DELAYS IN LOCAL COURTS

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In dealing with 'delay', we must acknowledge that some delays are inevitable and unavoidable because of the human process. Just as the ambulance has to get to the hospital, so a case has to be prepared. It is also the case that some delays are beneficial. The law is supposed to be dispassionate, to sort out issues and to deal with them on their merits: 'closeness' to the event blunts vision of it.

Delay is not a bad thing *per se*, just as celerity is not a good thing, *per se*. In the Socialist Peoples Republic of China you can have your appeal (against conviction) disposed of in three days, (after which you are disposed of).

Delay as associated with the legal process has a mythic quality in human consciousness. Everyone knows of Hamlet's soliloquy upon (*inter alia*) the motives for suicide: one of them is "the law's delays" which he couples with "the insolence of office". Again we have Dickens' picture of the operation of nineteenth century Chancery in *Jarndyce v. Jarndyce* in *Bleak House*. That case touches the nerve of the man and woman in the street, who fear the law as an abstruse monolith manipulated by unscrupulous initiates; a nightmare area in which the ordinary person is helpless, as in Kafka's *The Trial*. Consequently, delay is a hobby-horse and whipping-post for the media, for politicians and many other pressure groups.

The delay we should avoid is unnecessary delay, the delay we should minimise is unavoidable delay. Unnecessary delays are certainly caused by incompetence and ignorance. Every judicial officer has had experience of them as they apply to practitioners and, sometimes to litigants and sometimes, it must be said, to judicial officers and their support staff.

There is another kind of delay. That is the delay engineered or exploited by practitioners. This is not 'necessary' delay, needed for example, to prepare a case, interview witnesses, and so on. It is a delay serving only the purposes of the litigant: perhaps merely postponing the evil day; perhaps enabling the litigant to manufacture evidence; or perhaps to rely on uncertainty or reluctance in the memory of witnesses.

This deliberate kind of delay, and the delay in administrative or bureaucratic procedures, is what the public thinks of when it hears the term, 'delay'. There is less of it than the public believes - particularly in the Local Court system. Nonetheless, there is plenty, and reforms are urgently needed.

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1 Paper delivered at a Public Seminar entitled, "Delay in the Criminal Justice System", convened by the Institute of Criminology, 9 August, 1989

In specific terms there is one variety of delay with which this paper is concerned. It is the delay between first return date (in civil and criminal matters) and final disposition. There are, of course, many other phases of delay in the course of an action. Some of them, we cannot institutionalise and may have to legislate out, not only for the sake of efficiency but also for the sake of efficiency 'seeming to be done'. I mean the haphazard but not infrequent settling of an action at the door of the Court. The action may be a family law case in which the parties finally get an idea of how ill-equipped any organ of officialdom is to deal with the complex and intimate disputes between husband and wife, often involving children. It may be merely a contractual dispute where the plaintiff and defendant realise at last that the subject matter will not sustain even one day in Court. This is not because lawyers are greedy, but because lawyers, in our society, have to be paid at market level. Or it may be that the charged person seeing, just before he or she is due to go into Court, the statements of the prosecution witnesses, and changing his or her plea to 'guilty'.

These are, indeed, delays - delays in which decisions are made. They are delays which help the wheels go round, but they are happenstance only and therefore may not prevail in the teeth of a campaign for greater efficiency.

Pre-trial conferences and the concepts surrounding them may well overcome unjustifiable delays. They are, however, only one species of a genus. The genus is an informal disposal of issues. There may have been a time in our legal history when any alteration of formalism was a concession, not a natural thing; legal process operated through its forms and could not be interfered with (see *Jarndyce*). We do not see things that way now.

We recognise that formalism may be a cover-up to avoid quick decisions; no less just because it is quick, no less just because formal tracks have not been run along. If we want to save the time of Courts, because of economic necessity or for any other reason, we should ask ourselves what do Courts do which cannot be done elsewhere.

