E – BRIEF

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Criminal Trial Efficiency

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1 Introduction

Prompted by concerns of an increase in the length of criminal trials, the NSW Attorney-General, the Hon John Hatzistergos MLC, commissioned a specialist team to evaluate deficiencies in the current trial process and recommend ways to remedy them.

The Trial Efficiency Working Group (Working Group) convened in 2008 and published their findings in May 2009. This E-Brief is a summary of the discussion and findings of that report, and associated issues.

The Terms of Reference requested the Working Group to evaluate, amongst other things:

- the use and efficacy of current provisions aimed at reducing the length of trials;
- whether provisions of the *Evidence Act 1995* (NSW) are sufficiently broad to streamline proceedings in criminal trials;
- the use of courtroom technology and training for time efficiencies;
- proposals to curtail time wasting questions and other time limits on submissions;
- the possible introduction of a reciprocal disclosure scheme;
- the development of effective judicial case management practices; and
- any other relevant matter.

The Working Group identified seven areas that contributed to overall trial inefficiency, and made a total of 17 recommendations. Broadly speaking, the areas that were considered to require attention included:

- juries;
- the conduct of counsel;
- a lack of early identification of issues in contention;
- the presentation of evidence;
- technological deficiencies;
- appeals against interlocutory orders; and
- the continuity of staff.

Summarised below is a brief discussion of the Working Group's findings and recommendations, together with a brief overview of the Government's legislative response.

2 Juries

The Working Group identified two concerns about juries. The first related

to the excusal of individual jurors and its subsequent effect on the discharge of entire juries. The second related to general juror comprehension of some of the issues under consideration at trial.

2.1 Juror Selection

Before the Working Group convened, there had already been some discussion about the prevalence of hung juries. To reign in the incidence of aborted trials, a number of amendments were made to the *Jury Act 1977* (NSW). These included changes to how verdicts are secured, how juries are selected and how jurors can be excused.

2.2 Majority Verdicts

Historically, a conviction could not be secured until a jury reached a unanimous verdict, even if there was an 11 – 1 finding of guilt. Over time, this has been the subject of considerable controversy, especially when the motives or competence of the twelfth juror are called into question.[1] To address this, in 2006 changes were made to the *Jury Act 1997* (NSW) that allows a majority verdict to stand where there is an 11 to 1 finding of guilt (or 10 to 1 when there are 11 jurors) in circumstances where:

- a unanimous verdict has not been reached after the jurors have deliberated for a reasonable period of time, not being less than 8 hours; and
- the court is satisfied that it is unlikely that the jurors will reach a unanimous verdict.[2]

The change still requires an overwhelming majority of jurors to find guilt but prevents the reticence of one juror from disrupting the findings of the remaining jurors.

2.3 Juror Empanelment

Section 19 of the *Jury Act 1997* (NSW) requires the Supreme Court or the District Court engaged in criminal proceedings to empanel a jury consisting of twelve persons. The empanelment of a twelve-member jury is a long-standing convention.

The New South Wales Law Reform Commission ('the Commission') was asked to review the operation and effectiveness of jury selection in 2007. In its report, the Commission evaluated the potential for jurors who had been excused to adversely affect the proceedings of trial, most notably where too many excusals had already taken place, jeopardising the overall viability of the trial. Although juries could continue with 10 or 11 members, any further juror attrition may require the abandonment of trial. The Working Group echoed the Commission's concern, commenting that the 'greatest risk' posed by the late application for a juror to be excused is the subsequent discharge of the entire jury.[3]

In light of these concerns, further amendments were made to the *Jury Act 1977* (NSW) in 2007 that enabled a court to empanel up to three additional jurors to allow for the possible attrition of jurors through excusal. Additional jurors may be empanelled in circumstances where:

- the trial is expected to last at least three months;
- the selection of the additional jurors is an appropriate means of ensuring that there will be sufficient jurors remaining on the jury when the jury is required to consider its verdict; and

- appropriate facilities to accommodate the additional jurors are available.

