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PROBLEMS OF DELAY IN CRIMINAL PROCEEDINGS

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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

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THE INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

PROBLEMS OF DELAY IN CRIMINAL PROCEEDINGS

CHAIRMAN:

The Honourable Sir Laurence Street
Chief Justice, Supreme Court, New South Wales

12th March, 1980
State Office Block, Sydney

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FOREWORD

The Hon. Mr Justice Mahoney

I am grateful to Mr Anderson, S.M., for asking me to write an introduction to the published papers of the Seminar "Problems of Delay in Criminal Proceedings", because I think this Seminar marks clearly problems with which, most urgently, those involved in the administration of criminal justice must deal.

As a perusal of the papers will show, the structure of the Seminar was well planned. There were two main papers and three Discussion Papers. The two main papers ("Problems of Delay in Criminal Proceedings in the Supreme and District Courts" by Mr John Hogan; and "Problems of Delay in Criminal Proceedings in the Magistrates' Courts" by Mr B. R. Brown, S.M.) dealt respectively with the delays in jury and non-jury courts. Each of these papers was supported by commentators from different ends of the Bar Table (Mr W. D. Hosking, Deputy Senior Public Defender, and Detective Inspector R. J. King upon the first paper; Mr C. J. Bone, Deputy Public Solicitor, Sgt. O. Taylor, Police Prosecutors' Branch, and Mr M. B. Grove, Q.C., upon the second). The Discussion Papers raised possible remedies for delay in the proceedings. The first Discussion Paper (Dr G. L. Certoma of the Sydney University Law School) discussed criminal procedure in Italy. The second (by Mr E. Sikk, S.M.) discussed, inter alia, the imposition of a time limit for the conclusion of criminal proceedings. The third (by Mr J. Parnell, S.M.) proposed that all offences be tried by one level of first instance courts, with provision for review and limited appeal and, perhaps, the restriction of jury trials for certain crimes involving specific intent.

The matters raised in the papers and the commentaries, and by those who spoke at the Seminar, were many and varied and there was, I think, no single theme. In retrospect, I would see the Seminar as important for two main reasons: for what was said (and not said) about delay in criminal proceedings in this State; and for the insights it gave into the general problems of judicial administration.

Delay in criminal proceedings is socially corrosive and it is important that it be publicly discussed. That which the criminal law does is, on the one hand, to protect person and property and, on the other, to protect the liberty of those who, to this end, are arrested and to ensure that they are not overlong in jeopardy. The effectiveness of the law depends upon public confidence that it is doing what it should do. If people, sufficiently and in sufficient numbers, cease to have that confidence, the force of the law will be destroyed. And there are few things more calculated to destroy that confidence than long delay in criminal justice.

In an ideal Seminar (which had no restrictions as to time or finance) one would expect the papers and the discusson to do, inter alia, four things: to detail the facts; to identify the delays; to propose the remedies; and, upon an assessment of the extent of the delay, indicate the urgency of the problem.

The paper presented by Mr B. R. Brown, S.M., was most interesting. Mr Brown was able to present raw data as to the delay in Magistrates' Courts and as to when and where it occurred. He proceeded from this to a categorisation of the delays which have occurred and he then suggested remedies for some of them. Those who have been involved in the administration of the Magistrates' Courts are to be congratulated on having had the facilities, the finance, and the enthusiasm necessary for the preparation of these details.

Similar data was not able to be presented as to the delays in the Supreme Court and the District Court. As Mr Hogan pointed out, in his new office, he is only now able to start the development of a "statistical capability". The presentation of precise and particular data as to delay in these courts would have enabled a better judgment to be formed by those present (and by those who, later, will look to the Seminar for information) as to the dimensions of the problem in New South Wales.

The two main papers identified in some detail causes of delay in the disposal of cases and suggested remedies. The Discussion Papers also proposed remedies. Ideally, the area of delays which were identified might have been supported by statistical evidence, to identify the significance and dimensions of each of them. But those who presented the papers and who commented upon them represented together a great depth of experience in matters of criminal procedure. It is therefore of particular interest to have, in the record of the Seminar, what they say as to the things which contribute to the delay and what should be done about them. And it is particularly valuable to have the views of those "in the trenches": the prosecutors, the defenders, and the police officers who are concerned with the preparation of the cases. The considered views of such people must be the starting point for anyone seeking to deal with the present problem.

