CRIMINAL COURT DELAYS: Inevitable or Preventable?

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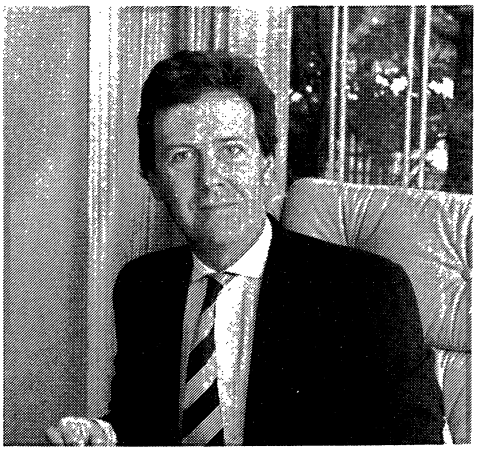

Professor Peter Sallmann has been the Executive Director of the Australian Institute of Judicial Administration since 1987. The main functions of the Institute, which is affiliated with the University of Melbourne, are to conduct courses and seminars for Judges and Magistrates, to conduct research into aspects of the administration of the Courts of Australia and to collect and disseminate information on these topics.

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He has a common interest with the Australian Crime Prevention Council in that he is President of the Australian and New Zealand Society of Criminology.

It is with a deal of pleasure that we reproduce his paper dealing with the perennial problem of Delays in the Criminal Courts.

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CRIMINAL COURT DELAYS: INEVITABLE OR PREVENTABLE?

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INTRODUCTION

I have been asked by the organisers of this Conference to say something about the subject of delay in the processing of criminal cases through the courts. The overall theme of the Conference, "Crime: Inevitable or Preventable", when applied in the context of my topic raises the question whether delay is inevitable or preventable. My answer is that, depending upon what one means by delay, a certain amount of it is inevitable, and indeed, highly desirable but that a substantial amount of it is preventable.

Criminological interest in the courts and the other components of the criminal justice system is comparatively recent even in the annals of a relatively young scholarly discipline like criminology. Traditionally, criminologists have been concerned with the phenomenon of crime. They have tried to develop an understanding of it from a behavioural standpoint, presumably so that steps could be taken to reduce it. But the development of modern policing organisations, courts, prisons and a variety of non-custodial penal measures has provided a rich, additional dimension to the crimonological agenda. In the main, criminological attention in this area has involved three central pre-occupations:

- a concern with the extent to which the loose aggregation of agencies and processes known as the criminal justice system plays a crime prevention role.
- an interest in studying the various agencies and their personnel essentially from a phenomenological point of view. Thus, we have a plethora of studies of police officers, prison officers and, to a lesser extent, personnel connected with the running of the courts.
- an emphasis, mainly from criminal and academic lawyers, on the justice and fairness of the criminal justice process.

In recent times, a fourth pre-occupation has emerged with focuses predominantly on the courts and the processes required for bringing cases to courts. This is essentially a pre-occupation of governments, presumably reflecting a certain amount of community concern. And this is where delay comes in. The main reason for the concern is the twin devils of delay and cost. Increasingly, in these times of governmental financial restraint Attorneys-General and other Ministers are asking whether we can afford to carry on with our traditional judicial system and if we are to preserve its essence what steps can be taken to streamline it and to improve its performance. This is the context for the brief and general remarks I make in this paper.

DELAY

There are some important general observations to make about the concept of delay. The first is that a certain amount of delay in the processing of criminal cases is highly desirable. Crime is a serious business but so is working out who the alleged criminal is, working up a case against him and then adjudicating upon it. Another aspect of this is that while some cases are factually and legally straightforward a good number are not. And even in the simple cases there is a process to be followed. The main reason for the process is fairness.

