ACCUSED DISCLOSURE

MEASURED RESPONSE OR ABROGATION OF THE PRESUMPTION OF INNOCENCE?

1 Introduction

The disclosure requirements imposed on accused pursuant to the *Crimes (Criminal Trials) Act* 1999 (Vic) (the Act)[1], have been subject to significant criticism. The level of adverse sentiment has been such to lead at least one typically measured and reflective commentator to brand proponents of the disclosure provisions as `numbskulls'.[2]

At the risk of attracting such heated vitriol, this paper cuts through the rhetoric that this debate has engendered by considering the desirability of imposing disclosure requirements on an accused person. First, the paper provides an overview of the relevant legislative changes. Second, it examines criticism of the legislation and finally the paper develops a response to these criticisms by arguing the productive and positive side to these legislative changes. Indeed this paper develops arguments in favour of disclosure by an accused person.

This paper contends that the attacks on the disclosure provisions are misguided. These attacks assert that these new provisions for disclosure are unjustifiable. This argument is based upon a perceived or supposed incompatibility of the new disclosure provisions with certain practices and principles that have always formed part of the criminal justice process (such as proof beyond reasonable doubt and the presumption of innocence). What the critics fail to do however is to explain *how* the disclosure provisions encroach on such maxims. For example,

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1 The Act was passed on 2 June 1999 and commences on 1 September 1999 (subject to the unlikely event of it being proclaimed earlier).

2 Judge Kelly (County Court of Victoria), Memorandum to Judge Barnett, `The Crimes (Criminal Trials) Amendment Bill 1999', 3 June 1999.

even if it were correct to say that more accused may be found guilty because of the new disclosure provisions does not of itself suggest an ancillary effect of an increase in wrongful conviction. These new provisions do not and will not violate basic criminal law ideals.

In assessing the merits or otherwise of these new provisions, this paper argues that critics invoke the wrong standards by focussing on subordinate practices and principles that are part of the criminal trial process. By such a focus, critics do not consider the interplay of the disclosure provisions with the ultimate objective of the criminal law to punishing wrongdoers. This paper contends when inquiry is undertaken at this level, it emerges that the disclosure provisions are an overdue change to the criminal trial process for all the reasons that will be elaborated below.

2 Overview of the Disclosure Provisions

The Act establishes a significant pre-trial disclosure regime by providing three methods for facilitating disclosure. Each trial is regulated by at least one of following processes:

-a post committal conference;
-a standard exchange of information; or
-individual case management.

Post Committal Conference

After an accused is committed for trial, the parties may agree to a conference in order to define the issues in dispute.[3] Where the parties agree to be bound by the issues disclosed at the conference, this is recorded and signed by both

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3 See section 26(2)(b) of the Act, which amends the Schedule of the *Magistrates' Court Act* 1989 (Vic).

parties, and this exempts the parties from further disclosure requirements. It is anticipated that this procedure will be used in `simple' cases where the issues are evident or easily identifiable at an early stage.[4]

Standard Exchange of Information

Where there is no post-committal conference, the Act prescribes certain information that must be exchanged between the parties prior to the trial. The prosecution must provide the defence a summary of its opening twenty-eight days before the trial date.[5] At the same time the prosecution will serve a notice of pre-trial admissions on the defence which sets out the matters that the prosecution considers uncontentious.[6] If the defence agrees, the prosecution is not required to call witnesses to establish that evidence.

In response, the defence, within fourteen days of the trial date, must file a response to the prosecution opening and the notice of pre-trial admissions. The response to the opening `must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken'.[7] The accused, however, need not stipulate whether he or she will give evidence or identity of any defence witness, except in the case of expert witnesses.[8] It is expected that the majority of cases will be dealt with pursuant to this disclosure method.[9]

Individual Case Management

The last disclosure process, individual case management, is designed for cases that are lengthy, complex, or where the parties will not co-operate. In such cases

