Reinventing the Courts

The Australian Law Reform Commission has been asked to look at the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before Courts and Tribunals exercising Federal jurisdiction. The inquiry arose from concerns that legal proceedings in Australia are excessively adversarial and that this is having a damaging effect. The aim of the inquiry is to assess whether any changes should be made to practices and procedures in Federal proceedings to address those concerns.

In the light of that inquiry it was particularly appropriate that the Bar Association hosted a seminar on "Reinventing the Courts" on 1 November 1996 as part of the 1996 New South Wales Legal Convention. There were a number of notable speakers including the Honourable Jeff Shaw QC MLC, Attorney General of New South Wales, Mr Alan Rose AO, President of the Australian Law Reform Commission and the Honourable Justice D Mahoney AO, Acting Chief Justice of New South Wales.

It is not possible to reproduce all of the papers which were delivered on the day. Bar News has selected two, in particular, to provide a beneficial insight into the question of reforming the legal system. The first, by the Honourable G L Davies of the Queensland Court of Appeal, describes reforms which have taken place in Queensland as well as affording some insights on the prospect of moving the Australian legal system towards an inquisitorial mode. The second, by his Honour Judge A F Garling of the District Court of New South Wales, provides an illuminating account of the substantial changes which have taken place in that Court in recent years which have had the effect of transforming its civil jurisdiction. Judge Garling's paper provides an account for all practitioners in that jurisdiction of the philosophy behind the radical changes which have taken place. Bret Walker SC, wearing both his Law Council and Bar Association hats, responded to the papers delivered in the morning session, one of which was Justice Davies'. Judge Garling's paper was delivered in the afternoon session.

Justice Reform: A Personal Perspective - The Hon Justice G L Davies *

1. Introduction

There has been a good deal of discussion recently about the adversarial and inquisitorial systems of justice, no doubt in part because of the Australian Law Reform Commission reference on that question. Much of that discussion has been misconceived because it has assumed two opposite mutually exclusive systems. Nothing could be further from the truth. The reality is, as I have said before, rather like a spectrum. Our system is towards the adversarial end, the French, for example, is towards the inquisitorial end and the German is somewhere in the middle. It is ironic that whilst many Australian lawyers would call the German system inquisitorial, the Germans themselves consider it to be adversarial. It all depends on where you stand in the spectrum.

I make this point at the outset for two reasons. The first is that reforms which I have been proposing over the last few years, many of which have been implemented by the Litigation Reform Commission of Queensland, of which I have been Chairman, will move our system towards the middle of that spectrum as I shall endeavour to show this morning. The second is that, even if it were thought desirable to move our system right through to the other end of that spectrum, neither government nor the legal profession would tolerate it because it would require a massive increase in the number of judicial officers and support staff and a corresponding decrease in the number of practising lawyers.

What I have to say this morning is a personal perspective on justice reform, both civil and criminal, although many of my views are reflected in the work of my Commission.

The objects of civil justice reform must be cheaper, quicker and fairer justice. What I have, in the past, called the adversarial imperative, the urge to win rather than to reach a fair resolution of a dispute, stands in the way of those objects and the system which we have had in the past encourages that imperative. Consequently, worthwhile civil justice reform will inevitably make proceedings less adversarial[1].

The primary object of criminal justice reform must be the maintenance or restoration of a balance of interests; on the one hand, of the accused to be treated fairly during the course of investigation, interrogation and trial and, on the other, of the community represented by the prosecuting authority, primarily in ensuring that criminals are brought to justice. And it seems to me that some of the rules once thought necessary to protect accused persons from unfairness need to be reconsidered in the light of changes which have occurred in the increased educational level in the community, in the means of ensuring more reliable evidence and in the greater independence of prosecuting authorities. There is now, in my view, an imbalance in favour of accused persons and

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* Judge of Appeal, Court of Appeal, Queensland, Australia.

1. I have explored the reasons for this in previous papers. See, for example, "A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale", G L Davies (1996) 5 JJA 201.

against the interests of the community. The proposals which I shall mention are aimed at restoring that balance[2].

2. Civil Justice Reform

My own view, and the rationale of reforms until recently implemented and proposed by my Commission, is that the objects to which I have referred - cheaper, quicker and fairer civil justice - can be achieved only if each of four specific objects is achieved.

