Adversarial Justice in Transition

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The Law Reform Commission of Western Australia has recently made important recommendations for the reform of criminal procedure in this State. The recommendations include proposals for the introduction of 'case management' techniques in criminal trials and for the use of sanctions against advocates who fail to cooperate with the courts in their efforts to deal with criminal cases expeditiously and fairly. In this article, a senior justice of the Supreme Court of Western Australia examines some of the Commission's key recommendations and calls for their implementation by Parliament.

THE adversarial system is a set of procedural rules that has been subject to change ever since its basic form developed some 200 years ago.[1] These changes have not occurred in an ordered manner. There have been long periods of inertia, which have been punctuated by outbursts of substantial reform brought about by community discontent.[2] We are again experiencing a period of troubling community cynicism and dissatisfaction with the legal system. Over the last decade, powerful pressures for reform have transformed our civil system of adversarial justice and further evolution is still taking place. Similar pressures are now being applied to the criminal justice system.

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1. S Landsman *Readings on Adversarial Justice: The American Approach to Adjudication* (Minnesota: West Publishing Co, 1988) 15-19.
2. See DA Ipp 'Reforms to the Adversarial Process in Civil Litigation – Part 1' (1995) 69 ALJ 705, 711.

We have reached a watershed in criminal litigation. According to the Australian Bureau of Statistics,[3] in 1997-98 there was a nine per cent increase over 1996-97 in criminal cases initiated in the higher courts.[4] Throughout the country, there was a significant increase in the number of defendants with cases pending at 30 June 1998. These phenomena have been a characteristic of the administration of criminal justice over the last several years. The overall trend is unmistakable.

Courts are not equipped to deal as effectively as in former times with the mass of criminal cases. The result is increased cost and delay with self-evident injustice to individuals. Additionally, as there is a limited sum of government money available for the administration of justice, there are fewer resources for each individual case. This results in greater delay and, with the disease feeding on itself, in more injustice.

Criminal litigation is particularly dependent on individual memory. Documents that can objectively refresh memory ordinarily play a small part in the usual kind of criminal case. Witnesses must rely solely on their recollection. When it takes more than a year, and sometimes three years, for a case to come to trial, memory becomes highly suspect. That is the inevitable human experience and it is well recognised by juries. The consequence has to be that not infrequently the guilty are acquitted, and less often — by reason of the presumption of innocence — the innocent are convicted. Hence community unhappiness with the criminal justice system.

Some evidence of this appears from the recent review of the criminal and civil justice system in this State conducted by the Law Reform Commission of Western Australia. The Commission reported a 'marked dissatisfaction evident in the public submissions' and noted that 'public submissions to us during the course of this review suggest the justice system is guilty of expense, delay and a lack of regard for the lay person'.[5] The major discontent with the administration of justice is, however, founded on a commonly held belief that the fulcrum of the criminal justice system favours the accused.[6] The judiciary, together with the legal profession, has come under attack. Regardless of the validity of these views, they reveal a weakening community confidence in the rule of law.

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3. ABS Media Release No 85/99 (26 Jul 1999). Recent figures show that in 1998/99 there was a 3% increase over 1997/98: ABS Media Release No 95/00 (24 Jul 2000).
4. Data for Queensland being unavailable.
5. LRCWA *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (Perth, 1999) 3.
6. G Melick 'Delays in the Criminal Process: Can the Courts Do More?' in *Reform of Court Rules and Procedures in Criminal Cases* AIJA conference: Proceedings (Brisbane, 3-4 Jul 1998) 55, 56.

Lawyers, particularly criminal lawyers, undoubtedly play a very important role in protecting individual liberties. Care must be taken, however, to avoid a damaging detachment by lawyers from the legitimate concerns of the general public. Some lawyers tend to disregard these concerns on the ground that they know better, particularly when it comes to the liberty of the subject. Plainly, lynch mob attitudes and uninformed comment deserve no attention. But it would be dangerous for lawyers to ignore the feelings of anger and disappointment that are frequently expressed by members of the public. As Justice Davies has pointed out, the law should reflect underlying community values.[7] When the legal system does not reflect community values it loses its legitimacy and disrespect for the institutions of the law develops apace. That is a destructive phenomenon and it invites legislative change that may be far less palatable than the kind of reforms contemplated by the Law Reform Commission's report. Old attitudes, born out of long and comfortable use of a particular set of very familiar rules, need to be re-examined. The situation demands a fresh and flexible approach, and careful, objective and unemotional consideration of proposals for reform.