In such circumstances, although 15 people would be required to attend the proceedings, only a randomly selected 12 would retire to deliberate a verdict.

2.4 Excusal of Jurors

The Working Group identified a few issues relating to the excusal of jurors, either through juror application or mistaken empanelment requiring excusal.

Firstly, the Working Group identified that it is not uncommon for empanelled jurors to request excusal after the commencement of trial. Opportunities are provided to jurors for their excusal under the *Jury Act 1977* (NSW), but 'good cause' must be demonstrated for a juror to be eligible. What constitutes 'good cause' is difficult to determine given the lack of legislative guidance. [4] The absence of guidelines gives the court wide discretion in the excusal process and the practice of dealing with excusals varies accordingly.

Secondly, the Working Group, backed by the earlier NSW Law Reform Commission Report, recognised the discomfort some jurors might experience if they are made to put their reasons for excusal in open court, especially in circumstances where their reasons are of a sensitive nature.

As noted, the absence of guidelines enables the courts to conduct hearings in a way they deem appropriate. For example, some judges deal with the matter entirely in chambers, in the absence of the parties, whereas others deal with applications in the courtroom in the presence of all parties. In this latter case, jurors may find it particularly stressful, especially if they are not experienced in public speaking or otherwise find courtroom procedure intimidating.

The Working Group stressed the need for the courts to be sensitive when hearing excusal requests and provide opportunities for hearings in a non-confrontational setting.

Thirdly, the Working Group affirmed earlier moves to clarify that a verdict will not be affected or invalidated on the basis that a juror was mistakenly or irregularly empanelled. This provision was inserted into the *Jury Act 1977* (NSW) to overcome a previous court decision that quashed a verdict based on the mistaken empanelment of a prohibited juror.[5] The court ruling was considered to be an overly strict application of the earlier provision, requiring amendment.[6]

Lastly, amendments were made to the *Criminal Appeal Act 1912* (NSW) to allow the prosecution to appeal cases in circumstances where the trial judge has discharged the jury.[7]

Given the recent amendments, the Working Group considered legislative change unnecessary. It did, however, recommend that the courts use existing procedures relating to juries to gain maximum benefit. In addition, it recommended that the material provided to jurors be continually reviewed, informing jurors of their rights and responsibilities, with a view to ensuring the information is current and accessible.

2.5 Juror Comprehension

The second major concern of the Working Group was the extent of juror comprehension. The Working Group considered there to be an inextricable link between the issues that adversely

impact juror comprehension and efficient trials.

This concern was given added impetus after it was discovered during the trial of *R v Lonsdale & Holland* that jurors had been playing Sudoku during the hearings. The trial was aborted after three months of evidence, 105 witnesses and $1 million in court and counsel fees.[8]

It is noteworthy that in this case responsibility was not attributed to the jurors' lack of attentiveness, but instead, to the trial process itself, including the adducing into evidence hours of surveillance audiotape that included lengthy periods of silence. The hearings had been described as 'more a test of endurance than an exercise in fact-finding'.[9] The NSW Attorney-General referred to the jury forewoman's comment that the presentation of evidence was 'rather drawn out'[10] and consensus emerged that counsel were responsible for driving the jurors to distraction rather than any deliberate misconduct by the jurors themselves.

Although the lack of juror attentiveness substantially compromises the defendant to a fair hearing, it can also impact on juror ability to comprehend the issues at trial. These issues, which can be tricky at the best of times, might be unnecessarily complicated by the protracted and ill-defined presentation of evidence.

The Working Group identified the twin problems of the length of criminal trials, together with its potential complexity, as key reasons affecting juror concentration and comprehension.

