STANDING COMMITTEE OF ATTORNEYS-GENERAL

DELIBERATIVE FORUM ON CRIMINAL TRIAL REFORM

REPORT

JUNE 2000

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Mr Chris Staniforth, Chief Executive Officer, Legal Aid Office, ACT
The Hon. Judge John Sulan, District Court, SA
Mr Bret Walker SC, Barrister, NSW

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SUMMARY OF RECOMMENDATIONS MADE IN THIS REPORT

Investigation and choice of charges

1. In complex cases the DPP should provide prosecution advice during the investigative process.

2. In all matters the DPP should be involved in reviewing charges laid by the police at the earliest possible opportunity.

3. Each DPP should prepare prosecution guidelines with respect to the choice of criminal charges. Guidelines should require: (1) that charge/s laid adequately reflect the criminal conduct disclosed by the admissible evidence and which will provide the court with an appropriate basis for sentencing; and (2) that discussions take place with defence counsel with a view to facilitating the appropriate choice of charges.

Pre-committal

4. The obligation of prosecution disclosure should be specifically identified as applicable to both prosecutors and investigators. Whilst a statutory obligation is not appropriate and DPP guidelines already contain the prosecutor's obligation, consideration should be given to the requirement of a disclosure certificate from investigators.

5. Internal disciplinary sanctions should exist in respect of investigators who fail to comply with their disclosure obligations.

6. The prosecution disclosure obligation should be expressed in terms similar to those contained in the Commonwealth DPP Prosecution Policy.

7. Prosecution disclosure should be required prior to committal proceedings unless the disclosure requirement is waived at the first or subsequent mention of the matter.

8. 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.

9. In addition to recommendation 8, recognition should be given to the ongoing nature of the prosecution's obligation to disclose.

10. 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.

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

12. 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.

13. Both prosecution and defence 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.

14. Where possible, there should be (1) consistency of representation throughout the committal and trial process, and (2) certainty of trial dates.

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

16. Consideration should be given to the introduction of measures aimed at preventing abuse of collateral review of investigative procedures. This might include imposing restrictions on the collateral review process.

Committal and post-committal

17. Where possible, a limited opportunity for prosecution witnesses to be examined and cross-examined at committal should be retained.

18. The DPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal.

19. A "deposing" procedure similar to those in Western Australia and Victoria should be available to the prosecution.

20. 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.

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

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

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

24. 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. Counsel should also inform the judge at the first directions hearing that this advice has been given to the defendant.

Pre-trial

25. The Courts should have authority to impose a strict pre-trial management regime in cases where it is necessary.

26. A pre-trial conference or directions hearing should canvass listing issues such as (1) readiness for trial, (2) time estimates of trial, (3) witness availability and (4) funding of the defence.

27. Case conferences should be used to identify cases requiring closer management.

28. Consideration as to whether specific judges should be allocated to supervise the first "baggage shedding" stage of pre-trial regimes. However, major procedural issues (e.g. joinder) and substantive issues should be dealt with by the trial judge.

29. Where possible, any involvement of a judge in pre-trial proceedings should be open and on the record.

30. It is necessary to identify those cases where the accused is prepared to enter a plea of guilty to appropriate charges at the committal stage. It is also necessary to maintain efforts to identify guilty pleas at the early stages of pre-trial procedures.

31. Consideration should be given to formalising plea discussions between the prosecution and defence.

32. Subject to exceptions (1) and (2) in recommendation 33, a reasonable time before the commencement of the trial, the prosecution should be required to serve on the defence and file in court a final case statement.

33. After provision of the final case statement, the prosecution should only be permitted to adduce evidence additional to that disclosed by the required date where (1) a reasonable explanation is provided as to why earlier disclosure was not made; or (2) the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

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

35. Shortly before trial and following the filing and serving of the final case statement and notice of pre-trial admissions by the prosecution, 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 dispense with formal proof;

(iii) 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 he or she proposes to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matter and circumstances on which the opinion is formed.

iv) notice as to the following:

(1) where the prosecution relies on any surveillance evidence, whether it is necessary to call all witnesses and if not, which witnesses are required; (2) in respect of exhibits, whether there is an issue as to continuity; (3) in respect of listening device transcripts, whether they are accepted as accurate and, if not, in what respects; (4) where charts, diagrams or schedules are to be tendered, whether there is any issue about admissibility or accuracy.

36. In relation to recommendation 35(iv), the defence is not required to formally concede accuracy, but if it proposes to contest accuracy it should forewarn the prosecution. Thus, options for the defence are: (1) to stay silent (no warning required); (2) to contest accuracy (warning required); (3) to concede accuracy (no warning required).

37. The defence should not be required to identify defences referred to in recommendation 30(iii) of the Martin Report.

38. The prosecution should not benefit from early case disclosure by the defence.

39. In addition to the requirement in recommendation 35 that disclosure be made shortly before trial, 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 a nominated defence or the calling of an expert witness, the obligation to disclose should be complied with as soon as reasonably practicable.

40. All jurisdictions should consider the adoption of rules in relation to the presentation of expert evidence in criminal trials based on experience gained in the use of such rules in the Federal Court and the Supreme Court of South Australia. Particular regard would need to be had to the peculiar nature of the criminal trial process.

Trial

41. 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 the issues in dispute.

42. 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.

43. Where the defence has provided a response as envisaged in recommendation 41, the trial judge, immediately following this response should be required to address the jury for the purpose of summarising the primary issues in the trial that are likely to arise for its consideration.

44. Consideration be given to improving the capacity of a trial judge, in appropriate cases, 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 interests of justice favour dispensing with formal proof.

45. Trials should be made user-friendly to juries by (1) identifying matters not in dispute, (2) using charts and aids (3) providing uniform rules for note-taking and (4) allowing the use of transcripts.

46. Consideration be given to the advantages of standard form directions on particular points of law in the judge's summing up.

47. 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. Such a power should not impose arbitrary time limits. The power should be related to the circumstances of the individual case and should be applied where there is a demonstrable reason for intervention by the judge; (ii) the greater use of agreed statements of facts and written statements of witnesses (iii) the need for rules of evidence to permit the taking of evidence by video, including evidence from overseas. The Federal Court Rules provide a good example; (iv) the use of information technology with respect to disclosure, the provision of briefs of evidence, and evidence presented at trial (including digitised evidence). Courts, investigative agencies, the prosecution and the defence should have access to common information technology standards to ensure electronic access to material at all stages prior to, and during a trial. The electronic transfer of prosecution files between investigator, prosecutor, the defence and the Courts, as recommended in the Victorian Pathfinder Report should be considered.

48. Consideration should be given to encouraging the prosecution not to overload indictments. This might include an examination of the power of the court to make rulings on the indictment, as exists in QLD.

49. Consideration should be given to enabling the defendant to elect for trial by judge alone. This option exists in the ACT, SA, NSW and WA. The Commonwealth Constitution prevents trial by judge alone in respect of Commonwealth indictable offences. The power of prosecution to veto the election for trial by judge alone which exists in NSW and WA jurisdictions should be re-considered.

Sentence

50. Any proposed Fast Track System should be given a legislative basis.

51. The existing system of discounts for guilty pleas should continue. It should be strengthened by requiring sentencing judges to state publicly in their reasons for sentence, the discount that has been given for the guilty plea.

52. 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.

53. 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.

Legal Aid

54. Any response to the decision in *Dietrich* must not infringe the common law concern to ensure a fair trial for every defendant.

55. Section s360A of the *Crimes Act 1958 (Victoria)* is not an appropriate model for resolving the *Dietrich* issue.

56. Whilst it may not be appropriate in all cases to link the question of indigence to a legal aid means test, the courts are not well equipped to determine indigence. The question of indigence requires investigation, the examination of evidence and the evaluation of the credit of the accused person. The question of indigence is separate from the question of the fairness of the trial. Consideration should be given to the possibility of permitting an appropriately qualified person such as the Public Trustee or the Trustee in Bankruptcy to determine indigence.

57. All issues regarding legal aid for the trial should be determined as part of pre-trial procedures.

58. 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*.

59. Advice of the rule in recommendation 58 should be given to each defendant at the time of committal.

60. The accused should bear the onus of proving indigence.

61. The Court is to consider the accused's behaviour (fault) in relation to incapacity to afford representation.

62. The Court cannot make orders as to identity, number or remuneration of counsel.

Culture

63. Whilst there is no agreement on the issue of sanctions, it is essential to the fair and efficient administration of justice that legal practitioners comply with their obligations to act diligently and expeditiously.

64. The obligation to give the advice in recommendation 24 (failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable) should be included in the rules of professional conduct.

65. Law schools and legal training courses should encourage the attitude of cooperation and compliance with the obligations to act diligently and expeditiously, but within the context and framework of the accusatorial system.

66. 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 time of the court is not taken up unnecessarily.

