Criminal Delay as Abuse of Process†

RICHARD G FOX*

A school child, asked in an examination paper, 'What is a circuit judge?' wrote that he was 'a man invented by Henry II to travel around the country, speedily dispensing with justice.'

Sir Victor Windeyer, comment on Wallace J, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124, 149.

Delay is inherent in the criminal justice system. The adage that justice delayed is justice denied,[1] is subject to the countervailing proposition that cases should not be disposed of so rapidly that there is scarce time for careful investigation and an adjudication on the merits. The summary trials and executions in the People's Republic of China, following the events in Tiananmen Square in June 1989, demonstrate that undue expedition is no less an affront to justice than unnecessary delay. The procedural safeguards provided for an accused in the criminal trial process, especially in relation to the prosecution of indictable crimes, involve a set of checks and balances which take time to work through. They require the prosecution to proceed at a pace which allows for careful preparation and proper deliberation.

On the other hand, society's stake in setting the speed of the criminal trial process arises out of a desire to avoid the detrimental effects of delay. Excessive delay between the crime and the trial affects the availability of witnesses and the clarity of their memories. Case backlogs foster unjustified plea bargaining and system manipulation, and increase the risk of defendants absconding or re-offending while on bail pending trial. There is also the public interest in the repercussions of detention in custody for those who cannot raise bail and in the deleterious effects of delay on the ultimate rehabilitation of offenders when sentences are remote in time from the crime.

Sir Victor Windeyer's story about the school child is a reminder that, at the end of the day, the object is not speed, but justice; and not merely justice for the accused, but also for the community. This paper deals with recent Australian developments that have seen criminal litigation terminated by the courts because they have regarded delay as an abuse of their processes or as a violation of some fundamental right of the accused.

STAGES OF CRIMINAL DELAY

Whatever the source of the delay, the application to the trial judge ultimately will be that it is too late to commence the trial and that the proceedings should

† A revised version of a paper presented at the 11th Lawasia Conference, Hong Kong, 18–21 September, 1989.

* Acting Professor, Faculty of Law, Monash University.

1 'Justitia non est neganda, non differenda', Jenkins Exchequer 93; 145 ER 66.

be permanently stopped. The delay may occur at different stages. It may be claimed that too much time has elapsed between the commission of the alleged crime and the arrest or summonsing of the accused. Delay in laying charges may, of course, have as much to do with the offender's luck or skill in avoiding detection, as with the dilatoriness of the investigatory authorities. Ordinarily, in summary offences, an information must be laid within a year of the offence, though commencement limits of up to five years can be found. The effect of non-compliance with a statutory time limit on laying charges is potent: the prosecution of the offence is statute barred. At common law, the prosecution of indictable crime may take place at any time after commission. Time limits are beginning to appear in legislation creating indictable offences, particularly consensual sexual ones involving young persons. However, in the absence of any statutory limit, charges for indictable crimes may be laid at any time during the life of the offender.

Complaints of delay may also concern the time which has passed from the accused's arrest and his or her initial appearance in court. The ordinary requirement is that an arrested person be brought before a justice or magistrate as soon as reasonably possible,[2] or within certain statutorily fixed time limits.[3] These are usually defined in terms of hours. In theory, habeas corpus is the remedy for unjustified pre-trial detention in custody,[4] but it has no impact on the trial itself. The real sanction for non-compliance is the risk that the trial judge or magistrate will exclude any evidence obtained after the detention became illegal. In *Williams*' case[5] the High Court declared that once police were satisfied that there was evidence upon which to lay a charge, it was unlawful for them to delay taking an arrested person before a justice solely so that they might have more time to investigate the alleged offender's complicity in other crimes. The court did not place an absolute bar on the receipt of evidence obtained after unlawful delay, but left trial judges with a discretion to admit it after considering policy matters relating to the administration of justice which were thought to transcend mere fairness to the accused.[6] It has been said that when such delay has tainted the case with illegality, the entire trial should be barred as an abuse of process, but the preference of the courts is to resolve such matters under the rules of evidence governing unfairly or improperly obtained evidence, rather than order a stay.[7]

[2] Eg *Crimes Act* 1900 (NSW), s 352, generally understood to be not more than 24 hours.

[3] Eg *Crimes Act* 1958 (Vic), s 460. The prescribed period was six hours, but this provision has been repealed as unworkable and, under s 464A, the requirement of a 'reasonable time' has been restored. At the federal level the Commonwealth Law Review Committee, *Interim Report: Detention Before Charge,* February 1989, has recommended a six hour limit for federal crimes carrying a penalty of imprisonment for a year or more and four hours for lesser offences.

[4] Additionally, the accused may have an action for false imprisonment, R Clayton and H Tomlinson, *Civil Actions Against the Police* (London, Sweet and Maxwell, 1987).

[5] *Williams* (1986) 161 CLR 278.

[6] *Ireland* (1970) 126 CLR 321; *Bunning* v *Cross* (1977) 141 CLR 54; *Cleland* (1982) 151 CLR 1; New South Wales Law Reform Commission, Working Paper No 21; *Illegally and Improperly Obtained Evidence,* 1979; M D Kirby and G D Woods, 'Illegally Obtained Evidence' *Proceedings of the Institute of Criminology,* University of Sydney, 1984.

[7] *Dugan* [1984] 2 NSWLR 554.

Lengthy delay often occurs at the third stage of the criminal process, namely, the period between the initial remand and the actual hearing. In the case of indictable offences, this stage encompasses the period between the first appearance and the preliminary examination and between the direction to stand trial given at that preliminary examination and the actual commencement of the trial itself. Because of these intermediate procedural steps, delay is a more significant problem in relation to offences triable on indictment than in respect of summary offences. It is not uncommon for delay to be attributed to prosecutorial tardiness at every pretrial stage and for the prosecution to counter with references to acquiescence or deliberate foot-dragging by the defence.

In 1987, in a discussion paper on criminal procedure, the New South Wales Law Reform Commission noted the difficulty of pinning down the reasons for this third stage delay. Various factors are on offer:[8]

* The lack of resources available to prosecuting agencies to cope with an increasing workload.
* The lack of sufficient court rooms, judges and ancillary staff necessary to process the cases required to be heard by the courts.
* The inefficient use of available resources.
* The incidence of long criminal proceedings.
* The developing complexity of criminal cases, including the tendency for technical evidence to be called, with a result that increasingly difficult decisions need to be made by judges, magistrates and juries.
* Deliberate tactics adopted by accused persons or their legal representatives for the purpose of delaying a case in the hope or belief that this will benefit the accused person.

The number of statutory constraints on how much time may be taken in getting to the start of the trial are few. Only one state, Victoria, has speedy trial legislation of general application. This was passed in 1983. The New South Wales Law Reform Commission complained that it was a defect for the trial court to have no effective control over the prosecution process until the case was actually brought before the court.[9] It recommended that there should be prescribed time limits within which the hearing of indictable or summary offences should be commenced. Non-compliance should lead to dismissal.[10] Nothing has yet eventuated on this front. Setting specific time limits on criminal prosecutions, as recommended, has the advantage of nominating, in advance, a determinate period within which the prosecuting authority must

[8] New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial — Specific Problems and Proposals*, Discussion Paper No 14, the Commission, Sydney, 1987, para 3.2.

[9] Para 3.13.

[10] Para 3.49–3.55. The proposed limits were to distinguish between those applicable to persons held in custody and those on bail. In the case of trials of indictable offences, a six month limit between the time of charge and trial for those held in custody was to apply and for those on bail the maximum was to be 18 months. For offences triable summarily, it was recommended that the relevant periods be two months for those in custody and six months otherwise.

bring the matter to court, rather than having the period assessed as excessive after the event.

In the Commission's view, if speedy trial rules were implemented, the courts would only find it necessary to consider the need to draw on common law powers to order a stay of proceedings in cases involving unreasonable delay between the time of the discovery of the offence and the time of charging the accused. While this might be thought to explain the paucity of cases on abuse of process as a response to court delay in Victoria, which has speedy trial legislation, compared with New South Wales, which does not, variations in the pattern of state and territorial delay figures supplied in the Commission's discussion paper suggest that differences between courts in the quality of their administration are just as likely to account for the variance as the existence or otherwise of speedy trial legislation.[11]

In Australia, in the 1980's, there was a rush of cases, particularly in New South Wales and South Australia, in which judges exhibited a willingness to entertain use of the permanent stay as a remedy for delay in the prosecution of indictable matters.[12] Ultimately, the High Court in the 1989 case of *Jago* v *District Court of New South Wales*,[13] was called upon to try to untangle whether the doctrinal foundation for this remedy was a common law right to a speedy trial, or the concept of abuse of process, or some other inherent power and whether, in any event, the sanction of a permanent stay was the preferred response.