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4 Second Reading Speech, Parliament of Victoria, Crimes (Criminal Trials) Bill 1999, 2.
5 Section 6(1)(a).
6 Section 6(1)(b).
7 Section 7(2).
8 Sections 7(4) & 9.
9 The Act also provides that where a party intends to raise a question of law in a criminal proceeding it must notify the court at least 14 days prior to the trial (or if the party does not become aware of the issue within that time, as soon as possible after becoming aware of it), and provision is then made for such issues to be determined before the commencement of the trial: s 10.

the court is given a broad discretion regarding the type of directions it may order.[10]

Sanctions For Non-compliance

Previously, some observers argued that one of the failings of the *Victorian Crimes (Criminal Trials) Act 1993* was that it contained insufficient sanction. In the new legislation, where the accused does not comply with the disclosure obligations, there are a variety of sanctions that are open to the court, including costs[11] and adverse comment to the jury.[12] An accused's failure to comply with the disclosure requirements may also result in a heavier penalty, on the basis that it evinces a lack of remorse.[13] The costs' sanction appears to be a controversial issue and has not been welcomed by any of the litigating parties.

The upshot of the changes is that whichever disclosure regime is invoked the accused must now to a far greater extent than ever before show his or her hand prior to trial. Accused must now participate in identifying the issues that are genuinely not in dispute and, effectively, disclose the nature of their defence before the trial.

3 Reasons for the Disclosure Provisions

(a) Expense

The main reason for the changes was concern regarding the unreasonable delay in the presentation of cases and the inefficient conduct of trials. It was perceived that delays and inefficiencies in the running of trials restrict access to the courts and cause hardship to victims, jurors, accused and the community.[14]

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10 See s5.
11 Section 24, these may also be awarded against the prosecution or lawyers for either party (s 25).
12 Section 16.
13 Section 37, which amends the *Sentencing Act* 1991 (Vic), s 5.
14 Second Reading Speech, Parliament of Victoria, Crimes (Criminal Trials) Bill 1999, 1.

The main factors contributing to delays were seen as including:
-calling witnesses to prove formal matters;
-calling witnesses to establish issues which are not substantially contested; and
-unnecessary and prolonged cross-examination of witnesses because the advocate does not know what issues are in dispute.[15]

At the bottom, the disclosure provisions are aimed at curtailing the increasing length of criminal trials and the enormous drain that they have on the public purse. In the twenty-five year period from 1972 to 1997 the average length of trials in Victoria increased three-fold, from 3 days to 8.8 days.[16] The cost to the community for each day of a trial is about $15,000.[17]

(b) The Adversarial System

Apart from such pragmatic economic considerations, there is also a purer basis for requiring defence disclosure. This concerns the nature of the adversarial system. In order for the adversarial system to have any hope of ascertaining the truth[18] an essential precondition is that the combatants are roughly equally armed. In the context of the legal system the only relevant armory is knowledge, and in particular knowledge of the opponents case.

Over the past few decades, rules of practice and law have developed requiring the prosecution to provide all relevant information to the defence. This includes not only witness statements (including, of course, prior inconsistent statements, where applicable) and copies of exhibits, but where necessary particulars of each offence.[19] No corresponding obligations have been imposed on accused. This

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15 Second Reading Speech, above n, 1.

16 Criminal Trials Consultative Committee, *Criminal Trials in Victoria*, January 1999, 1.

17 *The Age*, 7 May 1999 'Sentencing Shake-up to Curtail Trials', where the Attorney-General stated that a trial which last three months is estimated to cost almost $1 million.

18 Although many have persuasively questioned the appropriateness of such a system for discerning the truth: for example, see M Frankel, 'The Search For the truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031.

19 For example, see the Office of Public Prosecutions (Vic), Policy With Respect to Disclosure.

information imbalance is so pronounced that it is questionable whether the search for the `real truth' in a criminal trial can any longer be described as a genuine contest. Of course, there are several reasons that may be advanced regarding why the accused should not be required to say or do anything. It is to these that I now turn, in the context of considering the specific criticisms that have been levelled against the new disclosure requirements.

4 Criticism of Accused Disclosure

There are several distinct criticisms that have been advanced regarding the disclosure provisions. Not surprisingly, they have parallels with arguments that have been advanced in favour of retaining the right of silence.