The Seminar allowed less than three hours for the presentation and discussion of the papers. Had the time been available, I would have hoped to have heard the views of the participants on other aspects of the problem. I shall mention two.

First, no assessment was made of how bad (or how good) the position as to delay was. My own impression has been that the position in this State is, on world standards, not bad. A comparison with the position in, e.g., England, New York, Illinois, and California, would have been of assistance in deciding this. Mr Hogan, in his paper, expressed dissatisfaction with the present position in the District Court and, the quality of justice being, in the end, determined by what happens in individual cases, unnecessary delay in even a few cases should not be accepted. But a comparative assessment of the position here and elsewhere would be of significance in determining the extent of the evil and the urgency of the remedy that is required. It is fashionable at present to criticise the law and many of the criticisms are more colourful than accurate. In relation to a problem which affects public confidence in the law, it is, I think, important that the position be assessed and stated as accurately as possible. Second, the Seminar did not enable me to form a judgment as to how far delays in criminal proceedings result from

inadequacies in the procedural rules and how far from a less than fully effective use of them. It is right to give attention to the terms of the rules by which people must work, but I have the conviction that, that which, finally, determines the quality of the work done is the person and not the rule: it is the horse and not the harness that does the work. To deal with delay in criminal proceedings, those concerned in the administrative process must have both the knowledge and the will necessary to make the process work. There was, in the Seminar, no examination of how far delay in criminal proceedings in this State results from inadequacies in the administrative training or (let it be emphasised also) the administrative facilities necessary for the work. It may be that we are fortunate to have no felt need for extra skills in this area. If this be so, our position is unique: this has not been the experience in England or in the United States, where substantial attention and, at least in the United States, substantial funds, have been devoted to improving the skills of those involved in the administration of the judicial process and the facilities available to them. Mr Hogan mentioned, in passing, pending administration changes and suggested others. An examination of these matters in the Seminar might have had the result of focusing public attention upon the desirability of those concerned in the administration of criminal procedures having ongoing training and updated equipment for their task.

I have said that this Seminar was important because of what it illustrated in relation to our approach to the administration of our judicial system. The administration of justice is a growing industry. The reasons for this are many, not the least of which is an increased recognition that each case, and not merely the system as a whole, should be expected to yield a just result. Whatever be these reasons, a systematic approach to the administration of it is essential if we are to cope with the increasing demands upon the judicial system. It should not be the function of such a Seminar as this to examine whether there is an acceptable delay in criminal proceedings; nor should it be the function of those administering the system merely to react to such a finding. Ideally, the system should be such that the relevant information is already available, the relevant problems identified, and the options for their solution available to be discussed.

The necessity for the systematic and ongoing examination of the problems of the judicial system has been accepted in other countries. In the United States, the centres for this purpose are well-known: The Federal Judicial Centre in Washington, the National Centre for State Courts in Williamsburg, Virginia, the Institute of Judicial Administration in Denver, Colorado, and the Centre for Judicial Administration and Research in Berkeley, California, are some of them. The arrangements recently made in England, consequent upon the report of Sir Nigel Bridge, to provide information and assistance to judges in the criminal field, is a further development. It is, I think, unfortunate that, at least in New South Wales, there is no similar centre and that, insofar as they are performed, the functions that such a centre would perform are still to be undertaken, voluntarily and without adequate funding, by the Institute of Criminology.

This Seminar has served a most useful purpose. The Institute, and those who have participated in the preparation of the papers and the commentaries upon them are to be congratulated. I trust that it will not be long before the experience derived from the Seminar is used as the foundation for a more detailed examination of the present subject.

PROBLEMS OF DELAY IN CRIMINAL PROCEEDINGS IN THE SUPREME AND DISTRICT COURTS

John Hogan
Solicitor for Public Prosecutions
and Clerk of the Peace for New South Wales

On 16 December, 1934, near Juichin in Kiangsi Province in south-eastern China, 120,000 assembled souls set out on The Long March — 7,500 miles. Strung in four separate columns, carrying an enormous amount of goods, the ponderous, amorphous mass moved out of Juichin. It took a week to walk from the head of the cohort to the rear. On 20 October, 1935, the remnants of the cohort (only 7,000 survived) arrived at Wuchichen in north Shensi. Mao tse-Tung was still in the same uniform.