67. The need to minimise delay and to ensure that trials are conducted efficiently and within proper cost constraints must always be subsidiary to the fundamental concept of a fair trial.

68. Government should provide the infrastructure necessary to implement the reforms outlined in this report. Information campaigns will be necessary to gain judicial and professional support and commitment to implementing reform.

OVERVIEW

Many of the recommendations in this report mirror the recommendations of the Standing Committee of Attorneys-General (SCAG) Working Group on Criminal Trial Procedure contained in the report of September 1999 (Martin Report).
The Deliberative Forum on Criminal Trial Reform used the Martin Report recommendations as the starting point of its deliberations.

The Deliberative Forum, made up of persons nominated by the Attorneys-General of the Commonwealth, State and Territory Governments, was preceded by the National Conference of Criminal Trial Reform, hosted jointly by the Australian Institute of Judicial Administration (AIJA) and SCAG in Melbourne on 24-25 March 2000. The Conference, like the Deliberative Forum, had as its starting point the Martin Report recommendations. The Conference papers, many of which were presented by members of the Deliberative Forum, analysed existing law and practice and suggested models for reform of criminal trial procedure.

The Deliberative Forum, which met on 26 March 2000, immediately after the Conference, provided an opportunity for members to debate the relative merits of each of the relevant Martin Report recommendations in conjunction with other reform proposals arising from the individual Conference presentations.

In addition to the Martin Report, other recent reports and legislative initiatives, including the Western Australian Law Reform Commission Review of the Criminal and Civil Justice System (September 1999) and the operation of the *Crimes (Criminal Trials) Act 1999* in Victoria, provided sources for the Deliberative Forum deliberations.

The final recommendations and collective comments from members of the Deliberative Forum, including additional comments following the meeting of 26 March, have been incorporated into this report.

GENERAL CONSIDERATIONS

It is important that some general points are made which apply to all the Deliberative Forum recommendations.

Source of the recommendations

First, not all recommendations of the SCAG Working Group Report on Criminal Trial Procedure have been adopted by the Deliberative Forum. For example, Forum members did not support the Martin Report recommendation that prosecution disclosure be given a statutory basis. In addition, amendments, both substantial and minor, have been made to several Martin Report recommendations.

A number of Forum recommendations derive from sources other than from the Working Group's report. Where this is the case, the source is specifically identified together with a note indicating that the Working Group did not address that specific issue.

The Forum recommendations are grouped under headings which differ from those contained in the Working Group report. For example, recommendations in the Forum report relating to prosecution disclosure fall within two different headings entitled "Pre-Committal" and "Pre-Trial" respectively, as distinct from the "Prosecution Disclosure" and "Pre-Trial" headings in the Working Group report.

Nevertheless, it is important that the Martin Report is read in conjunction with this report. The Martin Report provides the background and context to the reform proposals and describes, in detail, the reasons for adoption of the recommendations by the Working Group. To avoid unecessary duplication, much of that information has been omitted from this report.

Jurisdictional differences

The capacity to apply and implement the recommendations will necessarily vary according to jurisdiction. In the course of deliberations, jurisdictional differences in the operation and practice of criminal trial procedure and the special requirements

arising out of these differences were duly noted. Thus, whilst the recommendations contained in this report are supported in principle, some recommendations will not be appropriate for implementation by the Commonwealth, and every State and Territory Government.

Indictable cases

The recommendations of the Forum apply to the reform of criminal trial procedure in respect of indictable cases. Matters involving summary cases are not dealt with at length in this report.

Funding

The reform of criminal trial procedure will require sufficient funding. The Deliberative Forum has not attempted to set out the costs of implementation and operation of the recommendations at a legislative and administrative level. Nor has the Forum tried to estimate the costs involved in respect of those cases which will already be in the criminal justice system at the time of implementation of reform.

However, the Forum is aware that the issue of funding and resources is extremely important if the recommendations are to be implemented successfully. The issue of funding is mentioned specifically in the Forum comments in respect of several recommendations. However, this fact should not be interpreted as excluding the possibility of funding issues arising in the context of other recommendations. Funding implications are of general consideration and are relevant to all aspects of reform.

Implementing the recommendations

The Forum report does not provide details of the actual change necessary to give effect to each recommendation. Whilst a number of recommendations allude to the methods of implementation, other recommendations do not provide specific instructions for the future action required. There may also be 2 or more possible methods of implementation. The Forum is confident that the appropriate methods will ultimately be determined upon further consideration of this report.

Support for the recommendations

Finally, the final recommendations were made by *general* agreement. Not all recommendations contained in this report achieved unanimous support. As mentioned previously, many recommendations were agreed to in principle only - jurisdictional differences are likely to affect their implementation. Moreover, given time constraints, each individual recommendation was not subject to equal scrutiny by all Forum members. Unless express objection was made, a recommendation was taken to have achieved general support.

Unanimous agreement was reached, however, on the value of the Deliberative Forum itself. Members, comprising representatives of the judiciary and legal aid services, policy officers, prosecutors and defence practitioners came together in support of reform to the criminal justice system. In recognition of the national concern to improve criminal law processes in every Australian jurisdiction, each Forum member was representing not only the views of his or her profession, but also the interests of the community more generally.

On behalf of SCAG, the Commonwealth Attorney-General, Mr Daryl Williams AM QC MP, would like to thank Deliberative Forum members for their contribution to, and support of, this important discussion.

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1. THE INVESTIGATION AND CHOICE OF CHARGES

RECOMMENDATION 1 - DPP ADVICE DURING THE INVESTIGATION

In complex cases, the DPP should provide prosecution advice during the investigative process.

This role may include reviewing the sufficiency of evidence, advising on proofs to be obtained and suggesting appropriate charges.

SOURCE:

Martin Report, Recommendation 8 as slightly amended by the Forum.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Blackburn Royal Commission 1990
Wood Royal Commission 1997
WALRC 1999, Recommendation 304

FORUM COMMENT:

It was generally agreed that the DPP has a role to play in the investigative stage of complex cases. This includes providing assistance to investigators in relation to questions of proof and the drafting of appropriate charges.

There was equal agreement that the role of the DPP should not be to control or direct the investigation, otherwise the independence of the prosecutor would be eroded.

Resource implications were noted.

ADDITIONAL COMMENT:

The Commonwealth DPP initiates indictable charges based on briefs submitted by the AFP in all but arrest matters. DPPs in other jurisdictions have a limited role in relation to the oversight of the police charging discretion.

However, there is a tendency for police to seek assistance in complex matters or where a decision whether or not to charge is likely to be controversial, for example, sexual assault cases or politically sensitive cases.

Greater DPP control over the charging process is likely to ensure that thorough and proper preparation of cases takes place prior to charging, and that the charges laid are appropriate.

Greater DPP involvement has resource implications and could be achieved by either legislative change or by mutual cooperation between police and the DPP. The additional resources required by the DPP to be involved in complex cases would enable scarce investigative resources to be properly targeted.

RECOMMENDATION 2 - DPP TO REVIEW CHARGES

In all matters the DPP should be involved in reviewing charges laid by the police at the earliest possible opportunity.

A review of charges could allow the DPP to recommend: (1) reduced charges (to summary or either-way charges), (2) fewer charges; or (3) more serious charges. The DPP should be involved in the review of charges in all matters. Whilst complex cases may require very early DPP involvement, such early involvement may not necessarily be required in other cases.

SOURCE:

Martin Report, Recommendation 9

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 304

FORUM COMMENT:

There was general support for the proposition that indictable charges be reviewed by the DPP before a committal takes place and that the DPP have control over the charge to be presented at Court.

The general supervisory role of the Court should not be interfered with. Judges should be able to strike out charges as an abuse of process, but should not exercise a general power to question the charges presented at court.

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial Justice in Transition*.

Judges should have power to inquire into charges and strike any out if the interests of justice require (page 5).

ADDITIONAL COMMENT:

Not every DPP is involved in the prosecution of all committal cases and it may be that some DPPs would not have the resources to comply with the requirement to attend every committal.

In some jurisdictions, if the DPP becomes involved in vetting the charge, this may cause the police to withdraw from the presentation of the case. Questions may arise as to whether the DPP is merely providing advice or is in fact taking over the matter from the police when it reviews the charge prior to committal.

As it stands, this recommendation is able to take into account the difference between jurisdictions by allowing the DPP to act in one or other of the following capacities:

- an advisory role, or
- a limited role - taking over simply to amend charges, or
- an interventionist role - determining the charges (if any) to be laid.

RECOMMENDATION 3 - PROSECUTION GUIDELINES FOR CHARGE SELECTION

Each DPP should prepare prosecution guidelines with respect to the choice of criminal charges. Guidelines should require:

- **(1) that charge(s) laid reflect adequately the criminal conduct disclosed by the admissible evidence and which will provide the court with an appropriate basis for sentencing; and**
- **(2) that discussions take place with defence counsel with a view to facilitating the appropriate choice of charges.**

SOURCE:

Mr Ian Temby QC, NSW Bar, *Prosecution discretion and the use of appropriate charges* (page 8)

This issue was not addressed in the Martin Report.