First, the existing litigation process must be simplified and accelerated.

Secondly, alternative means must be provided for resolving disputes and, in appropriate cases, parties encouraged to use them.

Thirdly, the existing costs system must be changed in two respects. The first is to abandon a system which fixes costs by reference to the time spent or the number of items of service rendered, for that is to reward incompetence, inefficiency, over-servicing and overcharging, in favour of one which fixes costs by reference to the amount of work reasonably required to be done. The second is to make costs more predictable so that a potential litigant may obtain a firm quote before embarking upon litigation.

The fourth, and perhaps most difficult to achieve, is to change the existing mindset of many litigation lawyers that their role is to win the case for their client, and of many judges that their role is to merely decide that case; to one that it is the role of each to facilitate resolution of a dispute in the fairest way which, in many cases, will not be by litigation.

I propose first to say something about how I would accomplish those objects and how my Commission sought to do so. But I emphasise that I do not think that the civil dispute system can be made quicker, cheaper and fairer unless all of those objects are pursued and, at least in part, achieved[3].

(a) Simplifying and accelerating the existing litigation process

Two related features of our traditional litigation system work together against its simplification. One is the encouragement it gives to the adversarial imperative; it is designed along the lines of trial by battle. The other is the encouragement it gives to leaving no stone unturned; for if you leave one unturned and your opponent does not, you may lose the case and your client may sue you. Together these features encourage the contesting of too many issues, the discovery of too many documents and a huge amount of duplication of work by opposing lawyers.

The first way in which my commission sought to overcome these problems was by tightening up the pleadings rules; in particular to prevent one party from simply denying or not admitting the allegations of the other. Under the Commission's proposal, if you do not admit an allegation, you must state positively that it is untrue or that you do not know whether it is true or not. In complex cases parties should be required to agree upon a statement of issues; and should be compelled, on pain of substantial costs orders, to abandon those issues kept alive merely for some forensic advantage.

Secondly, we sought to limit discovery. Our belief after talking to many solicitors was that, except in fairly simple cases, the discovery process was the single most expensive aspect of the litigation. And the *Peruvian Guano* test, together with the no-stone-unturned mentality, often resulted in over discovery. Moreover, in some cases discovery was deliberately used as an instrument of oppression by a richer litigant upon a poorer one. We have abandoned the *Peruvian Guano* test in favour of one requiring discovery only of documents directly relevant to an issue in the proceeding. Solicitors say that the change has worked well.

A third way in which we have sought to simplify the process by preventing duplication, at the same time reducing the element of surprise, is by requiring parties, as part of the discovery process, to disclose to one another the names and addresses of relevant witnesses of whom they know. This does not impose any obligation on either party to go and search for witnesses but it imposes a continuing obligation to disclose relevant known witnesses as they find them.

Case management is the other major tool now used in many jurisdictions in Australia, including my own, to simplify and accelerate the litigation process. Whilst I am generally in favour of case management, and my Commission has been instrumental in developing rules for it, there is, I believe, a danger in individual management of cases, particularly smaller ones, that it will increase rather than reduce costs. The extent to which cases are individually managed during the pre-trial process should reflect their complexity and size. But with that qualification, individual case management, especially where it is by the judge allocated to try the action, can be very effective in reducing the issues in dispute and the evidence to be called and in accelerating the time between issue of proceedings and trial.

There should be no such concern that case management at trial will increase costs. My Commission earlier this year produced draft rules for case management at trial, that is provisions allowing a trial judge to control the manner and extent of evidence; whether evidence should be given orally or in writing, how many witnesses may be called on any issue,

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2. Nothing in what I say, however, should be construed as limiting the function of courts to the fulfilment of these objects; it includes the definition and development of the law and the maintenance of the rule of law.
3. I do not propose, except in passing, to say anything about the effect which the use of modern technology will have in the achievement of these objects. It is substantial but is outside the scope of this paper.

whether, and if so, how examination-in-chief or cross-examination should be limited; and the manner and extent of submissions. These were generally welcomed by the profession.