RIGHT TO A SPEEDY TRIAL

In *Jago*'s case the accused had been charged under the New South Wales *Crimes Act*[14] on thirty counts of being a company director who fraudulently applied the company's property to an improper use. The chronology of the case, which was described by Brennan J in the High Court as 'a reproach to the administration of criminal justice',[15] dates from offences alleged to have been committed between April 1976 and January 1979. Jago was charged in October 1981. Though he was committed for trial in July 1982, the indictment was not filed for trial until February 1987. An application to the trial judge for a permanent stay because the delay breached the accused's common

[11] See also discussion in Victorian Bar and Australian Institute of Judicial Administration, *Shorter Trials Committee Report on Criminal Trials*, Victorian Bar Council, 1985, paras 3.146–3.160.

[12] For a discussion of the power exercisable by a superior court to stay summary hearings and preliminary examinations as an abuse of process, see *Clayton* v *Ralphs and Manos* (1987) 26 ACrimR 43; *Sams* v *DPP* (1988) 36 ACrimR 245. The position is complicated by the fact that a magistrate sits judicially when hearing summary trials, but administratively when conducting preliminary examinations. As to the magistrate's own power to order a stay of committal proceedings, see *Grassby* (1989) 63 ALJR 630.

[13] *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640 (HC), on appeal from (1988) 12 NSWLR 558 (NSW Court of Appeal).

[14] *Crimes Act* 1900 (NSW), s 173.

[15] *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640 per Brennan J at 644.

law right to a speedy trial was refused. The New South Wales Court of Appeal, by a majority of two to one, and a unanimous bench of five judges of the High Court upheld the correctness of the trial judge's decision despite almost a decade having elapsed between the offending and the proposed date of trial and five years from the examining magistrate's direction that the defendant stand trial.

In the New South Wales Court of Appeal, Kirby J, President of the court, suggested that the alleged right to a speedy trial at common law was actually a by-product of an enforceable right to a fair trial and that the latter could still be obtained in the present case.[16] Samuels J, after a lengthy historical analysis, ruled that no right to a speedy trial existed in New South Wales at common law, or under statute. There was a broader right of fair trial or 'due process', but that had not been violated.[17] The dissenting member of the court, McHugh J, insisted that a speedy trial was a common law right, distinct from the right to a fair trial[18] and that it had been seriously infringed. He would have granted a permanent stay.

Constitutional and international standards

In searching for the content of the common law in *Jago's* case, Mr Justice Kirby was more impressed by internationally accepted legal standards than by *Magna Carta* and 'antiquarian research'.[19] He found widespread recognition of a right 'to be tried without undue delay' in the *International Covenant on Civil and Political Rights.*[20] However, he correctly acknowledged that there was doubt regarding the Covenant's direct application to the states. Ratification of or accession to a international treaty or covenant does not incorporate its contents into domestic law in the absence of any express stipulation or legislation giving effect to its obligations. This was missing in the present case.[21] The Covenant provided guidance as to the common law, but was not law itself.

Nor could the accused rely on any right to a prompt trial expressly recognised in any entrenched constitutional document at a state or federal level. There was no Australian equivalent of the Sixth Amendment of the United States Constitution, or the Canadian Charter of Rights and Freedoms.[22] The former promises, that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial', while the latter asserts that 'any person

[16] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 568.
[17] Id, 578.
[18] Id, 583, reaffirming a view he elaborated earlier in *Aboud* (1987) 31 ACrimR 125, 149. His honour is now a Justice of the High Court of Australia.
[19] At 569–70. This is consistent with his views in 'The Role of the Judges in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 ALJ 514.
[20] Article 14(3)(c). Ratified with reservations by Australia on 13 August 1980. It forms the basis of the *Human Rights Commission Act* 1981 (Cth), see Preamble and Schedule 1.
[21] Cf *Racial Discrimination Act* 1975 (Cth), ss 7, 9 and 10 with *Human Rights Commission Act* 1981 (Cth), s 5.
[22] See also *Bell v DPP (Jamaica)* [1985] AC 937.

charged with an offence has the right ... to be tried within a reasonable time'.[23] It was true that, in the Bicentennial year, *The Final Report of the Constitutional Commission*[24] recommended that the Australian Constitution be amended to include an express provision that everyone charged with an offence had the right to be tried without delay,[25] but this was never put to a referendum.

Common law and Magna Carta

The adherence of McHugh J to the theory that the common law provided a distinct right to a speedy trial, built upon the proposition that chapter 29 of *Magna Carta*,[26] ('We will sell to no man, we will not deny or defer to any man either justice or right'[27]) recognised or established a common law right to a trial without delay. He found support in the United States Supreme Court[28] and in views expressed in the Supreme Court of Canada, though it was noted in the latter that the remedies to enforce such a right were defective.[29] The right was presumed to be one capable of being breached merely by the effluxion of time, without the need for proof of any specific prejudice to the person charged. And once breached, any trial on the particular accusation would thereafter be perpetually barred.

His honour relied on Coke's assertion that the 'statute of *Magna Carta* was but a confirmation or restitution of the common law'[30] and, aware of historical doubts about Coke's accuracy, argued that even if this had not been true in 1215, Coke had made it so subsequently by his influence: '... more than once the alleged errors of Coke have changed the face of the common law.'[31] McHugh J attributed the paucity of authority on the right to a speedy trial to the fact that, until comparatively recent times, persons charged with crime were in fact given speedy trials and so the right had not needed to be vindicated through case law.

This interpretation of English legal history was rejected by the High Court.[32] There, Justices Brennan and Toohey led the attack. In the view of the former, Coke was stating aspirations not law.[33] The absence of reported cases of a stay having been granted on account of mere delay in the commencement

[23] Section 11(b); J F R Levesque, 'Trial Within a Reasonable Time' (1988) 31 *Crim LQ* 55.
[24] Canberra, 1988, volume 1, para 9.554.
[25] Proposed s 124L(e).
[26] 25 Edward 1, (1297). The charter was originally granted by King John and afterwards re-enacted and confirmed by Parliament more than 30 times. The version now in force in England is contained in the statute 9 Henry 3 with which the English statute book commences. See J C Holt, *Magna Carta* (Cambridge University Press, 1969); 'Magna Carta and the Origins of Statute Law' in J C Holt, *Magna Carta and Medieval Government* (London, Hambleton Press, 1985) 289–307.
[27] 4 Halsbury's Statutes (2nd), 26.
[28] *Klopfer* v *North Carolina* (1967) 368 US 213.
[29] *Rahey* [1987] 1 SCR 588, 634–5.
[30] *First Institute*, Bk 2, Ch 4, s 108, 81a.
[31] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 584.
[32] *Jago* v *The District Court of New South Wales* (1989) 63 ALJR 640 per Mason CJ at 644, Brennan J at 647, Deane J at 656, Toohey J at 657 and Gaudron J at 664.
[33] Brennan J at 647–8.

of a criminal prosecution was far more significant than allowed for by McHugh J. Had there been a common law right to a speedy trial recognised by *Magna Carta* of such a kind that the court might enforce it by an order to stay the prosecution, the commissions of general gaol delivery would not have taken the form they did and s 6 of the *Habeas Corpus Act* 1679 might not have been necessary.[34] Moreover, the remedy alleged to vindicate the claimed right, the permanent stay of proceedings on the indictment, meant that, in effect, the judges claimed a right to impose a discretionary time limit on the presentation of indictments. This was inconsistent with the more clearly established rule of the common law that time did not run against the King and that, in the absence of statute, there was no time limit for the commencement of a prosecution.

Toohey J devoted the bulk of his judgement to an extension of the same line of analysis.[35] He too rejected *Magna Carta* as supporting an independent right to a speedy trial. Its intent and effect had been exaggerated and even when, as in New South Wales, the relevant chapter of *Magna Carta* had been re-enacted as part of local law,[36] the actual language of chapter 29 remained too ambiguous to lend itself to the extraction of the principle being advanced. Finally, though observations suggesting recognition of a common law right to a speedy trial could be found in the Privy Council decision of *Bell* v *DPP (Jamaica)*,[37] these were rejected as *obiter* and as citing no authority. Chief Justice Mason summed up the High Court's position thus:[38]

> . . . the Australian common law does not recognize the existence of a special right to a speedy trial, or to a trial within a reasonable time, which relies for its operation not upon actual prejudice or unfairness but upon a concept of presumptive prejudice.

Habeas Corpus Act 1679

Also rejected by Toohey J as a source of a right to a speedy trial was s 6 of the *Habeas Corpus Act* 1679 (UK).[39] The procedures originally set up by this

[34] Brennan J at 648.

[35] Toohey J at 657–61.

