should be required to inform the trial court that the appropriate advice has been given. In order to emphasise the importance of the obligation to give such advice, in our view the obligation should be included in the rules of professional conduct. The New South Wales Bar Council recently published a number of draft rules for comment. Included was the following:

> "17B. A barrister must advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage, including diminution of penalty, if the client pleads guilty or makes admissions, including at an early stage of the proceedings, or authorises other steps towards reducing the time, cost or distress involved in the proceedings.
>
> *The idea is that what good practice calls for in any event must be part of the basic advice to an accused."*[23]

In addition to those incentives, a number of possibilities by way of sanctions have been canvassed in various papers and proposals. They include:

1. Costs against a defendant.

   In our view, such a sanction would be largely ineffective as both the impecunious and the well resourced defendants will not regard the possibility of costs as a significant deterrent.

2. Costs against legal practitioners (prosecution and defence).

   While this possibility exists in the civil jurisdictions, there are particular difficulties associated with this proposal in the criminal jurisdiction. Changes in counsel and, subject to matters later discussed, the obligation to act in accordance with instructions create significant practical impediments. If such a rule is to exist, it should only be applicable in cases of gross mismanagement.

3. Exclusion of evidence.

   This form of sanction exists in the case of a failure to give notice of alibi. It is rarely enforced against a defendant. We suggest that it should exist, however, in respect of failure to identify the specific defence, but in terms similar to that applicable to the prosecution, namely, that the evidence can only be led if a reasonable explanation for failure to identify the defence is provided or the interests of justice otherwise require that the defendant be permitted to lead the evidence.

4. Restriction of the right to cross-examine.

   We perceive possible benefit in empowering the court to impose restrictions, but subject to the same qualification expressed in the previous paragraph.

5. Cross-examination of a defendant.

   We refer to the comments in the next paragraph.

6. Comment by trial judge and Crown.

   It is clear that this proposed sanction is fraught with difficulties. From a practical point of view, it would create enormous difficulties for a judge in determining both when a comment was appropriate and the content of the comment. Voluminous case law would follow on both issues. If a jury is to be permitted to draw an inference adverse to a defendant, issues such as the burden of proof and the "right to silence" need to be addressed. There is no form of adverse comment that can sensibly be made unless the jury is entitled to draw an inference adverse to the defendant by reason of the failure to cooperate. We do not recommend the introduction of this form of sanction.

7. Crown Re-opening.

   It may be unnecessary to alter the existing law. If a defendant failed to nominate a listed specific defence or nominated a particular defence and relied on another, we suggest a court would usually permit the Crown to re-open as the defence was not reasonably foreseeable.

Whatever remedies are made available to a trial judge, the application of those remedies should be determined in a summary manner. In addition, legislation should provide that the court is not bound by the rules of evidence and may inform itself on matters relevant to the determination in such manner as it thinks fit.

8.4 RECOMMENDATIONS

24. Compulsory pre-trial regimes under the control of the court should be instituted.

25. Specific judges should be allocated to supervising pre-trial regimes.

26. A reasonable time before the commencement of the trial, the prosecution be required to serve on the defence and file in court a case statement.

27. After the provision of the final case statement, the prosecution should not be permitted to adduce evidence additional to that disclosed by the required date, unless a reasonable explanation is provided as to why earlier disclosure was not made or the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

28. Pre-trial directions hearings be compulsory.

29. At the time of the filing and the serving of the final case statement, the prosecution be required to file and serve a notice of pre-trial admissions.

30. Following the filing and serving of the final case statement and notice of pre-trial admissions, a defendant should be required to file and serve:

    (i) a response to the notice of pre-trial admissions indicating what evidence, as set out in the notice of pre-trial admissions, is agreed to be admitted without further proof and what evidence is in issue.

    (ii) notice of any matters additional to those contained in the notice of pre-trial admissions in respect of which the defendant is willing to make admissions or dispose with formal proof.

    (iii) notice as to whether it is proposed to rely upon any of the following defences:

        self defence;

        substantial impairment of mental responsibility;

        automatism;

        claim of right including statutory corporate defences;

        duress (including source);

intoxication leading to inability to form the required intention.

(iv) All reports or statements of expert witnesses proposed to be called at trial or, if no report or statement has been obtained, the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.[24]

(v) notice as to the following:

- Where the prosecution relies on any surveillance evidence, whether it is necessary to call all witnesses and if not, which witnesses are required.

- In respect of exhibits, whether there is an issue as to continuity.