There are a number of less extensive changes which we have made which will nevertheless simplify and reduce the cost of the litigation process. We have developed rules to enable many matters to be determined entirely on the papers, that is by sending in written evidence and submissions without the need for parties or lawyers to come to court. We have implemented rules enabling evidence and submissions to be made by videolink or telephone. We have implemented rules enabling all court documents to be filed by post and we proposed a scheme for electronic filing of documents.

Two more controversial proposals, one of them already in force, complete our reforms in this area[4]. The first is a rule giving the court power to dispense with rules of evidence where these would cause unnecessary expense or delay. This is now commonly used and I have heard no complaints about it.

On the contrary, we received a great deal of opposition from the profession to our proposal for court-appointed experts. I suspect that this was at least partly because of two misunderstandings about the proposal; the first, that the court might have the opinion of only one expert when there were two opposing views fairly open; the second, that the court expert would be appointed after the parties had appointed theirs and consequently too late to effect any savings in costs.

As to the first of these, it was never intended that the court should be limited to the appointment of only one expert. If it appeared that there was a genuine difference in views then two such experts would be appointed, directed to confer and to produce a joint report stating where they agree, where they disagree, and why.

Secondly, the Commission was conscious of the need, in many cases, to appoint experts well before litigation commences. Consequently our proposal included legislative provisions enabling parties to a dispute to agree upon an expert or more than one expert and to apply to the court for their appointment before litigation commenced; with the consequence that, if litigation did commence, those persons would be court-appointed experts in the trial. And it must be remembered that cost saving is not the only object of this proposal. It is also to overcome the adversarial nature of expert evidence, a proposition which can hardly be denied.

I turn now to the second of the objects to which I referred earlier.

4. This is not strictly correct. Some of the reforms discussed under the next heading will also have this effect. There is inevitably overlapping and the inclusion of some reforms under one heading rather than another may be somewhat arbitrary.

(b) Providing alternative means for resolving disputes and encouraging their use

An informed agreement will often be the best resolution of a dispute, not least because it will be one chosen by the parties. It is important that, within the court system, there are a number of ways in which that can be achieved.

The most important of these is mediation. Because you are all familiar with its virtues I wish to make only two points about it. The first is that, whilst I see nothing wrong with private enterprise mediation, if that is what the parties want, I think it important that mediation also be part of the court system as it is in my State and I think yours. Parties to a dispute will often have more confidence in a process which they know is part of the court system. My second point is that, because some disputes are best resolved by agreement before litigation commences and adversarial attitudes have hardened, the court system of mediation should be available to parties to a dispute before litigation has commenced. The scheme which my Commission has developed enables that to be done.

Sometimes, as we all know, a party to a dispute may need to have pointed out, by some objective means, the weaknesses of its case, the strengths of its opponent's case, and how a court is likely to resolve the dispute before that party will make a realistic assessment. Consequently, case appraisal, arbitration and the mini trial, all of which are I think offered in your system and in mine are important aids to dispute resolution by informed agreement. But it is important that some of these should also be available, within the court system, to parties to a dispute before litigation has commenced and the scheme developed by my Commission allows this to be done.

For a number of reasons, some of them having no apparent legal basis, the resolution by a court of one of a number of questions in a dispute will result in the parties reaching agreement on the rest. There is therefore much to be said for encouraging that course. My Commission initiated two reforms designed to enable and encourage that to be done where that is possible at relatively little expense. One was to widen the existing provisions providing for the trial of separate issues. The other was to enable a judge, on the hearing of a summary judgment application, to decide any question finally even if summary judgment is refused.

Neither the changes to which I have referred under the first heading above nor those to the costs system to which I shall shortly refer will be enough to bring the costs of small cases within the means of many who would wish to litigate them. It is therefore important, I think, that there be a cheaper alternative trial system for those cases. The Small Claims Tribunal provides a useful model for this. Based on that model my Commission developed a statutory scheme pursuant to which parties to any action in the Magistrates Court could agree or the magistrate, on the application of either party, could, in his or her discretion, decide to adopt a process which is a mixture of mediation and investigatory adjudication

without the need to adhere to rules of evidence. The proceedings would be shortened and the costs accordingly reduced.

