

Case management has, for the last 25 years, been the catch-cry of courts in all jurisdictions striving to deal with increased case loads and proportionally diminishing resources resulting in ever increasing delays in the finalisation of charges.

The consequences of delay may :

- have a devastating effect upon victims and witnesses
- result in hardship for an accused in custody
- be prejudicial to the prosecution case
- increase costs
- bring the administration of justice into disrepute
- make it more difficult to ensure a fair trial

Looking back whistfully to the times of such cases as Woolmington V DPP and Stapleton v The Queen, which in the 1930's and 50's respectively, took less than six months from crime to charge to trial to appeal, former Chief Justice Murray Gleason remarked in 2007:

Delay is like inflation; it feeds on itself. Just as in financial markets, inflationary expectations, when factored into planning, themselves contribute to further inflation, so courts and lawyers build upon expectations of delay. Delay, like inflation, is sometimes convenient for those who are part of the system; altering expectation and reversing trends may cause pain. Yet there comes a time when that is necessary. It is easy to

become de-sensitised to this issue. Comparison of our current standards with those of earlier times is a useful corrective. (i)

On the other hand, having undertaken such a comparison, Justice Mark Weinberg in a paper delivered in March 2000 commented:

Despite the problems associated with delay in contemporary criminal proceedings, I doubt that anyone who compares the quality of justice afforded to accused persons today with what passed for justice in earlier times would consider the present system suffers by comparison. (ii)

In this context, he recalls the words of Felix Frankfurter:

“mere speed is not a test of justice, deliberate speed is. Deliberate speed takes time. Bit it is time well spent.”

Weinberg was speaking at a conference held in Melbourne on Reforms of Criminal Trial Procedure, the principal objective of which was

“... To consider options for reform of criminal procedure throughout the States and Territories of Australia in order to minimise delay in criminal trials and to ensure trials are conducted efficiently and fairly”

Significantly, the report of the Working Group on Criminal Trial Procedure did not discuss the right to silence, though clearly any proposal for expediting criminal processes was going to involve some form of mandatory defence disclosure.

The right to silence protects an accused from assisting or co-operating in any way with the investigation or prosecution of charges

against him. He has the right to “give ‘em nothing”, as the saying goes, and put the prosecution to its proof. That carries with it the correlative immunity from adverse inferences being drawn from the exercise of the right.

As Deane J said in Reid v Howard: “It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person” (iii)

It necessarily follows that any compulsory disclosure by the defence will to some degree infringe on the right to silence.

Any attempt to address the problem of delay has traditionally been cast as a choice between the commitment of additional resources by government or a scheme of compulsory defence disclosure. As we all know, the former has never been an attractive option for government and is, in current times even less so.

The Approach To Date

Since the 1990’s there have been various legislative schemes introduced in Victoria and throughout Australia which seek to address delay in the criminal justice system by requiring various levels of defence disclosure.

The purported justifications for full defence disclosure are:

- disclosure should be a two-way street, not a situation where the prosecution discloses everything and the defence nothing (this is somewhat difficult to maintain in the context of prosecution disclosure based on its duty of fairness and where prosecution and defence are not evenly matched when it comes to

resources. Mandatory defence disclosure is also seen as incompatible with the nature of an adversarial system, with the onus on the prosecution to prove its case and the accused's right to silence)

- that the elimination of surprise by so-called ambush defences would be conducive to accurate and just verdicts. (this is also difficult to maintain as the likely defence will be obvious to the prosecution without defence disclosure. Duress may be an exception. In the normal run of things, however, any 'surprise' experienced by the prosecution would come in the form of alibi or expert witnesses which can be and are the subject of specific legislation for defence disclosure without any significant impact on the right to silence)
- it would achieve efficiencies in the criminal justice system and contribute to better case management. Defence disclosure, it is argued, " would allow early identification and narrowing of issues actually in dispute while promoting more accurate and thorough case preparation, the discontinuation of weak prosecutions, and the earlier disposition of strong cases as guilty pleas...Resultant benefits would include more efficient use of court time with fewer and shorter trials, more accurate estimations of trial duration, improved trial listing procedures, and savings in legal aid. Not least of all, the time and resources of counsel would not be wasted on issues not in dispute and there would be less inconvenience to witnesses and juries" (Kevin Dawkins) (iv)

It is the appeal of these perceived practical considerations of efficiency that have been the catalyst for the introduction in Victoria of a statutory reciprocal disclosure regime.

Prior to the introduction of the Crimes (Criminal Trials) Act 1993, the Magistrates Court of Victoria had, without supporting legislation, introduced the contest mention system in the summary stream in 1991. Its aim was to identify issues in dispute, explore avenues for resolution as well as give sentence indications if requested.