[36] *Imperial Acts Application Act* 1969 (NSW), 2nd Schedule, Part I; *Imperial Acts Application Act* 1984 (Qld), First Schedule; *Imperial Acts Application Act* 1980 (Vic), Division 3. In Tasmania it is in effect under the *Australian Courts Act* 1828 (UK), s 24, and in South Australia it is regarded as part of the received law on settlement in 1836; see *Clayton* v *Ralphs and Manos* (1987) 26 ACrimR 43, 105, per Olsson J. In Western Australia it is part of the received law of settlement in 1829 and in the two mainland territories it is, in the Northern Territory, part of the received law via South Australia and in the Australian Capital Territory it is law by virtue of the *Imperial Acts Application Ordinance* 1986 (listed in Schedule 2 and as set out in Schedule 3). For cases on the recognition of Magna Carta see *McConnell* [1985] 2 NSWLR 269, 272; *Connelly* v *DPP* [1964] AC 1254, 1347; *Reibold* [1967] 1 WLR 674; *Heston-Francois* [1984] 1 All ER 785; *R* v *Grays Justices, Ex parte Graham* [1982] 3 All ER 653; *R* v *Secretary of State of the Home Department, Ex parte Phansopkor* [1976] QB 606.

[37] [1985] AC 937, 950.

[38] *Jago* v *The District Court of New South Wales* (1989) 63 ALJR 640, per Mason CJ at 644.

[39] Toohey J at 659–60.

section, and now found in its Australian derivatives,[40] do not aim at setting a fixed time for trial. Nor does the section expressly provide for dismissal of the charge or for a permanent stay of proceedings for non-compliance with its provisions. It is designed to achieve the release of accused persons from custody if delay has been inordinate. The section allows for a person committed for trial to make a formal application to be brought to trial in the current court session. If not brought to trial during that session (unless there is evidence that witnesses for the Crown cannot be produced in time), the person must be bailed and brought to trial at the next session. If still not tried the person must be discharged.

In Victoria, it has been held that this provision has been overridden by modern legislation dealing with the administration of prisons and can no longer be relied upon to achieve the discharge of offenders whose trial has been postponed.[41] Its relevance as a source of a right to a speedy trial had already been doubted in New South Wales.[42] As a sanction for delay, its principal limitation is that it does not operate to bar the prosecution. Thus, in the Tasmanian case of *Hill*,[43] the accused made a successful application under the section and was discharged from custody, having not been brought to trial within two sessions of the court. When she was later brought to trial, her counsel submitted that the order discharging her had the effect of an acquittal. Chief Justice Green of the Tasmanian Supreme Court ruled that the discharge under the *Criminal Code* equivalent of s 6 of the *Habeas Corpus Act* 1679 did not operate as an absolute bar to further proceedings for the same offence. Its objective was only to relieve the specific prejudice the accused suffered, namely, the curtailment of her liberty:[44]

> . . . the effect of an order for discharge made under s 345(3) is not to acquit an accused person or to debar further proceedings against him, but to discharge him from the incidence of a committal order so that his obligation to appear on remand is discharged and he is released from custody or from his obligation to observe the conditions of his release upon bail. I am reinforced in that conclusion by the fact that it still retains for s 345 a valuable function as a means of protecting the liberty of the subject and because it means that the section operates so as to progressively ameliorate an accused's position by a sequence of steps which appears to me to be logical and sensible in that after initially being in custody, the accused then becomes entitled to bail and, finally, is freed altogether.

In the particular case, two years had passed between the laying of the charges and the date set for trial. Chief Justice Green did not regard this as being sufficient to support an application for a perpetual stay of proceedings under the common law.

[40] *Criminal Code* (Qld), s 590; *Criminal Code* (Tas), s 345; *Imperial Acts Application Act* 1980 (Vic), s 3, Part II, Div 2; *Criminal Code* (WA), s 608.
[41] *Clarkson* v *Director General of Corrections* [1986] VR 425.
[42] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 578.
[43] (1982) 7 ACrimR 161.
[44] Id, 166.

Speedy trial legislation

In the United States, though the Sixth Amendment to the Constitution expressly provides for a right to a speedy trial, it does not contain any specific time limits. Nor have the courts interpreted the amendment in a manner that spells out precise time curbs upon prosecutors. This has led to the enactment of federal and state legislation to prescribe such limits. Under the United States federal *Speedy Trial Act* 1974 the accused person must now, in general, be brought to trial within 100 days of arrest. In theory, non-compliance leads to dismissal, but this threat is more apparent than real because of the generous allowance made in the Act for 'justifiable' delays.[45]

Victoria's speedy trial legislation directs that, once the prosecution process has reached a nominated stage in relation to indictable offences, it must proceed at a certain pace or be terminated. Presentments must be filed within nine months and the trial must take place within eighteen months of the accused being directed to stand trial following a preliminary examination.[46] The right to a speedy trial implied in these provisions is not absolute and extensions can be granted notwithstanding that the deadlines may have already expired.

RIGHT TO A FAIR TRIAL

Though denying recognition to a separate right to a speedy trial, each of the five High Court judges in *Jago's* case acknowledged that the right of an accused person to receive a fair trial was one of the entrenched rights in the Australian legal system. It existed 'in the interests of seeking to ensure that innocent people are not convicted of criminal offences'.[47] According to the Chief Justice:[48]

> [the right] is more commonly manifested in rules of law and of practice designed to regulate the course of the trial . . . [b]ut there is no reason why the right should not extend to the whole course of the criminal process . . .

Deane J preferred to couch the right in negative terms. Since strictly speaking no one had an enforceable right to a trial, there was not a right to a fair trial, but rather 'a right not to be tried unfairly'.[49]

The pivotal place of fairness as a source of power to shape criminal law and

[45] J Vennard, 'Court Delay and Speedy Trial Provisions' [1985] *Crim LR* 73; R L Misner, 'Legislatively Mandated Speedy Trials' (1984) 8 *Crim LJ* 17.

[46] *Crimes Act* 1958 (Vic), s 353(2) and (3); *Crimes (Procedure) Regulations* 1984. These time limits do not apply where a person is directly presented for trial without a preliminary examination, *Judge Dyett, Ex parte Aller.* [1987] VR 1049. In the case of rape offences, the trial must commence within three months of the direction to stand trial, *Crimes Act* 1958 (Vic), s 359A.

[47] *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640 per Mason CJ at 642.

[48] Ibid.

[49] Deane J at 654.

procedure has been a constant theme in the High Court.[50] But not merely fairness to the accused. In *Jago*, Mason CJ re-emphasised that the heart of the concept of fairness was a balancing of the interests of all directly affected including those of the prosecutor and the public.[51] He did so by adopting language borrowed from the judgment of Richardson J in the New Zealand case of *Moevao* v *Department of Labour*:[52]

> It is not the purpose of the criminal law to punish the guilty at all costs. . . . There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice. . . . The yardstick is not simply fairness to the particular accused.

It was acknowledged in *Jago's* case that the general notion of fairness was neither readily defined, nor wholly realisable. Nor was it possible to catalogue fully the matters which might affect a trial to the extent that it could no longer be regarded as a fair one.[53] Actual or ostensible bias in the tribunal, impropriety on the part of the prosecution in pre-trial procedures (eg supplying inadequate or misleading particulars, or withholding exculpatory information), or deliberate and unreasonable delay each were examples of factors which could contaminate it. But so could circumstances outside judicial control such as the death or unavailability of witnesses, or adverse revelations in a public enquiry, or notoriety generated by the media. Brennan J was prepared to regard much of what was said about the topic as founded more in rhetoric than in law. Absolute fairness was unattainable: 'we should ask . . . whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it.'[54] An unfair trial was not a nullity: an acquittal after such a trial ordinarily was final and, unless impeached on appeal, so was a conviction.[55]

What remedies were available to the courts to combat unfairness? Their honours were unanimous that the permanent stay was not the only one:[56]

> A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimise prejudice to either party.

[50] Eg, *Bunning* v *Cross* (1977) 141 CLR 54; *Barton* (1980) 147 CLR 75; *Williams* (1986) 161 CLR 278.
[51] Mason CJ at 642–3 and 644.
[52] [1980] 1 NZLR 464, 481–2.
[53] (1989) 63 ALJR 640, 644 per Mason CJ.
[54] Id, 651 per Brennan J.
[55] Id, 655 per Deane J.
[56] Id, 650 per Brennan J.

A court could choose such remedies as were appropriate to the circumstances. If the complaint was of being brought to trial prematurely, an adjournment or temporary stay could be granted.[57] If the grievance was delay, the primary form of judicial relief should be to give directions for the expedition of the trial,[58] not its abortion. Other options also existed to counteract factors contributing to unfairness. Pre-trial orders directing such matters as the release of the accused on bail; the provision of further and better particulars; the holding of a preliminary examination; or a change of venue could be made. Within the trial, rulings on evidence and directions to the jury could be designed to offset any prejudice which the accused might suffer. Or the trial could be terminated and a new one ordered. Such measures were preferable to refusing to exercise the jurisdiction to hear and determine the issues. There was no general principle of law that unreasonable delay in bringing to trial meant no trial at all. Indeed delay entitled an accused to apply for orders aimed at bringing on the trial and avoiding the unfair effects of the delay.