ADDITIONAL COMMENT:

Most DPPs currently use a test for the choice of charge that requires the prosecution to pursue the most *serious* charge available on the evidence. This is not necessarily the most appropriate charge, and the choice of a *lesser* charge need not lead to a significant reduction in the penalty applied.

The recommended test for the appropriate choice of charge is taken from the NSW DPP prosecution guidelines. It gives greater latitude to the DPP to select an appropriate charge, and it requires the prosecution to seek defence involvement in charge selection.

This recommendation was considered at the DPPs national meeting in April 2000. It was decided that the current individual charging practices of the DPPs were adequate, and formalisation of the choice of charge in the form of uniform national guidelines was unnecessary.

2. PRE-COMMITTAL

RECOMMENDATION 4 - DISCLOSURE OBLIGATION SPECIFICALLY IDENTIFIED

The prosecution disclosure obligation should be specifically identified as applicable to both prosecutors and investigators.
Whilst a statutory obligation of disclosure is not appropriate, and DPP guidelines already contain the prosecutor's obligation, consideration should be given to the requirement of a disclosure certificate from investigators.

This recommendation seeks to ensure that police and other investigators have a positive obligation to inform the prosecutor of all matters relevant to the possible guilt or innocence of the accused. The prosecutor, in turn, has a clear obligation to provide disclosure to the defence.

SOURCE:

Martin Report, Recommendation 2 as substantially amended by the Forum.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

LCA 1998, Recommendation 12
WALRC 1999, Recommendation 252(1)
Aronson 1992, Recommendation 31

CONFERENCE COMMENT:

Wendy Abraham QC, Associate DPP, South Australia, *The duty of disclosure on the prosecution*.

> It is of fundamental importance that investigators disclose all relevant material to the prosecution (page 8).

FORUM COMMENT:

This recommendation was supported as an ongoing obligation.

It was generally agreed that prosecution disclosure should not be given a *statutory* basis. DPP guidelines currently in place contain detailed provisions relating to the obligation to disclose and are considered a sufficient basis for the obligation.

There was only weak support for creating a statutory disclosure obligation in relation to investigators. It was agreed generally that guidelines and rules would suffice. Whilst any statutory obligation applicable to investigators and not prosecutors would be discriminatory, there was acknowledgment of the differentiation between the police and the prosecution.

There was general support for a procedure requiring the investigator to provide a certificate of disclosure to the prosecutor.

ADDITIONAL COMMENT:

Care needs to be taken to ensure that the obligation of disclosure is not restricted to the individual investigator in charge of a case. The obligation should extend to any police officer who has knowledge of a matter relevant to the guilt or innocence of an accused person.

RECOMMENDATION 5 - SANCTIONS FOR NON-DISCLOSURE BY INVESTIGATORS.

Internal disciplinary sanctions should exist in respect of investigators who fail to comply with their disclosure obligations.

This aim of this recommendation is to provide confidence in the system of disclosure outlined in recommendation 4.

SOURCE:

Martin Report, Recommendation 3

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 252(2)

FORUM COMMENT:

The disclosure obligation on investigators should not be significantly different from that applying to prosecutors. Internal disciplinary sanctions could be applied in the event of a breach of the obligation.

ADDITIONAL COMMENT:

In practice, it would be very difficult for the accused person to penetrate the police investigative process and expose the information being withheld. Moreover, if an investigator was found to have deliberately withheld the information, disciplinary sanctions may not have the desired deterrent effect.

RECOMMENDATION 6 - COMMONWEALTH DPP DISCLOSURE POLICY AS MODEL

The disclosure obligation should be expressed in terms similar to those contained in the policy promulgated by the Commonwealth DPP.

DPP policy on prosecution disclosure is not expressed in the same terms in every jurisdiction. For example, the Commonwealth DPP prosecution policy contains detailed provisions on the disclosure of unused material (Section E in Appendix 2 - Statement on Prosecution Disclosure).

SOURCE:

Martin Report, Recommendation 6

CONFERENCE COMMENT:

Wendy Abraham QC, Associate DPP, South Australia, *The duty of disclosure on the prosecution*.

It is difficult and problematic to define what type of material is included in the concept of "unused material".

ADDITIONAL COMMENT:

This recommendation may present some difficulty with respect to the determination of *relevant* material. The determination of relevance could be made less problematic by ensuring that the defence identifies the issues in dispute. This action may place the prosecution in a better position to consider the relevance of unused material.

RECOMMENDATION 7 - DISCLOSURE PRIOR TO COMMITTAL

Prosecution disclosure should be required prior to committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter.

The aim of this recommendation is to ensure disclosure is made before a committal hearing takes place, but only insofar as the accused's plea requires. For example, if the defendant intends to plead guilty, he or she could permit a waiver of the requirement that the prosecution provide full or specific disclosure at the first or subsequent mention of the charge(s) in the summary court.

SOURCE:

Martin Report, Recommendation 4

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendations 280, 282, 286
LCA 1998, Recommendation 6, 8

ADDITIONAL COMMENT:

There is a need to coordinate the disclosure obligation with any committal order for service of a brief.

CONFERENCE COMMENT

Wendy Abraham QC, Associate DPP, South Australia, *The duty of disclosure on the prosecution.*

> Committals are closely linked to the disclosure process. Whilst committals in some jurisdictions have become a "hand-up or paper committal, the disclosure role is still fulfilled" (page 10).

RECOMMENDATION 8 - PROSECUTION CASE STATEMENT

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.

SOURCE:

Martin Report, Recommendation 12

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Corns 1997, Recommendation 6
WALRC 1999, Recommendation 282

FORUM COMMENT:

It was noted that disclosure requirements under the DPP guidelines were often greater than those under committal legislation.

Concern was raised about the requirement to supply prosecution case statements in simple cases where the issues were obvious.

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

> "The process of preparing for a committal proceeding (in Victoria), which was once reasonably straightforward, has now been converted into a complex exercise requiring the preparation of a significant number of important documents which must be completed within strict time limits" (page 8).

RECOMMENDATION 9 - DISCLOSURE AN ON-GOING OBLIGATION

In addition to recommendation 8, recognition should be given to the on-going nature of the obligation.

This recommendation aims to ensure that the accused is kept informed as investigations continue and the prosecution case develops. The prosecution may also have to respond to aspects of pre-trial defence disclosure.

SOURCE:

Martin Report, Recommendation 5

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

LCA 1998, Recommendation 12(c)

RECOMMENDATION 10 - LEGAL AID TO FOLLOW CHARGING IN SERIOUS CASES

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.

In the various jurisdictions, legal aid for committals is either non-existent, severely restricted, or only available for an offence such as murder. Where legal aid is made available, it is often only for the committal hearing. There is a need for the defence to prepare well before the committal hearing in order to be in a position to consider appropriate pleas and to limit the issues.

SOURCE:

Martin Report, Recommendation 13

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Corns 1997, Recommendation 1
DPP & NLA 1998, Recommendation 2

CONFERENCE COMMENT:

This was one of a number of recommendations that was identified as having a financial impact up-front on the cost of proceedings. However, the costs involved in giving effect to this recommendation would be balanced by the results it would bring - a reduction in late guilty pleas and the better preparation of trial matters.

FORUM COMMENT:

The funding issue was noted.

Page 74 of the Martin Report refers to the need for increased funding in the early stages of the trial process in order to increase overall efficiency. The Report, however, admits that it may take considerable time before any benefits are apparent.

The Forum agreed that early legal assistance should be tied to attempts to ensure consistency of listing dates and continuity of counsel (see recommendation 14).

ADDITIONAL COMMENT:

The overall impact on legal aid funding needs to be considered.

RECOMMENDATION 11 - GRANTS OF AID STRUCTURED TOWARDS RESOLUTION

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

SOURCE:

Martin Report, Recommendation 14

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 2

CONFERENCE COMMENT:

His Hon. Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process*.

> Sufficient funding needs to be made available at an early stage to ensure that the defence is encouraged, and is able to, prepare its case and advise the client prior to committal (pages 3-4).

Mr Michael Rozenes, QC, Barrister, Victoria, *The right to silence in the Pre-trial and trial stages*

> In the case of legally aided matters even where counsel are sufficiently competent, nothing will be achieved unless counsel are well prepared. This in turn depends in most cases on the level of funding and court listing procedures (pages 3-4).

FORUM COMMENT:

It was argued that the legal aid grant should be structured towards resolving issues and outcomes. For example, Victoria Legal Aid has structured grants of aid so that counsel are paid relatively more per day for a four day hearing, than they would be for a ten day hearing.

It was noted that there was a potential for a conflict of interest if the grant of aid unduly favoured the entry of early pleas.