- In respect of listening device transcripts, whether they are accepted as accurate and, if not, in what respects.

- Where charts, diagrams or schedules are to be tendered, whether there is any issue about either admissibility or accuracy.

31. The obligation on the defence should be ongoing. In particular, if after responding to the final case statement and notice of pre-trial admissions, a defendant makes a different decision with respect to reliance upon a nominated defence or the calling of an expert witness, the obligation to give notice as envisaged by recommendation 30 (iii) and (iv) exists and should be complied with as soon as reasonably practicable.

32. If the prosecution fails to comply with its obligations or seeks leave to adduce the additional evidence:

(i) The Court should be empowered to award adjournment and incidental costs.

(ii) The Court should more readily be prepared to grant a voir dire examination in connection with the additional evidence.

(iii) The prosecution should only be entitled to lead the evidence if a reasonable explanation for its late production is provided or the interests of justice otherwise require that the prosecution be permitted to lead the evidence.

33. If a defendant fully cooperates and is convicted, the defendant should be entitled to a discount of sentence to be determined within the discretion of the trial judge, but to be specifically identified by the trial judge.

34. If a defendant fails to cooperate by declining to identify a specific defence relied upon at trial, the defendant should only be permitted to lead the evidence if a reasonable explanation for the failure to identify the defence during the pre-trial process is given or the interests of justice otherwise require that the defendant be permitted to lead the evidence.

35. If a defence has failed to cooperate by failing to identify a specific defence, subject to the overriding consideration of the interests of justice, the trial judge should be empowered to impose restrictions upon cross-examination of Crown witnesses.

36. If a defendant fails to cooperate in a meaningful way or only partially cooperates and is convicted, the sentencing judge should be entitled to adjust the discount.

37. A defendant committed for trial must be fully informed by counsel and the committing magistrate that a failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable.

38. Counsel should be obliged to inform the judge at the first directions hearing that the advice referred to in recommendation 37 has been given.

39. The obligation to give the advice mentioned in recommendation 37 should be included in the rules of professional conduct.

9.1 IMPROVING THE QUALITY AND TIMELINESS OF TRIAL PREPARATION

One of the topics we were asked to consider was the issue of means of improving the quality and timeliness of the preparation for trials. In addition we were asked to address means of reducing the number of adjournments. We hope that the adoption of the recommendations in this report will greatly assist in both areas. The proposed regime will require that counsel for both prosecution and defence address the critical issues affecting the trial much earlier than is frequently done under the present systems in most if not all jurisdictions. In turn this will assist in reducing the number of adjournments both because the Crown case will generally be fixed with a greater degree of certainty further in advance of the trial and because counsel for both parties will be better prepared. The suggested restructuring of legal aid grants should also assist.

In the context of the overall efficiency of a trial, which includes reducing the number of adjournments, in our view the existing procedure for obtaining pre-trial rulings should be fully utilised. It also has the advantage of reducing the number of occasions on which the jury is asked to leave the court room while legal argument occurs. It is obviously desirable that the trial judge conduct the pre-trial hearings and make the rulings. If a different judge conducts the trial, in our view the pre-trial rulings already made should prevail unless the party challenging the ruling demonstrates good cause for a change in the ruling in the sense that the interests of justice require a different ruling.

The ability to challenge pre-trial rulings on appeal or by any other review process prior to the delivery of a verdict should be limited and subject to leave being granted by the superior court.

9.2 TRIAL PROCEDURE

In furtherance of the aim of the pre-trial procedures to focus the trial upon the issues truly in dispute, we support the concept common to the Best Practice Model and the Law Council draft recommendations that in all trials the trial judge must, immediately after the prosecution opening, invite defence counsel to respond to the prosecution opening. We do not envisage the defence opening as the opportunity for a full scale attack upon the adequacy of the Crown case as would be conducted in a closing address. The trial judge should be required to invite the defence to make a response at the conclusion of the prosecution opening in words prescribed by statute. We put forward the following wording for consideration:-

> "I now invite you, on behalf of the accused, to respond to the Crown opening and to identify the issues in dispute".

It might be suggested that the judge and/or the prosecution should be entitled to comment adversely if counsel declines the invitation. In our view, however, no comment should be permitted. The forensic disadvantage of not opening is a matter that must be weighed by each defendant. Notwithstanding the absence of comment and the risk that a jury may draw an inference adverse to a defendant from a failure to take up the invitation, we are of the view that the judge and prosecution should be prohibited by statute from addressing <u>any</u> remarks to the jury concerning that failure.