ABUSE OF PROCESS

Common law

The first reported instance of a civil action being dismissed as an abuse of process of the court, independent of any specific rules of court and by virtue of its inherent jurisdiction, was *Castro* v *Murray* in 1875.[59] The plaintiff, having been convicted of a misdemeanour, prepared a Writ of Error and requested the appropriate court clerk to seal it. The clerk refused as the Attorney General had not issued his fiat, which was a pre-requisite. The plaintiff brought an action against the clerk claiming damages for the refusal, and a mandamus to compel the clerk to seal the writ. The Court of Exchequer held that the action must be stayed as an abuse of the process of the court. The abuse was clearly in the institution of a manifestly groundless action. The cases which followed[60] also supported the inherent right of superior courts to summarily stop groundless litigation. The rationale then offered was the saving of public and private money,[61] but in time it came to be regarded as power to prevent oppression and injustice in the process of litigation.[62] The concern was not with the manner of the hearing, but with whether there should be a trial at all. At that time there was no equivalent recognition at common law of the concept of abuse of process in relation to Pleas of the Crown, ie criminal prosecutions.

[57] If the trial is allowed to proceed prematurely and deprives the accused of the opportunity of adequately preparing his or her defence, an appeal will lie against either conviction or sentence: *Henderson* [1966] VR 41; *Re Arnold* [1977] 1 NZLR 227.

[58] *Mills* v *Cooper* [1967] 2 QB 459, 467; cf *R* v *Chairman London County Quarter Sessions, Ex parte Downs* [1954] 1 QB 16; *R* v *Derby Crown Court, Ex parte Brooks* (1985) 80 Crim AppR 164, 169; *Bell* v *DPP (Jamaica)* [1985] AC 937.

[59] (1875) LR 10 Ex 213.

[60] Eg *Dawkins* v *Prince Edward of Saxe Weimar* (1876) 1 QBD 499.

[61] Id, 500; *Willis* v *Earl Beauchamp* (1886) 11 PD 59.

[62] I H Jacobs, 'The Inherent Jurisdiction of the Court' [1970] 23 *Current Legal Problems* 23, 51.

Contribution of Supreme Court Rules

The development of the doctrine of abuse of process was given a boost by the English Rules of Practice. These have been copied in material respects in the Australian jurisdictions. The *Judicature Act* of 1883 (UK) empowered the Rules Committee to incorporate existing common law rules, such as the one relating to abuse of process, into a rule of the Supreme Court. One of the new rules stated that the court could strike out pleadings that were an abuse of the process of the Court, as well as proceedings that '(a) disclose no reasonable cause of action or defence, (b) are scandalous, frivolous, vexatious, (c) may prejudice, embarrass, or delay the fair trial of the action'. Being made under powers given by statute, the Rules of the Supreme Court themselves have the force of statute in matters of procedure. Abuse of the process of the court was interpreted under the rule to mean that the process of the court had to be used bona fide and properly and that the court could summarily prevent its machinery from being deployed as a means of oppression in the process of litigation. In the first case to be decided under the new rule,[63] the House of Lords acknowledged the existence of the prior inherent jurisdiction of the court to stay proceedings which were an abuse of its process, but interpreted abuse of process under the rule to mean that the court had power to stay an action on grounds wider than those on which it could have acted at common law.

The decisions which followed soon made the further point that the Supreme Court Rules only applied to what appeared on the pleadings. The court still retained its inherent jurisdiction to stay any proceedings which were obviously an abuse of its process. The independence of this inherent jurisdiction from the rules of practice was firmly entrenched in English law in the cases of *Lawrence* v *Norreys*[64] and *Haggard* v *Pelicier Frères.*[65] It is the dicta from these two cases that is most often quoted as authority for the existence of such an inherent jurisdiction in criminal as well as civil matters. From the beginning, the judges have emphasised that:[66]

> It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.

Yet, at the same time, they have consistently refused to circumscribe the discretion:[67]

> It is impossible to limit the categories or circumstances in which the Court's inherent power to stay proceedings or take other steps to prevent 'abuse of process' will be exercised. For, as the Full Court of the Supreme Court of New South Wales stated in *Tringali* v. *Stewardson Stubbs & Collett Ltd,*[68] 'it is a power which is exercisable in any situation where the requirements of justice demands it' . . .

[63] *The Metropolitan Bank* v *Pooley* (1885) 10 AppCas 210 (HL).
[64] (1890) 15 App Cas 210 (HL).
[65] [1892] AC 61 (PC).
[66] *Lawrence* v *Norreys* (1890) 15 App Cas 210, 219.
[67] K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ALJ 449, 455.
[68] (1966) 66 SR(NSW) 335, 344.

Other statutory bases

Jurisdiction to deal with an alleged abuse of process may also be derived from general statutory powers such as that given to the New South Wales Court of Appeal under s 23 of the *Supreme Court Act* 1970 (NSW) to exercise 'all jurisdiction which may be necessary for the administration of justice in New South Wales',[69] or under more specific provisions such as s18(6) of the *Service and Execution of Process Act* 1901 (Cth). In allowing for interstate extradition of offenders, the latter provides that the magistrate may refuse to order extradition if, on the application of a person apprehended, it appears that, 'for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period'. The cases interpreting this provision have recognised it as representing another facet of the general doctrine of abuse of process by their emphasis on the adverse effect of delay and prejudice on the accused's ability to obtain a fair trial if extradited.[70] Improper removal into the jurisdiction is already recognised as a possible ground for staying proceedings at common law.[71]

Emergence in criminal matters

The understanding that all superior courts possess an inherent discretion to decline to hear matters that they regard to be oppressive and an abuse of the court's own processes took some time to be accepted in the criminal jurisdiction.[72] There was a strong view that the power to stop criminal proceedings was considerably narrower than that available in civil matters.

Most of the innovation in the use of the doctrine of abuse of process in Australia in the 1980's derived from the acknowledgement by the High Court of the existence and potential force of this jurisdiction on the criminal side, in its 1980 decision in *Barton*.[73] The court relied for authority on the House of Lords speeches in *Connelly* v *Director of Public Prosecutions*[74] and *Director of*

[69] *Herron* v *McGregor* (1986) 6 NSWLR 246.

[70] *White* v *Cassidy* (1979) 40 FLR 249; *Carmady* v *Hinton* (1980) 23 SASR 409; *Perry* v *Lean* (1985) 39 SASR 515; *Levinge* v *Director Custodial Services* (1987) 9 NSWLR 546; *Binge* v *Bennett* (1988) 13 NSWLR 578.

[71] *Hartley* [1978] 2 NZLR 199.

[72] *Clyne* v *NSW Bar Association* (1960) 104 CLR 186; *Barton* (1980) 147 CLR 75; *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640. The periodical literature includes: K L Chasse, 'Annotation: Abuse of Process as a Control of Prosecutorial Discretion' (1970) 10 *CRNS* 392; I H Jacob, 'The Inherent Jurisdiction of the Court' [1970] *Current Legal Problems* 23; R S Barton, 'Abuse of Process as a Plea In Bar of Trial' (1973) 15 *Crim LQ* 437; D Feldman, 'Declarations and the Control of Prosecutions' [1981] *Crim LR* 25; K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ALJ 449; R Pattenden, 'The Power of the Courts to Stay a Criminal Prosecution' [1985] *Crim LR* 175; D C Morgan, 'Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter', (1986) 29 *Crim LQ* 15; C Thomson, 'Abuse of Process and Public Interest' (1987) 11 *Crim LJ* 206; A Choo, 'Abuse of Process and Pre-Trial Delay' (1989) 13 *Crim LJ* 178; M L Abbott, 'Abuse of Process in Australia — The New Equity in Criminal Law' (1988) 10 *Law Society Bulletin* 137; R Pattenden, 'Abuse of Process in Criminal Litigation' (1989) 53 *Journal of Criminal Law* 341.

[73] (1980) 147 CLR 75.

[74] [1964] AC 1254.

Public Prosecutions v *Humphrys*.[75] In those cases, though their Lordships accepted that superior courts possessed a residual discretion to prevent an abuse of process in criminal matters, there were deep divisions of opinion with regard to both the width of the doctrine and where the line was to be drawn between executive and curial functions in the administration of criminal justice. Did the courts only have a discretion to halt criminal proceedings when the prosecution improperly split its case so as to offend against the spirit, though not the actual letter of the double jeopardy rule, or was the power to order a stay available to deter a much wider range of actions that smacked of an abuse of process?

