EDITED SPEECH NOTES BY JUSTICE K.G.W. MACKENZIE FOR PRESENTATION OF PAPER "CONDUCT OF THE TRIAL AND POWERS OF THE TRIAL JUDGE" MELBOURNE, 25 MARCH 2000

The published paper is in some respects an issues paper rather than one which attempts to suggest that there are clear answers. The variety of views expressed so far during the conference suggests that there are not. "In principle" agreement can easily be reached on many matters but the more difficult task lies in the detail.

One of the issues for SCAG will be whether to encourage adoption of procedural and substantive reforms and in what form. It has already been questioned whether uniformity is necessary. It is questionable whether it is achievable. The best achievable outcome may be that jurisdictions decide in principle to adopt reforms which are broadly consistent but not necessarily identical with those in other jurisdictions. There is a good case to be made for as much convergence as possible. Uniformity may be an impossible dream.

Judicial Pre-Trial Management

I have serious reservations about the utility of creating a system involving excessive formality. I have listened to the discussion of the Victorian system of holding conferences at an early stage in matters where accused have not indicated which way they will plead. However I am concerned at the time which appears to be involved in preparing for and holding these conferences. It would be interesting to see statistics as to how beneficial the procedure is in overall savings as a clear picture emerges. It appears to require commitment of more resources, both judicial and otherwise, and unless a commitment to supply additional resources is made other areas of the system will come under stress.

I doubt whether the criminal justice system is suited to regimentation in the same way as the civil jurisdiction is. A flexible system backed up by powers enabling the court to manage cases intensely and compulsorily, where necessary, is preferable. My views have been shaped by 3 years in charge of the criminal list in the Supreme Court of Queensland, Brisbane. I make no claims that the system is perfect, nor that it would necessarily work in jurisdictions with a different caseload. However from this Court's perspective it operates relatively effectively and, in my view, at least demonstrates the benefit of flexibility. I suspect that because of the co-operation of the profession that I have experienced, we do not have the acute problems that some other jurisdictions have.

According to the Supreme Court of Queensland Annual Report 1998-99, in

Brisbane 81% of all criminal matters were disposed of within 6 months of presentation of the indictment and 95% within 12 months. Seventy-four per cent of matters committed to the court resulted in pleas of guilty. Of those which went to trial 60 per cent were disposed of within 6 months and 81 per cent within 12 months. Some of those not disposed of within 12 months were retrials after successful appeals or where the jury had been discharged after disagreement or for other reasons or cases where the trial had to await the outcome of referral to the Mental Health Tribunal, an appeal in a related case or a separate trial granted to a co-offender. There are usually about 200 active cases in the trial division in Brisbane mostly homicides, attempted murders and drug offences.

The 15 Judges of the Trial Division in Brisbane are calendared periodically for specific periods in crime, usually two, three or four weeks at a time. Long trials are identified in advance and special calendar arrangements are made well in advance for them. The active matters before the court are in varying states of maturity. Some will be awaiting hearing as definite trials. In some, negotiations will be under way with the DPP, or the accused will be awaiting examination by medical experts, or instructions will not yet have been finalised for other reasons.

Management of the list is undertaken by a Judge of the Trial Division who sits each Friday, usually at 9.15 am, to review a selection of matters in the system. Typically there will be about 20 matters and the process will take about 1 hour. Every four weeks, indictments in matters recently committed to the Supreme Court will be presented as well. Depending on the number of new presentations, the whole callover will take 1½ -2 hours.

When the indictment is presented for the first time the accused is not arraigned but a legal representative or the accused personally, if unrepresented, is required to appear. Legal representatives are expected to advise if the matter will be a sentence. If instructions have not been finalised the matter will be listed for further review at a later Friday callover. The length of adjournment is governed by the advice given to the Listing Judge. Frequently it will be reviewed in one or two weeks time, in the expectation that a conference with the client will have been held. In some cases a longer period will be necessary.