An historical perspective on this is useful. While there have always been complaints about the slow processes of the law in general it would be difficult to criticise the speed at which the criminal process operated in England in the seventeenth, eighteenth and even nineteenth centuries. As Langbein has written:

> "No-one should be surprised that in the eighteenth and nineteenth centuries English criminal procedure would undergo fundamental changes. There were grievous shortcomings in the procedure that we have observed in the Old Bailey into the 1730s especially from the standpoint of the accused. Too many cases ... give us cause to wonder whether innocent people were being condemned. If we look backwards as this Old Bailey practice from the perspective of either of the two mature twentieth century procedural models, the adversarial and the non adversarial systems, we should have to say that the accused in the Old Bailey was being denied the safeguards of both. We have seen that he lacked the protection that the adversary system was about to provide for him, in particular the assistance of counsel in gathering and adducing defensive evidence: the rules excluding varieties of possibly prejudicial evidence and the rules for more benign selection, instruction, and control of the jury. Yet the English were not giving the accused the principal alternative safeguard of the modern non adversarial tradition: thorough official investigation of exculpatory claims in pretrial and trial procedure."[1]

Much of what Langbein criticised was put right in the latter part of last century and the early part of this. The middle and latter parts of the twentieth century have seen further, albeit far less dramatic, changes in the criminal trial phase of the criminal process. Mr Justice McGarvie of the Supreme Court of Victoria has commented on the Australian situation as follows:

> "Within our time there was an enormous gap between the rhetoric describing the justice and impartiality of the criminal law and the actual reality in practice. In too many trials the prosecution evidence was a verbal confession and a couple of witnesses, the prosecutor was a refugee from the bar cultivating his love for the strong waters, the accused was unrepresented or represented by a practitioner retained in a hotel bar the afternoon before, the judge was inclined towards a conviction and the court of criminal appeal was inclined to let it stand. To the credit of the community all that has changed. Typically today, the prosecution case includes substantial scientific and circumstantial evidence, the prosecutors are capable and keen, the accused is well defended, usually through legal aid, the trial judge is not expected to identify with the prosecution and courts of criminal appeal are not resistant to the conclusion that an appeal has been made out. It is a matter for some community pride that during a period in which much of the world has moved away from the protection of the rights of accused persons the Australian judicial system has increased the reality of that protection. Of course, this change has inevitably and substantially increased the time taken by a criminal trial."[2]

While today's system is under heavy scrutiny from the standpoint of effectiveness and efficiency, and this is entirely appropriate, I would very much doubt whether the community would want to turn back the clock to the point in recent history where criminal trials were not approached in the same thorough, exhaustive manner of today, let alone to the dimmer reaches of seventeenth and eighteenth century trials of England which were grossly unfair, certainly by today's standards.

We have to face up to the fact that as our democratically oriented system of governance has evolved, so, as part of that process, has our judicial system. And short of revolutionary strategies there is a certain intractable core of that system. Professor Van Caenegem put it well in his book **The Birth of the English Common Law** when he said.

> "Judicial proceedings are, of course, slow, because they go deeply into the matter, both sides are heard, documents inspected, experts consulted, witnesses or jurors come forward and procedural rules must be observed. Purely executive redress, which 'envisaged no trial, prejudged the issue and authorised reseisin without further preliminaries', in summary direct police action, is quick but it is a hit-or-miss technique. It is ill-informed, one sided and arbitrary and leads to injustice and contradictory, self-defeating measures. In the end it causes even greater wrongs than it sets out to combat."[3]

All that having been said, there is absolutely no doubt that there is considerable room for improvement in the way we conduct the pre-trial and criminal trial process. Much of the scope for improvement lies in the pre-trial area but there is also a certain amount that can be done to improve the conduct of criminal trials themselves. In this context it must, of course, be remembered that the great majority of people who are charged with criminal offences do not have trials because they plead guilty. (For example, some recent Queensland figures indicate that for the years 1985, 1986 and 1987 of 10,000 people who pleaded not guilty at the conclusion of commital proceedings in relation to indictable offences 7,000 pleaded guilty when the matter came on for trial.)

The second general observation to make about delay is that its mere measurement is complex and, partly as a result of this technical difficulty, presenting overviews of the situation in particular jurisdictions, let alone comparing the position in a variety of jurisdictions, is fraught with problems. The reason for the difficulty in comparing situations in different courts and even in comparing different courts in the same jurisdiction is that very often different measures of delay are used. In terms of the somewhat hackneyed analogical device, apples are not being compared with apples.

The problem of measurement is a technical matter and some reference should be made to some of the difficulties which can arise. Basically, the problem is that a number of different approaches can be taken to the measurement of delay. One approach, in context of criminal cases is to measure the time which elapses between the commission of the alleged offence to the time of the commencement of the hearing or trial or the completion of the hearing or trial.

A second approach is to calculate the time from when the case first enters the court system until it comes to hearing or trial or is disposed of. A third possible approach is to examine how long it takes a case to move from the point when the case is ready to proceed to the point of hearing or disposition.