The judges forming the minority in *Connelly*[76] feared that the consequence of asserting the wider discretion would be to reopen the constitutional question of who, ultimately, was to superintend the prosecution process to protect citizens from abuse. The minority view was that the courts should not directly or indirectly enter an arena of executive responsibility for prosecutions which the courts had traditionally treated as largely immune from judicial review.[77] Any inefficiency, neglect, or misconduct in the prosecutorial process, whether in the exercise of prerogative or statutory powers, should be controlled through the responsibility which the Attorney-General, as Principal Law Officer of the Crown, ultimately owed to Parliament. If a prosecution fell so below standard as to amount to an abuse, it was for the Attorney-General, or the Director of Public Prosecutions, to terminate it, not the courts.

The answer which Lord Devlin gave, as one of the majority, was that:[78]

> The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has, up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their processes from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility of seeing that the process of law is not abused.

In *Barton's case*,[79] the High Court was asked to determine whether a trial held without an antecedent preliminary examination was necessarily unfair. It ruled by a majority that, unless justified on strong and powerful grounds, to dispense with a preliminary hearing would be to deprive an accused of a

[75] [1977] AC 1.
[76] See also *Osborn* (1971) 1 CCC (2d) 482 (SCC).
[77] In *Ex parte Newton* (1855) 4 El & El 869, 871; 119 ER 323 it was said in relation to the Attorney-General's discretions: 'When he has heard and considered, and refused, we cannot interfere. The Attorney-General may be made responsible to Parliament. If he has made an improper decision the Crown may and, if properly advised, will dismiss him; but we cannot review his decision'. See modern discussion in *Watson* v *Attorney-General NSW* (1987) 28 ACrimR 332, 339–42.
[78] [1964] AC 1254, 1354 (HL).
[79] *Barton* (1980) 147 CLR 75.

valuable protection normally available to those charged with serious crime.[80] The question whether it was unfair to proceed in the particular case was remitted to the Supreme Court of New South Wales to answer, but on the conflict between curial and executive responsibility, the members of the High Court majority had no doubt that:[81]

> There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial. The exercise of this power extends in an appropriate case to the grant of a stay of proceedings so as to permit a preliminary examination to take place. . . . It is for the courts, not the Attorney-General, to decide in the last resort whether the justice of the case requires that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney-General, let alone Crown Prosecutors whom he may appoint.

As the result of these powerful sentiments, the areas of improper prosecutorial practice which have since been accepted, in theory or practice, as warranting the staying of proceedings have included delay in bringing matters to hearing;[82] misuse of extradition powers;[83] breach of undertakings by a prosecutor;[84] the laying of informations as a 'protective' measure[85] or as a means of enforcing civil debts;[86] prosecutions based on entrapment;[87] destruction or withholding of exhibits so they are no longer available to the defence;[88] failure to hold a preliminary examination;[89] defective preliminary examinations;[90] failure of the prosecution to call relevant witnesses at a preliminary examination;[91] and an inadequate preliminary examination followed by an ex-officio indictment.[92] There have even been suggestions from across the Tasman that abuse of process should provide a remedy to

[80] (1980) 147 CLR 75, 100–101.
[81] (1980) 147 CLR 75, 96 and 101 (Gibbs ACJ and Mason J with Aikin J concurring.
[82] *R* v *Grays Justices, Ex parte Graham* [1982] 1 QB 1239; *R* v *West London Stipendiary Magistrates, Ex parte Anderson* (1984) 80 CrAppR 143; *McConnell* (1985) 2 NSWLR 269; *Clayton* v *Ralphs and Manos* (1987) 26 ACrimR 43; *Bell* v *DPP (Jamaica)* [1985] AC 937; *Herron* v *McGregor* (1986) 6 NSWLR 246; 28 ACrimR 79; *Moore* v *Jack Brabham Holdings Pty Ltd* (1986) 67 ALR 561; (1986) 22 ACrimR 181; *Watson* v *Attorney-General NSW* (1987) 28 ACrimR 332; *Gagliardi* (1987) 26 ACrimR 391; *Joel* v *Mealey* (1987) 27 ACrimR 281; *Cawley and Clayton* (1987) 30 ACrimR 325; *Kintominas* v *AG* (1987) 24 ACrimR 456; *Clarkson* (1986) 25 ACrimR 277; *Climo* (1986) 27 ACrimR 421; *Cooke* v Purcell (1988) 36 ACrimR 425.
[83] *Perry* v *Lean and Fry* (1985) 39 SASR 531; *Hartley* [1978] 2 NZLR 199; *White* v *Cassidy* (1979) 40 FLR 249; *Carmady* v *Hinton* (1980) 23 SASR 409; *Bow Street Magistrates, Ex Parte Mackeson* (1981) 75 CrAppR 24; *R* v *Bow Street Magistrates' Court, Ex parte Van Der Holst* (1985) 83 CrAppR 114.
[84] *Miles and Green* (1983) 33 SASR 211.
[85] *R* v *Brentford Justices, Ex Parte Wong* [1981] QB 445.
[86] *Thornton* (1926) 46 CCC 249; *Leroux* [1928] 3 DLR 688.
[87] *Vuckov and Romeo* (1986) 40 SASR 498.
[88] *Lord and Fraser* [1983] Crim LR 191; *Emanuel v Cahill* (1987) 30 ACrimR 164.
[89] *Barton* (1980) 147 CLR 75; *Barron* [1987] 10 NSWLR 215.
[90] *Cordell* (1984) 10 ACrimR 475.
[91] *Ngalkin* (1984) 12 ACrimR 29; *Walden* (1986) 41 SASR 421; cf *Harry, Ex parte Eastman* (1987) 20 ACrimR 63.
[92] *Gagliardi* (1987) 26 ACrimR 391.

control any 'serious abuse of the criminal jurisdiction in general'[93] and not just actions that represent an abuse of the judicial process. This enlargement of the abuse of process doctrine in the criminal domain was indicative of a loss of faith in the ability of the prosecuting authorities to act efficiently or fairly. It was a development later described optimistically as the 'new equity' in criminal law.[94]

Relevance of delay

In *Jago*'s case, none of the members of the High Court absolutely excluded the possibility of a permanent stay on account of delay. While cautioning against the use of such a radical remedy, they all conceded that extreme circumstances would justify exercise of the discretion to order a stay. However, there was disagreement whether abuse of process was the appropriate doctrinal vehicle.

Mason CJ said that where delay was the sole ground for seeking a permanent stay, the accused must be able to show 'that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.'[95] It had to be a fundamental defect going to the root of the trial beyond redemption by the trial judge. Though this formulation was clearly evocative of abuse of process, and his honour conceded that the discretion to order a stay was to be exercised on similar grounds, he regarded the incidental power of courts to make orders to control unfairness as preferable to relying on the abuse of process doctrine. The former was wider, and more flexible. It was ample to deal with delay and allowed for pre-trial orders to be made to prevent injustice, even when there was no reason to suspect that the trial itself would be unfair.[96]

Brennan J regarded the ultimate vehicle for a stay to be that of abuse of process. However, he took a strong stance against expansion of the doctrine to cover situations of delay simpliciter.[97] For him, abuse of process, was concerned with preventing misuse of the functions of the court. In the criminal process it might address such matters as the reason for examining the accused's conduct; the manner of trying the accusations; and the finality of the proceedings:[98]

> When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the Court's control unless it be said that an accused person's liability to conviction is discharged by such

[93] *Moevao* v *Department of Labour* [1980] 1 NZLR 464, 476.
[94] M L Abbott, 'Abuse of Process in Australia — The New Equity in Criminal Law' (1988) 10 *Law Society Bulletin* 137.
[95] *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640 per Mason CJ at 644 quoting *Clarkson* [1987] VR 962, 973.
[96] Mason CJ at 643.
[97] Brennan J at 653.
[98] Brennan J at 650 and 653.

> unfairness. That is a lofty aspiration but it is not the law. . . . No abuse of process appears merely from delay on the part of the prosecution, either by inadvertence or by negligence, in presenting an indictment. It may be different if the prosecution were to delay deliberately in presenting an indictment in order to prevent an accused from making an effective defence but, even in such a case, the remedy may lie not in permanently staying the proceedings but in bringing them to a conclusion with a direction which nullifies the effect of the tactic.

Deane J also agreed that abuse of process could be called in aid if the inevitable effect of unreasonable delay would be to make any subsequent trial an unfair one.[99] However, he thought that delay due to limited institutional resources had to be accepted as a 'normal incident' of the due administration of justice and, without more, could not be regarded as unfairly oppressive or an abuse of the process of the court.[100] The two remaining judges, Toohey and Gaudron JJ,[101] were disinclined to pursue the search for a distinction between the power of the courts to deal with unfairness and the power to prevent an abuse of process. They found the two ideas to be inter-related and to separate them:[102]

> carries the risk that the remedies in each case will be seen as necessarily different. That will not always be the case. Greater flexibility and in the end greater justice will be achieved if the two notions are understood as bearing on each other.