On the issue of the length of trials, commonwealth Director of Public Prosecutions, Chris Cragie, has stated that 'eight days was the most one could expect of a jury. We need to be kinder to the jury system and what we can reasonably expect of it'.[11]

Despite recognising the benefits of shorter trials, District Court criminal trials have, on average, been trending upward in recent years, from approximately 4.6 days in 1996 to 7.25 days in 2007, pushing the upper limits.[12] As this only represents an average, a fair proportion of trials would be longer than the eight days suggested as an appropriate maximum.

On the issue of complexity, the presentation of evidence was identified as a key culprit. A New Zealand Law Commission report discovered that only a minority of jurors could easily assimilate information when presented orally, the primary means of communication during a criminal trial. Jurors were found to have difficulty recalling information correctly, if at all, and often confused or rearranged the names of witnesses, date and times of actions. There was even suggestion that jurors had difficulty remembering which evidence related to which charge.[13]

To address this concern, section 50 of the *Evidence Act 1995* (NSW) enables the court to direct a party to adduce evidence in summary form in circumstances where the documents in question are 'voluminous or complex', providing the court with an avenue of simplifying evidence.[14] However, the Working Group indicated that this provision was not sufficient and suggested reviewing the admissibility of documents provisions in the *Evidence Act 1995* (NSW) with a view to allowing a statement or transcript evidence to be given in summary form

or through charts and schedules.[15] The one caveat provided was that summary evidence could only be tendered if it did not result in unfair prejudice to any party.[16]

Lastly, the Working Group recognised that in order to ascertain the problems jurors faced during trials, a proper mechanism for juror feedback needs to be created. For example, in Victoria, it is common practice for a judge to debrief a jury upon the conclusion of a trial. The Working Group encouraged the development of a similar process in NSW. The Working Group considered that periodic surveys of jurors, (by the Bureau of Crime and Statistics Research) at two yearly intervals would be sufficient to achieve this end.[17]

3 Conduct of Counsel

The Working Group identified that sometimes, the improper conduct of counsel had an adverse impact on trial efficiency. The Working Group identified that the following methods were ways in which counsel unnecessarily lengthened proceedings:

- through 'fruitless, pointless or the unduly repetitive'[18] questioning of witnesses;
- by affirming arguments or asking questions on issues that are not in contention;
- by positing fallacious legal arguments, and the courts' tolerance of entertaining such arguments;
- by acting as 'mere agent' for their client by acting on their instruction to 'chase every rabbit down its burrow'[19] rather than exercising independent discretion;
- by deliberately lengthening proceedings, or certain parts of a proceeding, due to tactical considerations; and
- general incompetence.

There are existing provisions in place under section 41 of the *Evidence Act 1995* (NSW) that requires a court to disallow improper questions. However, these do not properly regulate questions in cross-examination that are considered either time wasting or irrelevant and do not address the issues raised above.

Similarly, rule 42 of the NSW Barristers' Rules requires barristers to confine issues raised in trial to those in dispute, and ensure that the matter progresses in a succinct and timely manner. Despite this, there was consensus across the Working Group that the Bar Rules were not properly enforced and breaches were not properly being reported.

The Working Group made two recommendations on this issue:

First, it suggested that judges be encouraged to refer breaches of the Bar Rules by counsel appearing before them to the NSW Bar Association. This process would invoke the use of existing provisions, largely considered sufficient, for dealing with improper conduct by counsel.

Second, the Working Group suggested the creation of a cross-party panel that would draft minimum standards that practitioners would be bound by and audited against.[20]

Although some consideration was also given to whether time constraints should be placed on opening and closing addresses by counsel, the Working Group stopped short of recommending legislative change, deeming it too difficult to manage by legislation.

4 Pre-Trial Proceedings

Unlike civil proceedings, criminal trials do not have a system of pleadings to define the issues. By failing to set out the issues early, the Working Group identified that criminal trials potentially lacked proper focus, unnecessarily extending proceedings. This lack of focus has resulted in:

- the submission of evidence of limited or no ultimate relevance;
- the calling of non-contentious witnesses, for example witnesses who merely corroborate surveillance evidence not in dispute; and
- the propensity to 'over prove' evidence, most notably through repeating arguments and submitting the same evidence.