It is necessary to provide adequate funding so that counsel can properly prepare and become sufficiently acquainted with the matter and with the client in order to resolve the plea and the issues prior to, or at, committal.

RECOMMENDATION 12 - EXPERIENCED COUNSEL AT COMMITTAL

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.

SOURCE:

Martin Report, Recommendation 15

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 4
Corns 1997, Recommendation 1

CONFERENCE COMMENT:

His Hon. Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process*.

> A senior adviser from the defence, (preferably trial counsel) and a senior DPP officer who is able to make binding decisions should attend from the pre-committal stage. The early attendance of senior practitioners will help to resolve later problems in relation to pre-trial hearings (pages 5-7).

ADDITIONAL COMMENT:

There are funding implications for the appearance of senior practitioners. Appropriate remuneration may be needed if there are additional burdens on the defence.

There is also recognition of the need for junior practitioners to be included in the criminal law process. Consideration should be given to the introduction of committal management units within the DPP which operate under the direct supervision of a senior trial prosecutor.

RECOMMENDATION 13 - COUNSEL TO HAVE FULL CHARGE OF CASE

Both prosecution and defence 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.

SOURCE:

Martin Report, Recommendation 16

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 5

CONFERENCE COMMENT:

His Hon. Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process* (see recommendation 12).

ADDITIONAL COMMENT:

Ensuring the continuity of counsel will always be difficult, especially where 2 or more jurisdictions are involved in the criminal trial process.

Continuity of counsel cannot always be guaranteed in serious matters involving senior counsel, particularly where there is limited availability of such counsel.

RECOMMENDATION 14 - CONSISTENCY OF REPRESENTATION - TRIAL DATE CERTAINTY

Where possible, there should be (1) consistency of representation throughout the committal and trial process, and (2) certainty of trial dates.

SOURCE:

Tony Glynn SC, Queensland Bar, *Pre trial procedures* (page 2).

LINK TO MARTIN REPORT RECOMMENDATION:

No specific Martin Report Recommendation but in accord with Martin Report Recommendations 15 & 16.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE

WALRC 1999, Recommendation 317.

FORUM COMMENT:

This recommendation is not controversial as a statement of principle but it may be hard to give effect to. (See Forum Comment for recommendation 13).

Certainty of trial dates is only possible if listing is certain, which necessitates an end to the practice of overlisting. Consequently, judges would not be in their courtrooms continuously.

There needs to be an awareness that money and resources are currently being wasted in preparing cases that do not reach trial, or that fail to commence on the date listed for trial.

RECOMMENDATION 15 - COUNSEL TO ACTIVELY SEEK TO RESOLVE MATTERS

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

SOURCE:

Martin Report, Recommendation 17

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 6
WALRC 1999, Recommendations 257 and 259

RECOMMENDATION 16 - LIMIT COLLATERAL REVIEW OF INVESTIGATION

Consideration should be given to the introduction of measures aimed at preventing abuse of collateral review of investigative procedures. This might include imposing restrictions on the collateral review process.

SOURCE:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*

> Collateral review processes have adversely affected investigations in respect of Commonwealth and State offences. Courts are not addressing adequately this increasing problem (pages 4-5).

This issue was not addressed in the Martin Report.

FORUM COMMENT:

It was agreed that limiting collateral review is desirable, however, it may be difficult to give effect to this recommendation.

There was some concern that collateral review rights should not be interfered with lightly. The real problem lies in the abuse of such remedies and the court time taken up with them.

ADDITIONAL COMMENT:

The problem of "collateral attack" is being addressed federally in the *Jurisdiction of Courts Legislation Amendment Bill 2000* which is awaiting Royal Assent as at May 2000.

Under the Bill, while a State or Territory Court is hearing a prosecution that arises under a Commonwealth law, the Federal Court's jurisdiction to review the decision to prosecute will be removed. Instead, the relevant jurisdiction will be vested in the State and Territory court which deal with the prosecutions.

3. COMMITTAL AND POST-COMMITTAL

RECOMMENDATION 17 - LIMITED RIGHT TO CROSS EXAMINATION AT COMMITTAL

Where possible, a limited opportunity for prosecution witnesses to be examined and cross-examined at committal should be retained.

SOURCE:

Martin Report, Recommendation 7

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Limitations imposed: *Magistrates Court Act 1999* (Vic), *Justices Act* (NSW)

FORUM COMMENT

The Forum recognises that there are different approaches in each jurisdiction to the function and role of the committal which will affect the operation of this recommendation. For example, the recommendation will not be relevant to WA.

The test for determining whether or not a witness can be called at committal differs across jurisdictions. It will be necessary to consider the current arrangements in each jurisdiction to ascertain the appropriate way to limit the opportunity to cross-examine at committal.

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

> In complex cases there will be applications to review decisions to refuse leave to cross-examine witnesses at committal. This will lead to further delay (page 9).
>
> "It is plainly inappropriate to require witnesses whose evidence is formal, or at best peripheral, to be made available for cross-examination at a committal proceeding. However, those witnesses whose evidence is of substantial relevance to the case against the defendant ought, in my view, to be available for cross-examination. Such cross-examination should be subject to proper limits. There should be no repetition of the appalling excesses of the past"(page 16).

Paul Coghlan QC, Chief Crown Prosecutor, Victoria, *Committal and post committal*

> "In the new system (Victoria), the committal mention is the occasion on which debate takes place as to whether or not leave will be given to the defence to cross-examine witnesses and if permitted to do so, to what extent. The defence are obliged to have filed a notice indicating which witnesses will be the subject of an application for leave to cross-examine and "the scope of the proposed questioning and how it is of substantial relevance to the facts in issue"" (page 7)
>
> At present, fewer cases are being settled at this point; a reason being that the focus tends to be on the question of leave. In addition, further litigation arises as a result of challenges to the decision to refuse leave to cross-examine; "such action is fragmentation of the criminal process of the most fundamental kind" (pages 8).

RECOMMENDATION 18 - DPP TO CONDUCT COMMITTALS

The DPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal.

SOURCE:

Martin Report, Recommendation 10

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 1
Corns 1997, Recommendation 4

CONFERENCE COMMENT:

Paul Coghlan QC, Chief Crown Prosecutor in Victoria, *Committal and post committal*.

The DPP has the conduct of all committals in Victoria (page 7).

FORUM COMMENT:

It was generally considered essential that the DPP be responsible for committals in order to reduce the possibility of delay and to make the committal process more efficient.

ADDITIONAL COMMENT:

At present, not every DPP has the responsibility for committals, however, this is changing and DPPs are progressively taking on this function.

RECOMMENDATION 19 - DEPOSING PROCEDURE REQUIRED

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

Where a witness will not provide a statement but can be expected to give evidence, the prosecution should be able to call that person and subject him or her to oral examination.

SOURCE:

Martin Report, Recommendation 11

Victoria - section 56A and Clause 13 Schedule 5 *Magistrates Court Act 1989*

Western Australia - section 73 *Justices Act 1902*

FORUM COMMENT

This recommendation was supported. It was agreed that there would be a need to provide advice to, and protect the rights of, a witness called to give evidence by deposition. The witness, for example, may need protection from self-incrimination.

It was noted that the deposition of the witness becomes that witness's statement. The deposition may be taken in the absence of the accused or, if present, the accused should have no say in the proceedings.

There was some contention as to whether the warnings of the presiding magistrate would suffice to properly protect the witness called to give a deposition.

It was noted that in Tasmania, the parties can return to the Magistrates Court after committal to have evidence taken.

RECOMMENDATION 20 - AGREEMENTS ON PLEA IN LOWER COURT FOR SENTENCE IN HIGHER COURT

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.

SOURCE:

Martin Report, Recommendation 18

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

DPP & NLA 1998, Recommendation 7

ADDITIONAL COMMENT:

At present, an agreement as to facts between the prosecution and defence is not binding on the sentencing judge.

RECOMMENDATION 21 - FAST TRACK PROCEDURE

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

The Fast Track system allows for a matter, in which the accused wishes to plead guilty, to be quickly transferred to the District Court for sentencing. By doing so, the accused is entitled to a significant sentence discount.

SOURCE:

Martin Report, Recommendation 19

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, page 240

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay* (page 17)

"An excellent scheme" (page 17).

His Hon. Judge John Sulan, District Court, South Australia, *Defence co-operation in the trial process*

(The Fast Track) procedure has existed for some years in Western Australia which has had some success in the prompt hearing of cases and savings costs (page 4).

RECOMMENDATION 22 - ABBREVIATED COMMITTAL BY CONSENT

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

This recommendation proposes an abbreviated procedure for the transfer of cases for trial. In relatively straightforward matters where the defendant intends to plead not guilty, subject to the defendant's consent, the case can proceed to trial without the prosecution having to fulfil every disclosure requirement.

SOURCE:

Martin Report, Recommendation 20

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 13

RECOMMENDATION 23 - DIRECTIONS HEARING POST-COMMITTAL

Where possible, the concept of a conference or directions hearing soon after committal should be included as part of the pre-trial procedures.