Clearly, these are very different kinds of measures. In the case of the first approach much is beyond the control of the court. A significant proportion of the time taken is attributable to the criminal investigative phase of the process which is generally the responsibility of the police. There are many obvious reasons why delays are involved at this stage of the process.

Similarly, if one takes the second measure — the elapse of time between the first involvement of the court in a case and the hearing — there are many factors involved which contribute to delay. The police are still involved, the prosecution process comes into operation and there is the issue to consider of the ability of the court

to get the case on for a hearing. In indictable cases one must also include the role of the Magistrates' Court in conducting a preliminary hearing into the case to decide whether the person should be committed for trial and, if so, on what charges.

Courts have the greatest control over delays which occur from the time when a case is ready to proceed to a hearing until it is disposed of but to adopt that measure of delay is to take what many people would regard as a highly artificial and relatively meaningless approach to the overall problem. Most people are most interested in how long it takes from the commission of the crime until the matter is resolved by a court or at least in the time taken from the case first entering the court until disposition.

It should also be pointed out that the problems of delay measurement are not purely of a technical nature. One basic difficulty is that not all courts have adequate statistical information about their caseloads and their rates of case processing. Even more fundamental is that some do not readily acknowledge the value of statistical and other forms of information. They regard collection of such information as potentially a threat or at least as an unnecessary burden upon their already stretched resources. Given the elementary significance of adequate, basic statistical information to measurement delay this is a substantial problem.

DEALING WITH DELAY: GENERAL CONSIDERATIONS

A certain amount of delay in the processing of criminal cases is essential not only for reasons of fairness but also efficiency. It takes time to prepare a case adequately. Thoroughness is obviously important to fairness, as it is for efficiency. The key is not delay as such but rather unnecessary delay. At first blush, one might think that the identification of unnecessary delay would be a relatively straightforward matter and that, having identified it, steps could be taken to deal with it. Close analysis, however, reveals that it is far from uncomplicated.

A recent New South Wales initiative provides a good example of the difficulties which can arise. In May this year the Attorney-General's Department released a Discussion Paper on Criminal Procedure. One option floated in the Paper is the abolition of preliminary hearings in indictable criminal cases. The argument in favour of abolition is essentially efficiency; that the main functions performed by preliminary hearings can be achieved by other far cheaper and more efficient means. The counter argument is that far more that efficiency issues are raised by the proposal and that fundamental issues of justice and fairness in the criminal process are involved. Critics of the proposal say that preliminary hearings are crucial to justice because they involve a judicial testing of the prosecution case and an independent assessment of whether an accused person should stand trial. This example points out rather well the sort of difficulty which crops up all the time in the so-called "justice versus efficiency" debate. And rarely are the issues easy to resolve.

Despite the complexities in measuring delay, in sorting necessary from unnecessary delay, and as part of that, separating issues of principle from issues of pure efficiency, it is clear that a number of Australian Courts have significant levels of unnecessary delay in the processing of criminal cases. On the whole, these are the high volume courts of New South Wales and Victoria. The question is what can be done about it? The answer is proper management of the whole system. But before discussing that something should briefly be said about resources. They are crucial to the ability of the courts to deal with delay.

Finance is the life blood of any court system. There must be an adequate supply of money to fund the courts. What constitutes an adequate supply of money is a matter of debate in Australia at present. The AIJA has recently published a pioneering study of the financing of Australian courts[4]. Using the public accounts of the State and Commonwealth Governments recorded in Treasurers' Annual Statements and Estimates and Auditors'-General reports, the authors of the study, Dr Alan Barnard of the Australian National University and Professor Glenn Withers of La Trobe University, have provided annual data on the financing of courts in Australia in the post-war period. The figures include all government expenditure on salaries, salary related expenses and purchases of goods and services and (where identifiable) on building construction and maintenance and on superannuation.

They have provided a fascinating context for their work by including information on total law and order expenditures and the relevant distributions across police court and prison functions. The court and total law and order figures are also contrasted with inflation, population, total public expenditures and GPD in order to assess the relative as well as absolute significance of the data. Thus the Report collects for the first time in Australia a detailed picture of the quantum of court financing.