In 2001, the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act* 2001 (NSW) was introduced to improve the system of pre-trial disclosures in criminal trials in NSW. In 2009, the relevant provisions were significantly redrawn in response to the recommendations of the Working Group.

Generally, pre-trial disclosures involve an exchange of information between parties that are material to the proceedings. Its purpose is to ensure that each of the parties is cognisant of the facts and each party has identified the legal issues in dispute before the trial commences.

One of the Working Group's main concerns about the earlier tranche of pre-trial disclosure provisions was its restrictiveness. The *Criminal Procedure Act 1986* (NSW) limited the use of pre-trial disclosures to 'complex criminal trials', a test not often met.[21] A 2004 Standing Committee Report noted that this restrictiveness was responsible for the relatively small number of pre-disclosure orders.[22]

The basic premise of the Working Group's recommendations was that, given the increasing length and complexity of trials, more matters need access to pre-trial disclosure provisions to enable more information to be exchanged between parties before trial.[23] The Working Group considered that this could be achieved by relaxing the present threshold test to widen the pool of participating matters.

In addition, the Working Group deemed it necessary to extend the amount and type of information exchanged between parties before trial. To this end, it proposed a model of reform that significantly widened the scope of disclosures and created multiple tiers of case management.

In response, the Government brought in sweeping changes to pre trial proceedings under the *Criminal Procedure Act 1986* with the introduction of the *Criminal Procedure Amendment (Case Management) Act* 2009, commencing with a mandatory exchange of information for all matters.

Additional schemes have also been created for intermediate-level case management – the pre-trial hearing and pre-trial conference – to be

activated at the courts' discretion or on application of the parties. These schemes are designed to facilitate pre-trial collaboration between the parties, mainly to clarify the issues in agreement and in dispute, as well as make pre-trial determinations in relation to the admissibility of evidence.

Finally, there are now more intensive pre-disclosure provisions open to the court, with the existing 'complex criminal trial' test dispensed with for a more accessible threshold.

4.1 Notice Provisions

The notice provisions are comprehensively set out under the newly introduced section 137 of the *Criminal Procedure Act 1986* (NSW). The notice of exchange requires the prosecution to give to the accused a copy of the indictment, statement of facts, lists of witnesses, exhibits and reports that it seeks to adduce into evidence in addition to copies of any charts or summaries.

The prosecution is also required to provide to the accused information it received from policy officers that 'may be reasonably regarded as being of relevance.' This provision is wider in scope than the previous equivalent provision that required the prosecution to provide information that 'may be relevant'.

For its part, the defence must comply with the provisions set out under new section 138. These provisions include giving the prosecutor notice of the name of its representative at trial, notice of any consent that the accused person intends to give in relation to any statements from witnesses or summaries of evidence that the prosecutor proposes to adduce, and specific notice provisions if they intend to raise the defence of alibi or substantial mental impairment.[24]

The requirements of the notice provisions outlined above are compulsory for all matters and not subject to any threshold test.

4.2 Pre-Trial Hearing

New section 139 enables the court to order both the prosecutor and accused to attend pre-trial hearings. The intention of the pre-trial hearing is to make orders, determinations or rulings the court finds appropriate for the efficient management of the trial, for example in relation to the admissibility of evidence. Any such direction would bind the trial judge unless it is contrary to the interests of justice. The decision for the court to require a pre-trial hearing is entirely discretionary.

4.3 Pre-Trial Conference

New section 140 sets out the pre-trial conference, which is a means of bringing the parties together to identify and record the areas in agreement and in dispute. Those areas in agreement are to be recorded on a form, placed on a court file and only become relevant at trial if one party departs from the agreement. Generally, a party to proceedings may not object to the admission of any evidence at trial if the parties agreed that the evidence is not in dispute. Similar to the pre-trial hearing, the decision for the court to require a pre-trial conference is entirely discretionary.