CRITERIA FOR A STAY

In *Jago's* case there was little reliance on analogies with principles governing abuse of process in the civil jurisdiction. The concentration was on the countervailing considerations in the criminal jurisdiction compelling the continuation of the trial. Not only was there the availability of other measures short of a stay by which unfairness might be eliminated or mitigated, there was also the interest of members of the community, particularly the victims, in the administration of criminal justice and in the appearance that justice was being done by the matter being brought to conclusion at a public trial.[103] Since permanent stay orders were in effect certificates of immunity it was feared that their issuance on too free a presumption that prejudice had been caused by delay would inspire cynicism and suspicion in the public mind and would result in loss of public confidence in the courts.

In handling the allegations of abuse of process based on delay, the state Supreme Courts had derived their criteria from a fourfold test formulated in the United States Supreme Court in *Barker* v *Wingo*[104] as adopted by the

[99] Deane J at 655.
[100] Deane J at 654.
[101] At 661 and 662–663.
[102] Toohey J at 661.
[103] Mason CJ at 644; Brennan J at 651.
[104] 407 US 514, 530 (1972).

Privy Council in *Bell* v *DPP (Jamaica)*.[105] These looked to the extent of the delay; the reasons given by the prosecution to explain or justify it; the accused's responsibility for and past attitude to the delay; and the proven or likely effect on the interests of the accused. These criteria were not extensively discussed in *Jago's* case, but in listing them, Deane J specifically warned that they should not be treated as a code.[106] Indeed it was acknowledged that the Australian cases had already added a fifth factor, namely the public's interest in the outcome of the case.

Extent of the delay

Even prior to *Jago* the judges ordinarily refused to offer set periods or mathematical formulae for what would justify a stay. In *Aboud*,[107] McHugh J ventured the opinion, based on his own experience, that if the trial was expected to take only a matter of days, a delay of more than a year should be treated as prima facie breach of the accused's right to a speedy trial. Because the High Court has now denied the existence of any such separate right and indicated that delay alone is not enough to warrant a stay, such rules of thumb may be of little value except possibly as a subjective measure of what is acceptable as 'normal delay'.

The cases leading up to *Jago*, were marked by some success in getting courts to admit objective statistical evidence on average delay in bringing matters for trial within the jurisdiction or elsewhere. But there were problems in adducing such material.[108] First, it was not clear what new evidence (statistical or otherwise) a superior court could act upon when asked to review a trial judge's refusal to grant an application for a stay. If its function was akin to that provided by the prerogative writs, the court might find itself confined to the material contained in the 'record' of the court below.[109] If the proceedings were in the nature of an original proceeding for relief,[110] the court would be free to receive any additional relevant evidence. Secondly, there was the danger of gauging what was a proper local time frame by reliance on intra- and inter-state statistical patterns and in drawing inferences about a particular case from aggregated data. A third danger was that, even when statistical data was directly relevant, the pattern of delay revealed could not be accepted uncritically as providing a measure of normality:[111]

[105] [1985] AC 937, 951–2.
[106] Deane J at 656.
[107] (1987) 31 ACrimR 125, 152.
[108] *Aboud* (1987) 31 ACrimR 127, 134–5, 142–3. See also the earlier discussion in *Watson* v *Attorney-General NSW* (1987) 28 ACrimR 332, 347–8.
[109] The situation has since been affected in New South Wales by the *Criminal Appeal (Amendment) Act* 1987 (NSW) which gives the Attorney-General or the Director of Public Prosecutions a right to appeal to the Court of Criminal Appeal (as opposed to the Court of Appeal) against a stay and which requires an appeal to be determined on the evidence available to the trial judge to whom the original application for a stay was made, unless leave to adduce additional evidence is given.
[110] So regarded by McHugh J in *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 583; cf Samuels J at 571.
[111] *Aboud* (1987) 31 ACrimR 127, 142.

> Otherwise, by the normality of gross delays, the Crown could lull the courts into an insensitive indifference to delays in criminal trials . . .

In any event, length of delay never was a useful predictor of whether a stay would be granted. In the first reported Australian decision in which a permanent stay of a criminal prosecution was granted because of delay,[112] the time between charge and trial was almost three and a half years.[113] A permanent stay was also granted in one case involving four years[114] and two cases in which approximately seven years elapsed between charge and trial.[115] Yet stays have been refused when the equivalent periods have been five and a half years[116] and six years.[117] In these cases, the delay was dated from the laying of charges, but the period can also be dated from the time the event first came to the notice of the authorities.

In *Joel* v *Mealy*[118] proceedings were permanently stayed because of prejudice suffered by the defendants when six years passed between the date of the alleged offences and the laying of the information. In *Cooke* v *Purcell*[119] the delay between the alleged conspiracy to cheat and defraud and the commencement of the preliminary examination stretched to almost twenty years. Despite the large sums of money involved and the numerous investors affected, a permanent stay was granted. On the other hand, in *Cawley and Clayton*[120] a stay was denied in relation to manslaughter charges brought fifteen years after the event.[121] Something beyond even significant delay must be present.

Reasons given by the prosecution

While there is no need to show bad faith on the part of the prosecutor,[122] delay by the prosecution which is deliberately calculated to hamper the defence, harass the defendant, deprive the defendant of a protection provided by law, or which takes unfair advantage of a technicality, or deprives the defendant of reasonable notice of the possibility of prosecution will be treated as strongly indicative of irretrievable unfairness. So will delay occasioned by lengthy efforts to bolster a patently weak prosecution case.[123] It will weigh more heavily in favour of a stay than delay produced by prosecutorial negligence or inefficiency, or attributed to the complexity of the case, court congestion, lack of institutional resources, need to search for witnesses and difficulties in

[112] *McConnell* [1985] 2 NSWLR 269.
[113] So too in *Gagliardi* (1987) 26 ACrimR 391.
[114] *Watson* (1987) 28 ACrimR 332.
[115] *Kintominas* v *AG* (1987) 24 ACrimR 456; *Climo* (1987) 27 ACrimR 421.
[116] *Carver* (1987) 29 ACrimR 24.
[117] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558.
[118] (1987) 27 ACrimR 281.
[119] (1988) 36 ACrimR 425.
[120] (1987) 30 ACrimR 325.
[121] See also *Moore* v *Jack Brabham Holdings Pty Ltd* (1986) 22 ACrimR 181 (stay refused though over ten years had passed since events giving rise to prosecution. This ruling was affirmed on appeal: *Jack Brabham Holdings Pty Ltd* v *Minister for Industry, Technology and Commerce* (1988) 85 ALR 640).
[122] *Whitbread* v *Cooke (No. 2)* (1986) 5 ACLC 305.
[123] *Cooke* v *Purcell* (1988) 36 ACrimR 425.

effecting service, or delay for which there is simply no explanation.[124] It is in relation to the less wilful justifications of the prolongation of proceedings that *Jago*'s case supports the countervailing claim that the delay must be condoned in the public interest of seeing the accusations brought to trial. In declining to grant a stay in *Jago*, the trial judge spoke of the community being entitled to extract its 'pound of flesh'.[125] This overstates the case. The end does not always justify the means. Nonetheless, the High Court has signalled its intention to strengthen the weight to be given the public interest.

In *Bell* v *DPP (Jamaica)*,[126] the Privy Council referred to the attainment of justice 'in the context of the prevailing economic, social and cultural conditions'. This is an invitation to prosecutors to offer explanations for delay in terms relating to prosecutorial overload, crowded court lists and other factors over which they claim to have no control. While some delay will be accepted as normal, especially in preparing for the prosecution of complex matters, to accept whole-heartedly 'the prevailing economic conditions' as a justification for delay carries with it the risk of subordinating minimum standards of fair trial to the prevailing political priorities. There is no surer way of legitimizing present and future delay. At the end of the day, the state, rather than the accused, must bear the brunt of the under-resourcing of the judicial system. The point was made in the Canadian Supreme Court case of *Mills*:[127]

> There can be no assumption that the constitutional right to be tried within a reasonable time must conform to the status quo; rather, it is the system for the administration of criminal justice which must conform to the constitutional requirements of the Charter.