As part of the process of assisting the jury to understand their role and the significance of evidence as it is presented, we also approve of the concept that, immediately after the defence response to the prosecution opening, the trial judge should be usually to address the jury with a view to summarising the primary issues in the trial that are likely to arise for their consideration. If counsel for a defendant declines the invitation to respond to the Crown

opening, or for some other reason the judge is in doubt as to the primary issues that are likely to arise, it would obviously be undesirable for a judge to speculate as to those issues and it may be more appropriate for the judge to give the jury a simple overview of the elements of the offence that the Crown is required to prove.

In the context of the trial process, we have been asked to consider means of improving judicial management of the trial process, including issues related to instructions to the jury such as length and complexity.

As to the management of the trial process, various pieces of legislation exist in all jurisdictions, together with the inherent powers of superior courts, which provide judges with considerable powers of control. Difficulties in exercising those powers can be experienced, however, in circumstances where the judge is unable to assess the forensic purpose or necessity of particular examination and cross-examination when ignorant of the particular defences or defences upon which a defendant intends to rely. We believe that the proposed improvements to the pre-trial process and the introduction of defence openings will arm the judge with sufficient knowledge to more readily and confidently exercise the substantial powers of control that already exist. In that context, we suggest consideration be given to improving the capacity of the trial judge to dispense with formal proof in circumstances where the Crown has sought an admission or for some other reason there is difficulty, delay or expense in leading the evidence and the balance of the interests of justice favour dispensing with formal proof.

As to instructions to the jury, some authors have argued recently for a reduction in the extent to which the judge is required to sum up to the jury, in particular as to the extent of the warnings required concerning the uses of evidence.[25] Others will argue equally forcefully that

the recent statutory removals of some traditional warnings have highlighted the need for additional warnings as currently required by the High Court. Considerable research and analysis is needed on these issues which is beyond the scope of our deliberations. In our view, however, if all the pre-trial and trial recommendations come to fruition, in the majority of cases the task of the trial judge in directing the jury will be simplified. In such circumstances there may be a firmer basis for reducing the content of the summing up. For example, there would be scope to relieve the judge of the obligation to address the jury on possible defences that have not been relied upon, but might arise on the evidence. Considerable caution is required in this area, however, which is highlighted by the obvious problems associated with the defendant who is unrepresented or incompetently represented.

In addition, we recommend the adoption of the NSW short form summing up procedure. Section 405AA of the New South Wales *Crimes Act 1900* provides that a trial judge need not summarise for a jury the evidence given in a trial if the judge is of the opinion that, in all the circumstances of the trial, the summary is not necessary. In commenting on this legislation, the New South Wales Court of Criminal Appeal has said:

> "I am unpersuaded that in a short trial, where the focus was on the complainant's credibility, anything would have been achieved by yet another restatement of that issue or of the points made by either the Crown or by the defence. The position is likely to be otherwise in a complex and lengthy trial, to which the observations in *Domican* are particularly apposite. It would have been otherwise had the trial judge here undertaken, for example, a detailed analysis of the Crown case and then dismissed the defence case in short terms. What is required is a fair balance when any excursion into the issues and evidence is undertaken."[26]

In our view, this is a sensible and useful provision and an approach that should be adopted by each jurisdiction.

Section 19 of the 1999 Victorian Act empowers the judge to provide the jury with a number of documents other than documentary exhibits which currently are provided to the jury. While we believe that providing the jury with a copy of the indictment and with written directions as to legal issues can be of considerable assistance to the jury, we do not agree that the jury should routinely be provided with other documents such as the summary of prosecution opening, opening and closing speeches, transcript of trial judge's charge to the jury or transcripts of evidence. In cases of any substance, the jury is currently assisted by the trial judge summarising the prosecution and defence cases and is able to request that particular transcript be provided or read. Consideration must be given to the possibility that the routine provision of such material would be attended by the risk of undue emphasis being placed on matters in written form.

A topic that is relevant to both pre-trial and trial procedures is that of expert evidence. Considerable court time is wasted through a lack of pre-trial consultation and clear direction as to the role of experts in legal proceedings. The Federal Court and the Supreme Court of South Australia have recently issued Practice Directions designed to overcome the difficulties in these areas. Copies of those Practice Directions are attached and we recommend that careful consideration be given to these matters in all jurisdictions. As we have noted in footnote 22, defence disclosure of expert reports is required by statute in Queensland, Victoria and by draft rule in Western Australia. In New South Wales defence disclosure of an expert's report is required in relation to evidence of substantial impairment of mind only.