It seems obvious that one of things they do (which may take time viz. cause delay) is impartially 'weigh up' the arguments of the parties. Courts, judicial officers, are the entrenched bodies for these purposes, whether they do it ill or well. It is, however, a primitive notion that because it is the Court's domain to weigh up overall, everything must be attended to by the Court. If the parties can be properly represented, (bearing in mind the loser generally feels she or he has been ill-treated) are there not issues of a kind preliminary to the main contest which can be resolved prior to the main contest? Can the parties not argue these out before quasi-judicial or non-judicial officers (or perhaps at conferences at which no one is 'presiding'), and still feel they are having their day in Court? What genuine prejudice would be suffered by either the prosecution or defence in pre-trial procedures designed to define and limit the issues between the parties, thereby limiting 'delay'.

It is now widely accepted that there should not be 'trial by ambush'. This means that, short of giving the other side an unfair advantage, each party's case

should be disclosed to the other side before the matter gets to Court. Court rules covering the interlocutory matters of discovery and inspection, particulars generally, interrogatories, now reflect the policy that except in very special circumstances of privilege nothing of a party's case should be held back until the hearing. This, however, has been confined to the civil jurisdiction. In the context of the current problems of delay, we ought to consider whether there is good reason for treating the criminal jurisdiction differently. This, of course, is not to suggest that defendants in criminal cases should be obliged to disclose their entire case, nor that the burden of proof shifts from the prosecution. The same cry goes up as went up in relation to the civil jurisdiction reforms: that they will impose unfair burdens upon, in particular, the defendant or accused person; the prosecution is less tenderly thought about. I suggest that analysis discloses no more prejudice to the criminal defendant than to the civil defendant in pursuing these interlocutory procedures.

The prosecution must prove its case beyond reasonable doubt. It discloses in many instances what that case is by serving its brief in committal hearings and by the informal disclosure of witnesses' statements in many summary matters. Why should not the defendant be in the same position? The defence will, after all, be disclosing its case in Court. The only conceivable prejudice from early disclosure would be the possibility of criminal behaviour by the prosecution to change proposed evidence. This seems an outside possibility, one which will be risky, possibly detectable, and one which measures could be taken to guard against.

Some steps have already been taken towards these ends. Some months ago, following meetings between the Chief Magistrate's Office, Senior Prosecutors and Legal Aid Solicitors at the Downing Centre, the Police Department agreed to experiment at the Sydney Police Centre with a standard form of Facts Sheet. These are prepared by the informant, and served on the defendant when charged and bailed. Two types of pro forma Facts Sheets are used: one related to prescribed concentration of alcohol offences; and another suitable to all other criminal (summary) offences. The Facts Sheets contain a simple summary of the facts known to the informant at the time of charging together with certain other relevant information. A copy is served on the defendant when bailed and a further copy is available in the prosecutor's brief to be handed to the defendant or the legal representative on the first return date at Court. It has not been practicable to keep any statistics, but at the end of a three month trial period, the assessment by experienced legal aid solicitors was that up to 40 per cent of defendants seeking legal aid representation, brought their Facts Sheets along on the first return date. Another 10 per cent referred to the Facts Sheets, but said they had left them at home. It was felt that the Facts Sheets had considerably assisted duty solicitors in obtaining instructions and had increased early and realistic assessment of the prosecution's case, with a corresponding increase in pleas of 'guilty' at the first opportunity, thereby allowing the defendant the benefit attached to an early plea of guilty.

The police are not dissatisfied with the results. It is arguable that their job is made easier by being obliged to commit to paper at the earliest opportunity, a factual account of the offences with which the defendant has been charged. Although some fears were expressed, that a defendant so armed would be in a position to

manufacture evidence in rebuttal of the prosecution case, there is no evidence of that occurring. If this happens from time to time, it is a reasonable price to pay for an overall improvement in case disposition.