In deciding whether a stay is warranted, the courts are prepared to examine how the prosecution has been instituted and carried forward, but it is clear that the actual decision to prosecute cannot be reviewed or overturned. Only the continuation of the case in court is in issue. And even in the exercise of that jurisdiction, the courts are firm that their purpose is not to punish the prosecution, nor to discipline the Crown:[128]

> Obviously the invocation and application of the jurisdiction may have, incidentally, a stimulating effect on the prosecution authorities. They may improve their performance. More resources may be accorded them by government, in order to avoid the embarrassment or frustration created by orders for the permanent stay of a criminal prosecution. But these effects are incidental and consequential. They are not the purpose of the exercise of the jurisdiction. The Court would be misusing its powers and stepping out-

[124] A Choo, 'Abuse of Process and Pre-Trial Delay' (1989) 13 *Crim LJ* 178, points out that a source of delay may be deliberate slowness by the police in the hope that the defendant will lead them to more significant parties and instigators in the criminal enterprise, as in *R* v *Canterbury and St Augustine Justices, Ex parte Turner* (1983) 147 JP 193.

[125] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 584. See also 563–4.

[126] [1985] AC 937, 953.

[127] (1986) 26 CCC (3d) 481, 555.

[128] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 564–5, per Kirby P.

side its proper role if it were to provide a stay for the specific purpose of causing changes deemed desirable to prosecution practices.

Responsibility of the accused

The courts will look at the extent to which the accused, by his or her own action or inaction, has contributed or acquiesced to the delay. While a defendant is not duty bound to take energetic steps to bring the trial on promptly, a failure to do so prior to the hearing may be taken, in any subsequent application or appeal, as evidence that the person had not in fact been disadvantaged.[129] And because a prompt trial may be waived,[130] so too will time lost through adjournments at the request of, consented to, or caused by the accused.[131] On the other hand the acceptance, by agreement or silence, of some periods of pre-trial delay does not prevent the accused later protesting that the total time which has passed makes a fair trial impossible. If the accused has pleaded guilty, or indicated an intention to do so, there will be less apparent oppression or unfairness in the delay.[132]

The likelihood of a stay will be offset by the degree to which the defendant's own manipulative behaviour contributed to the delay. To an accused who is conscious of guilt, delay brings advantages. By extending pre-trial proceedings for as long as possible, there is hope for a weakening of the prosecution case, better plea bargaining opportunities, the possibility of a reduced sentence because of the effluxion of time awaiting trial,[133] and the psychological benefit of postponing the day of reckoning. Ironically, even applications for a permanent stay, initially to the trial judge and then in the Supreme Court, may be a source of delay.[134] In the United States, the timing of the defendant's protestations are relevant to the judgement whether the fairness of the trial has been seriously compromised. But, because in Australia the general practice is to file the presentment or indictment on the eve of the trial, applications for a stay on account of delay have tended to be made only at the outset of the hearing. Applicants should not be disadvantaged because of this. The practice of last minute filing does not prevent earlier applications for the trial to be brought on more rapidly. These can be made under the Supreme Court's inherent jurisdiction, or under special legislation allowing a court to advance the date of a trial,[135] or in the course of prescribed pre-trial hearings.[136]

Prejudice to the accused

The next major element is that there be actual prejudice or unfairness to the

[129] *Aboud* (1987) 31 ACrimR 125,130,140 and 152.
[130] By pleading guilty; by agreeing to adjournments and extensions; by failing, before the trial, to seek a prompt hearing; or, at the trial, by omitting to apply for a stay.
[131] *Jago* v *District Court of New South Wales* (1988) 12 NSWLR 558, 565.
[132] *Cooke* v *Purcell* (1988) 36 ACrimR 425, 461.
[133] R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press, 1985) 11.516.
[134] See the chronology in *Clarkson* (1986) 25 ACrimR 277, 281–3.
[135] Eg *Crimes Act* 1958 (Vic), s 359.
[136] Eg *Crimes Act* 1958 (Vic), s 391A; *Supreme Court (Pre-Trial Criminal Procedure) Rules* 1984 (Vic); *County Court (Pre-Trial Criminal Procedure) Rules* 1987 (Vic).

accused. The importance of this last criterion has been boosted by the High Court out of concern that concentration on the fact of the delay, rather than its effect, would too easily allow proceedings to be stayed where only minimum adverse effects had been suffered by the defendant. In general, the applicant for the stay must point to a significant impairment of the opportunity to make a full defence. The onus of proof rests upon the person, on the balance of probabilities.[137] Proof of the prejudice creates substantial problems since the handicap may be prospective rather than present and subjective rather than objective. Earlier case law allowed the accused to rely for a stay on an inference or presumption of prejudice instead of proof of actual disadvantage, but the High Court, in *Jago*, has now stressed the primacy of the latter.

Actual prejudice can be demonstrated in an objective way, though it may take various forms. Most commonly the complaints relate to loss of witnesses (they vanish, leave the jurisdiction, or die[138]); loss of recollection, or of documents;[139] loss of access to other relevant material; or the adverse effects of lengthy pre-trial incarceration on the accused's preparation for trial.[140] The complexity of the charge and the mode of proof are relevant. Thus a longer delay can be tolerated in complex fraud cases, in which the primary evidence is in a documentary form, than in prosecutions for street crime which depend on eyewitness evidence that is more vulnerable to deterioration over time. Delay prior to the laying of charges may be just as prejudicial as delay subsequently:[141]

> A person who has been 'accused' of a specific offence is able at least to take steps to preserve his memory, or the memories of witnesses, of relevant details relating to the alleged occurrences. But a person unaware that criminal charges will eventually be brought against him will have no reason to do so.

Self incrimination is a particularly potent form of prejudice. In *Cooke* v *Purcell*[142] one of the effects of almost two decades of delay without warning of prosecution, was that some of those who were subsequently accused had been much freer in giving evidence in related civil proceedings than they would have been if they had appreciated the prejudice they were creating for their criminal defence.

The concept of presumed prejudice, against which the High Court is turning its face, is more amorphous. It involved judicial notice of the fact that some form of prejudice must have been suffered by the defendant because the delay has passed the boundary of reasonableness. Strictly speaking it is not necessary to spell out the content of the prejudice presumed to have been suffered. Nevertheless, reference is often made to subjective elements such as the anxiety, stress, suspicion and probable hostility the accused must be suf-

[137] *Watson* v *Attorney-General NSW* (1987) 28 ACrimR 332, 334; *Cawley and Clayton* (1987) 30 ACrimR 324, 330.
[138] Eg *Carver* (1987) 29 ACrimR 24.
[139] *Kintominas* v *AG* (1987) 24 ACrimR 456, 463.
[140] *Barker* v *Wingo* 407 US 514 (1972).
[141] A Choo, 'Abuse of Process and Pre-Trial Delay' (1989) 13 *Crim LJ* 178, 185.
[142] (1988) 36 ACrimR 425.

fering from being the subject of unresolved criminal charges, as well as more objective ones such as the memories of witnesses fading. Of course, any accusation of crime involves stigmatization, loss of privacy, anxiety, stress, domestic and work disruption, legal costs and uncertainty regarding outcome and sanction. These are a consequence of the open process of accusation and trial which, paradoxically, is one of the major due process protections for accused persons. These effects are felt by those who are brought to trial within a reasonable period as well as those who are not.

Prior to *Jago*, Choo argued that even where there was no substantial risk that the delay had left the accused without a fair opportunity to mount a defence, a stay should nevertheless be ordered if the 'psychological' and 'sociological' effects on the person of the delay have been such that the proceedings should not be permitted to continue.[143] He asserted that this went to the 'legitimacy' of the criminal justice system. However, it is now clear that if the original delay was not actuated by bad faith on the part of the prosecution, nor the defendant actually deprived of the opportunity of a reasonably fair trial, psychological or sociological effects on the accused cannot be asserted as, alone, warranting a stay. These factors, and other forms of inferred prejudice, will continue to be highly relevant to other discretionary remedies short of a permanent stay, but at the end of the day the High Court has insisted that, for a permanent stay to be ordered, the level of actual prejudice must be substantial. As Wilson J said in *Barton's* case,[144] it must be 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'.

Statutes of limitation

In civil cases the courts have been disinclined to treat proceedings brought within the applicable limitation period as oppressive because of delay.[145] In criminal and quasi-criminal contexts the point has been repeatedly made that a limitation period for the laying of charges, does not define the minimum interval of acceptable delay.[146] If, in the totality of the circumstances, the conduct of the prosecution can be characterized as an abuse of process there will be power to stay the proceedings despite any relevant statutory limitation period not having expired.