9.3 RECOMMENDATIONS

40. Immediately after the prosecution opening, in a prescribed form of words the trial judge should invite the defence to respond to the Crown opening and to identify issues in dispute.

41. No explanation or remarks should be addressed by the judge or the prosecutor to the jury concerning a failure by the defence to respond to the Crown opening.

42. Immediately after the defence response, the trial judge should usually address the jury for the purpose of summarising the primary issues in the trial that are likely to arise for their consideration.

43. Consideration be given to improving the capacity of a trial judge to dispense with formal proof in circumstances where the Crown has sought an admission or there is difficulty, delay or expense in leading the evidence and the balance of the interests of justice favour dispensing with formal proof.

44. The short form summing up procedure provided in Section 405AA of the New South Wales *Crimes Act 1900* be adopted.

45. All jurisdictions should adopt rules in relation to the presentation of expert evidence such as those promulgated by the Federal Court and the Supreme Court of South Australia.

46. Consideration be given to the following matters:

    (i) Empowering the trial judge to impose time limits for examination and cross-examination of witnesses and for addresses of counsel. Considerable experience in this area has now been gained in the United Kingdom and the United States of America.

(ii) Greater use of agreed statements of facts and written statements of witnesses.

(iii) Ensuring that the rules of evidence permit the taking of evidence by video, including evidence from overseas. In this regard the rules of the Federal Court provide an example of how the practical difficulties can be overcome while ensuring appropriate safeguards are in place with respect to the credibility of witnesses, particularly those who give evidence without the sanction of an oath.

(iv) The use of information technology in connection with the provision of briefs of evidence, disclosure and evidence during the trial. While there has been an increased tendency in appropriate cases toward the use of computer technology to manage documents and evidentiary material in the trial, we believe it is important to ensure that courts, investigative agencies, prosecution and defence all have access to common information technology standards to ensure access to material electronically prior to and during the trial. This includes following through the recommendations made in the Victorian Pathfinder Report that a system be created for the transfer of prosecution files between investigator, prosecutor, defence and the courts by electronic means.

(v) Encouraging the prosecution not to overload indictments.

(vi) Enabling the defendant to elect for trial by judge alone. This option exists in South Australia, New South Wales and Western Australia. Section 80 of the Commonwealth Constitution prevents trial by judge alone in respect of Commonwealth offences.[27] While we recognise the argument that the community should be entitled to participate in all criminal trials through service on a jury, and we have not had an opportunity to research and consider the implications of the

capacity that exists in the DPP in New South Wales and Western Australia to veto trial by judge alone, in our view the concept of trial by judge alone at the election of a defendant is worthy of careful consideration.

10 UNREPRESENTED ACCUSED - *DIETRICH* ISSUES

We have been asked to consider the difficult issue concerning means of resolving problems in relation to defence funding arising from the High Court decision in *Dietrich*. In particular, by way of example, we have been asked to specifically address whether the Court or legal aid commissions should determine the question of indigence. There is no simple or easy answer.

In essence, the High Court confirmed that every person charged with a serious criminal offence is entitled to a fair trial. If, through no fault of the defendant, by reason of indigence the defendant is unable to obtain legal representation, and if by reason of seriousness or complexity the trial would be unfair if the defendant was unrepresented, a trial judge is required to permanently stay the trial until representation of the defendant is arranged.

It is not difficult to appreciate the problems that have arisen following the High Court decision. An increasing number of persons are unable to afford legal representation. Some arrange their affairs so that they appear to be indigent, thus necessitating consideration as to whether the inability to obtain representation has been caused by the fault of the defendant. Legal aid commissions face increasing difficulties in providing funding for persons charged with serious crimes. On occasions the commissions determine that an applicant does not qualify for legal aid which results in that person seeking a stay on the basis of indigence and inability to obtain representation. On other occasions the same consequence follows when

legal aid commissions determine that funding is not appropriate because of the lack of legal merit in the defendant's case.

We do not have the time or the resources to fully investigate this complicated problem. We have, however, considered the Victorian response and a South Australian proposal.