While the disclosure in writing a party's case will abbreviate the time taken in Court, a real reform in this direction will be achieved by the logical extension of written disclosure through pre-trial conferences. The party's now armed with the nature and quality of their opponent's case and even an indication of the method and merit of how that party will support the case, are in a position to talk to each other under proper conditions with two objects: one is to further abbreviate the conflict, if possible; the other is to reach a compromise or to 'settle', again, if possible.

We have some empirical evidence in relation to pre-trial conferences, though this evidence is far from exhaustive. Pre-trial conferences commenced as a formal matter at Blacktown Local Court in January 1988. There is an average of one per week, each lasting about 30 to 45 minutes and conducted by the Registrar of the Court. These conferences are an excellent start, but they operate, understandably, within a much narrower ambit than they ought to.

Matters for resolution include whether the prosecution has served its brief, and whether the defence has served its reply listing the witnesses required to attend to give evidence. This is important as it enables the Court to assess the length of the case and the Court diary to be adjusted accordingly. Of greater assistance in estimating realistic hearing times, are indications as to the likely length of cross-examination; whether summary jurisdiction will be sought (and what, if any, defence witnesses will be called); or an indication that the matter will proceed on a plea of guilty pursuant to Section 51A of the Justices Act. Finally, formal admissions may be made at the pre-trial conference thereby reducing the evidence to be called.

There ought, however, to be clear requirements as to service by both prosecution and defence of the documents already referred to, not simply of the brief and reply regarding witnesses. Further, these formalities should be established by written verification before the conference, so as not to take up time during the conference.

The great distinction between the Blacktown Local Court conferences and the desirable reforms is that parties cannot be compelled to attend the Blacktown Local Court conference. This needs to be a mandatory step in litigation. Further, conferences need only be between legal representatives. With mandatory conferences, attendance of the parties should, in most cases, be mandatory.

Pre-trial conferences should apply across the board in all matters estimated to take in excess of a prescribed time, whether summary or indictable. (In the New Zealand system all matters estimated to take in excess of two hours are required to go to pre-trial conference.) The parties should be compelled to state what admissions will be made. It should no longer be possible to refuse to make an admission without showing reasonable cause.

To anticipate the predictable vociferous objections, the requirement that the prosecution must prove its case should not be a requirement that the prosecution must prove every element of its case, no matter how formal or no matter how unrelated to the question of liability or guilt. (For example, ownership of goods or public street.)

Clearly, a pre-trial conference applies when a plea of not guilty has been entered. The conference should explore whether or not that plea may be changed. The theory is that the defence has before it enough material upon which to make that decision and, except in special cases, the defence should be compelled to make the decision or to indicate upon what specific grounds it is unable to make the decision.

The New Zealand experience with pre-trial procedures is instructive on two levels. One is by way of pre-trial conferences and the other is something quite different - a 'First Offenders Diversionary Scheme'. I made some study of these matters when I went to New Zealand in March last year for the New South Wales Government. In summary matters for hearing in excess of two hours, the brief is prepared and served on the defence. Thereafter there is relatively informal discussion between prosecution and defence in which a wide range of issues is discussed and agreed. After a trial period of approximately nine months, delays in case disposition in the area I observed had been reduced from five months to six weeks. Otherwise there had been an increase in pleas of guilty, in withdrawals of prosecutions and a reduction in the number of matters in which the defendant failed to appear.

The First Offenders Diversionary Scheme was introduced as a pilot scheme in Wellington in January 1988 and has proved so successful that it is being extended to other centres throughout the country. The Scheme operates in the following manner:

- offenders who qualify for the Scheme are first offenders, where the offence is not regarded as serious and where there are circumstances which make it appropriate to include the offender in the Scheme;
- when the victim, the offender and the officer-in-charge of the case agree that the scheme should be used; and
- when the offender is prepared to admit guilt and to make such reparation as may be agreed.