In consequence of the changes which I have mentioned so far, litigation will be less adversarial. Parties will not have the same opportunity to contest irrelevant issues, conceal relevant witnesses, shop around for witnesses, delay or unnecessarily build up costs. Courts will be more likely to find the true facts; and they will generally have greater, and the parties less, control over the pace and shape of the dispute resolution process. The changes will also encourage the use of dispute resolution procedures which are even less adversarial than litigation will become.

I am inclined to think that these changes will take our system about as far along the path away from the adversarial end of the spectrum as one can go without requiring government to incur substantially increased recurring expenditure. For example, to take fact gathering out of the hands of the parties and place it in the hands of the court, as occurs in many continental systems, would require a massive increase in court resources, the cost of which governments are unlikely to accept.

I turn now to costs.

(c) A new costs system

May I, at the outset, explain my concern. It is not that lawyers' fees are generally too high for the work which they do. I do not believe that generally either the rate at which lawyers are paid is too high or the incomes of lawyers are too high. My main concern is rather that our system in general and our costs system in particular discourage efficiency and, on the contrary, offer incentives to inefficiency and over-servicing. The related features to which I referred earlier, the encouragement which our system gives to the adversarial imperative and the encouragement which it gives to leaving no stone unturned are powerful disincentives to efficient and economical conduct of a case. A costs system which allows lawyers to charge either by time spent or items of work done offers an additional disincentive. Notwithstanding the changes which I have proposed and my Commission made to the system, these disincentives cannot be overcome without also changing the costs system so that it is based on the amount of work which should be done rather than on the amount of work which is in fact done. Moreover, where costs are based on the amount of work in fact done, most litigants have no way of judging how much of the work done was worthwhile or, indeed, how much of the work charged for was actually done.

My second concern is that the existing costs system makes costs so unpredictable. A client should be able to obtain a firm quote from his or her lawyer on the basis of the estimated length of trial with an additional estimate for each extra day of trial.

Both of my concerns would be answered by a fixed costs system. Prima facie costs, both party and party and solicitor and client could be fixed by a scale. This occurs in some foreign systems and has existed in some courts of limited jurisdiction in Australia.

One version of this would be to classify actions into categories by reference both to amount involved and complexity with a separate scale for each category; the scale in each case fixing a lump sum fee for each stage of the action - from instructions to sue or defend to issue of proceedings, from issue of proceedings to close of pleadings, from close of pleadings to trial and for trial. It must be accepted, of course, that such a scale would in some cases result in fees which were either unfairly high or unfairly low. There therefore needs to be a mechanism by which application may be made to a court assessor for variation of the amount, either up or down, because of the greater complexity (or simplicity) or the greater (or lesser) volume of work. The court assessor should be a person skilled in costs assessing such as a practising or retired litigation solicitor or a practising or retired costs assessor.

Moreover, solicitors and their clients should be able to contract out of the scale for solicitor and client costs. The only qualification which I would make to this would be that the client should first be fully informed. This may be unnecessary in the case of repeat litigants such as insurance companies or financiers but is undoubtedly necessary in the case of first time litigants. Litigants should know what the scale fee would be before they agree to pay on some other basis. They should know that there are other lawyers, and who those lawyers are, who would conduct the case for them at the scale fee. And even where a client agrees to pay on an hourly or item basis he or she should be given an estimate of total cost with a right to a review of costs charged if they are substantially in excess of the estimate. Of course, whatever agreement may be made with respect to solicitor and client costs cannot affect the calculation of party and party costs and the client should also know what that difference is likely to be before making the agreement.

Scales such as I have envisaged would not result in any reduction of the fees earned by honest, competent and efficient lawyers. Nor should they. Indeed, they should be based on the fees which would be earned by such lawyers in a procedural system of the kind I have outlined. What they would do, primarily, is ensure that the incompetent or inefficient lawyer, or the lawyer who over-services, is not paid for incompetence, inefficiency or over-servicing. They would also make costs predictable and enable a lawyer to give a firm quote at the time of taking instructions.

There is one other aspect of costs, which I would call incentive costs, which I think is worth considering and which I will consider under the following heading, to which I now turn.

(d) Changing the mindset of lawyers and judges

We are all, practising lawyers and judges, inclined to see ourselves as litigators. The title of this morning's session, litigation reform, is some indication of this. What we need to

do, to make the necessary change in thinking, is to see ourselves as dispute resolvers, litigation by trial being one of the means, but only that of last resort, for achieving that resolution. We need to make this change because that is what the public whom we serve expect and are entitled to expect from us - the resolution of their disputes at a reasonable cost in a fair way.