4.4 Pre-Trial Disclosures

Lastly, a further round of pre-trial disclosures is now available to the courts for more complicated matters. The basic premise of pre-trial disclosures is to compel the defence to give the prosecution a more detailed response to the initial prosecution

notice.[25] However, the Government has redrafted the definition of when pre-trial disclosures can take place, allowing courts to order pre-trial disclosure where it is in the 'interests of the administration of justice' to do so, replacing the more restrictive 'complex criminal trial' test.[26]

Under new section 142, pre-trial disclosure requirements for the prosecution include all those requirements listed under section 137, any information in the prosecution's possession that may be adverse to the credit or credibility of the accused and a list identifying the statements of witnesses proposed to be called by the prosecution at trial.

The Government amendments include the introduction of section 143, which sets out a comprehensive (and much lengthier) list of the pre-trial disclosure requirements for the defence, including, but not limited to:

- statements as to the facts alleged by the prosecution that the defence intends to dispute;
- matters that the defence intends to raise in relation to the evidence proposed to be adduced by the prosecution; and
- objections to proposed evidence by the prosecution and the basis for the objection.

Further provisions are provided that allow the prosecution to address in pre-trial disclosure any of the issues raised by defence.[27]

4.5 Additional Reforms

In addition, the reforms include implementing the Working Group's recommendations in relation to:

- creating a process for dispensing with formal proof of a fact that is alleged by the prosecution and not disputed by the defence;[28]
- dispensing with provisions of the *Evidence Act 1995* (NSW) in circumstances where the evidence was disclosed to the defence and the defence did not give notice that the evidence would be objected to;[29] and
- making binding pre-trial rulings on evidence in all cases. This would extend the existing rule, which previously only applied to sexual assault trials, to all criminal trials.[30]

Despite the Working Group's advocacy of these reforms as a measure to ease the burden of criminal procedure process, the Director of Public Prosecutions, Nicholas Cowdery QC contended that 'on the basis of the recommendations contained in the [pre-trial sentencing] report, a significant additional workload would be imposed upon the ODPP that would require more, not less, resources and lead to no significant benefits'[31]. It remains to be seen if the nascent reforms will have any discernible impact on the length and efficiency of criminal trials.

5 Continuity of Staff

The Working Group identified the inability to brief Crown Prosecutors early as another reason giving rise to significant inefficiencies. The handover of briefs across different lawyers within the DPP before its eventual referral to the Crown Prosecutor has been criticised for aiding trial inefficiencies.[32]

6 Interlocutory Orders

The *Criminal Appeal Act 1912* (NSW) allows for appeals to be made against interlocutory orders – that is – a provisional decision given in the intermediate stage between commencement and conclusion of proceedings. Section 5F(3) of the *Criminal Appeal Act 1912* (NSW) allows any party to a criminal proceeding on indictment to appeal against interlocutory orders in certain circumstances.

Although the Working Group recognised the importance of having an interlocutory mechanism, their potential for misuse was also recognised. There was concern that applications without merit could be lodged to either delay proceedings, force a trial to abort or, in the most extreme circumstances, allow counsel to engage in 'judge-shopping'.[33]

Despite the potential for appeals to disrupt proceedings, the Working Group determined that the relatively few number of appeals recorded, together with the importance of maintaining the appeal provisions, meant that the Working Group was not prepared to recommend any changes.

7 Technology

The Working Group stressed the impact of courtroom technology on trial efficiencies, stating that such issues 'cannot be underestimated'.[34] The Working Group did not provide a comprehensive list of examples but pointed to issues that can lead to trial delays, including:

- untrained court staff and lack of technical competence by the party presenting the evidence;
- lack of equipment availability;
- lack of technological upkeep, including poor picture and sound quality; and
- lack of compatibility between the formats the evidence is produced in with available courtroom technology.