On the first return date the defendant appears in Court. The Court is informed that the matter is suitable for the Scheme and that all necessary consents have been obtained. The matter is adjourned for the length of time necessary to effect the anticipated reparation. (Where community service or the payment of damages is involved this may be weeks or months.) Shortly thereafter, the offender, the victim and a senior officer from the prosecuting branch meet and terms of reparation are agreed. Reparation may be an apology, payment of damages, a contribution to charity, attendance at anger management courses, community service, or repair of damage done, and carrying out work to recompense victims. Once the terms are agreed, a time is set for completion of the agreement. That time can, with the consent of the Court, be extended.

When the agreed reparation has been completed, the offender returns to Court. The Court is informed that the offender has carried out the agreed terms. The offender is then discharged without conviction. There is no criminal record of the defendant's appearance before the Court. A register is kept in the Police Department of those who have been dealt with under the First Offenders Diversionary Scheme. The Scheme is not available for second or subsequent offences. If an offender is dealt with subsequently by a Court there will be no reference to the fact that the defendant has previously had the benefit of the First Offenders Diversionary Scheme.

The system has a number of substantial advantages, not the least of which is giving a first offender the opportunity to have no criminal record. The rate of recidivism in the New Zealand pilot scheme was 1 per cent compared with 60 per cent recidivism amongst the general population of first offenders. That, of course, is not a balanced statistic as there is a substantial sifting procedure when determining who shall have the benefit of the scheme. Nonetheless, it is an impressive figure. This is an important area of reduction in delay and it is an improvement in the criminal justice system. The Scheme is notable because it falls, in a real sense, outside the formal, time-hallowed operations of the system.

In New South Wales, the First Offenders Diversionary Scheme may be compared with the Community Aid Panel - Wyong (CAP). This scheme is an innovation. It was introduced in November 1987 at Wyong Local Court and Children's Court by Mr E. Considine, Magistrate. The scheme is not the product of legislation or Government action. It is therefore voluntary on the part of offenders and on the part of Panel members. It is an experiment for which success is now claimed. The scheme provides in effect, if not in law, for another option in sentencing. It applies to a first offender (or an offender with a distant prior record) who pleads guilty to an offence which is not regarded as a serious offence. Where the Court has found such an offence proved, the offender may request to be referred to a CAP for an interview. The Court may then adjourn the matter for sentencing to a later date and refer the offender to the panel. Adjournments are usually for three months.

A Panel consists of four voluntary members comprising two people from the local community (one older and one younger), an experienced police officer and a solicitor. The Panel has the Court papers but meets with the offender away from the Court for such time as may be necessary. The circumstances of the offence are discussed with the offender (and with the parents where possible) to ascertain why the offence was committed and what rehabilitative measures are appropriate. Community work, attendance at literacy courses, compensation or apology to the victim may be recommended. There is no coercion. The offender's attendance, and compliance with the panel's suggestions, is voluntary. At the end of the period a report is submitted by the Panel to the Court for the Court's consideration when the offender appears for sentence.

Of the first 366 offenders who participated in the scheme, only 11 have re-offended. There appears to be strong community support for the scheme. Local service clubs and charity institutions have provided ample opportunity for community work and have shown a willingness to supervise and report to the panel. The scheme is presently to be evaluated by the Department of Family and Community Services. Depending upon the outcome of that evaluation, there will be a move to extend this apparently successful innovation to other areas in the State.

Lastly, we should consider that area of delay notorious in the Local Court system. This is, of course, committals.

The report of Coopers and Lybrand said change was required. The Attorney-General has recently released a discussion paper in which the proposed changes are outlined. Inevitably, there will be objections, some of them well-founded, many of them mere lawyers' rhetoric. It is sobering and ultimately depressing to experience in the Local Courts system in New South Wales the waste of time and resources in committal procedures, for the simple reason that they are often poorly conducted. The present system allows for a low standard of practise. It does not follow, however, that committal proceedings themselves are a waste of time. The efficient operation of the paper committal procedures introduced in 1985 has not been assisted by practitioners who, without any proper forensic purpose, insist upon having all evidence in chief given orally, and all witnesses cross-examined.