There are several impediments to that change. The first is our training. From the cradle of the university we are taught about legal rights, how they are established by proof in our system and how the skills of advocacy enable us to establish them.

I do not criticise that teaching as far as it goes. It is necessary to know your clients' rights in order to advise them what is in their best interests; and, in the end, courts must uphold rights. But you also need to know that your clients' best interests may not be served by your unqualified pursuit of their legal rights or, more accurately, your perception of them which, for factual or legal reasons, may not be correct. You need to know, realistically, where those interests lie.

Your client's financial interest may best be served by a negotiated solution because of the desirability of getting or maintaining a good relationship with the opponent. And your client's interests may be best served by a solution different from your perception of the correct legal one. It is necessary to look at the wider picture of your client's business or personality including his or her relationship with the opponent in order to see where those interests lie. And of course the cost to your client, not only the legal cost but that of the time lost and anxiety caused by the dispute are factors which must be considered. The skills necessary to understand these questions and to achieve your client's best interests in every case need to be acquired and should be taught.

There are also psychological inhibitions upon this change. One is a natural resistance which we all have to change if it affects the way we do things, that resistance being all the greater if it requires us to acquire new skills. And the older we get the less we like it.

A more specific inhibition is the adversarial imperative. It is difficult to convert a warrior into a pacifist. That is not quite what I have in mind but it makes my point. Litigation is about winning. Dispute resolution should be about finding the best solution to a dispute; and what may be in your client's best interest may also be in the opponent's.

I said earlier I thought that of the four objects which, in my view, must be achieved to make dispute resolution cheaper, quicker and fairer, this might be the most difficult to achieve. And I think that the greatest problem is the adversarial imperative. That is not to say that there aren't many sensible lawyers who seek to resolve disputes by agreement at an early stage. My experience has been that those who habitually do so are generally the best and the most successful. But there are still many, far too many, who see their role, from the time they are engaged, as litigating for their clients, often with exaggerated views of what that litigation will achieve, encouraging rather than discouraging an adversarial attitude in their clients, and consequently often causing their clients considerable harm.

I do not intend to exclude judges from my criticism, for the adversarial imperative affects many of them too. Many of them do not see their function as the resolution of the dispute before them but as, in the interlocutory phase, getting the matter ready for trial and, at the trial phase, hearing it until judgment.

What can be done about this? A broader approach to legal training must be taken in the universities. And both practising lawyers and judges should evolve continuing education courses to enable them to perceive and perform a wider role as dispute resolvers[5]. I would also favour costs incentives to encourage lawyers to use alternative dispute resolution and other cost and time saving procedures and, more generally, to obtain an early resolution of a dispute. There is a good deal to be said, in my view, for the payment of a fee uplift of up to 100% to a lawyer whose skill and efficiency has enabled a client to resolve a dispute reasonably and quickly, and consequently at a substantial costs saving; the percentage uplift should be determined by the court assessor depending on the stage at which the dispute is resolved and the quality of the work done.

Some lawyers in the United States have found a new market for their services in implementing for their clients programs designed to enable them to avoid or quickly resolve disputes. That is a worthwhile cause as well as a remuneration field of activity. Lawyers should be expert in dispute prevention at least in the kinds of commercial disputes which commonly end in litigation.

(e) Civil litigation in jeopardy

The judiciary and the legal profession, together with government, have failed the public in their expectation that their disputes will be resolved at a reasonable cost in a fair way. That expectation cannot be fulfilled if the only or even the primary way of achieving resolution is by trial. Although trial may establish the parties' rights, that may not be in either party's interests and it may be at a cost which neither can afford.

Unless we cheapen the means of resolution by trial, provide more interest based solutions to disputes, make costs transparently fair and reasonably predictable and become active in promoting a wider range of dispute resolution services we will all become increasingly irrelevant to the process of civil dispute resolution.

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5. I do not mean to imply that judges should themselves be involved in the resolution of disputes otherwise than by trial; but they should be aware of the advantages and of the means of doing so and should, where appropriate, facilitate those means.