In the committal stream, legislation was introduced in 1999 in the form of Schedule 5 of the Magistrates Court Act 1989, requiring the leave of the court to cross-examine witnesses at committal. In order to obtain leave, a Form 8A had to be served and filed by the defence which would identify the issues to which the evidence of the particular witness was relevant as well as the scope of the cross-examination.

This was subsequently amended by the Magistrates Court (Committals) Rules Act 2007. The parties were now to file a form 10A stating that the prosecution and defence had familiarised themselves with the brief and explored resolution. If the matter was to proceed by way of a contested committal, the defence had to identify the issues in contention to which the evidence of the witness sought to be cross-examined was relevant. The shift in emphasis from 1999 to 2007 was to require discussion of the issues between defence and prosecution leading to resolution in the form of a plea, or consensus on the relevance of witnesses sought for cross-examination.

In the higher jurisdictions, the criminal trial procedures legislation, the Crimes (Criminal Procedure) Act 1993 and Crimes (Criminal Trials)

Act 1999, required the defence to file a defence response to the prosecution's opening statement the contents of which were required to include the "acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken". They were also required to respond to a prosecution notice to admit evidence.

The 1993 Act was regarded as onerous principally due to section 15 (2) of that Act which in the event of a departure from the case disclose by a party prior to trial:

The presiding judge or, with the leave of the court, a party may make any comment on that departure that the judge or that party (as the case requires) thinks appropriate

In the context of a profession grounded in the adversarial process with its inherent rights of an accused, and judges wary of appeal processes, it is not surprising that, as the NSW Law Reform Commission commented;

"By and large, the Act was met by a general culture of combat rather than co-operation and most trials proceeded as though it never existed" (v)

This highlights that the effectiveness of pre-trial regimes depends on compliance by the bar and enforcement by the bench.

The total failure of the 1993 Act led to the 1999 amendments that do not entail sanctions such as existed in the 1993 Act.

In 1998, the "Best Practice for the Determination of Indictable Charges" acknowledged that:

“Criminal procedure is, and should remain, fundamentally accusatorial, that is the state accuses the citizen of a criminal offence and must prove guilt without the assistance of the accused. While there is a public interest in improving the efficiency of criminal proceedings by reducing delay and costs, this must proceed in the context of the accusatorial framework”
(vi)

As Chief Judge Michael Rozenes of the County Court said:

Proposals that fundamentally change the status quo should it is submitted do as little damage as possible to the balance that has been struck between the prosecution and the defence. The focus should be to achieve efficient case management rather than trying to enhance the prospects of conviction. (vii)

The Working Group at the Melbourne conference in March 2000 in fact approached the issue of defence disclosure as limited to case management issues and proposed that defence disclosure be restricted to the identification of what is not in dispute except for alibi or expert evidence. This keeps faith with the adversarial system and its attendant rights.

What has been achieved by this statutory reciprocal disclosure schemes?

The 1999 amendments to criminal procedure in Victoria have remained in force and although not ignored by the bench and the profession have failed to deliver the hoped for benefits in reducing delay. The profession is often critical of the procedures, requiring as

they do an increasing workload of drafting documents, additional appearances and of course increasing costs. The benefits are not seen as proportionate, with the responses to the prosecution summary often vague or merely obvious and the concessions of evidence in general those that would have been made in anycase, e.g. the admission of bank records, telephone CCR's, ownership of stolen property, continuity, etc.

In 2007 the Australian Institute of Criminology published a research paper "***Criminal trial delays in Australia: trial listing outcomes***" (viii) which found that rather than an increase in trial initiations and complexity, delays were the result of a significant proportion of trials that fail to proceed as scheduled. It is these 'ineffective' trials which consume significant court resources.

The study found that out of every ten trials listed:

- 3 will proceed as scheduled
- 4 will be finalised without trial, either by way of guilty plea or prosecution withdrawal
- 3 will be adjourned and listed for another hearing

.Reasons for late finalisation:

- late plea negotiation between defence and prosecution, late disclosure by prosecution, late changes to charges, or limited contact with the defendant and late examination of the brief and depositions

- the difficult of apathetic client- some defendants play the system and refuse to negotiate till the last minute
- defendants advised not to negotiate earlier- attempts by counsel to improve remuneration in legal aid matters, to prolong case in hope that evidence is unobtainable or cannot be produce, and because limited incentives to consider early plea

Where matters withdrawn from prosecutions, reasons identified:

- the role of the committal hearing in determining the sufficiency of the evidence – criticism of the efficacy of the committal procedure to ensure that sufficient evidence existed to proceed with prosecution as many deficiencies in evidence not identified until well after the committal process.
- Preparedness of the prosecution- many withdrawals due to limited or late preparation by the prosecution due to late briefing of counsel or later transfer of brief to senior prosecuting counsel.
- Unexpected issues – forensic evidence not available by trial date or victim may decide just before trial that they don't want to give evidence.