Two factors must be recognised by the legal profession. There is limited money a government can justifiably spend upon the criminal justice system; and the legal profession must play a part in ensuring that their matters are disposed of in Court as efficiently as possible, consistent with justice.

The system of paper committals was intended to do that. Although it has failed, the potential for success is still there. One reason for failure is that too many advocates have lost sight of, or have never understood, the proper forensic purpose in the conduct of a pre-trial hearing. Some will not take the time and trouble to analyse the paper brief and select only that evidence needed either to persuade the magistrate that the client should not be put upon trial, to assist in preparation for trial, or in an application for a 'no bill'.

A further reason for the failure of the paper committal system is that magistrates were not given sufficient discretionary powers to control the proceedings, nor broad enough powers to exercise their discretion not to commit for trial. The result is that a procedure which should be relatively brief and to the point often becomes rambling. There have been lengthy arguments about the admissibility of evidence which will ultimately be a matter for the discretion of the trial Judge. There have been frequent applications to the Supreme Court on minor points. All this has been in the interests of a weeding out process which presently eliminates only two or three percent of cases.

The Attorney-General's Discussion Paper refers to the decision of His Honour Mr Justice Carruthers in the case of *Saffron and Allen v. D.P.P.* Since that Paper was prepared, the Court of Appeal has handed down its decision in the same matter. [2] The Court effectively sanctions the widening of discretionary powers in the magistrate and confirms the view that a magistrate, when considering whether or not to commit for trial, may properly have, and can only sensibly have, regard for his or her own assessment based on the view formed about the evidence as to whether or not a jury would be likely to convict. The Paper proposes eliminating committal proceedings which may well be throwing out the baby with the bath water. Magistrates lack essential powers to control committal proceedings and the power to apply a realistic test as to whether or not a defendant is likely to be convicted (even allowing for the widening of discretionary powers post the *Saffron and Allen* decision).

These problems can be overcome by setting limits on the rights which defence lawyers have taken for granted. Such changes are necessary because the community cannot continue paying for a sifting procedure which eliminates only two or three percent of defendants.

The following proposals would produce the desired results and eliminate at least that proportion presently eliminated, inefficiently, between charge and trial (approximately 20 to 25 per cent):

- there should be mandatory paper committal;
- all evidence-in-chief of prosecution witnesses to be by way of paper brief;
- where witnesses are to be called for cross-examination the written reply under Section 48 served by the defendant should stipulate the proper forensic purpose for which attendance of witnesses is required;
- all prosecution evidence which may be the subject of argument as to its admissibility before a judge and jury should be admitted as of right before the magistrate;
- the magistrate should have the power to limit cross-examination [Section 41(9)].

At the close of the prosecution case the test presently laid down in Section 41(2) of the Justices Act should be applied. If a case is found at that level, the defence may do one of three things:

- reserve its defence and make submissions under Section 41(6) (to be amended);
- call any evidence upon which the defence seeks to rely to persuade the magistrate to discharge the defendant; or
- call evidence on the *voir dire* as to the admissibility of that evidence which may be admitted in the discretion of the trial judge at the trial.

Thereafter, the magistrate should be required to consider the whole of the evidence and to consider, *inter alia*, the nature and quality of that evidence, to determine whether, in the opinion of the magistrate, it is likely that the defendant would be

2 **Allen v. D.P.P. & anor**, and **Saffron v. D.P.P. & anor** unreported 7th June, 1989

convicted before a jury. If so, the defendant should be committed for trial. If he or she is not of that opinion, the defendant should be discharged.

Combined with this procedure there should be a legislative provision directing judicial officers in Local Courts, when dealing with indictable matters where summary jurisdiction may be offered, that where, in the opinion of the magistrate, the offence would not justify a term of imprisonment in excess of the jurisdictional limit of the local Court, that matter must be heard and determined as a summary procedure in the Local Court.