3. Criminal Justice Reform

The object here, as I have said, is the maintenance of a fair balance between the interests of a person suspected or accused of a crime and the public interest in having criminals brought to justice. Whether such a balance is being maintained is a subject which lawyers almost never discuss. I propose to mention four areas in which, in particular, I think there is an imbalance in favour of accused persons which should be redressed.

The first is the right to silence. The question is not, of course, the right of persons suspected or accused of crimes to decline to answer questions or to decline to give evidence. Those rights are absolute. It is whether, at trial, a jury should be able to draw such inferences from that failure as appear proper. I suspect that most non-lawyers would see nothing wrong with that. But the prohibition against the drawing of such inferences is defended by some lawyers with religious fervour.

The second issue involves pre-trial disclosure. There does not seem to be any dispute that the prosecution should disclose its case, including its witness statements, to an accused before trial. Why should not an accused do likewise? Of course, that cannot be compelled; nor should it. But the question again is whether the jury should be able to draw such inferences from the failure to do so as appears proper.

The third issue involves the discretionary exclusion of evidence illegally or improperly obtained. The main object of this discretion is to mark the court's disapproval of illegal or improper conduct by those whose duty it is to enforce the law. But it may be questioned whether the exercise of this discretion is effective to do that or to eliminate unfairness or whether, on the contrary, its effect is merely to punish the public for the wrongs of the police. In a case where, for example, an electronically recorded admission of guilt is excluded on the basis that it was illegally or improperly obtained, especially where that is the only or principal evidence against an accused, it is difficult not to think that the public are made to suffer because the police have acted wrongly. That impression is often strengthened by the knowledge that the police are unlikely to be punished for their conduct. Is there an alternative which would allow such evidence to be admitted but ensure that the offending police are punished?

The fourth issue is whether committals should be retained. Full committals are, in my State, now less common than they were but the question is whether they should be retained at all. Is it necessary, given the independence of a director of prosecutions, that there be such a proceeding; and does it do any more than provide, at considerable expense, an opportunity for the defence to have a practice run?

My purpose this morning is not to discuss these issues in depth, nor to attempt to provide final solutions to the questions which they raise. It is to provoke wider discussion of important issues which appear to be ignored by lawyers.

(a) The right to silence

The term is a misnomer. The so-called right is an immunity against the judge or prosecutor commenting on the failure of an accused, either when being interviewed by police or at trial, to answer the allegations made against him or her or the jury drawing an adverse inference from that failure. I am unable to find a rational explanation for the current rule. I tend to agree with Jeremy Bentham that an innocent person's highest interest and most ardent wish would surely be "to dissipate the cloud which surrounds his conduct and give every explanation which may set it in its true light". Moreover, it is generally not the weak and unwary suspect who is likely to exploit that right but rather the strong and cunning practised offender.

Whilst courts in recent years have made a number of inroads into the rule[6] I think we need wholesale legislative change. Somewhat surprisingly, but spurred on by their terrorism problems, the British have taken this step. Their legislation deals with the question both at the interrogation stage and in court[7].

In the first of these situations, where an accused fails to mention a fact later relied on in his or her defence in circumstances in which the accused ought reasonably to have mentioned it or fails to account for the presence of an object or substance or mark which a police officer reasonably believes may be attributable to the participation of the accused in the commission of an offence, or fails to account for his or her presence at a particular place where a police officer reasonably believes that that presence may be attributable to that person's participation in the commission of an offence, the court may draw any proper inferences from any such failure.

In court, at the conclusion of evidence for the prosecution, the judge may now tell the accused not only that he or she may give evidence, but that if the choice is made not to give evidence the jury may be asked to draw such inferences from the failure to do so as appear proper. One result of this change, I am told, is that now many more accused persons give evidence in their own defence.

What can be wrong with these changes if procedural fairness is accorded to the accused at all times? Indeed it is said, by those more experienced in the criminal law than I, that juries will often draw such inferences even when told they cannot do so.

I wonder even whether we should go further than this. Why should not a judge, in some cases in which an accused declines to give evidence, nevertheless ask him or her some questions. The accused could not, of course, be compelled to

6. *Weissensteiner v The Queen* (1993) 178 CLR 217 being the most significant.
7. *Criminal Justice and Public Order Act* 1994, which came into force in April last year.

answer them but shouldn't the jury be able to draw such inferences as are proper from the failure to do so?