Victoria responded with section 360A of the *Crimes Act 1958*. In essence, the trial court is empowered to require legal aid to provide representation if satisfied that a defendant is unable to afford the full cost of obtaining private legal representation and if satisfied it will be unable to ensure the defendant will receive a fair trial unless legally represented. The provision was amended in 1998 to provide for a number of matters that the Court must consider before directing that legal aid provide assistance. The legislation directed as follows:

(i) The Court is able to refuse an application if the vexatious or unreasonable conduct of the defendant contributed to the inability to afford representation;

(ii) The legal burden of proof is on the defendant;

(iii) The Court is required to consider property over which the defendant has effective control or in which the defendant has an interest;

(iv) The assistance to be provided is limited to legal representation;

(v) The conditions a court is able to stipulate exclude the identity, number or remuneration of persons representing the defendant;

(vi) The Victoria Legal Aid is to be given the opportunity to be heard on each application.

A tension between the executive decisions made by Victoria Legal Aid and court decisions pursuant to section 360A is immediately apparent. The bulk of the applications pursuant to section 360A arise in circumstances where Victoria Legal Aid has rejected an application on grounds related to the applicant's means. In doing so Victoria Legal Aid

applies a national legal aid means test. That test is a stringent assessment of the financial means or lack of means. Victoria Legal Aid also assesses financially persons associated with a defendant including any person from whom the defendant usually receives financial support and any person whom Victoria Legal Aid could reasonably expect to give financial support to the defendant.

Where Victoria Legal Aid has refused assistance on the basis of a failure to pass the national legal aid means test, it appears before the trial court on an application by a defendant pursuant to section 360A and, generally speaking, opposes the application. The Victorian Courts appear to have taken a more lenient position as to indigence than is contemplated by the national legal aid means test. In a number of instances, the courts have also demonstrated a keen desire to ensure that defendants are represented by adopting a more lenient position in relation to the issue of fault than appears to have been contemplated by the High Court in *Dietrich*.

Whatever shortcomings may have been experienced with the operation of Section 360A, many of which were addressed by the 1998 amendments, that section creates a mechanism by which the court is able to ensure the representation of persons whose trial would be unfair if they were unrepresented. Valuable experience has been gained during the operation of Section 360A. We are of the view that, as a matter of principle, the response provided by Section 360A is appropriate and worth careful consideration in those jurisdictions where the application of the *Dietrich* principle is resulting in prosecutions being stayed and disruptions to the trial listing process.

In South Australia the Criminal Law (Legal Representation) Bill 1998 was introduced but ultimately lapsed. That Bill required the trial court to order a stay if satisfied it would be

unfair to proceed because the defendant's financial resources were insufficient for the presentation of an adequate defence and that financial position was not attributable to unreasonable conduct on the part of the defendant or to action taken by the defendant. The trial court would also have been required to certify the amount of value of the defendant's financial resources reasonably available for the defence.

Any response to the decision in *Dietrich* must be related to the common law concern to ensure a fair trial for every defendant. Any legislative response that sought to resolve *Dietrich* through a non-judicial administrative agency would, in our view, be an unwarranted intrusion into the power of the court to supervise its own processes. In our view, the concept of linking indigence to a legal aid means test which is often based upon or heavily influenced by budgetary considerations, is quite inappropriate. The touchstone is the fairness of the trial. Parliament should not have the capacity through such means to deem, in effect, that a trial would be fair regardless of the view of the trial court.

The role of superior courts is to protect their processes and those of inferior courts from threatened unfairness. This role is fundamental to the administration of justice, particularly the administration of criminal justice. The power to stay unjust proceedings is an essential part of the courts' armory necessary to attain an acceptable level of fair trial values in practice. Any legislative alteration of this inherent aspect of judicial power in serious criminal cases should do nothing to reduce the flexibility presently available to the judges. The common law is adaptable to deserving as well as to undeserving cases and flexibility is important to enable applications to be both rejected and upheld according to the infinite variety of circumstances that are placed before the courts. In addition, given the integral

importance of fair trials, there may be constitutional restrictions on statutory limits on judicial discretions in this area.

In our opinion, therefore, all issues, including indigence, should be determined by the trial court. In arriving at this view, we recognise the serious burden that is placed upon the trial court and the sensitive issues that are involved. For example, it may be necessary for a trial judge to be informed of the nature of a defence in order to properly determine whether a trial would be unfair if the defendant was unrepresented. Some assessment of the merits of a proposed defence might be necessary. In addition, consideration must be given to the position of a judge who, in the course of a determination of these issues, reaches the view that a proposed defence is totally lacking in merit. From a defendant's perspective the judge will have made a determination adverse to the credit of the defendant prior to the commencement of the trial. These and other issues require very careful consideration.