(a) Accused Not Required to Incriminate Themselves

The most common criticism is that the accused disclosure provisions are said to encroach upon `the fundamental principle that the defence should not be compelled to participate in facilitating a conviction'.[20] This stems from the further underlying maxim `nemo tenebatur prodere seipsum [no man should be obliged to give himself away]; and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.[21]

In the calm light of day however, it is difficult to identify exactly how the new disclosure provisions make any (additional) incursions into this principle. The accused is not required to reveal or do anything that he or she is not *already* required to do: his or her disclosure is merely being accelerated to the extent that the main defence arguments must be advanced (or at least summarised) prior to trial, rather than being advanced incrementally throughout it. The point seems to

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20 *The Sunday Age*, `Judges at Odds Over Crime Bill', 6 June 1999, p3

21 Blackstone, *Commentaries*, Vol IV at 293. This proposition underlies the privilege against self-incrimination, the principle manifestation of which is the right of silence: see M Bagaric, `The Diminishing Right of Silence' (1997) *Sydney Law Review* 366, 380.

have been lost that where an accused contests a criminal charge, he or she must at some stage invariably do something to resist the prosecution case; whether it be to simply attempt to discredit a prosecution witness,[22] deny an element of the offence or advance a positive defence (such as self-defence or duress). The disclosure requirements do not compel accused to take any measures that were not already necessary, only to hasten them. This does not constitute an additional substantive duty imposed on the accused, but rather a procedural change regarding when certain steps must be taken.

Furthermore the principle that a person should not be obliged to incriminate him or herself is *not absolute and un*questionable. There appears to be no foundation for it beyond some delinquent notion of fair play. There is no special harm done to a person by making the person give their side of the story where there is a case against them. *If the underlying objective of the system is to find the truth while ensuring that an innocent person is not punished, it is difficult to see why calling on a person to explain why a set of facts do not incriminate him or her is objectionable.*

For those who remain unconvinced that there is not a right not to participate in the process of one's own incrimination, it is noteworthy that there is no such thing as an absolute right. Even Ronald Dworkin, perhaps the leading contemporary rights philosopher, accepts that it is appropriate to infringe on a right when it is necessary to protect a more important right or ward off some threat to society.[23]

(b) Violation of the Presumption of Innocence

It has also been contended that the new disclosure provisions reverse the onus of proof by cutting across the presumption of innocence:

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22 If a prosecution witnesses account is not challenged then the defence is taken to have accepted the account in its entirety: *Browne v Dunn* (1893) 6 R 67.

23 R Dworkin, *Taking Rights Seriously* (1984). It is sometimes forgotten that the community has a right to know where a terrible crime has been committed.

> [Accused disclosure violates the presumption of innocence, which means that] a person is presumed to be innocent unless and until convicted ... It means no person is called upon to prove their innocence *because to do so would mean that their guilt had been assumed.* So it follows that an accused cannot be compelled to answer questions which might prove or disprove guilt... To compel an accused to disclose not only the nature of their evidence, but also the particulars of the evidence to be called in support of the defence cases casts an onus on the accused to establish innocence.[24]

Again, it is not apparent *how* the disclosure provisions violate the presumption of innocence or detract from the evidential burden on the prosecution. The argument seems to run that requiring an accused to take some positive steps in the trial process entails that he or she is assumed to be guilty. Therefore, it is argued, the onus on the prosecution is, at least to some extent, alleviated.

The Connection Between Legal Duties and Culpability

The flaw in this criticism is contained in the assertion that the imposition of a legal duty to do something *implies* fault or blame. There are innumerable reasons why the law imposes legal obligations on members of the community; most of them have nothing to do with fault or blame. A parent's duty of care to his or her children and an employer's duty of care to employees stem simply from the relational ties between the respective parties. Culpability and duty are in such contexts clearly divorced.