Underlying public dissatisfaction is the perception that a search for the truth plays little part in our adversarial process. Evidentiary rules exclude testimony that on a commonsense basis is highly relevant, and rules of procedure do not encourage discovery of relevant facts by defendants. It has been pointed out that the current rules of practice and law require the prosecution to provide all relevant information to the defence.[8] This includes particulars of each offence, witness statements (including prior inconsistent statements) and copies of exhibits. No corresponding obligations have been imposed on the accused. This is a pronounced information imbalance that arguably detracts from the fairness of the trial — that is, fairness to the prosecution who, in an important sense, represent the community. At the very least, the search for the truth is obstructed by these rules.[9]

THE NECESSARY REFORMS

Justice Hunt has drawn attention to decisions of the European Court of Human Rights that have recognised that a fair trial means one which is fair not only to the accused but also to the prosecution.[10] While the fundamental protections given by

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7. GL Davies 'The Prohibition Against Adverse Inferences from Silence: A Rule Without Reason? – Part II' (2000) 74 ALJ 99, 105.
8. G Flatman & M Bagaric 'Accused Disclosure: Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 Crim LJ 327, 329.
9. Ibid.
10. D Hunt 'The Right to a Fair Trial : A Different Perspective?' (1999) 11 JOB 17.

the general law or by statute to an accused should not in any way be cut down, the wider concept of a fair trial is regarded as applying to both parties and equal treatment should be afforded to the prosecution and the defence. In particular, both the prosecution and the accused should be given equal opportunities in relation to the evidence tendered by the other. Each party should be afforded a reasonable opportunity to present its case — including its evidence — in conditions that do not place it at a substantial disadvantage vis-à-vis its opponent.[11]

Nowadays it appears to be accepted by most that there needs to be some form of greater disclosure by defendants, and at an early date. It remains to be seen what that form will be. The disclosure will have to be compatible with the retention of the appropriate basic protections to which each individual is entitled. But to remedy the imbalance that presently exists, to allay community concerns, and to provide for a fair trial for both parties, changes need to be made and incorporated into statute.[12]

The role of the judiciary in coordinating criminal justice is changing and is likely to change further. The delay in processing criminal trials requires the adoption by courts of a systematic, managerial approach to dealing with caseloads. Nowadays there is general acceptance that the court must control the pace of litigation.[13] It has been suggested that any plan for rationalisation and reform must begin with a single goal — namely, 'that a person charged with a criminal offence should be brought to trial within six months of being charged'.[14]

It may be necessary to provide continuous judicial case management and pre-trial supervision or to have some form of differentiated case management. Such measures would narrow the issues, facilitate proof of matters not in dispute and assist in ensuring that the trial proceeds with the least possible interruption. The imposition and strict enforcement of time limits would help to reduce delaying tactics.

An important aspect of the Law Reform Commission's report[15] deals with judicial power to dispense with formal proof requirements. There is good reason to allow proof by affidavit of facts not truly in dispute. I mention this as an example of sensible reforms that have been opposed in the past by resort to arguments based on the burden of proof. This is where careful and objective analysis should hold sway. Properly understood, reforms of this kind facilitate swift and cheap proof of

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11. *Ekbatani v Sweden* (1991) 13 EHRR 504, para 30; *Barbera v Spain* (1988) 11 EHRR 360, para 78; *Brandstetter v Austria* (1991) 15 EHRR 378, para 67; *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, para 33.
12. Davies supra n 7; see also Part I (2000) 74 ALJ 26.
13. American Bar Association *Defeating Delay: Developing and Implementing a Court Delay Reduction Program* (Chicago, 1986).
14. MA Viney 'The Process of Reform' (1990) 2 CICJ 43.
15. LRCWA supra n 5, paras 29.22-29.24.

facts without prejudicing a defendant's true defence. They do not touch on the presumption of innocence.

Another reform that should be contemplated would be to empower the judge to inquire into the need for and desirability of particular charges when a defendant has been charged with several counts, and to strike out charges in the interests of justice. Over-charging is a real problem, unnecessarily complicating trials and causing substantial delay and unnecessary costs. Some mechanism of the kind I have suggested would apply a necessary inhibitory force to overly optimistic prosecutors.