If it is accepted that these issues should be resolved by the trial court, in our opinion those issues should be resolved as part of the pre-trial procedures. Only those who have exhausted the application and appeal processes for seeking legal aid or access to assets seized by the prosecution under confiscation procedures should be entitled to seek a stay on the basis of the principles enunciated in *Dietrich*. Advice to this effect should be given to each defendant at the time of committal. In this way we envisage minimum disruption to trial listings and the processes of the trial. In addition, a defendant should not be able to obtain a stay or mistrial by dismissing counsel on the eve of or during a trial with a view to achieving either of those results.

An area that requires special consideration in the context of this discussion is the operation of provisions in confiscation legislation such as the Commonwealth *Proceeds of*

Crime Act 1987 which permit the release of restrained assets to enable a defendant to meet reasonable legal expenses. In our view these assets should continue to be available to a defendant, but under stringent controls designed to ensure that such assets are not dissipated in meeting unreasonable legal expenses.

In the context of legal aid issues, it is important to recognise that legal aid commissions do not have the capacity to fund the exceptional or mega-trials from standard budgets. In our view consideration should be given to a special programme or fund for the exceptional cases.

In concluding our brief discussion on this topic, we observe that the complexity of the problem is beyond our capacity to fully explore. We also wish to emphasise our unanimous view that, wherever possible, a defendant be legally represented at trial. Immense practical problems are experienced with unrepresented defendants. We anticipate considerable difficulties in connection with pre-trial regimes if defendants are unrepresented. Appropriate flexibility must exist within those regimes to cater for the unrepresented defendants. Pre-trial and trial costs are almost invariably increased when a defendant is unrepresented. The risk of error increases markedly. Most importantly, representation is an important safeguard against unfair trials.

10.1 RECOMMENDATIONS

47. Any response to the decision in *Dietrich* must be related to the common law concern to ensure a fair trial for every defendant.

48. It is inappropriate to link the question of indigence to a legal aid means test.

    Parliament should not, through a non-judicial administrative agency, seek to deem, in effect, that a trial would be fair regardless of the view of a trial court.

49. All issues, including indigence, should be determined by the trial court as part of pre-trial procedures.

50. Only those who have exhausted the application and appeal processes for seeking legal aid or access to assets seized by the prosecution under confiscation procedures should be entitled to seek a stay on the basis of the principles enunciated in *Dietrich.*

51. Advice of the rule in recommendation no. 50 should be given to each defendant at the time of committal.

52. Consideration should be given to introducing legislation similar to Section 360A of the Victorian *Crimes Act 1958* (as amended).

53. Restrained assets should be available to meet a defendant's reasonable legal expenses, but under strict controls designed to ensure that such assets are not dissipated on unreasonable legal expenses.

11. CHANGING LEGAL CULTURE

We have been asked to consider "means of bringing about change in the legal culture to facilitate effective reform". In his press release the Attorney-General referred to the utilisation of available pre-trial procedures by those involved in the criminal justice system as "disappointing". We assume we have been asked to consider the issue because of the reluctance of sections of the legal profession to embrace and assist in procedural and other reforms.

There can be no doubt that the legal profession is, at times, reluctant to adopt changes. Frequently, however, that reluctance is borne out of long experience and knowledge that changes are not necessarily improvements. At times judgments are made that proposals will

not ultimately be to the benefit of the community which has a vital interest in the proper administration of the law. It should not be assumed that all resistance is necessarily based upon considerations of self-interest. There are many in the profession who are active advocates of change.

In the context of the matters we have been asked to consider, public statements from members of the profession concerning proposals to date for reform indicate that some resistance is to be expected to any form of compulsory defence disclosure. This resistance is not surprising given that the adversarial and accusatorial nature of criminal practice has fostered a culture in which the defence is seen as entitled, if not bound, to put all matters in issue in a criminal trial and to take every possible point. In recent years, however, the public interest in the timely and efficient disposal of litigation has been given greater prominence as has the duty of counsel to act diligently and expeditiously. In 1974 the High Court pointed out that counsel have a responsibility to the Court not to use public time in the pursuit of submissions which are really unarguable.[28] Similarly, fourteen years later in *Giannarelli v Wraith*,[29] Mason CJ emphasised that the duty to the client is subject to counsel's overriding duty to the Court and said:

> "...a barrister's duty to the Court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what

> questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises independent judgment in the interests of the court"[30] (emphasis added).