It may be asserted that accused are in a different position. Failure to discharge their duty may result in a deprivation of liberty. This is no different however to the witnesses' duty to attend court when summonsed to do so. Nor is it any different to the victim's duty to subject him or herself to cross examination at committal and again at trial The duty on witnesses to participate in the criminal justice system clearly does not stem from an implication of wrongdoing. It follows from

the simple realisation that the criminal justice system works most effectively and efficiently if an obligation to participate in court proceedings is imposed on all members of the community. It is precisely for the same reason that accused should be required to disclose in advance the nature of their case.

As a result of the disclosure requirements, there is no doubt that the obligations on an accused go beyond those of a witness. It has been claimed that it is unjust to impose such obligations `merely because they have been charged'.[25] This, however, ignores the realities of the criminal justice system. One could hardly begrudge the total reluctance of a person selected at random to having any positive role in the trial process, but, in our community, no person is plucked from the street and arbitrarily tried for a serious criminal offence. In order for the disclosure provisions to become operative, significant thresholds must first be established. Following an investigation by police, a Magistrate must first be satisfied of a prima facie case against the accused. Then an independent arbiter must be further satisfied that there is a reasonable prospect of conviction for the offence with which the accused has been charged. This test is resolutely applied as is indicated by the prosecutorial guidelines that are used by all Australian prosecuting agencies.

In this respect, all accused who are tried for serious criminal offences in Victoria not only have a case to answer, but they also have at least a reasonable prospect of being convicted. In light of this, and the significant advantages to the community flowing from the disclosure requirements, that are discussed below, the level of participation now required by accused is not inordinate. This is not because, after the reasonable prospect of conviction test is satisfied, the accused is no longer presumed innocent. Simply this is a reflection of the practical reality that *given* an accused will be tried, it is not unreasonable to impose a modest obligation on him or her that will promote other important objectives. It operates

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24 F Hampel, `Put Legal Rights Before Rhetoric' *The Australian*, 21 January 1999, 11. These comments were made in the context of similar proposed accused disclosure provisions in NSW.

25 Ibid.

in the same way as in civil matters whereby defendants are required to file a defence irrespective of the merits of the cause action alleged against them.

Underlying Rationale For the Presumption of Innocence

A telling aspect of this general criticism of the accused disclosure provisions is that it stops at the claim that accused disclosure violates the *presumption* of innocence. The critics do not look at the underlying rationale for the presumption. This presumption serves as a valuable safeguard against the abhorrence of convicting the innocent. The test is to see how the accused disclosure provisions are likely to impact upon this underlying objective. Upon undertaking this inquiry it is evident that the disclosure provisions do not even remotely threaten the prohibition against convicting the innocent. *Even if* more accused may be convicted, there is no tenable reason why the innocent may be caught in this widening net.

The Burden of Proof

In light of the above comments little needs to be said concerning the claim that the disclosure provisions cast an onus on accused to establish innocence. The evidential burden of proof (still) rests squarely on the prosecution. It sits outside the scope of particular rules, procedures and processes that regulate criminal trials. Changes to the rules of evidence, or as is the case here, the manner and nature in which evidence may be adduced, cannot alter the burden. At most, sometimes such changes (for example, loosening the rules of evidence) may result in it being *easier for the prosecution to discharge the burden of proof*, but this does not diminish the threshold of the burden or project it onto the accused. It seems that the only reason that it can be argued that the disclosure provisions cast an onus on accused, is because now accused must pro-actively participate in the trial process and that this coercion somehow implies fault. As has been

previously discussed above, there is however, no necessary connection between the imposition of a legal obligation and actual or perceived culpability.

(c) Witnesses May Tailor Evidence

It is suggested that `one of the few weapons available to the defence was the ability to cross examine witnesses without them knowing the specific direction of questions'.[26] With respect to the new provisions, there is a perceived danger that if accused are required to telegraph their blows, `a witness may become aware of the defence and *tailor* their evidence to meet it (emphasis added)'.[27]

It is not apparent in what sense the word `tailor' is being used here. If it is used to infer that witnesses will fabricate evidence to resist the accused's defence, there is already a powerful mechanism to prevent this: the offence of perjury. If, as we suspect, it means that the defence will no longer be able to take witnesses by surprise regarding the subject matter of questioning, then this is an advantage of the reforms, as opposed to a drawback. To the extent that witnesses appear less credible *because* they are taken by surprise, this detracts from the purpose of the criminal justice system that is to ensure wrongdoers are found guilty. Tactics that can be used to give the incorrect *impression* that a witness is less than honest frustrate the search for truth and should be eradicated.