Matters adjourned by request of defence or prosecution

- where one or more of the parties (witnesses, defendants, legal counsel) are unavailable

- where additional information required – need for additional evidence, clarification of legal funding or simply that one or both parties had not adequately prepared their case.
- Further judicial processes required prior to trial – Basha inquiry or voir dire. Need for this results from last minute negotiation and late identification of issues by the defence or prosecuting counsel.

The report highlighted a number of underlying factors as contributing to trial adjournment/withdrawal:

- Trial uncertainty – not likely to prepare if think unlikely trial will proceed
- Prosecution case uncertainty - less concrete the prosecution case, the more likely late modification resulting in further negotiation, withdrawals and adjournments
- Prosecution charge uncertainty- where prosecution make decision to amend charge shortly before trial, late plea negotiation likely
- Lack of seniority of legal practitioners – junior legal and paralegal staff handling pre-trial preparation in offices without the experience or authority to critically assess and negotiate in early stages.]
- Limited or late disclosure – failure to disclose all relevant material to defence often results in adjournments. This often not

the fault of the prosecution as such but rather the investigating officers who fail to provide the prosecution with all the necessary material keeping them on the drip feed. This of course undermines the efficacy of the prosecution discharging its disclosure obligations and necessitates defence issuing subpoenas against relevant law enforcement agencies.

- Limited or late communication between defence and prosecuting counsel may result in later preparation and negotiation on a guilty plea.
- Limited incentives for an early guilty plea.
- Ambiguity of probable sentencing outcome – sentence indication
- Barriers for victims and witnesses – the more disconnected they become during the trial preparation process the less likely they are to be willing to participate.

Apparent from the results of this study, that a well prepared, skilled, experienced and willing prosecution could alleviate many of the factors contributing to ineffective trials.

New Initiatives

For almost a generation the problem of delay has been the subject of research discussion and ultimately legislation.

Invariably the approach has been simplistic: have the prosecution sign off on full disclosure and then determine the extent to which disclosure by the defence will be required. The benefits to case management will surely follow. They haven't.

The attempts to change the culture of the defence were always destined to fail in the context of an adversarial system based on the presumption of innocence, the right to silence and the obligation of the prosecution to prove its case. Moreover, the focus on the defence has distracted the discussion from the potential within the prosecution to effect change in a manner that will be conducive to early resolution.

Recent initiatives in Victoria, both within the OPP and VicPol have achieved encouraging results and in effect commenced to bring about a radical cultural change within these prosecutorial organizations.

The OPP

In October 2007, the OPP established a unit within its organization aimed at achieving early resolution of appropriate cases. The unit consisted of five solicitors who were experienced advocates and had a skill set and track record of resolving matters.

The objectives of the project were:

- At an early stage to filter out of the system those matters capable of early resolution
- This would allow resources to be concentrated on those matters with genuine issues in dispute
- Reduce delay
- Reduce impact on victims and defendants

Files are allocated to the solicitors following the filing hearing based on the remand summary, prior convictions and a form completed by

the informant. Solicitors who appear at the filing hearing are also asked to comment on whether the matter is capable of early resolution.

Discussions may commence at any time, however, this usually occurs after the brief is served.

The scheme depends on the involvement of senior more experienced practitioners who are skilled at initiating discussions, have sound judgement and come to the bottom line in a speedy fashion. The experience of the solicitors and their recognised purpose in the OPP also stands them in good stead when seeking instructions from a crown prosecutor as well as in negotiations with the defence.

Criteria for file referral to an early resolution advocate includes :

- Strength of the crown case including admissions
- Defence indications at filing hearing
- Type of offence (offences of armed robbery, theft and assaults have more potential to resolve)
- Size and complexity of the case (the larger more complex files are not allocated)

During the 12 months from October 2007 to October 2008, resolution was achieved pre committal in 60.5% of cases, at committal in 36.4% and post committal in 3.1%.

In the first half of 2009, 809 files were considered for allocation to the unit of which 300 were actually allocated. Resolution was achieved in 73% of those cases.