None of these changes would affect either the burden or the standard of proof. At present the so-called right to silence, it seems to me, remains a sanctuary for the sophisticated or practised offender. It no longer serves, if it ever did, the interests of the weak, the confused or the nervous who are the least likely to have the presence of mind to assert the right.

(b) Disclosure by an accused

It is now accepted that the prosecution should not only particularise its case against an accused, but should also provide the accused with statements of witnesses it proposes to call. Why should not the accused reciprocate? That question has also recently been addressed by the British[8]. Under their legislation, where the prosecution has given specified documents to the accused, the accused must give a written statement to the court and the prosecutor setting out in general terms the nature of the accused's defence, indicating the matters on which the accused takes issue with the prosecution and setting out, in the case of each such matter, the reason why issue is taken. Where an alibi is relied on, particulars of the alibi must be given, as in most Australian jurisdictions. If the accused fails to give such a statement, sets out inconsistent defences in the statement or puts forward at trial a defence which is different from any defence set out in the statement, the judge, or the prosecutor by leave, may make any comment as appears appropriate and the jury may draw such inferences as appear to be proper. Except with respect to alibi these provisions do not require disclosure of witnesses. I cannot see why an accused person should not have to disclose at least the names and addresses of the witnesses he or she proposes to call. That would at least give the prosecution an opportunity to interview them.

An accused person should retain the benefit of proof against him or her beyond reasonable doubt. But should an accused also be able to maintain an element of surprise? Apart from alibi, that is certainly the present system.

(c) Evidence illegally or improperly obtained

The admissibility of such evidence most frequently arises in the context of confessional evidence. But it may arise in search and seizure cases or where law enforcement officers may have participated in an offence[9].

I propose to discuss only the first of these, that is confessional evidence, although a good deal of what I say will apply also the others. The discretionary exclusion of confessional evidence illegally or improperly obtained arises most frequently these days in a context in which the evidence has been electronically recorded so that, unlike situations which arose frequently in the past, there is little likelihood that there can be any real dispute about the reliability of the evidence; interception devices are frequently used, undercover police and others are frequently "wired for sound" and most police interviews whether at the police station or in the field are now electronically recorded. Consequently, in this context, the question of fabrication of evidence, once common, is now rare.

Why should reliable confessional evidence ever be excluded? It is difficult to see what can be unfair about it in the context of the investigation and prosecution of crime, especially serious crime. It is not a game of cricket. The only serious objection can be that referred to earlier; that it is necessary to mark the court's disapproval of illegal or improper conduct by those whose duty it is to enforce the law and thereby to discourage such conduct. But there is not the slightest evidence that excluding evidence illegally or improperly obtained does discourage such conduct. Statistical studies in the United States indicate rather that it does not[10]. On the other hand, exclusion can often result in a plainly guilty person going free.

Courts can hardly be blamed for attempting, however vainly, to ensure that law enforcement officers themselves obey the law and rules of propriety where there are no other effective means of ensuring this. It seems that police are rarely punished for their transgressions[11]. What is needed is a statutory code of conduct for law enforcement officers and power given to an independent body to ensure its enforcement. If that were done there would be no need for courts to exclude apparently reliable confessional evidence in order to attempt to deter illegality or impropriety by police.

(d) Committals

In my own State most committals are now a formality. But there are still some which occupy a great deal of the time of the Magistrates Court, not because there is any real question that there might not be a prima facie case, but because the defence team would like a trial run, to ask the questions they would not risk asking in front of the jury.

An independent director of prosecutions should not prosecute unless satisfied that there is a prima facie case. I can see little point in having the need for some further person determine the same question. But if that solution is thought too radical then why should it not be sufficient for the determination to be made on the papers with a discretion in exceptional cases to hear evidence?