The trudge to judgment in this State is starting to show some similarities to Mao's march; from the time it takes to get to trial even after committal, very often a year in the District Court, to the clothes the dramatis personae are still wearing at the end of that time. The accused is in different clothes when the curtain is finally raised — he has had time to change. By and large, he does not wish an early performance anyway, and he usually knows, better than anyone else, especially if he has been a regular patron of the *theatrum criminis,* that an early performance is to be avoided and the producers and directors will usually accommodate him.

Before proceeding to deal with some of the problems of delay, it will be useful to sketch the functions of my office which, since 1 January, 1980, has been retitled "Office of the Solicitor for Public Prosecutions and Clerk of the Peace". Firstly, I am the instructing attorney for the Crown in the majority of indictable matters prosecuted in this State, and in appeals from Petty Sessions to the District Court, appeals to the Court of Criminal Appeal and the High Court of Australia. Secondly, I am, by legislation, Registrar of the District Court in crime and, although I am not a registrar of the Supreme Court, my office performs many of the functions of registrar in respect of criminal matters coming before that court.

I must say, for my own part, that this dual role is not one which I espouse and, indeed, since taking office in October, 1978, I have sought to achieve a division of the roles which my office performs. It seems to me that it is quite improper for the one person to be registrar and prosecuting attorney.

The change in title is a step in the right direction and is reflected organisationally in my office by what is presently a kind of biological cleavage, leading, I hope, eventually to a complete separation between prosecuting and registry functions.

I mention this matter, not only so that the role my office performs, which hitherto could not possibly have been gleaned from its former title, might be appreciated at least in outline, but also because I am of the view that the combination of the two roles in the one person has been a feature of

delay in itself. Many of my professional officers who are responsible for instructing counsel and who, in some instances, appear themselves, get bogged down in the performance of registry-type functions. This causes some delay in preparation of cases and consequent delay at times in bringing the matter to hearing.

I turn now to a delay problem arising from the non-involvement of the Crown at Petty Sessions level. There are an increasing number of committal cases in Petty Sessions of a very lengthy and complex nature. When such cases have been disposed of in the Magistrates Courts by way of committal of the accused, the papers then come to my office and the preparation of the matter begins *ab initio* — my office not having been involved in the case before. This not only involves considerable duplication of effort, very often a long time after the events which gave rise to the committal proceedings, but also places my office in the position of having to prepare a matter for trial before a Judge and jury which, up to that point of time, has not been looked at in that light.

I can best state my views by setting out part of my submission of 17 August, 1979, to the Lusher Inquiry:

> I propose that the services of my officers be utilised in the conduct of the prosecution of selected committal proceedings, as it is my firm opinion that such a course will react, not only to the benefit of the Crown, but also be of advantage to the police.
>
> The proposal I am submitting is not entirely a novel one. Quite some years ago — in the early nineteen-sixties to be precise — the Crown, at the behest of the Police Department, took over the prosecution of committal proceedings in difficult and complicated cases. This operated very satisfactorily for a number of years, until the then Clerk of the Peace decided that his staff was insufficient to meet all requirements, and regrettably the practice ceased. I have no doubt that I will be able to make available sufficient staff so that the proposal becomes a viable one.
>
> Recently, at the request of police, I have made available an Instructing Officer to assist in committal proceedings of a complicated and lengthy matter of conspiracy. A number of accused are charged, and they are all in custody. In the event that they are committed for trial, they will have been in custody for many months, but, fortuitously, the attendance of my officer at the committal proceedings will reduce the period between committal and trial that otherwise would occur.
>
> Adoption of the proposal will result in much closer liaison between the police and the Instructing staff, thus enabling difficulties to be resolved more readily, and time taken in obtaining statements and checking out queries reduced to a minimum.
>
> Being in the matter from "grass-roots" the Instructing Officer will be conversant with every facet of the case, and importantly, there is

greater scope for the Crown to acquire information that can become relevant in reply in the light of what the accused raises in his statement from the dock.

Adoption of the proposal will facilitate the course the trial will ultimately take. Because of the close relationship that already exists, the Instructing Officer will always have ready access to the Crown Prosecutor, who will be prosecuting at the trial, and evidence called at committal can be confined to the issues that will ultimately be submitted for determination by the jury.