The Victorian Court of Criminal Appeal also had occasion to emphasise the responsibility of counsel in *R v Wilson and Grimwade*.[31] The Court said:

> "In *R v Sorby* (1986) VR 753 at 786 this Court had occasion to notice the strain placed upon the available resources of the system of justice by the irresponsible conduct of the defence in a criminal trial. The Court remarked that, if unwarrantable tactics, "tend to place more pressure on the system than it can reasonably bear, it will be put in danger of collapse"; and that the system "is not to be exploited for the time being at the expense of those who are entitled to expect that the system will survive."
>
> Those remarks appear, sadly, to have had little impact upon the conduct of counsel for Wilson in the present case. Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate 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."[32]

We strongly endorse the remarks in the authorities to which we have referred. Law schools and practical legal training courses should encourage the attitude of cooperation in the way in which we have explained cooperation within the context and framework of the accusatorial system. Professional conduct rules should exist that reflect the duty of counsel to confine the trial to identified issues which are genuinely in dispute and to conduct matters

generally so that the time of the court is not taken up unnecessarily. The exposure draft issued by the New South Wales Bar Council to which we have already referred also includes the following paragraphs:

"Efficient administration of justice

41. A barrister must seek to ensure that:

the barrister does work which the barrister is briefed to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and

warning is given to the instructing solicitor or the client, and to the opponent, as soon as the barrister has reasonable grounds to believe that the barrister may not complete any such work on time.

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

(a) confine the case to identified issues which are genuinely in dispute;
(b) have the case ready to be heard as soon as practicable;
(c) present the identified issue in dispute clearly and succinctly;
(d) limit evidence, including cross examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
(e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

42A. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the

client to adjourn any hearing, of that fact and the grounds of the application, and must try with the opponent's consent to inform the court of that application promptly.

The Chief Justice has asked that the Bar Council consider the ways in which the Rules could reflect the Bar's professional responsibilities for the improved administration of justice. The bracket of new Rules 41-42A is our response. Since then, it may be noted that the Australian Law Reform Commission's Discussion Paper 62, 'Review of the federal civil justice system' has discussed similar issues (at 5.54-5.77)."

In our opinion provided the courts are prepared to be actively and firmly involved in the judicial management of the processes we have recommended, in due course the vast majority of the profession will recognise the value of and accept the reforms we have proposed. It should be remembered that no system can ensure there will not be occasions of abuse and lack of cooperation by those well resourced and determined to frustrate the smooth operation of the system. We believe, however, that the wider profession is receptive to fair changes and improvements.

11.1 RECOMMENDATIONS

54. It is essential to the fair and efficient administration of justice that legal practitioners comply with their obligations to act diligently and expeditiously.

55. Law schools and practical legal training courses should encourage the attitude of cooperation and compliance with the duty as we have explained it, but within the context and framework of the accusatorial system.

56. Professional conduct rules should exist that reflect the duty of counsel to confine the trial to identified issues which are genuinely in dispute and to conduct matters generally so that the time of the court is not taken up unnecessarily.

12. CONCLUSION

As we observed at the outset, we have not attempted to engage in extensive discussion on the various issues in view of the limited time and resources available to us. We have concentrated upon presenting a concise report of practical application. It is essential to bear in mind that the criminal trial process is made up of a series of connected and inter-dependent steps which must be addressed in a coordinated and integrated manner. At a number of points in the process, the dependence of one step upon the preceding step is such that the process will break down or its efficiency will be substantially impaired if the preceding step is not completed satisfactorily and efficiently.

Finally, it is necessary for us to briefly mention the aspect of funding. It is not part of our function to consider the adequacy of funding and we do not intend to comment upon it. It is, however, appropriate for us to observe that if effective reform is to be achieved, it must occur across all stages of the criminal process and adequate funding at all levels must be provided. In order to achieve the ultimate objectives of enhancing the quality of justice while consuming less public resources, it will probably be necessary to increase funding in some areas. For example, our recommendation that counsel for both the prosecution and the defence be involved at an earlier stage, with a consequent restructuring of the basis of legal aid, will require increased expenditure directed at the early stages of the process of the administration of criminal justice. Ultimately, by identifying the pleas of guilty at an earlier

time and by reducing the length of trials, savings should ensue. The effect of the increased efficiency, however, may not be felt for a considerable period. It may be that the improved efficiency and savings will simply offset future increases in the volume of work.

We raise these matters to stress that the proposals will not be successful if the response is to suggest that the additional needs can be met by simple re-allocations of finances within existing budgets. Such an approach would be short-sighted and would not work. The key strategic changes must be identified and funded at the outset with appropriate resources.