Once it is indicated that a plea of guilty will be entered the matter is immediately placed on the plea list. If a definite date for sentence is available, the sentence date is fixed. If not, the listing officer assigns a date for sentence as time becomes available. Progress of trials is monitored and if days become available during the course of a Judge's sittings, that time is utilised, as far as possible, to list sentences. Where time becomes available on short notice. it is often difficult to completely utilise the time. The most usual reason for time becoming available is the late plea, notwithstanding that the court has been assured that the matter will be a definite trial.

There seems to be no acceptable practical way of eliminating late pleas in cases

where the accused finally acknowledges the inevitability of conviction only when the day of trial has arrived. In an attempt to reduce the incidence of late pleas there is a practice direction establishing a system under which a matter listed for trial is mentioned at the Friday callover two clear weeks prior to the commencement of the week in which the trial is expected to begin. By this time the accused's legal representatives are required to have ensured that all representations and requests to the DPP have been made in sufficient time to permit DPP to consider them properly and respond. Legal representatives are required to ensure that appropriate advice has been given to the accused and final instructions taken so that the Judge in charge of the list may realistically be informed of the accused's intentions. The DPP is obliged to have provided the accused's legal representatives with all relevant statements, transcripts and other information and respond to representations and requests in sufficient time before the final mention to permit them to take all necessary steps to give advice and obtain instructions.

At the final mention the accused is required to advise the Judge in charge of the list whether the matter remains a trial. Where a plea of not guilty is maintained at the final mention but a plea of guilty is subsequently entered without any material change in circumstances, the practice direction reminds that the fact that the plea of guilty was not entered at the final mention may be taken into account as a factor disentitling the accused to the benefit ordinarily obtained through a timely plea of guilty.

This reflects a statutory obligation to take a plea of guilty into account in imposing sentence and to state why a reduction was not made in the particular case if it is not. It is also provided that in determining the reduction, regard may be had to the time at which the plea of guilty was made or notified to the prosecution, and to remorse. Co-operation by pleading early is also rewarded if it in fact involves a real saving of resources.

It is too early to say if the Practice Direction will have any noticeable effect on the incidence of late pleas. I will be pleasantly surprised if it does, since, in all probability, the accused will have been advised in any event of the benefits of an early plea and trial prosecutors who are often appointed late for supposed reasons of cost saving will only begin to absorb the fine detail when the trial is imminent. While it may be attractive to shift costs from one budget to another in administrative terms it is false economy if a small amount in the DPP's budget is saved but the court's time is wasted for at least a day and often more as a result of a late plea of guilty. There are frequent complaints at the callover that this policy frustrates attempts by the defence to discuss aspects of the case with the prosecutor who must present the case in court, who is best placed to make a realistic assessment of its strengths and weaknesses. Often, once the prosecutor is appointed, decisions shortening the trial or accepting a plea which realistically reflects the merits of the case are taken, when, before his appointment, they were not.

In 1997 the Criminal Code was amended by inserting section 592A which allows directions or rulings as to the conduct of the trial to be given once an indictment has been presented. The Crown or an accused may apply, or a Judge may on his or her initiative direct the parties to attend for directions or rulings to be given. A non-exclusive list of specific instances is set out in s 592A(2). The same amendment inserted s 590B which requires a party who intends to adduce expert evidence in relation to an issue in the trial to give as soon as practicable to the other parties written notice of the name of the expert and any finding or opinion he or she proposes to adduce and as soon as practicable before the trial date to give the other parties a copy of the expert report on which the finding or opinion is based. Times for compliance with these obligations may be fixed under s 592A.

Section 592A is a facilitating provision. It does not require each case to be subjected to management but the callover system employed results in compulsory management of all matters in practice. During the course of the reviews preceding a trial listing being given, the parties will have been asked to identify any preliminary issues such as applications for separate trials or severance of counts, challenges to admissibility of confessional or other evidence and as to steps taken to eliminate formal proof of matters which are not in dispute. The prosecution is required to indicate any periods when witnesses will be unavailable.