Under the present system, there is unnecessary time-wasting by reason of the duplication of work involved. The police prosecutor gives considerable time and effort in grasping the issues involved in the more complex cases, carries the matter to committal stage, and then bows out. The Instructing Officer takes over, and he prepares the case afresh for submission to the Crown Prosecutor. I think the police prosecutor will agree that his time can be better devoted to some matter that he can bring to finality.

I have in mind, in particular, that there are many important summary prosecutions which the police are able to bring to finality before a magistrate. They cannot bring committal proceedings to finality. I believe the community and the police themselves would be better served by the police being able to devote more time to the preparation and presentation of cases they can conclude in the lower courts. Acceptance of my proposal would contribute significantly towards that end.

But by far the greatest benefit I see accruing from adoption of the proposal is the elimination of delay that occurs between committal and trial. The administration of the criminal law has come under severe criticism by reason of the time that elapses between commission of the offence and date of trial. Criticism has been validly made on many grounds — difficulty experienced by witnesses in recalling events of so long ago — strain on the accused having the charge hanging over his head for such a length of time — and disinterest by all parties, including the jury, in events that have become so old. Whilst there are many factors attributable to the delay that does occur, it must be said that the delay between committal and trial is one of the principal factors. I would envisage that under the proposed system the Crown would be ready to proceed to trial within a short time after committal.

There remains for considering the method of selection of the cases in which the Crown would prosecute at the committal proceedings. It should be worked out between the Chief of Staff at the Criminal Investigation Branch and the Senior Police Prosecutor with nominated members of my staff.

I made mention on page 14 of one of my officers being involved in committal proceedings last year. That case has been referred to in the press as the "Croatian Conspiracy Case". It ran for some 58 sitting days at Petty

Sessions and took some 4,000 pages of transcript to record the 106 witnesses who gave evidence. The committal to the District Court for trial ultimately took place on 24th October and, although my office had only a portion of the transcript taken at Petty Sessions, I was able to brief senior and junior counsel in the matter within 48 hours of the committal concluding. The reason for that was purely and simply that I had one of my officers in Petty Sessions assisting the police throughout the proceedings. On committal for trial, the venue was changed to the Supreme Court and the case fixed for trial in April.

The benefits accruing to a more expeditious disposal of cases from this example are obvious. I hope that the opportunity for my office to participate in committal proceedings will continue on a larger scale.

This paper, according to the title selected by the Institute, is to concern itself with delays in both superior jurisdictions. Let me say at once that there is little delay in bringing on matters after committal for trial in the Supreme Court. It must be remembered, of course, that nearly all cases coming before that court are cases in which the accused is in custody and, consequently, there is considerable pressure on everyone involved to get the matter disposed of.

There have, of course, been delays in specific cases for specific reasons. However, the general position is very satisfactory. The vast majority of matters are able to be brought on within three to six months of committal. Mind you, we are looking at only about 200 matters a year arising throughout the State, whereas the Sydney District Court alone has a queue of matters awaiting disposal over the last year of about seven times that number of which a smaller percentage are in custody than in Supreme Court cases.

Apart from the relatively small number of cases requiring the attention of trial by the Supreme Court, there are other reasons, perhaps more important reasons, for the small delay factor in that area. Firstly, cases coming to my office as a result of committal to the Supreme Court, are handled principally by police officers from the one specialised squad, and these officers have become particularly well versed in the requirements of the Crown. Secondly, because of the relatively small number of cases and the matter to which I have just referred, it is possible for my office to list these cases within a reasonable time after committal. Thirdly, once cases are listed, adjournments are very rare. No doubt an element here is that, as already mentioned, there is pressure on everyone to get the matter disposed of because of its seriousness and the fact that the accused is, almost always, in custody.

There are, on the other hand, significant and disturbing delays in the District Court, particularly the Sydney District Court. There has, of course, been an increase in work in that court in the last couple of years. The A.B.S. statistics for the middle seventies give the impression of a fairly stable situation or even a downturn, no doubt consequent upon the 1974 amendments to s.476 of the *Crimes Act*.

