

As at 27 August 1998

LAW COUNCIL OF AUSTRALIA

REFORM OF PRE-TRIAL CRIMINAL PROCEDURE PRINCIPLES

Criminal procedure is an area of great public importance. The Law Council has formulated, in summary form, basic principles for reform of the area of pre-trial criminal procedure.¹ It proposes a framework for analysis and change in all Australian jurisdictions.

A. Introduction

1. While modifications have been made to the adversarial nature of litigation in civil proceedings, there are important distinctions between civil and criminal proceedings.
2. Criminal procedure is, and should remain, fundamentally accusatorial (that is, the state accuses the citizen of a criminal offence and must prove guilt without the assistance of the accused)
3. Such a procedural framework is justified by a number of considerations, including:
 - (a) the imbalance of power and resources between the state and the accused;
 - (b) the desire to minimise the risk of wrongly convicting an innocent accused;
and
 - (c) the unfairness in requiring the accused to assist in proving his or her guilt.

¹ For the purposes of this document, pre-trial procedure refers to that part of the criminal process which begins with the charge of the accused and ends when a trial commences or a plea of guilty is entered.

In consequence of these considerations, the accused is presumed innocent and guilt must be proved beyond reasonable doubt.

4. While there is a public interest in improving the efficiency of criminal proceedings, this must proceed in the context of the accusatorial framework.
5. Within that framework, there is more scope for efficiency improvements by proper regulation of the prosecution than by abrogation of basic rights of the accused.

B. Prosecution Disclosure

6. One aspect of the accusatorial process is that, before trial, the accused should be informed of:
 - (a) the substance of the accusation; and
 - (b) the evidence on which the accusation is based.
7. In respect of disclosure of the accusation, it must be fully particularised, so that the accused knows precisely the nature of the accusation.
8. In respect of the evidence on which the accusation is based, the prosecution must disclose, at a reasonable time before the trial, the totality of the evidence on which it intends to rely in proof of the accusation. Evidence not disclosed at that time should only be admitted in exceptional circumstances in the interests of justice.² (Additional disclosure obligations are discussed in paragraph 12.)

C. Facilitating Proof

9. Prosecution disclosure of the evidence on which it intends to rely in proof of the accusation does not preclude the development of procedures facilitating proof. It makes possible the development of such procedures and the efficiency improvements which they offer. For example, the *Evidence Act 1995* (Cth and

² An example of an exceptional circumstance would be where the evidence was not known to the investigating authorities or prosecution.

NSW) facilitates proof of voluminous or complex documents by admission of a summary of the documents where:

- (a) notice has been given; and
- (b) the parties have been given "a reasonable opportunity to examine or copy the documents in question".³

Subject to proper notice and disclosure requirements, the prosecution may apply a pre-trial hearing for a dispensation from strict proof. It may be anticipated that, unless the defence showed that a genuine dispute existed about the matters sought to be proved, or the mode of proof, the dispensation would be granted and the summary admitted into evidence. The defence would still be fully entitled to dispute the matters sought to be proved at trial (that is, the dispensation would extend only to the mode of proof and would not affect the burden of proof).

- 10. Similar procedures could be developed to facilitate proof of complex transactions, proof of a continuing course of conduct, proof of a negative in relation to documented conduct, proof of technical and scientific matters, and the like.

D. Defence inquiry

- 11. In an accusatorial system, the accused must be given a realistic opportunity to respond to the accusation, both in terms of testing prosecution evidence and obtaining defence evidence. Pre-trial procedures must facilitate defence inquiry.
- 12. Given the limited resources of the accused, and the desire to minimise the risk of convicting an innocent person, it is essential that the prosecution (and investigating authorities) assist in obtaining, and then disclosing, evidence which may help the accused.⁴ Reliance on ethical rules and prosecution guidelines is inadequate. Obligations should be imposed to require:

³ See s 50. Another requirement (s 50(1)(b)) is that the court must be "satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume and complexity of the documents in question". Procedural safeguards are provided in ss 166-9. Another example of a facilitative provision is s 25(4).

⁴ The *Criminal Procedure and Investigations Act 1996* (UK) and associated Code of Practice provides one model for proper regulation of this area of disclosure.