This recommendation will enable counsel attending the committal to resolve issues after the committal order while all the parties are together with their minds focused on that case.

SOURCE:

Martin Report, Recommendation 23

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

A "post-committal conference" as provided for in the Victorian provision (s. 24(6)), is, in effect, a "dead letter" (page 8).

FORUM COMMENT:

Whilst this recommendation was supported in principle and there was general agreement on the value of capturing the preparedness of counsel attending the committal, concerns were raised about the appropriateness of this type of conference. It could be argued that any relevant or useful advancement of the case should have been made during the committal process.

Jurisdictional differences and local requirements are also likely to affect the suitability of the recommendation. Where the volume of cases is high, for example in NSW, such a hearing is likely to add to delay, and, given a formal basis, would only be onerous and counter-productive.

It was thought that informal procedures were being used effectively in NSW to achieve a substantial resolution of cases by counsel at the time of the committal. Anecdotal evidence suggests that the informal discussions between counsel have had a very significant impact on the flow of cases into the District Court.

A special feature of NSW practice is that the prosecution and defence decide which either-way indictable charges (that can be heard on indictment or summarily) are to proceed to trial.

In Victoria, the Magistrate is not a stakeholder in the case after making a committal order. The Victorian *Crimes (Criminal Trials Act) 1999* provision for a post-committal conference ought to be carefully monitored.

This recommendation is linked to recommendation 3; - the creation of prosecution guidelines requiring the discussion of appropriate charges with the defence. The success of this recommendation is also linked to the early provision of legal aid (recommendation 10) and the structuring of the grant towards resolution (recommendation 11).

RECOMMENDATION 24 - NOTICE OF SENTENCE DISCOUNT FOR PLEA

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. Counsel should also inform the judge at the first directions hearing that this advice has been given to the defendant.

This recommendation reinforces the need to enter a plea at an early stage in order to obtain a sentence discount

SOURCE:

Martin Report, Recommendations 37 & 38

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

Sentencing discounts should be given for cooperation in the conduct of the trial. Sentencing courts should give detailed reasons for sentence discount (page 17).

4. PRE-TRIAL

RECOMMENDATION 25 - AUTHORITY TO IMPOSE AND ENFORCE STRICT PRE-TRIAL REGIME

The Courts should have authority to impose a strict pre-trial management regime in cases where it is necessary.

SOURCE:

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

Different criminal matters require different levels of management and as such there is debate as to the respective merits of formal, compulsory directions hearings and informal hearings. Notwithstanding these differences, there should be authority to impose strict pre-trial management regime in order to prevent the incidence of "rogue" trials (page 4).

LINK TO MARTIN REPORT RECOMMENDATION

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

OTHER CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

There is general acceptance that the court must control the pace of litigation. A systematic managerial approach to managing caseloads is required (pages 4-5).

FORUM COMMENT:

It was generally recognised that there is a need for judicial management of the pre-trial process. However, whilst there was no real support for court imposed sanctions, there was general agreement that practitioners would be bound by the obligation to the Court.

RECOMMENDATION 26 - LISTING ISSUES

A pre-trial conference or directions hearing should canvass listing issues such as readiness for trial, time estimates, witness availability, and funding of the defence case.

SOURCE:

Tony Glynn SC, Queensland Bar, *Pre trial procedures*.

The conference should address those issues that affect length of the trial, including:

date of completion of Crown disclosure obligations
estimated trial length
witness availability
funding the defendant's trial
dates for disposal of matters of questions of law and procedure
identifying cases in need of closer management (page 6).

This was not the subject of any specific Martin Report recommendation.

RECOMMENDATION 27 - IDENTIFY CASES IN NEED OF CLOSER MANAGEMENT

Case conferences should be used to identify cases requiring closer management.

SOURCE:

Tony Glynn SC, Queensland Bar, *Pre trial procedures.*

At a pre-trial conference or directions hearing, cases in need of closer supervision due to length and/or complexity should be specifically identified (page 7).

This was not the subject of any specific Martin Report recommendation.

FORUM COMMENT:

This recommendation was generally supported within the context of judicial management of pre-trial procedures.

RECOMMENDATION 28 - SPECIFIC PRE-TRIAL JUDGES

Consideration should be given whether specific judges should be allocated to supervise the first "baggage shedding" stage of pre-trial regimes. However, major procedural issues (e.g joinder) and substantive issues should be dealt with by the trial judge.

SOURCE:

Martin Report, Recommendation 25 as amended

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 312

A pre-trial magistrate should manage pre-trial matters before it is apparent that a charge is destined for trial and is committed to the higher court (page 252).

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

There has been success in Victoria with three judges allocated to pre-trial work (page 12).

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

One judge conducting pre-trial management of the list is more efficient in terms of continuity and avoidance of repetitive excuses. (page 2)

FORUM COMMENT:

Generally it was agreed that where a judge had embarked on deciding substantive issues relevant to the trial, for example, admissibility issues, rather than trial management issues, then that judge should preside at the trial.

RECOMMENDATION 29 - OPEN PROCESS

Where possible, any involvement of a judge in pre-trial proceedings should be open and on the record.

SOURCE:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

Open and recorded discussions are preferable. Such discussions would not preclude things to be said on a "without prejudice" basis. Any 'off the record' case conferences have inherent risks and are capable of being misinterpreted (page 12).

This was not the subject of any specific Martin Report recommendation.

FORUM COMMENT:

There was qualified support for this recommendation. Concerns were expressed about the presence of potential witnesses, and judicial comment on the quality or weight of evidence. One suggestion was that a court-appointed mediator, rather than a judge, would be appropriate for the purpose of assisting the parties to resolve pre-trial issues.

RECOMMENDATION 30 - PLEAS RESERVED AT COMMITTAL

It is necessary to identify those cases where the accused is prepared to enter a plea of guilty to appropriate charges at the committal stage. It is also necessary to maintain efforts to identify guilty pleas at the early stages of pre-trial procedures.

SOURCE:

Paul Coghlan QC, Chief Crown Prosecutor in Victoria, *Committal and post committal*.

In relation to "reserved pleas" (page 12) as amended by the Forum.

This was not the subject of any specific Martin Report recommendation.

OTHER CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

The burden on the higher courts will be eased if there is an increase in the early identification of guilty pleas.

FORUM COMMENT:

The practice of reserving pleas can be perceived as "judge shopping". Special emphasis is needed to ensure that pleas are properly identified at the committal stage, rather than wasting the case management resources of the trial courts.

In order to weed out cases where a plea of guilty is effectively reserved at the committal, it is also necessary to maintain efforts to identify guilty pleas early in the trial case management procedures. The Victorian "Pegasus project" could serve as a model.

RECOMMENDATION 31 - PLEA DISCUSSIONS FORMALISED

Consideration should be given to formalising plea discussions between the prosecution and defence.

SOURCE:

His Hon Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process*.

Formalisation of plea bargaining would reduce court costs and increase public support for plea bargaining. The process should ensure greater safeguards for the defence in order to promote defence cooperation (pages 7 - 8).

This was not the subject of any specific Martin Report recommendation.

FORUM COMMENT:

This recommendation was raised at the national meeting of the DPPs in April 2000. It was generally agreed that formalisation of plea bargaining was unnecessary and that the informal arrangements currently in existence were seen as advantageous - any formal requirement might jeopardise the success of the current arrangements.

RECOMMENDATION 32 - PROSECUTION CASE STATEMENT PRE-TRIAL

Subject to exceptions (1) and (2) in recommendation 33, a reasonable time before the commencement of the trial, the prosecution should be required to serve on the defence and file in court a final case statement.

SOURCE:
Martin Report, Recommendation 26

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Corns 1997, Recommendation 6

FORUM COMMENT:

There was qualified support for this recommendation. Concern was expressed about the 'locking' of indictments and the potential for prosecutors to overload indictments.

RECOMMENDATION 33 - LIMITS ON PROSECUTION CHANGING NATURE OF ITS CASE

After the provision of the final case statement, the prosecution should only be permitted to adduce evidence additional to that disclosed by the required date where (1) a reasonable explanation is provided as to why earlier disclosure was not made; or (2) the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

SOURCE:

Martin Report, Recommendation 27

CONFERENCE COMMENT:

Tony Glynn SC, Queensland Bar, *Pre trial procedures.*

Notion of a *final* case statement is nonsensical if prosecution evidence that will have "any bearing on the outcome of the case" satisfies the "interest of justice" test (pages 4-5).

FORUM COMMENT:

This recommendation was generally supported. Concern had been expressed regarding the ease with which the prosecution might change its case under the 'interests of justice" test.

A suggestion was that the prosecution should not be able to change its case unless it shows that additional material wasn't available to it with reasonable diligence prior to identification of its final position.

However, the risk of the prosecution being unfairly prejudiced in the presentation of its case was also highlighted in respect of this recommendation.