The most salient findings of the study are that:

- The public accounts data on court finance have been substantially deficient. There is a major need for improved public financial accounting in this area. Some important steps in the right direction have commenced, but they do not yet go far enough and fast enough.
- Contrary to some impressions, the post-war period has seen a substantial increase for the courts in money expenditure, real expenditure, real per capital expenditure and expenditure relative to total public outlays and national output, i.e. the national resources devoted to courts have increased absolutely and relatively.
- Within total law and order outlays the court share has not experienced any long term decline.
- Within the court system, the core courts of general jurisdiction (Supreme, County/District, Magistrates) have been squeezed by the greater burgeoning growth of courts of special jurisdiction and by the administrative "court-like" tribunals.
- The Commonwealth courts have risen to increasingly greater financial prominence, such that Commonwealth court outlays have become larger than in any State except for New South Wales.
- Within the court core (i.e. the courts of general jurisdiction) there has been an increased relative reliance over time upon the intermediate courts i.e. County/District Courts, at the relative expense especially of the Supreme Courts.
- Victoria has been distinctive among the State court systems for its low recorded expenditure per capital on courts, and on total law and order.
- Balancing court-generated direct revenues against court outlays, shows a national recovery rate of about fifty per cent. But there is close to full recovery recorded for Western Australia and very low recovery recorded for the Commonwealth.
- Law and order expenditure now represents around one per cent of GDP and resource provision seems to have risen at least as much as the broad range of indicators of requirements for law and order expenditure e.g. crime, vehicles, business activity, though this need not fully represent changing demands on the system.

The finding that the courts of general jurisdiction, (Supreme, County/District and Magistrates' Courts) have been squeezed by the "great burgeoning growth" of courts of special jurisdiction and by the administrative "court-like" tribunals, will not surprise too many people involved in courts. Nor of course will the rise to financial prominence of the Commonwealth as an operator of courts, as a result of the establishment of the Family and Federal Courts in the 1970's. What will no doubt surprise a number of people, however, is the finding that in the post-war period there has been a substantial increase in real expenditure, real per capital expenditure and

expenditure relative to total public outlays and national output, i.e. the national resources devoted to courts have increased absolutely and relatively. It is also of interest that despite massive recent increases in expenditure on policing, and to a lesser extent on prisons, overall the court share of total law and order outlays has not experienced any long term decline.

These results are important and intriguing but as informed court watchers and those working in courts will know, in order to develop a truly balanced picture of court financing it is vital to consider a much broader range of factors than was considered by Barnard and Withers. I must hasten to add that it was never the intention of the authors nor the AIJA to consider those factors in the first stage of the project. The study took no account of variations in the demands made upon the court system by the community during the study period. It is very likely that since the last War, despite the increases in real overall and per capital expenditure on courts, the demands upon them have increased at a far greater rate. And there is not only the question of volume to consider. No doubt the nature of work done by the courts has changed considerably also. For one thing, many cases seem to have become much more complex and protracted than in the past. And certainly, many Australian courts are dealing with far greater delay problems than in the past.

Building upon its study of the quantum of Australian court finance the AIJA is proceeding to tackle a second phase in this project. The idea is to deal with these important "environmental" factors which must be considered in order to determine whether the levels of court financing are adequate. This will be an ambitous undertaking and will examine, among other things, financial management of courts and will attempt to assess effectiveness and efficiency against the background of a number of goals and objects of the court system. The research proposal is in draft form and if funding can be obtained the work could be underway towards the end of this year. The court resourcing issue is a vital one; this research will add a most valuable dimension to our knowledge in the area. And one of the most important aspects to explore is the increase over time in the criminal case workload of the courts and the role of greatly increased police numbers in the process.

Before diverging on to resources I mentioned the matter of management. The criminal trial process by definition is not a unified, corporate entity. It is a complicated process made up of many institutions, all having very different roles to play in the overall system. This makes any overall management scheme very difficult. More significant perhaps is that good management depends very much on identification of the goals and objectives of the particular institutions or processes in question. That also is difficult in the context of the criminal process. The concepts of justice and fairness are always difficult to come to grips with. And in this context they take precedence over notions such as economy and efficiency.

Nevertheless, in order to improve the overall efficiency of the criminal process a managerial perspective must be adopted. This necessitates being able to develop a systemic view of the system. Somehow one must develop the ability to get a handle on all the institutions, people and processes which play a role in the process and then co-ordinate them so that better results are achieved.