I have not selected the four questions which I have just

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8. *Criminal Procedure and Investigations Act* 1996, to come into force next year.
9. As in *Ridgeway v The Queen* (1995) 184 CLR 19. See also the case where there has been illegality in the apprehension of an offender, as in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42.
10. Schlesinger, *Exclusionary Injustice*, Marcel Dekker Inc., at 50 ff.
11. See, for example, *Ridgeway* supra n 7.

discussed because I think that they are the only questions requiring discussion on this topic. A number of the reforms to which I have referred in the civil area could also be made here; court-appointed experts and the rule allowing judges to dispense with the rules of evidence are obvious examples. No doubt there are others. But each of the four I have mentioned appears to raise a question of imbalance; at the very least they require serious consideration. The aim must be, as I have said, to find the appropriate balance. No doubt many defence lawyers would say that we have it now. I doubt that there are many non-lawyers who would agree.

4. Conclusion

It is understandable that criminal lawyers are even more adversarial than civil lawyers. There is usually no other solution to the dispute than conviction or acquittal. But that does not mean that the criminal justice system must remain as adversarial as it is; to the point where an accused may, without fear of adverse comment, refuse to answer questions or explain incriminating marks or explain his presence at the scene of the crime and may conceal his defence, if any, until all of the prosecution evidence has been given. And, as I have already pointed out, there is no possible justification for the civil justice system remaining as adversarial as it has been.

My own Commission, which has embarked on changing all that, has been recently abolished. In some other States, and recently in the federal area, there appear to be bodies capable of pursuing this task in the civil area. But I can see no sign of criminal justice reform. Unless both are pursued, courts, lawyers and government will fail to fulfil the legitimate expectations of the community we serve. ❑

Litigation Reform: The New South Wales Experience

- His Honour Judge A F Garling, District Court of New South Wales

On 1 February 1994 the District Court of New South Wales in its Sydney Civil Jurisdiction had a median delay between filing of the Praecipe for Trial and disposition by a Judge of 50.8 months. On 1 February 1997 the District Court in its Sydney Civil Jurisdiction will have no backlog. All cases which were commenced prior to 1 January 1996 and in which a Praecipe for Trial has been filed will have either been heard or they are not ready for hearing despite the Court's efforts. Those cases not ready to proceed should number no more than 100 cases. Many of these are infant cases in which the plaintiff's injuries have not stabilised.

The Court has a case management system for all cases commenced on or after 1 January 1996 which offers a hearing date within a 12 month period of the filing of the Statement of Claim. The Court still has some backlog in some country areas and in Sydney West. Steps are being taken to quickly dispose of that backlog. The Chief Judge has already invited those regional courts with long cases to transfer them to Sydney for immediate hearing. Additional sittings have been allocated to the country next year. Audits are being carried out in Sydney West and country areas to find out how many cases are still in the list and this will allow the Court to allocate additional sittings. The Chief Judge has already allocated sittings in January 1997 to some of the larger centres which have a backlog. These steps should ensure that any backlog outside Sydney will quickly be eliminated.

Prior to 1992 the Court lists were in an unacceptable state. It was taking many years for cases to come on for hearing. The profession had developed a way of preparing cases which reflected the long delays within the Court system. It was not only the District Court but also the Supreme Court and other courts where there were long delays. The profession, not unnaturally, developed a negative attitude towards the preparation of cases. In the District Court a Praecipe for Trial would be filed at an early stage and nothing further would be done to prepare the case for hearing. Eventually, a call-over would be held, perhaps many call-overs would be held over a period of time. It was not uncommon to go to a call-over only to be told that no hearing dates were available or to be allocated a hearing date a year or more in advance. It was not uncommon, having had a hearing date allocated well in advance, to then be "not reached" and to have a further hearing date allocated many, many months after the not reached hearing date. It is a matter of record that numerous cases were neglected and many were allowed to be stood over generally. They fell into a hole and nothing further was done.

I well recall in those desperate times the birth of the arbitration system. The profession really had to do something to get cases heard and the Law Society of New South Wales, along with Ted O'Grady and others, worked extremely hard in developing the arbitration system and then bringing in the Philadelphia arbitration system. The District Court co-operated with the Law Society and the Attorney-General's Department and there was brought into place a system which allowed, in some cases, the speedy disposal of a case. Unfortunately, where a re-hearing was requested, the case then went back to take its normal place in the list and it often would not receive a hearing date for some years after the arbitration hearing. There was also set up in the District Court a type of specialist managed list in which certain cases were managed