Even more importantly, given that the witness is required to furnish sworn statements and is subject to cross-examination at committal, it is hard to see how it could be said that any real danger of tailoring could occur.

Perhaps the not too subtle irony in this argument lies in the now developed Crown obligations of disclosure to the defence which are based on notions of

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26 Ibid.

27 *The Sunday Age*, `Judges at Odds Over Crime Bill', 6 June 1999, 3. This remark is attributed the vice-chairman of the Criminal Bar Association, Roy Punshon.

efficiency and utility. Because of these obligations, the defence has knowledge of all Crown evidence, that it has to meet before it is required to disclose its defence. An accused will always be in a much better position to tailor a defence around the known facts if he or she is so minded. Yet the critics complain of a remote and far more unrealistic possibility in relation to witnesses who are less motivated and already "locked in" by prior statement and cross-examination.

Closing the Gap.

It is true that by disclosing a new point or issue too early the Crown might be able to lead evidence that will close that gap or rebut the issue. In those instances however, that will always be a matter of appropriate proof in all cases. Such evidence should never be shut out by tactics. Similarly, "keeping powder dry" in order to avoid properly admissible contradictory evidence could hardly be said to advance the interests of truth.

The perennial chestnut that often crops up is that defence disclosure will cause the police to manufacture evidence to meet any weaknesses in the Crown case. The fact is the Crown always has to prove facts to establish the elements of a charge. If it is seriously put that evidence can be as easily manufactured as suggested then we should have no faith in our adversarial system at all.

5 Advantages of Accused Disclosure

(a) The Purpose of the Criminal Law

The most serious problem underlying the above criticisms of the Act is that they fail to relate the arguments back to the very basis that underlies why we have a criminal justice system. The general pattern of the objections is to seize upon particular rules and standards that have evolved in the criminal justice system, such as the presumption of innocence and to elevate them to inviolable

principles. The next step is to assert that the disclosure provisions are incompatible with these inviolate principles and to then declare victory. In doing so however, the critics place their select rules and standards above the principles[28] through which they derive their relevance and authority.

The purpose of the criminal law is to control socially harmful behaviour:[29] `the function of the criminal law is to protect the community from crime and to punish those who infringe against its mores'. [30] A corollary of this principle is that the innocent should not be subject to criminal sanctions. To promote these ends our criminal justice system embraces a number of *contingent* ideals and prescribes certain rules of practice; such as imposing the onus of proof on the prosecution, setting the standard of proof at the level of beyond reasonable doubt and implementing rules regarding the reception of evidence. The crucial element here is that none of these ideals are sacrosanct. All are subject to ongoing modification and if appropriate outright revocation.

In assessing the merits of any proposed change, the ultimate yardstick is not subordinate rules or practice that operate within the relevant institution, but rather the ultimate purpose of the institution in which the reform will operate. As a consequence of this, the relevant question regarding the desirability of accused disclosure is whether it will facilitate better protection for the community from crime.

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28 For a discussion on the distinction between rules and principles see, Ronald Dworkin, *Taking Rights Seriously* (4th ed, Harvard University Press, Cambridge,1977), 22-8, 76-77. Rules (such as no driving over 60 km/h) apply to conclusively resolve an issue or not all, hence rules never clash. Whereas principles (such as no person should benefit from his or her own wrongdoing) are standards observed because of a requirement of fairness or justice and secure some individual or group right. These are of broader compass and carry a certain amount of weight; several principles can apply to one situation, with the most relevant or important resolving the outcome.

29 See J Bentham, *Rationale of Judicial Evidence* Bk IX.

30 Sir Frederick Jordan, former Chief Justice of New South Wales as cited in J F Nagle, `Punishment, Parliament and the People" (1998) 10(3) *Judicial Officers Bulletin* 17.