RECOMMENDATION 34 - PROSECUTION NOTICE OF PRE-TRIAL ADMISSIONS SOUGHT FROM DEFENCE

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

SOURCE:

Martin Report, Recommendation 29

RECOMMENDATION 35 - DEFENDANT'S DUTY TO RESPOND AND DISCLOSE MATTERS

Shortly before trial and 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 dispense with formal proof;

(iii) 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.[1]

(iv) 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.

[1] 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)

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

SOURCE:

Martin Report, Recommendation 29, as amended by the Forum.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 253

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

In light of prosecution disclosure, defence disclosure should be required and this requires a statutory basis (page 4).

COMPARE:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

The provisions in the 1999 Victorian Act impose unduly heavy obligations on the defence. These requirements ignore difficulties defence counsel often face e.g – inability to gain meaningful instructions early on. They may also infringe principle that an accused should not be required to assist the prosecution in procuring a conviction (page 13).

Michael Rozenes QC, Victorian Bar, *The right to silence in the pre-trial and trial stages.*

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and (in relation to evidence of substantial impairment of mind) by section 405B of

It takes great care to require the defence to indicate what is NOT in dispute (pages 6 - 8).

Tony Glynn SC, Queensland Bar, *Pre trial procedures.*

Pre-trial procedures must not exacerbate the already significant imbalance in resources between the defence and the prosecution (pages 6 - 8).

FORUM COMMENT:

Concern was expressed about the implications in respect of the defence disclosure obligation if the prosecution can change the indictment right up to the time of the trial.

It was argued that the requirement of the defence to disclose expert evidence should be limited to circumstances where the defence proposes to call that evidence.

Formal sanctions for breaches of disclosure obligations are not supported - encouragement and incentives are considered more appropriate.

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the Crimes Act 1900 (NSW).

RECOMMENDATION 36 - THE DEFENCE IS NOT REQUIRED TO FORMALLY CONCEDE ACCURACY

In relation to recommendation 35(iv), the defence is not required to concede accuracy formally, but if it proposes to contest accuracy it should forewarn the prosecution. Thus, options for the defence are: (1) to stay silent (no warning required); (2) to contest accuracy (warning required); (3) to concede accuracy (no warning required).

SOURCE:

Tony Glynn SC, Queensland Bar, *Pre trial procedures*

Notification of particular surveillance witnesses and any dispute on the admissibility of charts are reasonable requirements, however, the prosecution should be responsible for the accuracy of charts, transcripts and the continuity of exhibits (page 8].

LINK TO MARTIN REPORT RECOMMENDATION:

Martin Report, Recommendation 29.

RECOMMENDATION 37 - DEFENCE NOT TO BE REQUIRED TO IDENTIFY SPECIFIC DEFENCES

The defence should not be required to identify defences referred to in Recommendation 30(iii) of the Martin Report recommendations.

Recommendation 30(iii) of Martin Report provides that the defence should give notice as to whether it proposes 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

SOURCE:

Tony Glynn SC, Queensland Bar, *Pre trial procedures.*

Whilst there is merit in requiring notification of defences of alibi and defences which rely on expert evidence (especially those relating to impairment of mental responsibility), this notification requirement should not apply to defences of self defence, claim of right, duress or intoxication (pages 7-8).

This recommendation is contrary to Martin Report Recommendation 30(iii).

FORUM COMMENT:

It was generally agreed that other pre-trial procedures would adequately indicate if the defences referred to in Martin Report Recommendation 30(iii) were going to raised by the defence. Thus, the requirements on the defence may not realise any benefit of real significance and may only serve to upset the balance between prosecutor and defence.

RECOMMENDATION 38 - PROSECUTION NOT TO BENEFIT FROM EARLY CASE DISCLOSURE BY DEFENCE

The prosecution should not benefit from early case disclosure by the defence.

SOURCE:

Michael Rozenes QC, Victorian Bar, *The right to silence in the pre-trial and trial stages.*

Limiting defence disclosure to case management requirements promotes efficiency and certainty, however, defence disclosure of any kind raises concerns. Safeguards such as prosecution case statements and the prohibition on the prosecution changing its case ensure that the prosecution does not benefit from early defence disclosure (page 6).

This was not the subject of any specific Martin Report recommendation.

RECOMMENDATION 39 - ONGOING OBLIGATION ON DEFENCE TO DISCLOSE

In addition to the requirement in recommendation 35 that disclosure be made shortly before trial, 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 a nominated defence or the calling of an expert witness, the obligation to give notice should be complied with as soon as reasonably practicable.

SOURCE:

Martin Report, Recommendation 31

RECOMMENDATION 40 - DISCLOSURE OF EXPERT EVIDENCE

All jurisdictions should consider the adoption of rules in relation to the presentation of expert evidence in criminal trials based on experience gained in the use of such rules in the Federal Court and the Supreme Court of South Australia. Particular regard would need to be had to the peculiar nature of the criminal trial process.

SOURCE:

Martin Report, Recommendation 45 as amended by the Forum

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

WALRC 1999, Recommendation 253(1)

FORUM COMMENT:

The consideration of this recommendation would depend on the treatment of recommendation 35 (iii) regarding defence disclosure of expert evidence in pre-trial procedures. The existing rules of court deal with civil procedure and cannot necessarily be simply transferred to criminal trials.

It was argued that the requirement on the defence to disclose expert evidence should be restricted to circumstances where the defence proposes to call that evidence.

CONFERENCE COMMENT:

Michael Rozenes QC, Victorian Bar, *The right to silence in the pre-trial and trial stages.*

The requirement that the defence disclose expert witnesses reports should only come into operation at the time when the defence proposes to call the witness.

Where the defence seeks to lead expert evidence but the prosecution does not, a requirement that the defence disclose its expert evidence would only serve to benefit the prosecution.

5. TRIAL

RECOMMENDATION 41 - DEFENCE RESPONSE TO BE INVITED

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.

SOURCE:

Martin Report, Recommendation 40

SIMILAR RECOMMENDATIONS MADE ELSEWHERE

WALRC 1999, Recommendation 318

Unless excused by the trial judge, the defence should be required to outline the defence case at the close of the prosecution opening.

CONFERENCE COMMENT:

Michael Rozenes QC, Victorian Bar, *The right to silence in the pre-trial and trial stages.*

There is a strong forensic incentive in many cases to make such a response in order to focus the jury on the defence case.

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

It is questionable whether it is of benefit to have a formal procedure applying rigidly to the defence opening. It may be better to identify cases where a defence statement will occur in pre-trial management and introduce it informally (pages 10-12).

RECOMMENDATION 42 - NO COMMENT ON DEFENCE FAILURE TO RESPOND

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.

SOURCE:

Martin Report, Recommendation 41

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

The provision in 1999 Victorian Act which allows comment to the jury, is likely to lead to many appeals (page 14).

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

The practice of adverse comment is fraught with problems and provides a recipe for appeals (page 8).

COMPARE:

The Hon Justice Geoff Davies, Court of Appeal of Queensland, *The limits of the right to silence.*

Adverse comment for failure to explain a defence that ought to be explained should be allowed (pages 9-10).

RECOMMENDATION 43 - JUDGE'S SUMMARY OF ISSUES FOLLOWING RESPONSE

Where the defence has provided a response as envisaged in recommendation 41, the trial judge, immediately after the defence response, should be required to address the jury for the purpose of summarising the primary issues in the trial that are likely to arise for its consideration.

SOURCE:

Martin Report, Recommendation 42

RECOMMENDATION 44 - DISPENSING WITH FORMAL PROOF

Consideration should be given to improving the capacity of a trial judge, in appropriate cases, 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.

SOURCE:

Martin Report, Recommendation 43

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

Proof by affidavit of facts not truly in dispute should be permitted. Sensible reforms of this kind do not prejudice a true defence and do not touch on the presumption of innocence (page 5).

Robert Cock QC, DPP, Western Australia, *Evidentiary rules and aids in the presentation of evidence*.

Current technology and business law enforcement practices are such that some formal proof requirements should be dispensed with (page 3).

FORUM COMMENT:

The power of the trial judge to dispense with formal proof should be restricted to appropriate cases only. Invoking the court's power in this regard necessitates a balancing of the interests of justice, including the interests of the prosecution and of the defence.

RECOMMENDATION 45 - MAKE TRIALS USER FRIENDLY TO JURORS

Trials should be made user-friendly to juries by (1) identifying matters not is dispute, (2) using charts and aids; (3) providing uniform rules for note-taking, and (4) allowing the use of transcripts.

SOURCE:

Michael Rozenes QC, Victorian Bar, *The right to silence in the pre-trial and trial stages.*

More needs to be done to ensure that there are uniform standards for jurors to have access to note-taking facilities, transcripts etc. (page 3).

Robert Cock QC, DPP, Western Australia, *Evidentiary rules and aids in the presentation of evidence*.