ACHIEVING REFORM: OBSTACLES TO CHANGE

Of course, reforms to the adversarial system are difficult to achieve. A major obstacle is said to be the culture of the system which is fiercely resistant to change. But that may be an overrated factor. Experience has shown that with determination and sensitivity it can be overcome. Opposition to civil reforms was vigorous indeed. Hostility to the first proponents of case management and greater judicial intervention was at times extreme. Initially, neither the judiciary nor the legal profession was convinced of the merits of the changes, and there were many obstructions to progress. Nevertheless, as time has gone by, the merits of civil reform have been accepted and the culture has changed. The legal profession has generally responded in a most constructive fashion, an example being the changes made by the New South Wales Bar to its rules. There are, in fact, many signs of helpful cooperation by the profession.

The question of how the culture is to be changed is of fundamental importance. There are three levels at which it should be addressed — namely, government, judiciary and legal profession. At government level, it is essential that statutory force be given to reforms. Without statutory force, the judiciary has no effective power to put the reforms into practice. In the case of civil reforms, statutory force was obtained, generally, by the delegated legislation of court rules. As changes to the adversarial system in crime have potential to affect the liberty of the subject, it is desirable that such changes be effected by legislation. This time, the judiciary cannot act alone. Additionally, governments should provide the necessary infrastructure to implement the reforms. Merely making changes in statute books is not enough.

Procedural reforms will not work unless the judges are persuaded of their merits. An information campaign is needed for this purpose. Judges are particularly concerned with individual rights and will need to be satisfied that these are fully protected. The support of the Chief Justice in each jurisdiction should be enlisted. The need for change should be justified and the reforms explained by knowledgeable persons of appropriate standing. Senior judges, responsible for piloting changes through the court system, may be asked to arrange for papers on

the topics concerned to be delivered to the judges in each jurisdiction.

The lessons of civil reform emphasise that case management should be in the hands of judges who support the reforms with enthusiasm and who are prepared to introduce them with vigour and commitment. Consistency of approach is necessary, and judge-shopping should be prevented. This requires a small cadre of judges, well-suited to case management, to deal with all management issues. Once consistency has been achieved and general acceptance of the new regime has begun to permeate the profession, the number of judges dealing with case management can be expanded. One must attempt to break the logjam by some well-aimed and consistent thrusts.

It is critical to enlist the support of the profession. Successful reform cannot be imposed by statutory fiat without the goodwill and cooperation of the profession. Again, an information campaign would be needed. Many will have genuine concerns about the reforms. Explanatory seminars should be held at which papers should be given by members of the judiciary and leading members of the profession. A full and open debate involving all interested parties is desirable. A powerful motivating factor will be the appreciation that, for good reason, change is inevitable and constructive cooperation will be to the benefit of all.

SANCTIONS

For reforms to be effective, they must be backed by the power to impose sanctions. It does not follow that sanctions will be imposed with any frequency. Experience in civil litigation is that that would rarely be the case. But power to impose sanctions should exist.

Complex trials present special challenges. In *R v Wilson and Grimwade*[16] the Victorian Court of Criminal Appeal, in a statement which has now become well-known, said:

> Let it be understood henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed; if the present adversary system of litigation is to survive, it demands no less.[17]

But what sanctions would be available against counsel who do not comply? The Court of Criminal Appeal went on to say:

16. [1995] 1 VR 163.
17. Ibid, 180.

> Counsel in future faced with a long and complex trial, criminal or civil, will cooperate with their utmost exertion to avoid a mockery of the system of justice. If not, they must expect to receive, with the sanction of this court, appropriate regimentation by the judge — perhaps of a kind not hitherto experienced — designed to avoid the unhappy result that befell this trial.[18]

How is the judge to effect 'appropriate regimentation'? What is required is some statutory power that would allow the court to impose sanctions so that, at the very least, judicial admonitions and directions carry real force.

Devising appropriate sanctions is particularly difficult. Sanctions imposed on the Crown are not a practical solution. Any sanction would be relatively insignificant as regards most guilty or even acquitted defendants who attempt to abuse the court system. The idea of making adverse comments to the jury, which has been mooted, is also fraught with problems and is a recipe for appeals.