One possible consequence of the disclosure provisions is that more people will be convicted of criminal offences, because the prosecution will be informed at an earlier point in time of the accused's line of attack and the possibility of the accused opportunistically seizing upon a technical flaw that emerges in the prosecution case will be reduced. Increasing the conviction rate for people charged with serious criminal offences can only serve to better protect the community from crime.

From the defence perspective real defences are better raised and put before the jury as early as possible. The advocate has a better chance of raising a reasonable doubt where the issue is clearly canvassed. Early identification of a defence ought to lead to greater professionalism by defence counsel.

Despite the speculation on both fronts, the critical point to note is that accused disclosure will at not adversely effect the objectives of the criminal law, and can in fact only advance them. In the final analysis, it is contended that the changes are calculated to achieve efficiency rather than results.

(b) Savings to the Community

The criminal justice system, like every institution, such as health and education, does not operate in a vacuum and due to the finiteness of community resources it is reasonable that measures must be taken to curtail the expense of system. The stakes for an accused in a criminal trial are enormous, but to stop the criminal justice system becoming self-defeating practices which reduce the cost of determining criminal liability must be implemented, otherwise at some point `the harm to society in proscribing [criminal] offences and punishing wrongdoers becomes greater than the benefits flowing from their enforcement and

prevention. It is illogical for society to spend [$1 million] to punish a wrong which it believes is worth [$50,000]'.[31]

Considerations of this nature and the associated desirability of reducing the length of criminal trials have resulted in a recent report into the nature and duration of criminal trials by the Australian Institute of Judicial Administration firmly coming down in favour of accused disclosure.[32] The report noted that `the single most important consideration in any strategy to reduce the length of long criminal trials is the development of an effective pre-trial hearing procedure to act as a framework within which to minimise the issues in contention and to minimise the evidence to be relied on at trial'.[33] It should be noted that these developments are far from sudden.[34]

(c) Ancillary Advantages

There are also several other benefits, which are likely to flow from the accused disclosure provisions, which I will briefly mention:

-limiting evidence to the matters that are genuinely contentious will spare many witnesses the inconvenience of attending court;

-by having to come to grips with a realistic defence at an earlier time the incidence of `hopeless' or `desperate' defence will be reduced; and

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31 M Bagaric, `Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot (1998) *Monash University Law Review* 231, 270.

32 C Corns, *Anatomy of Long Trials* (Australian Institute if Judicial Administration Incorporated, 1997), xiii, 112-4.

33 Ibid, 111.

34 See Shorter Trials Committee "Report on Criminal Trials" 1986, Victorian Crimes (Criminal Trials) Act 1993, Best Practice Model for the Determination of Indictable Crimes Directors of Legal Aid and Directors of Public Prosecution 1998, Report Scrutiny of Acts and Regulations Committee March 1999.

-the trial judge will be better able to consider questions of law and control cross-examination where the parameters of both sides are known.[35]

6 Conclusion

The disclosure provisions for accused have been met with unduly emotive criticism. The main attack is that the provisions encroach on the presumption of innocence. However, this involves the flawed assumption that there is an inescapable connection between the imposition of a legal obligation and culpability. Further, it is illuminating that the critics have not even charged that accused disclosure will result in the increased likelihood of wrongful conviction.

To the extent that accused disclosure changes the outcome of criminal trials, it will only be to more effectively focus the issues, and hence promote the primary objective of the criminal justice system from both the perspective of the community and the accused. The disclosure provisions will also have the welcome effect of shortening the duration of trials and reducing community expense in this area. Far too often, criticism of new legislation or indeed changes to legislation that is already in place is couched in negative or repressive terms. There is a great need to consider the productive and positive aspects of such changes, particularly the ways in which the criminal justice system can be enhanced to the benefit of the community who have "a right" to be protected from harm and to have an expectation of sanction against those who are deemed to have inflicted a harm.

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[35] It is sometimes forgotten that Trial Judges can benefit from early access to the depositions and the issues. This will mean he or she is better equipped to deal with questions of law that presently requires decision "on the run". This is particularly relevant in today's environment where their decisions are subject to *intense* scrutiny from Appeal courts.