The above provisions would overcome the two chief causes of inappropriate matters being committed for trial before a jury. Firstly, the refusal by defendants to accept summary jurisdiction when offered in appropriate cases (of which there are presently a large number) and secondly, the provision of adequate and realistic tests to be applied by magistrates in determining whether or not to commit for trial.

The changes raised for discussion in this paper are aimed at delay reduction and an improvement in the criminal justice system. It is of interest briefly to consider the success of the delay reduction programme in Local Courts carried out under the existing system.

In late 1988 seven new magistrates were appointed to Local Courts. While there had been a need for increased numbers for some time, it is not suggested that simply increasing the number of judicial officers will overcome delay. Each additional appointment requires facilities - courts, chambers, books and support staff. Many magistrates continue to work quite regularly in substandard conditions in terms of those facilities. Be that as it may, those additional magistrates have allowed new country circuits to be created thus reducing delays in the country. A number of metropolitan Courts have been allocated permanent second and, sometimes, third magistrates, and areas where delays were quite unacceptable were 'blitzed' with extra sittings to bring the delays back to a manageable level. As a result, there is now little, or sometimes no, delay, in a number of areas, with many others moving towards an acceptable level of delay.

Disposition rates must necessarily vary from court to court taking account of local conditions. Increased speed of disposition may itself produce problems. For example, Legal Aid Commission solicitors report that sometimes, when clients are offered hearing dates much earlier than was previously the practice, the solicitors are not in a position to appear for them. The brief is sent out to the private profession. Thus there is an additional cost to the Legal Aid Commission. The question remains as to whether the lack of delay in disposing of such matters is cost effective in the overall system.

In the same period there have been substantial improvements brought about by changes to administrative practices. For example, in May 1988 the tiny administrative staff of the Chief Magistrate's Office was increased by the creation of the position of Court and List Co-ordinator. The primary activity of the Co-ordinator

is to supervise the disposal of short hearings and/or other matters before the Court from day to day by co-ordinating the activities of magistrates, Court staff, prosecutors and defence representatives, the defendants and the public. The secondary function of the Co-ordinator is to keep and analyse data on case disposition.

In November 1988, a Registrar's Call-over Court commenced at the Downing Centre. That Court commences at 9.30 am each day and relieves the Charge Court of the bulk of administrative work, leaving the magistrate in the Charge Court free to deal with work properly judicial in nature, such as pleas. Also in November 1988, on the recommendation of the Courts Co-ordinator, a substantial restructuring of listing at the Downing Centre and metropolitan Courts coming under the umbrella of the Downing Centre was undertaken. The effectiveness of that restructuring has been demonstrated by an increase in disposition rates for both special fixtures, that is matters occupying in excess of one day, and shorter matters. Not only has there been an increase in the number of cases dealt with at the Downing Centre (the rate increased by 67 per cent per diem between September 1988 and February 1989), but there has, naturally, been a substantial reduction in delay in obtaining a hearing date.

At present, matters occupying one day or less than a day can obtain a hearing date within 20 working days of the Court being advised they are ready to proceed to hearing. Special fixtures, depending upon length, can obtain a hearing date within period ranging from eight to 18 weeks. The upper limit of that range is too long.

Similar reductions have been achieved in a number of metropolitan and country Courts where previously there was substantial delay. In many instances, reductions in delay were achieved by providing substantial magisterial assistance to individual Courts. Whilst that is effective in the short term, it is clear that current and foreseeable resources will not permit such assistance to be offered on a continuing basis. Permanent reduction in delay must be achieved by administrative procedures, caseflow management, changes in attitudes and practices in relation to disposition of matters before the Courts, and, where necessary by sometimes radical changes to practices and procedures. Some of those more radical changes have been canvassed in this paper.