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1 *Dietrich v R* (1992) 177 CLR 292

2 A Best Practice Model for the Determination of Indictable Charges, National Legal Aid and the Conference of Australian Directors of Public Prosecutions, August 1998.

3 Law Council of Australia, Reform of Pre-Trial Criminal Procedure Draft Principles, Law Council of Australia, September 1998.

4 op cit., p. 1.

5 Australian Law Reform Commission, Discussion Paper 62, Review of the federal civil justice system, August 1999.

6 op cit. pp. 32-33

7 op cit. p. 35.

8 Australian Bureau of Statistics, Higher Criminal Courts, Australia, 1997-98, ABS, Canberra, 1999, ABS Catalogue Number 4513

9 For a discussion of this issue see Weatherburn, D. *Sentence Disparity and its Impact on the NSW District Criminal Court ,* NSW Bureau of Crime Statistics and Research, Sydney 1994.

10 A similar recommendation is canvassed by the Law Reform Commission of Western Australia in its Consultation Paper, *The Right to Silence*, 30 November 1998.

11 *Justices Act 1902*, section 48E

12 *Summary Procedure Act 1921*, section 106

13 *Magistrates Court (Amendment) Act 1999*, section 13

14 Chief Justice Malcolm, quoted in the West Australian newspaper on Thursday 19 August 1999, in comments made following an address to the WA division of the Australian Institute of Company Directors on 17 August 1999.

15 *Justices Act 1902*, Section 73

16 Section 56A Magistrates Court Act 1989

17 In a report by the Council on the Cost of Government (NSW) titled *Review of Office of the Director of Public Prosecutions* dated November 1998 the Council commented "Prosecutors are only involved at the end of the case screening and brief development process where they may find that the brief is inadequate or unnecessary work has been done. Several parties have mentioned the need to have prosecutors involved earlier in the process, enabling them to bring to bear their knowledge and experience to define more precisely the matters to be followed up by solicitors and exclude material and work effort that would not be necessary in presenting the case in court." Appendix 1 p. ii.

18 For example, a sentence discount for assistance to authorities is recognised in New South Wales in the *Crimes Act 1900* at section 442B, however the extent of the discount allowed need not be specified, see *R v Gallagher* (1991) 23 NSWLR 603 and *R v De Silva* CCA(NSW) 14 December 1993, unreported. Similarly where a guilty plea is taken into account in reducing penalty, section 439 of the *Crimes Act 1900* does not require the amount of the reduction to be stated and the Court of Criminal Appeal has reasoned against specifying the amount of the discount; *R v Beavan* CCA (NSW) 22 August 1991, unreported. Unlike the proposal put forward by us, the NSW law does not recognise a significant discount for a plea of guilty in the face of the inevitable; *R v Winchester* (1992) A Crim R 345, or allow for any effect on the reduction of court delays; *R v Coffey* CCA(NSW) 12 April 1991, unreported.

19 Doherty; Court of Criminal Appeal (Western Australia), 14 October 1997, unreported. Library No. 9705185

[20] Doherty, supra.

[21] Rule 6.05 of the Supreme Court Criminal Rules provides that a directions hearing is to be held pursuant to the Rules following a plea of not guilty or following a plea of guilty if it appears there is to be a dispute as to the facts upon which sentence is to be imposed.

[22] Attorney-General Jan Wade, Second Reading Speech, Crimes (Criminal Trials) Bill 1999, Hansard, 30 April 1999.

[23] Bar Association of New South Wales, *Proposed Changes to the New South Wales Barristers' Rules* 26 August 1999 draft.

[24] Defence disclosure of expert reports is required by section 590B of the Queensland Criminal Code; Section 9 of the Crimes (Criminal Trials) Act 1999 (Vic); Draft rule 6(3) of the Criminal Practice Review Discussion Draft Rules (WA) and (in relation to evidence of substantial impairment of mind) by section 405B of the Crimes Act 1900 (NSW).

[25] Flatman. G. and Bagaric. M., "Juries Peers or Puppets - The need to Curtail Jury Instructions", Criminal Law Journal, Vol. 22, August 1998, pp. 207-214.

[26] R v Williams, unreported, [1999] NSWCCA 9, 22 February 1999, per Wood CJ at CL, at p.8.

[27] *Cheatle v The Queen* (1993) 177 CLR 541

[28] *Richardson v The Queen* (1974*)* 131 CLR 116 at N.123

[29] (1988) 165 CLR 543

[30] supra, p556

[31] [1995] 1 VR 163

[32] supra, pp179-180