Shortening Complex Criminal Trials

John Nader QC

This paper is intended to accompany my recent submission to the Attorney General by whom I was requested towards the end of last year to consult with as many interested persons as possible in order to devise ways of shortening complex criminal cases and thereafter to report to him.[1] Although the terms of reference were directed primarily to fraud cases, they had a rider concerning complex criminal cases in general.

Some influential persons — particularly members of the Supreme Court — were convinced that there was no good reason why any useful reforms that might result from this exercise should be restricted to cases involving fraud, but that they should be applicable to all serious and complex cases. A number of the judges pointed out that some drug conspiracy cases, for example, are very complex indeed and sometimes involve numerous clandestine financial transactions.

The consultation process was extensive. Persons were consulted individually and in small groups. Two larger meetings, which were described as forums, were held in November 1993 at Parliament House.

It is clear that I was chosen for the task not for academic eminence, but rather on the basis of some practical experience, as a practitioner of the criminal law, and later as a judge. Apart from involvement in the forensic process, I have been actively concerned with the administration of the criminal law for some years. My opinions and recommendations were chiefly based on that experience and on work done elsewhere.

The focus of my submission is upon serious and complex criminal cases in general. The resolution of the considerable problems unique to fraud and corporate criminal cases has been and is being considered by persons whose special interest is in corporate crime. I expect that, in general, my recommendations are applicable to such crime, but that additional special and more particular procedural provisions may be desirable with respect to corporate fraud cases.

I expect that if some or all of my suggestions are adopted, the procedural changes to be adopted in relation to corporate criminal cases can be engrafted upon the procedural changes I have suggested either by addition or by explication.

I have suggested that where the prosecution pleads by way of a Case Statement with particularity any material allegation not denied by the accused should be taken to be admitted.

When an accused person stands mute upon arraignment, under the common law she or he is deemed to have denied every material allegation implicit in the charge. I think that statutory authority would be necessary to give effect to my suggestion.

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1 *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993).

Of course, the mere fact that an accused may be required to plead specifically where there is a Case Statement would not prevent her/him from denying every allegation, but denial of the most obviously provable matters may be perceived to be tactically unwise where the denial might operate to discredit the more credible parts of the defence. The provision I recommend would not operate to deprive an accused person of any legitimate advantage.

I have pointed out in the report that I believe the moral authority of the trial judge will remain the major influence towards persuading counsel for accused persons to advise them that a fair measure of cooperation will not be to their detriment in the long run and may well operate to their advantage. I have recommended that a judge should be permitted to be active in promoting cooperation at the Preparatory Hearing without risk of disqualification. Nice judgment will sometimes be required to ensure that an accused person is not subjected to unfair pressure to make a concession.

Serious inconvenience frequently caused to jurors has been a mark of our criminal procedure for many years. I regard that as intolerable. This anecdote is typical of a common experience: counsel recently informed me in the course of a voir dire examination that the jury should be brought back at 2.00 pm the following day. When I questioned counsel further it became obvious that he thought that the voir dire might just happen to be completed by then and if the jury were on hand the trial proper could proceed then. The fact that 12 jurors would have to leave their own affairs and suffer the inconvenience of coming to the court with the real possibility of being sent away again did not seem to trouble counsel at all. It is obvious that whatever can reasonably be done to obviate such difficulties should be done. One way of doing so is to so provide procedures for criminal trials so that all matters that may have to be dealt with by a judge without a jury are in fact so dealt with before a jury is empanelled. The Preparatory Hearing procedure is one way of achieving that end.

There is another and very simple way of minimising jury inconvenience that is used elsewhere, and I am surprised that it is not used here. It involves the extension of the use of recorded telephone messages into the trial itself. A jury sent away by a judge for more than a day in a situation where it is uncertain when they will be required again can be given a phone number to call after 4pm each day. The recorded message gives them the best information then available as to when they will be required to return to court. Eventually it gives them a precise time to return. It is simple, cheap and effective. That we do not do such a thing already is an example of our backwardness in some quite simple but important ways concerning the administration of the criminal law.

That backwardness is due, I believe, not to the lack of desire on the part of governments to effect reforms, but to an attitude that we, the most populous and oldest state, do not need to look beyond our borders to see whether someone else might be doing some things better. Some of the other states are doing some things better. I referred in the submission to the use of technological aids to communicate concepts to juries. I believe that New South Wales is behind some other places in that respect. The archaic and esoteric language of the criminal law here, both substantive and adjective, is almost impossible of comprehension by even well educated lay persons. I presided over a trial recently in which a woman was charged with being an accessory before the fact to a felony. The language of the indictment was nothing short of absurd. There is no excuse to continue using such language. The use of more contemporary language itself would shorten trials somewhat because the trial judge would not have to spend so much time explaining the meaning of unfamiliar language to juries. Can it be seriously suggested that there are ideas that cannot be expressed in good modern English! The esoteric learning, the distinct vocabularies and consequences (accessories before and after the fact versus aiders and abettors)

that accompanies the retention in New South Wales of the now idle distinction between felonies and misdemeanours is no doubt a great source of satisfaction for lawyers with a historical turn of mind, but there is no modern justification for the distinction. The reduction of all serious offences to a single class, called "crimes", has proved elsewhere to be accompanied by economies of time and effort.

My report to the Attorney General is only an early, but major stage on the way to the implementation of practical reforms. If the recommendations or some of them are accepted, the next stage will be, in respect of each such recommendation, to inquire how they might be given effect to. Some of the recommendations may require statutory provisions to implement, others may be done without involving the Parliament, such as by rules of court.

As to those changes that will require statutory authority, there will be the question what statute or statutes should be the vehicles for change. In the UK and Victoria special Acts of Parliament have been enacted implementing most of the reforms: virtual codes of procedure.

I know that some of the judges of the Supreme Court have expressed a preference for the enactment of such general statutory provisions as may be necessary, to be given particularity by rules of court. I favour that approach because the judges know what precise procedures are best suited in practice and they can quickly and efficiently make and amend rules as the need arises. It is to be expected that for some time after the implementation of any new scheme, there will be a need for a facility enabling amendment to allow for fine-tuning resulting from experience. If too much is entrenched in statute, the process of amendment will be cumbersome and difficult and is likely to be bedevilled by party political games.