As a double check the practice direction urges practitioners to notify the Judge in charge of the list or the criminal listing officer of any perceived need for a voir dire or any issue which might usefully be addressed under s 592A sufficiently in advance of the final mention and in any event well prior to the assembling of the jury panel to avoid any unnecessary or unnecessarily early summoning of jurors.

The necessity to identify these issues as early as possible is to allow applications to be heard some time in advance of the trial. Often the decision made will cause the parties to reconsider their positions. Some decisions will bring proceedings to an end.

Not all applications need to be heard by the judge who is to preside at the trial, but some, especially those which involve a discretionary element and some where admission of evidence depends on perceptions of its relationship to other evidence, are best decided by the trial judge. In practice if the proposed trial judge can hear applications which are best heard by him or her conveniently the application is listed accordingly some time before the date set for trial. The flexible approach adopted to calendaring by the Senior Judge Administrator allows an approach to be made to him to make the proposed trial judge available for sufficient time to hear the section 592A application even if it involves adjusting the calendaring of that judge for the time necessary.

The criminal list is run as a running list. Ordinarily more than one judge will be sitting in crime at any particular time. The trial is given a number before a particular judge. During the management phase an estimate of the length of each trial is

obtained. Subject to the problem of late pleas, these are generally reasonably accurate and therefore those in number 2 and subsequent trials know approximately when their trial will start. Nevertheless the right is reserved to move the trial from one judge's list to another's if that becomes desirable. Sometimes if a trial ends prematurely, arrangements are made where possible to accelerate the starting date of the next trial. No doubt the criminal bar and solicitors would prefer fixed dates but the list simply would not be disposed of efficiently if that system were employed. The dead time would reach unacceptable proportions.

There are many possible approaches to the pre-trial management of criminal trials. Local legal cultural factors may have an important influence on what is appropriate and feasible, but judicial management of the pre-trial phase has advantages. No matter how good the listing officers are there are instances where only judicial input can achieve the necessary outcome expeditiously. There should be continuity in managing the list to minimise the risk of matters being unduly protracted. If there is a consistent approach, continuity allows the profession to become accustomed to what will be expected of them. This should not be underestimated as a factor in developing a climate of co-operation without which the task of management is much more difficult. Experience also confirms that all matters should pass through the management system even if briefly. Whether this is best done compulsorily and formally by formal directions hearing or conference or more informally is open to debate. What is necessary or desirable in one jurisdiction may be unnecessary in another. The truth may be that both approaches have their place. We must not lose sight of the fact that the more formal the system the greater are the cost and resource implications. Some matters require no management at all. Some matters require some management; others require intensive management. The important thing is that there be a process for identifying which are which and authority to impose a strict free trial management regime in cases where it is necessary. Without such authority there is a risk of rogue trials which bring the system into disrepute occurring because they come to trial without proper attention having been paid to containing the issues to those which are essential to do justice.

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Some of the measures discussed in the paper can be implemented by the judiciary by instituting practices within individual courts, but cooperation of the profession is essential if they are to work effectively. Some can be facilitated by adjustment of judicial attitudes and philosophy. Some will need legislative action and therefore involve political judgment and political will to carry them through. Most importantly there must be commitment of adequate resources to the criminal justice system if many of them are to be implemented successfully.

We may be able to devise systems which, in theory, will streamline trials but they will fail in the real world without adequate commitment of resources. It is the interaction of the efforts of the prosecution, the defence, the legal aid systems, the courts and, although in a different portfolio, the forensic science service which

determines whether a system is working well or not. If any one of those sectors is inadequately resourced, the system, no matter how good in theory, will be thrown out of balance and work inefficiently because the under-funded sector will be unable to perform its role in a timely and effective way.