Recent experience, especially in the United States, has shown that a team approach is vital. Senior representatives of all the relevant agencies must be prepared to get together and form working parties to trackle the various problems. Often, a great amount of work is involved and a good deal of patience required.

Experience has also demonstrated that judicial leadership is imperative to the success of any delay reduction programme. The initial impetus for a delay reduction programme may come from the judiciary, the legal profession or government but if a successful programme is to be conducted it must be led by the judiciary.

Once a delay reduction committee or team is assembled it must produce a programme for achieving its objectives. This will normally involve the following features:

- Goal setting for the criminal process.
- Statistical analysis
- Analysis of the causes of delay
- Introduction of caseflow management principles.

The key principles from the United States approach to caseflow management are as follows:

- The court should take early control of the case
- The court should maintain continuous control of the case
- Key events should be scheduled according to prescribed time limits
- Lawyers schedules should be reasonably accommodated
- Events should occur when they are scheduled to occur

It is also clear from the United States experience with delay reduction that the working group must plan carefully for the implementation of its ideas. This will involve a lot of attention to strategy, administrative factors and financial implications.

SOME SPECIFIC, MAJOR INITIATIVES.

This general approach has been taken up in Australia where a project is underway in New South Wales to reduce the backlog and delays in the Common Law Civil Division of the Supreme Court and a similar exercise is being undertaken in relation to indictable criminal cases in Victoria by the Criminal Case Delay Reduction Committee.

In both cases the project committees are chaired by judicial people (in the Victorian case, the Chief Justice, The Hon. Sir McIntosh Young) and they have senior representatives from all the various institutions in the system. Both groups have identified delay as a major problem and have set out methodically to do something about it. Another interesting feature of both projects is that they are "action oriented". These Committees are not intending to produce reports but rather to recommend a whole series of inter-connected reforms and to implement them along the way.

The work of the Victorian Committee, dealing with criminal cases, is presumably of greater interest to this Conference. That Committee is working to implement a caseflow management approach to the processing of criminal cases. It is focusing primarily on the following areas:

- Time standards
- Reducing the County Court backlog
- Listing of cases in the higher courts
- Early identification of guilty pleas
- Committal proceedings
- Computerisation and management information.

The Committee has been in operation just on twelve months and is already making significant inroads into the delay problem, especially in the County Court. The backlog has been reduced, more stringent time standards are being negotiated and more efficient systems are being introduced at the "front end" of the system where the police and the Magistrates' Courts intersect.

The work of these two committees, one in the civil and one in the criminal area, is most encouraging not only for their own jurisdictions, where the delay problem is quite severe, but also for the rest of Australia. Their work will act as models for other courts and court systems interested in reducing delay. Each situation is unique and requires its own particular solution but the general principles and strategies adopted by the New South Wales and Victorian groups have been well tested earlier in countries like the United States and have proved successful in a wide variety of court settings.

CONCLUSION

Australia has a lot of problems to deal with in the next few years, many of them are of an economic and social nature. It has often been thought that while we might have considerable problems in economic and social areas the basic institutions such as Parliament, the Executive and the Judicial systems will just carry on regardless. Speaking only of the judicial system I think it will survive and it is very important that it does but it is under siege at the moment. The main reason is access. Increasingly there is concern that because of delay and cost, access to the courts is a problem.

I believe that there is sometimes a tendency to exaggerate the delay problem but in places like New South Wales and Victoria, and to a lesser extent elsewhere as well, there are problems which must be tackled if the community is to get an appropriate standard of service and if the system is to survive. There are methods and techniques available for doing it. Most of them involve taking a modern managerial approach. This in turn necessitates a marriage between the judicial and managerial cultures. A number of courts are working on this, albeit a little belatedly. We should watch and support their efforts because it is very important work and vital to the long-term health of the judicial system.

NOTES

1. Langbein, J.H., "The Criminal Trial before the Lawyers", **The University of Chicago Law Review,** Vol. 25, No. 2, 1978, pp 263-316, at p. 271.
2. Mr Justice McGarvie, "The Shorter Criminal Trial" Paper delivered to the Supreme Court Judges' Conference, Hobart, 1985, P. 12 (Unpublished).
3. Van Caenegem, R.C., **The Birth of the English Common Law,** Cambridge University Press, 1973.
4. Barnard, A. and Withers, G. **Financing the Australian Courts,** AIJA, 1989.