- (a) investigating authorities to pursue all reasonable lines of inquiry, whether these point towards or away for the suspect/accused;
 - (b) investigating authorities to retain and disclose to the prosecution all material which may be relevant to the investigation;
 - (c) a reasonable time before trial, and continuing thereafter, prosecution disclosure to the defence of all material held by the prosecution or the investigating authorities which may be relevant to the accusation or the investigating of the accusation, subject to any claim for immunity; and
 - (d) if there has been defence disclosure, prosecution disclosure to the defence of all material held by the prosecution or the investigating authorities which may be relevant to the matters disclosed by the defence.
13. One pre-trial procedure which facilitates defence inquiry is the committal proceeding. While one of the purposes of a committal proceeding is determining whether there is sufficient evidence to justify putting the accused to trial, it also serves the purposes of giving the defence:
- (a) "the opportunity of gaining relatively precise knowledge of the [prosecution] case"⁵;
 - (b) an opportunity before the trial to test prosecution witnesses by cross-examination⁶; and
 - (c) an opportunity before trial to question prosecution witnesses with a view to eliciting evidence which may assist the defence at trial⁷.

Consequently, committal proceedings should be retained.⁸

14. In the absence of a full committal proceeding, the accused should be entitled to question prosecution witnesses in a non-curial context a reasonable time before trial.

⁵ *Barton v R* (1980) 147 CLR 75, Stephen J at 105.

⁶ *Ibid.*

⁷ *R v Harry; ex parte Eastway* (1985) 39 SASR 203, King CJ at 208.

⁸ Other reasons for their retention exist, including the fact that they may result in an early plea of guilty.

E. Legal Assistance

15. Since the criminal process is both adversarial and accusatorial, it cannot proceed efficiently unless the accused receives timely and competent legal assistance.⁹ An unrepresented accused will be at a substantial disadvantage and criminal proceedings in respect of such an unrepresented accused will be presumptively unfair.¹⁰

16. A court should be able to order, on appropriate conditions, the Attorney-General to provide legal assistance to the accused for any criminal proceeding¹¹ if the accused is unable to afford private legal representation through no fault on his or her part. The criminal proceeding should be adjourned until the legal assistance is provided.¹²

F. Defence Disclosure

17. The public interest in improving the efficiency of criminal proceedings justifies consideration of some degree of pre-trial defence disclosure, whether in the form of answers to questions, responses to notices to admit, disclosure of any defence to the accusation or disclosure of defence evidence to be adduced at trial.

18. However, an important component of the accusatorial process is the accused person's right to silence. If the state must prove guilt without the assistance of the accused, the accused should not be compelled to answer questions, make admissions, disclose a defence or disclose evidence.¹³ Equally, the accused should not be penalised for exercising the right.¹⁴ Consequently:

- (a) the defence should not be precluded from relying on a defence or evidence which was not disclosed pre-trial; and
- (b) adverse inferences should never be drawn from exercise of the right.

⁹ It is implicit that there should be continuity of legal assistance throughout the pre-trial/trial process.

¹⁰ Cf *Dietrich v The Queen* (1992) 177 CLR 292.

¹¹ For the purposes of this document, a criminal proceeding is defined to mean any proceeding consequent upon, or in relation to, a charge, which charge renders the person accused liable to a sentence of imprisonment. It will include a committal proceeding.

¹² Institutional reliance on pre-bono services provided by the legal profession is not, and cannot be, a substitute for property funded legal assistance.

¹³ Cf article 14(3)(g) International Covenant on Civil and Political Rights: article 6 European Convention on Human Rights: rule 42A Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia; article 26(6)(a)(i) Draft Statute for the International Criminal Court.

¹⁴ cf *Perry v The Queen* (1991) 173 CLR 96 at 99.

19. These conclusions do not prevent the development of procedures designed to facilitate, and encourage, pre-trial defence disclosure. Incentives to encourage pre-trial disclosure might include:
- (a) first ensuring full prosecution disclosure;
 - (b) encouraging informal resolution of issues by legal practitioners appearing for the prosecution and defence;¹⁵
 - (c) requiring the prosecution to disclose, at a reasonable time before the trial, the totality of any further material which may be relevant as a consequence of the defence disclosure;
 - (d) where the accused is found not guilty, taking into account defence disclosure in consideration of costs awards; and
 - (e) where the accused is found guilty, taking into account defence disclosure in sentencing proceedings as a mitigating circumstance (although failure to make disclosure should not be regarded as an matter of aggravation).
20. By the conclusion of the pre-trial process, the defence should be in a position to outline the nature of the defence case. If there is a trial, the defence should be required to provide that outline, immediately after the prosecution opening address.

¹⁵ Such practitioners must be adequately experienced and properly instructed.