The Working Group stressed the need for streamlining and maximising the use of technology. It noted that there is no common standard for CCTV footage, despite its prevalence in criminal trials. To this end, the Working Group made the following recommendation to mitigate time slippages:

- the ongoing training of court staff;
- the employment of dedicated courtroom employees to deal with technology-related issues;
- the anticipation of future needs and developments of technology by auditing current capacity in the courtroom, and its publication to court users;
- the development of a single standard procedure for all NSW courts to require technology to be tested in location within two working days of a hearing; and
- allow parties to access courtroom technologies to trial their electronic evidence.[35]

8 Conclusion

In recent years the average length of a criminal proceeding has slowly tracked upward. The NSW Attorney-General has commented that implementing the

recommendations of the reform will 'reduce avoidable delays, which place a significant burden on the justice system and the taxpayer'. However, the main thrust of the Working Group's finding is that change is best achieved through 'cultural reform' from 'legal practitioners and judges embracing new ways of presenting and conducting trials'[36].

1 See, for example, the Hperjury trial Hinvolving for Queensland Premier Sir John Bjelke-Petersen.
2 *Jury Act 1977* (NSW), s55F
3 New South Wales Attorney General's Department, *Report of the Trial Efficiency Working Group* ('Working Group'), March 2009 at p 63.
4 New South Wales Law Reform Commission, *Report 117 Jury Selection,* September 2007 at p 128.
5 *Jury Act 1977* (NSW), s73
6 See *Petroulias v R* [2007] NSWCCA 134; *R v Brown & Tran* [2004] NSWCCA 324.
7 See *Criminal Appeal Act* 1912, s5G
8 Malcolm Knox, *Game's up for jurors playing Sudoku,* The Age, 11 June 2008.
9 Michael Pelly, *Call for reform as Sudoku trial ends,* The Australian, 20 November 2008.
10 Ibid.
11 Ibid.
12 The Hon. John Hatzistergos, NSWPD, 19 May 2009 at p 14677.
13 See New Zealand Law Commission, *Juries in Criminal Trials,* Report 69, February 2001.
14 *Evidence Act 1995* (NSW), s 50.
15 Working Group, op cit., at p 70.
16 Working Group, op cit., at p 89.
17 Working Group, op cit., at p 70.
18 M. Tedeschi, *Criminal law and social change in Fiji: Lessons from two criminal trials,* (2007) 81 ALJ 661.
19 *Giannerelli v Wraith* (1988) CLR 543 at p 556.
20 Working Group, op cit., at p 74.
21 Barry Collier MP, NSWPD, 28 October 2009 at p 18869.
22 See Legislative Standing Committee on Law and Justice, *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001 – Stage Two (Inquiry),* December 2004.
23 Working Group, op cit., at p 77.
24 Working Group, op cit., at p 80.
25 Barry Collier MP, NSWPD, 28 October 2009 at p 18869.
26 *Criminal Procedure Amendment (Case Management) Bill 2009,* s141.
27 *Criminal Procedure Amendment (Case Management) Bill 2009,* s144.
28 *Criminal Procedure Amendment (Case Management) Bill 2009,* s145(2)
29 *Criminal Procedure Amendment (Case Management) Bill 2009,* s145(1)
30 *Criminal Procedure Amendment (Case Management) Bill 2009,* s130A
31 Joe Gibson, *Criminal trials face radical overhaul to cut court time,* The Sydney Morning Herald, 28 August 2009.
32 Working Group, op cit., at pp 86 – 87.
33 Working Group, op cit., at p 90.
34 Working Group, op cit., at p 74.
35 Working Group, op cit., at pp 91 – 95.
36 Claire D'Arcy, *Report prompts Government action on efficiency in criminal trials,* Australian Legal Monthly Digest, 27 May 2009.