This throws up the difficulty of characterizing proceedings for the purpose of applying the different criteria. In *Herron* v *McGregor*,[147] the issue was whether the New South Wales Court of Appeal had jurisdiction to grant a stay in relation to the proceedings of a statutory disciplinary tribunal dealing with

[143] A Choo, 'Abuse of Process and Pre-Trial Delay' (1989) 13 *Crim LJ* 178, 186.
[144] (1980) 147 CLR 75, 111.
[145] *Birkett* v *James* [1978] AC 297, 322.
[146] *R* v *Brentford Justices, Ex Parte Wong* [1981] QB 445; *Herron* v *McGregor* (1986) 6 NSWLR 246, 253; *Jack Brabham Holdings Pty Ltd* v *Minister for Industry, Technology and Commerce* (1988) 85 ALR 640, 653–4.
[147] (1986) 6 NSWLR 246.

alleged professional misconduct by a number of medical practitioners. This arose out the deaths of patients in a hospital between five and thirteen years before. The state Health Commission had full information in respect of at least one case for ten years and in the other two for more than five years before formally lodging a complaint. The Court of Appeal took the view that complaints lodged so long after the Health Commission was in possession of the facts amounted to 'an abuse of the right to lodge a complaint' and ordered that proceedings on all complaints be stayed. In this case the Court of Appeal was able to avoid the problem of having to indicate whether it was applying the wider civil or narrower criminal common law abuse of process rules to the disciplinary hearings. It simply drew on the broad statutory grant of jurisdiction found under s 23 of the *Supreme Court Act* 1970 (NSW) which gave the court 'all jurisdiction which may be necessary for the administration of justice in New South Wales'.[148]

In *Jack Brabham Holdings Pty Ltd* v *Minister for Industry, Technology and Commerce*,[149] the question was whether offences under s 234 of the *Customs Act* 1901 (Cth) involving an intention to defraud the revenue were 'civil' or 'criminal' for the purpose of an application for a stay. Though there was a delay of twelve years from the events giving rise to the prosecution in bringing the matter to trial, formal proceedings in relation to the prosecution had been commenced within the prescribed five year statute of limitation. The Minister responsible for enforcing the legislation contended that the proceedings for the recovery of penalties under the Act were civil in nature and that, as the action to recover the penalty had commenced within the relevant limitation period, the case for a stay for abuse of process must fail. He relied on s 247 which declared that customs prosecutions may be 'commenced, prosecuted and proceeded with . . . in accordance with the usual practice and procedure of the Court in civil cases . . .' The ruling of the trial judge that this provision did not make the proceedings truly civil, was subsequently upheld by the New South Wales Court of Appeal which saw it going only to procedure, not substance. In the opinion of the President of the court, the customs prosecution fell into a hybrid class like that of the professional disciplinary proceedings in *Herron* v *McGregor*, and more akin to criminal than civil proceedings. The criteria applicable to criminal cases was to apply.[150] This view was later endorsed by Mason CJ in *Jago*'s case who said that for the purpose of applying the abuse of process rules it was the nature of the proceedings, not their formal classification, that counted.[151] Because of the accused's contribution to the delay in the particular case, all three judges in the Court of Appeal denied that there was any relevant abuse.

[148] The coroner's inquest of 1976 was quashed in 1986 and a fresh inquest ordered. The effort to stay the latter proceedings as an abuse of process failed: *Herron* v *Attorney-General for New South Wales* (1987) 28 ACrimR 353.
[149] (1988) 85 ALR 640.
[150] Id, 650–2.
[151] *Jago* v *District Court of New South Wales* (1989) 63 ALJR 640, 641.

EFFECT AND FORM OF THE ORDER

An order to stay proceedings counts as neither an acquittal nor a conviction. In this regard its effect is similar to the entry of a nolle prosequi by the Attorney-General or the Director of Public Prosecutions, or an order for the release of a prisoner under the equivalent of s 6 of the *Habeas Corpus Act* 1679. But while these forms of termination of trial or release from custody allow for the possibility of presenting the accused for trial again in the future, an order for a permanent stay does not. The person remains accused of a crime, but is never to be tried for it within the jurisdiction.[152] Such a form of legal limbo may give comfort to the guilty, but it taints the innocent and leaves both under a permanent cloud of suspicion.

No order by a superior court to stay proceedings can be directed to the Attorney-General to prohibit his or her exercise of the discretion to present an accused for trial. The order is made against the relevant court (which should be named as a party to the application for a stay)[153] to prevent it acting on the presentment or indictment or, in the case of committal proceedings, prohibiting the continuation of the preliminary examination. If the presentment or indictment has been filed and a trial court is seized of the matter, it can be ordered not to proceed further. If an indictment or presentment in respect of the alleged offence has not yet been signed and filed, a conditional order can be made to prevent any future trial of that offence provided that charges have been laid at some stage.[154] In the case of *Kintominas*[155] Rogers J carefully restricted his order to what was to occur in the District Court if and when an indictment was presented. The order made was that any proceedings against the plaintiff upon any indictment 'which may hereafter be presented based on the facts founding counts 1–5 inclusive [of an earlier indictment] be permanently stayed'.

In the absence of a statutory provision to the contrary, the general rule is that costs are not normally awarded in favour of or against the Crown in prosecutions of indictable crime. In *Goia*,[156] an application for a permanent stay had been successfully made to the Australian Capital Territory Supreme Court. The applicant also obtained an order that the Crown pay his costs. The justification was that the matter was not one involving a question of the guilt or innocence of the accused, but whether proceedings should have been taken or continued at all. On appeal, the Federal Court of Australia set aside the order to pay costs. It concluded that since the general rule also operated in respect of proceedings other than those in which guilt or innocence was at stake, eg motions to quash the indictment, change the venue, or adjourn the proceedings, it was also applicable to applications to stay them.

[152] Unless the order is later varied.
[153] *Watson* v *Attorney-General NSW* (1987) 28 ACrimR 332, 351.
[154] Id, 345–7. The laying of charges means that some 'proceedings' are on foot.
[155] (1987) 24 ACrimR 456.
[156] (1988) 35 ACrimR 473.

CONCLUSION

Delight with Australian judicial innovation in making use of the doctrine of abuse of process led Mr M L Abbott QC of the South Australian Bar, himself counsel for the applicant seeking a stay in the leading South Australian case of *Clayton* v *Ralphs and Manos*,[157] to suggest that a new sensitivity to unfairness was being shown by the criminal courts:[158]

> the threshold level at which [the courts] will exercise their undoubted powers to stop or stay proceedings as an abuse seems to . . . require less evidence of unfairness or oppression as the body of the case law grows in Australia. Circumstances in which it would have been unthinkable for the trial to be stopped or stayed a few years ago have now suffered a reversal; now it would be unthinkable if the trial was to proceed.

The conservative stance taken by the High Court in *Jago* v *The District Court of New South Wales* to the significance of delay as an abuse of process will be disappointing to defence counsel. It weakens one of their newest strategic weapons. Trial judges and appeal courts have been warned that they must think more carefully about ordering permanent stays in cases of delay. Delay simpliciter is not enough. Some other element of aggravation must be present. Malice will do, but, at least according to Brennan J, not prosecutorial ineptitude. The likelihood of success in applying for a permanent stay has been reduced now that accused persons are less able to rely on the idea of presumptive prejudice to establish the gravity of the prosecutor's behaviour towards them. This has wider implications. Use of the permanent stay is a dramatic public means by which the inadequacies of the criminal justice system may be highlighted. The previous willingness of state courts to grant a stay under the doctrine of abuse of process, placed considerable pressure on governments to attend to the problems of delay and of inadequate prosecutorial services. Now that judicial pressure on them will be eased.

Yet the courts have not been desensitized to unfairness. If anything, the High Court, has recommitted itself to the strong position it took on fairness in *Barton*'s case. The doctrine of abuse of process in criminal matters is still intact and still has great potential; the inherent power to mould procedures to achieve a fair trial has been strengthened; the only aspect weakened is the assumption that the sole sanction for inordinate delay is a perpetual stay. What is behind *Jago's* case is the High Court's reluctance to encourage courts to refuse to exercise their jurisdiction. Such refusal excludes the executive arm of government from access to lawful prosecutions and indirectly does that which the courts insist cannot be done, namely review the discretion of the executive to prosecute. Moreover, the High Court regards it as unwise that offenders be returned to the community with immunity from prosecution if, notwithstanding delay, an approximation of a fair trial in public can be obtained. Infringement of standards of fairness remains central to doctrine of

[157] (1987) 26 ACrimR 43.
[158] 'Abuse of Process in Australia — The New Equity in Criminal Law' (1988) 10 *Law Society Bulletin* 137, 145.

abuse of process, and will result in a stay in irretrievable cases, but the High Court has stressed it is not just fairness to the accused that must appear in the balance, but also fairness to the state, to victims and to the continuation of the judicial system itself. This is consistent with its position in *Bunning* v *Cross* when it was said:[159]

> it is by reference to large matters of policy rather than solely to considerations of fairness to the accused that the discretion here in question is to be exercised . . .

Despite this qualification, fairness to the accused still remains a driving force in the High Court. By reminding criminal court judges of the variety and potential strength of other discretionary powers, short of a stay, which they may use to mitigate unfairness the court has invited boldness in the use of these powers, rather than in the doctrine of abuse of process, as the next stage of judicial innovation in Australian criminal justice.

[159] *Bunning* v *Cross* (1977) 141 CLR 54, 77.