Complex criminal trials should involve the increased use of technology in the courtroom. In order that juries are better able to understand the evidence, computerised aids and presentations should be available to juries after they retire.

This was not the subject of any specific Martin Report recommendation.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Aronson 1992, Recommendation 12
Corns 1997, Recommendation 29

FORUM COMMENT:

The Forum noted the work of Professor Young in New Zealand, which should be considered in relation to the needs of the jury.

RECOMMENDATION 46 - STANDARD FORM DIRECTIONS TO JURY

Consideration should be given to the advantages of standard form directions on particular points of law in the judge's summing up.

CONFERENCE COMMENT:

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

Summing up should be expressed simply, and directions should be relevant and specific to the case. Jurors should be made to understand that they may wish to seek further directions, and should be so encouraged.

The extent to which a trial judge comments on the arguments of counsel must vary from case to case (pages 16-17).

This recommendation was not the subject of any specific Martin Report recommendation. However, Martin Report Recommendation 44 - The short form summing up procedure provided in section 405AA of the NSW Crimes Act 1900 be adopted - was considered. It was agreed that further information was required before that recommendation could be endorsed.

FORUM COMMENT:

It was agreed that standard form directions be applicable in appropriate cases only. The use of standard form directions may otherwise be the focus of appeals - their value in reducing delay will be lost if their use is not supported in appeal cases.

RECOMMENDATION 47 - CONSIDERATION OF TIME LIMITS, AGREED FACTS, VIDEO EVIDENCE.

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. Such a power should not impose arbitrary time limits. The power should be related to the circumstances of the individual case and should be applied where there is a demonstrable reason for intervention by the judge.

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

(iii) The need for rules of evidence to permit the taking of evidence by video, including evidence from overseas. The Federal Court Rules provide a good example.

(iv) The use of information technology with respect to disclosure, the provision of briefs of evidence, and evidence presented at trial (including digitised evidence). Courts, investigative agencies, the prosecution and the defence should have access to common information technology standards to ensure electronic access to material prior to, and during, a trial. The electronic transfer of prosecution files between investigator, prosecutor, defence and the courts, as recommended in the Victorian Pathfinder Report should be considered.

SOURCE:

Martin Report, Recommendation 46(i)-(iv)

CONFERENCE COMMENT:

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

There should be a common approach to a management oriented and interventionist judiciary. Judges have certain powers in respect of the control and regulation of the trial, but care should be taken in the decision to limit cross-examination and to limit the indictment, for example.

Robert Cock QC, DPP, Western Australia, *Evidentiary rules and aids in the presentation of evidence*.

The Victorian "Project Pathfinder" initiative could well become a model for reform in other jurisdictions.

SIMILAR RECOMMENDATIONS MADE ELSEWHERE:

Aronson 1992, Recommendations 22, 29
Corns 1997, Recommendations 18, 22, 29

FORUM COMMENT:

It was noted that technology should not be adopted for its own sake, but where it assists in reducing delay.

RECOMMENDATION 48 - ENCOURAGING PROSECUTION NOT TO OVERLOAD INDICTMENT

Consideration should be given to encouraging the prosecution not to overload indictments. This might include an examination of the power of the court to make rulings on the indictment, as exists in QLD.

The practice of overloading indictments creates overly long trials, especially wasteful if fewer charges can reflect adequately the criminality alleged against the defendant.

SOURCE:

Martin Report, Recommendation 46(v)

CONFERENCE COMMENT:

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge* (see recommendation 47).

FORUM COMMENT:

It was noted that in Queensland, the court has the power to make rulings on the indictment.

RECOMMENDATION 49 - ELECTION OF TRIAL BY JUDGE ALONE

Consideration should be given to enabling the defendant to elect for trial by judge alone. This option exists in the ACT, SA, NSW and WA. The Commonwealth Constitution prevents trial by judge alone in respect of Commonwealth indictable offences.[2] **The power of prosecution to veto the election of trial by judge alone that exists in NSW and WA should be re-considered.**

Whilst there is recognition of the argument that the community should be entitled to participate in all criminal trials through service on a jury, the concept of trial by judge alone at the election of a defendant is worthy of careful consideration.

SOURCE:

Martin Report, Recommendation 46(vi)
WALRC Recommendations 324-340

CONFERENCE COMMENT:

The Hon Justice Ken Mackenzie, Supreme Court of Queensland, *Conduct of the trial and powers of the trial judge*

Election of trial by judge alone carries with it certain considerations. Whilst a trial judge would save actual court time in not having to sum up to the jury or rule on issues of law, a trial judge would have to provide a reasoned judgment. Community reaction to verdicts where the trials are by judge alone, has the potential to shake public confidence in the criminal justice system.

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

FORUM COMMENT:

The power of the prosecution to veto the election for trial by judge alone in NSW and Western Australia is said to be susceptible to improper use and should be reconsidered.

6. SENTENCE

RECOMMENDATION 50 - FAST TRACK SYSTEM BE GIVEN LEGISLATIVE BASIS

Any proposed Fast Track system should be given a legislative basis.

SOURCE:

Martin Report, Recommendation 19 and Recommendation 22 as amended by the Forum.

CONFERENCE COMMENT:

See Forum Recommendation 21.

RECOMMENDATION 51 - RECOGNISABLE DISCOUNT FOR PLEA

The existing system of discounts for guilty pleas should continue. It should be strengthened by requiring sentencing judges to state publicly in reasons for sentence, the discount that has been given for the plea of guilty.

SOURCE:

Martin Report, Recommendation 21

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

The practice of sentencing discounts for early guilty pleas and for cooperation in the conduct of the trial should continue (page 17).

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

Whilst sentencing discounts may not be entirely effective, as a recalcitrant defendant who is acquitted has no need of such an incentive, it is helpful to have such discounts (page 10).

RECOMMENDATION 52 - DISCOUNT FOR COOPERATION

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.

SOURCE:

Martin Report, Recommendation 33

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*. (page 10).

FORUM COMMENT:

It was noted that this recommendation would require appellate approval or legislative implementation.

RECOMMENDATION 53 - ADJUSTED DISCOUNT FOR PARTIAL COOPERATION

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 to reflect the degree of cooperation provided by a defendant.

SOURCE:

Martin Report, Recommendation 36

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay* (see recommendation 51).

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition* (see recommendation 51).

7. LEGAL AID

RECOMMENDATION 54 - DIETRICH RESPONSE TIED TO COMMON LAW

Any response to the decision in *Dietrich* must not infringe the common law concern to ensure a fair trial for every defendant.

Court decisions to stay trials in situations where legal aid has been denied has created a problem for legal aid authorities in terms of managing their legal aid budgets. In attempting to address this problem, the right of the defendant to a fair trial should not be overlooked.

SOURCE:

Martin Report, Recommendation 47, as amended by the Forum.

FORUM COMMENT:

It was noted that there is no right to legal representation *per se* and that it is reasonable to prevent the accused having an absolute choice of counsel.

The legal aid authorities should be able to appoint counsel or permit such appointments by a panel. Membership of the panel should be subject to review by the legal aid authorities.

RECOMMENDATION 55 - S.360A NOT RECOMMENDED AS A MODEL

Section 360A of the *Crimes Act 1958 (Victoria)* is <u>not</u> an appropriate model for resolving the Dietrich issue.

Section 360A confers power on the court to order legal representation on any conditions specified by the court (but not conditions relating to the identity, number or remuneration of counsel) - in circumstances which are not directly concerned with the original decision in *Dietrich*. The question of whether or not to grant legal aid is distinct from the limited *Dietrich* issue of whether the accused will obtain a fair trial.

SOURCE:

Martin Report, Recommendation 52 as substantially amended by the Forum.

FORUM COMMENT:

Whilst it is acknowledged that the Victorian Act provides certainty where the accused claims indigence and Victorian Legal Aid disputes that claim, it is recognised that many more cases come before the courts under s.360A than arise elsewhere as applications under the *Dietrich* principle. Section 360A is serving other purposes in allowing the court to order representation.

The Forum considered that it was possible to separate the question of indigence from the court's deliberations. *Dietrich* arises out of common law principles which, in the absence of valid legislation to the contrary, will apply in any case where an application is made before the court. The Forum recommendations are aimed at providing an appropriate test for indigence, not for determining whether a fair trial may be had or not.

RECOMMENDATION 56 – COURT NOT NECESSARILY WELL PLACED TO RULE ON INDIGENCE

Whilst it may not be appropriate in all cases to link the question of indigence to a legal aid means test, the courts are not well equipped to determine indigence. The question of indigence requires investigation, the examination of evidence and the evaluation of the credit of the accused person. It is separate from the question of the fairness of the trial.

Consideration should be given to the possibility of permitting an appropriately qualified person such as the Public Trustee or the Trustee in Bankruptcy to determine indigence.