Inevitably, I suggest, sanctions would have to be directed at the legal representatives of the Crown and the defendant. Of course, that would leave a lacuna as regards the unrepresented defendant, and that matter may have to be addressed at some time in the future. But it would be advisable in this area to proceed incrementally.

There is a readily available source for the sanctions that are needed — that is, the duties that lawyers owe to the courts. The integrity of the adversarial process requires lawyers to refrain from taking any action for purposes other than the due advancement of the administration of justice. Importantly, lawyers who take steps purely to encourage delay will be guilty of a breach of their duty to the court. There is a public interest in the prompt and economical disposal of litigation. Cases must be conducted as expeditiously as possible within the constraints of the requirements of justice. Thus lawyers have a duty to act diligently and expeditiously so as to bring trials to a conclusion. This covers such matters as general prolixity, deliberately protracting cross-examination and unnecessarily putting parties to the proof of allegations known to be true. Lawyers have a duty to assist the court in doing justice according to law. This duty applies to selecting and limiting the number of witnesses to be called, the topics to be covered in address and the points of law to be raised. Hopeless points should not be taken.

These duties have become particularly important in current circumstances. Their codification by legislation could provide judges with the necessary armoury to promote compliance with new procedures that depend for their efficacy on reasonable and ethical conduct by legal practitioners.

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18. Ibid, 185.

A NEW SOUTH WALES INITIATIVE

The New South Wales Bar has recently taken steps that might pre-empt any statutory change. If all professional bodies follow this example (and enforce their own rules effectively), legislation may be unnecessary. The new New South Wales Bar Rules 41, 42 and 42A are highly significant. The explanatory notes to those three rules state:

> The new rules 41, 42 and 42A are intended to advance what their new heading describes, ie, the 'efficient administration of justice'. The policy behind them includes the recognition that the work of a barrister in litigation affects the business of the court as well as opposing parties and practitioners....
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> The new rule 42 also relates to the existing rule 19. Their combined effect makes even more clear the essential independence of counsel in the sense that barristers cannot justify dilatory or delinquent conduct with respect to the procedural rules or directions of a court by invoking the instructions or desires of the client. What has been called 'our duty to the court' prevails over our undoubted duties to our client. These new rules supply some specific content to that well-established paramount duty.

Apart from sanctions, there should be incentives for defendants to cooperate. These are contemplated by the Law Reform Commission's report[19] and may be regarded in many ways as more important than sanctions. There should be appropriate discounts in sentencing not only for early pleas of guilty but for cooperating in the trial process. That is not entirely satisfactory, as a recalcitrant defendant who is acquitted has no need of such an incentive. Nevertheless, the prospect of discounts of that kind may prove to be helpful.

Many of the issues involved in criminal reforms are interdependent, and it is important that a coordinated and holistic approach is taken to reform. It is open to question whether the recent legislative changes that have been made in some States have gone far enough or are working effectively. The Law Reform Commission's report presents a package of reforms that seek to address the manifold problems otherwise than on an ad hoc basis. It is very much a step along the path towards the long desired national plan of action.

Professor Van Kessel, an American academic, has said:

> We should ... seek to shift the focus of the trial from the battle between the lawyers to the discovery of truth by modifying our complex rules of evidence, encouraging the defendant to contribute to the search for truth, and requiring full and open discovery from the prosecutor.... For defense attorneys, courtroom victory usually

19. LRCWA supra n 5, paras 25.7-25.8, 27.32, 29.13-29.14.

> translates into obtaining an acquittal, and they often regard discovery of the truth as incidental or even irrelevant to this pursuit. In most criminal trials, discovery of truth is the *last* thing a defence lawyer desires. Pursuing acquittal of the guilty while avoiding presentation of clearly perjured testimony is admired as one of the greatest achievements of the advocate's art.[20]

Prosecutors, generally, are willing and active participants in this flawed process. It is this ethos that has brought our adversarial system to its current transitory stage. The challenge is to produce reforms that will remedy the present egregious defects, ensure a fair trial for all and preserve all the basic rights of the individual.

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20. G Van Kessel 'Adversary Excesses in the American Criminal Trial' (1992) 67 Notre Dame L Rev 403, 409, 435.