If as some argue, a guilty plea is the optimum outcome in a criminal proceeding as it allows court resources to be focused where really needed, assists the victim to recover and achieve closure whilst contributing to the offender's rehabilitation, then this cultural change in the OPP has achieved much.

The model used by the OPP is:

Objective: reduce delay

Strategic Activities:

- Early resolution of cases
- Early resolution of issues (adjournments, meeting timelines)

Key Mechanism:

Phase 1: 5 Early resolution Advocates

Phase 2: Embedding early resolution approaches

The OPP promotes the program within its organization as cultural change highlighted by:

- The Director's Policy on Early Resolution
- All Crown Prosecutors focused on resolution - increase in chambers advice – close working relationship with the early resolution advocates

VicPol and the Summary Stream

In February 2009, the Criminal Procedure Act 2009 was passed in the Victorian parliament. As it relates to matters heard in the

summary stream of the Magistrates Court, it introduced the procedure of a notice to appear followed by the filing of a charge and the service of a preliminary brief. Once the preliminary brief had been served a matter was not to be listed for contest mention or contested hearing unless a summary case conference was held in which issues of prosecution disclosure and resolution were addressed.

Though the Act does not come into effect till the end of October 2009, VicPol have initiated pilot programs at Heidelberg and Ballarat Magistrates Court to assist with implementation.

There are many facets to the new scheme contained in the Criminal Procedure Act which I need not address here, but central to the success of the Act as it relates to criminal matters in the summary stream, is a cultural change within the police force that evidences a willingness to engage in early resolution.

This is supported by assigning experienced prosecutors at *the front end* of the criminal law process **with the authority to engage in meaningful discussions leading to the appropriate withdrawal and/or amendment of relevant charges.** Alternatively, they may provide further disclosure of material to assist in resolution.

This is no small matter, as currently, aside from these pilot programs, a police prosecutor must seek the approval of the informant to withdraw/amend charges. As often happens, the informant is not as well versed in the rules of evidence or the criminal law to come to the same conclusion as the prosecutor. Nor, given his emotional proximity to the case, is the informant best qualified to deal with the issues in a detached and professional manner.

Likewise, defence are currently obliged to forward all requests for prosecution disclosure to the Informant who by this time has moved on to other cases if not other police stations. This singular fact is a constant source of delay in the magistrates court.

The assignment of a Summary Case Conference Officer with experience in prosecutions and a willingness to engage in early resolution discussions, has in effect reduced the number of contest mentions from 45 to 5 a week and the listing period for contest mentions from 10 to 4 weeks. At the Heidelberg pilot only 1% of cases have gone through to contested hearing.

The case conference officer will initiate contact with the defence prior to a matter listed for contest mention to discuss the case in a meaningful fashion. Issues will be addressed, often necessitating further prosecution disclosure of the evidence and the prospects of resolution canvassed. The experience and seniority of this officer are pivotal to the success of the scheme.

Conclusion

These two initiatives have brought significant benefits to the criminal justice system in reducing delay and permitting the re-allocation of court and prosecutorial resources. These benefits will also accrue to legal aid.

Significantly, the changes that produced this were not legislative and did not raise issues of infringement of an accused's rights. The changes were cultural within the existing prosecutorial institutions and

not only produced benefits for the court's administration of its case load, but for the management of the agencies themselves.

One can only wonder whether the approach to issues of case management has for far too long been defence – centric, seeking to assail the rights which are the touchstones of our system of justice, when far more effective and less threatening alternatives were ever present.

Anecdotaly allow me to conclude with a quote from a ROI in a case that came before me some years ago. It serves as a constant reminder of the human element in the sphere of legal rights.

The police officer having administered the caution and advised the suspect of his rights asks :

Q: I believe that you understand your rights, and you've had them explained several times now. Do you wish to exercise any of these rights?

A: Yes, I have the right to be hit by you. I have the right to be belted by him. I have the right to have my hair pulled by that other cunt. They're my rights.

Q: Do you wish to exercise any of these rights before the interview proceeds?

- (i) Murray Gleeson: Some Legal Scenery – Judicial Conference of Australia 5 October 2007
- (ii) Mark Weinberg, The Criminal Trial Process and The Problem of Delay (Criminal Trial Reform Conference)
- (iii) (1995) 184 CLR1
- (iv) Kevin Dawkins: Defence Disclosure in Criminal Cases (2001) New Zealand Law Review 35
- (v) NSW Law Reform Commission, The Right to Silence (Discussion Paper 1998)
- (vi) Michael Rozenes: The Right to Silence in the Pre-Trial and Trial Stages (25 March 2000)
- (vii) Jason Payne: Criminal Trial Delays in Australia: trial listing outcomes No74