SOURCE:

Martin Report, Recommendation 48 as amended by the Forum

RECOMMENDATION 57 - LEGAL AID ISSUES TO BE RESOLVED AS PART OF PRE-TRIAL PROCEDURES

All issues regarding legal aid for the trial should be determined as part of pre-trial procedures.

To the extent that it is possible, legal aid issues must always be sorted out prior to the day of the trial.

SOURCE:

Martin Report, Recommendation 49 as amended by the Forum.

RECOMMENDATION 58 - EXHAUST ALL OTHER AVENUES BEFORE APPLYING TO COURT RE DIETRICH

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.*

SOURCE:

Martin Report, Recommendation 50

CONFERENCE COMMENT:

Nunzio La Rosa, Assistant General Manager, Criminal Law, Victoria Legal Aid, *Dietrich and the appropriate way to deal with related applications*.

In Victoria, only after all appeal avenues with Victoria Legal Aid are exhausted can the court be asked to consider the issue of representation.

The same applies where assets are held by the prosecution. ie the accused must exhaust all other avenues before seeking a stay or a court order for assistance to be provided to them (page 12).

FORUM COMMENT:

This recommendation was supported, subject to the scheme to be developed for the determination of indigence.

RECOMMENDATION 59 - ADVISE DEFENDANT OF NEED TO ACT TO OBTAIN LEGAL AID

Advice of the rule in Recommendation 58 should be given to each defendant at the time of committal.

SOURCE:

Martin Report, Recommendation 51

RECOMMENDATION 60 - ACCUSED TO PROVE INDIGENCE

The accused should bear the onus of proving indigence.

SOURCE:

Nunzio La Rosa, Assistant General Manager, Criminal Law, Victoria Legal Aid, *Dietrich and the appropriate way to deal with related applications*.

The act of placing the onus on the accused has an effective impact in the context of white collar cases, where often measures are taken to distance the accused from assets. However, it can also operate the other way, to deny assistance to a worthy recipient (pages 5 - 6).

This was not the subject of any specific Martin Report recommendation.

RECOMMENDATION 61 - FAULT TO BE CONSIDERED

The Court is to consider the accused's behaviour (fault) in relation to incapacity to afford representation.

SOURCE:

Nunzio La Rosa, Assistant General Manager, Criminal Law, Victoria Legal Aid, *Dietrich and the appropriate way to deal with related applications*.

Case law indicates that the court is to look at the accused's behaviour and the concept of a fair trial. It would appear that the position is similar in all States on this point (page 8).

This was not the subject of any specific Martin Report recommendation.

RECOMMENDATION 62 - COURT NOT TO SPECIFY IDENTITY, NUMBER OR REMUNERATION OF COUNSEL

The Court cannot make orders as to identity, number or remuneration of counsel.

SOURCE:

Nunzio La Rosa, Assistant General Manager, Criminal Law, Victoria Legal Aid, *Dietrich and the appropriate way to deal with related applications*.

It would appear that there is common ground across Australia that such matters are properly left to the funding body. Section s360A(4)(e) does not permit the court to specify conditions relating to the identity, number or remuneration of persons representing the accused. (pages 6 - 8).

This was not the subject of any specific Martin Report recommendation.

8. CULTURE

RECOMMENDATION 63 - LAWYERS TO BE DILIGENT AND ACT EXPEDITIOUSLY

Whilst there is no agreement on the issue of sanctions, it is essential to the fair and efficient administration of justice that legal practitioners comply with their obligations to act diligently and expeditiously.

SOURCE:

Martin Report, Recommendation 54 as amended by the Forum.

CONFERENCE COMMENT:

The Hon Justice Mark Weinberg, Federal Court of Australia, *Criminal trial process and the problem of delay*

There is justified concern about a power of the Court to award costs against an accused and an accused's legal practitioner (pages 14, 18).

COMPARE:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*

It is necessary to advance the reform process with the power to impose sanctions. By giving statutory basis to lawyers' duties to the court, judges would have the "necessary armoury to promote compliance with new procedures that depend for their efficacy on reasonable and ethical conduct by legal practitioners". (page 9)

However, if all professional bodies follow the New South Wales Bar Rules, legislation may be unnecessary.

FORUM COMMENT:

The *Report of the Western Australian Law Reform Commission into Civil and Criminal Justice* (WALRC 1999), in relation to civil cases, recommended the following:

"Recommendation 439

There should be a general legal immunity from suit where the practitioner genuinely, and after reasonable communication with the client, has acted to promote the principles enshrined in legislation on which the civil justice system is said to rest."

The Forum was of the view that such a provision would be a valuable element of changing legal culture.

The Forum was sceptical about the value of sanctions and felt that inducements were to be preferred. In relation to counsel, it was considered important not to frighten off new or inexperienced practitioners with the threat of draconian sanctions.

The imposition of sanctions limiting evidence to be called would risk a breakdown of confidence in the criminal justice system.

It was noted that two different views had emerged from the Conference. One view was that the problem for judges lies in the lack of statutory backing to enforce judicial controls. The alternative view was that the problem would not, and should not, be resolved with legislation - judges simply needed to be encouraged (at an appellate level) to use the powers already available to them.

RECOMMENDATION 64 - ADVICE TO DEFENDANT PART OF PROFESSIONAL OBLIGATION

The obligation to give the advice in recommendation 24 (failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable) should be included in the rules of professional conduct.

Legal practitioners should also advise of, and identify, any incentives for cooperation, including matters that properly could be the subject of cooperation.

SOURCE:

Martin Report, Recommendation 39 as amended.

Tony Glynn SC, Queensland Bar, *Pre-trial procedures*.

Defendants should be advised of available pre-trial procedures and any advantages that flow from cooperation (page 7).

RECOMMENDATION 65 - EDUCATION OF THE PROFESSION

Law schools and practical legal training courses should encourage the attitude of cooperation and compliance with the obligations to act diligently and expeditiously, but within the context and framework of the accusatorial system.

SOURCE:

Martin Report, Recommendation 55

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

Means of cultural change should be addressed at the levels of government, judiciary and legal profession. Government needs to legislate and provide infrastructure. Judges need to be educated and have their concerns addressed.

Explanatory seminars on the benefits of constructive cooperation should be held for the judiciary and the legal profession (page 7).

His Hon. Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process*.

Prosecution and defence must be taught to consider their cases at the earliest stage. This includes recognition of the benefits of avoiding delay and that co-operation and concession do not cause an erosion of fundamental rights (page 3).

RECOMMENDATION 66 - PROFESSIONAL CONDUCT RULES

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.

SOURCE:

Martin Report, Recommendation 56

CONFERENCE COMMENT:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition*.

The legal profession needs to continue to support reform. The changes to the NSW Bar Council Rules provide a good example of this support (pages 6 - 7).

His Hon. Judge John Sulan, District Court of South Australia, *Defence cooperation in the trial process*.

Education, recognition in bar rules and ethical rules of the profession should be encouraged to promote a change of attitude and approach by the profession to ensure that reforms work in a satisfactory way (pages 2-3).

FORUM COMMENT:

The NSW Bar Council Rules should be considered in the implementation of this recommendation.

RECOMMENDATION 67 - EFFICIENCY MUST BE SUBSIDIARY TO A FAIR TRIAL

The need to minimise delay and ensure that trials are conducted efficiently and within proper cost constraints must always be subsidiary to the fundamental concept of a fair trial.

SOURCE:

The Hon Justice Mark Weinberg, Federal Court of Australia, *The Criminal Trial Process and the Problem of Delay*.

Parallels have been drawn between the criminal justice system and the civil justice system, in terms of delay and expense. However, there are significant differences between these systems - in the former the “stakes are generally far higher”. It is of fundamental importance that accused persons against whom there is insufficient evidence should be acquitted (page 2).

This was not the subject of any specific Martin Report recommendation.

RECOMMENDATION 68 – GOVERNMENT SUPPORT FOR REFORM AND INFORMATION CAMPAIGNS

Government should provide the infrastructure necessary to implement the reforms outlined in this report. Information campaigns will be necessary to gain judicial and professional support and commitment to implementing reforms.

SOURCE:

The Hon Mr Justice David Ipp, Supreme Court of Western Australia, *Adversarial justice in transition* (page 6) as amended by the forum (see recommendation 65).

This was not the subject of any specific Martin Report recommendation.

Attachment A: MARTIN REPORT RECOMMENDATIONS

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.

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

The prosecution obligation of disclosure should be given a statutory basis.

The statutory obligation should be specifically identified as applicable to both prosecutors and investigators.

Internal disciplinary sanctions should exist in respect of investigators who fail to comply with their statutory obligations.

Disclosure should be required prior to committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter.

Recognition should be given to the on-going nature of the obligation.

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.

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.

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.

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.

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.

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.

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.

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.

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

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

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

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.

All issues, including indigence, should be determined by the trial court as part of 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 of the rule in recommendation no. 50 should be given to each defendant at the time of committal.

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

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.