My office is only starting to develop its own statistical capability, but a look at the number of remanets on 30th November, 1979, revealed a worrying situation in the Sydney District Court. We now have approximately 100 more trials in the remanet figure than we did in 1977, and that is despite more Judges, more Crown Prosecutors and some increase in infrastructure support. Furthermore, the number of cases coming into my office is increasing at a steady rate, and a goodly proportion of these are long and complex. The increasing length and complexity of trials adds to the problem of reducing the remanet figure. Normally, there are seven divisions of the District Court sitting in crime in the City of Sydney. The matters to which I have adverted seem to suggest that there should be an examination, either of the need for more divisions of that Court being engaged in criminal work, or whether the present number of divisions is being efficiently utilised.

Since assuming my present Office I have noted that these seven divisions are less than fully occupied in certain periods of the year, for example, school holidays. This is brought about by the unavailability of many people necessary to the proceedings. For instance, police officers are entitled to six weeks holidays a year and, like many other groups in the community, including the profession, should be able to enjoy their leave at times convenient to them. However, I do think it may be possible to so arrange the order of listings to enable cases to be listed during those periods to keep the courts fully occupied without inconvenience to those involved. I might also suggest here that the present system of court vacations could be looked at with a view to ascertaining whether their elimination would alleviate delay in disposing of cases.

I have placed emphasis on the Sydney District Court and on trials in that court. It should not be assumed that delays have not been occurring in other areas of that court's operation, for instance, in Appeals and in the country. However, efforts have been made over the last year, of an administrative nature, to tackle those areas and, I am happy to say, beneficial effects are starting to show. For instance, the number of appeals awaiting disposal twelve months ago was alarming, and the small number actually being dealt with each month more alarming. As a result of administrative changes implemented by my office, with the concurrence of the Chief Judge of the District Court, the number of appeals dealt with rose from under 60 in March, to 200 in November.

In relation to the country, I have introduced a concept of regionalisation in my own administration. I believe that decentralisation of an organisation such as mine is desirable in administrative terms. Moreover, it enables cases to be prepared locally, eliminating much time consuming contact with Sydney. This reduces delay. In the past fifteen months I have opened offices in Newcastle, Wollongong, Lismore and Dubbo. An office is expected to open in July in Wagga. Furthermore, the operations of my office in the western fringe area of Sydney have been re-organised. Offices exist at Parramatta, Penrith and Liverpool. Hopefully, an office will open in Campbelltown within a year. My administration is now divided into three divisions covering the State. A northern division, based on Parramatta and

Dubbo, and a southern division based on Wollongong with, as I have said, an office to open in July in Wagga.

I might take this opportunity to suggest that the superior courts also look at a regionalised concept of operation. I mention here that the concept was strongly supported recently by a team of Canadian Management Consultants, Bob Leighton & Associates Ltd., in their Master Plan for Courts Administration in New South Wales.

I have mentioned some problems the Crown has encountered in bringing accused persons more speedily to trial, and have outlined some of the initiatives I have taken to solve such problems. I should indicate that a number of organisational and administrative improvements have been made throughout my office in addition to those already mentioned. These have all been directed towards efficiency in administration which has, as a central feature, the elimination of unnecessary delay in bringing cases to finality.

Much of the real effectiveness of the steps I have taken can be reduced unless complemented by other involved parties. One of these is the profession.

I want to devote a little time now to delays occasioned by what I will call inefficiencies in the legal profession. These take many forms, from the submission of no bill applications to the Attorney-General at the last minute, that is, when a trial has been listed and is about to come on for hearing, to the lack of expedition of the profession in getting on with the job. There are many instances where it is all too clear that the profession itself is to blame for delay, not only prior to the trial but also at the trial. In the case of *Brian James Turner and Ors.*, 61 CAR 67 at p.76, Lawton L.J. had this to say:

> . . . what we do want to do is to invite the attention of both judges and counsel to the need to keep trials as short as is consistent with the proper administration of justice . . .

His Lordship then went on further to say this:

> . . . Trials as long and as complicated as this one was are a burden upon judges, jurors and accused, which they should not be asked to bear. The public has an interest too. When legal aid for two counsel and solicitors is granted to all accused persons, as it rightly was in this case, the bill which the public has to pay in the end is very large indeed . . .

Long trials place a burden upon everyone involved in them. I am convinced that a lot of the delay in this area can be avoided, if not by a realistic approach by legal representatives on both sides, then by procedures specifically designed to shorten trials.

Naturally, everything must be done to ensure that the interests of the

accused are well served by those appearing for him. Moreover, the Crown has a duty to see that justice is done, and that involves, amongst other things, fairness in its conduct of the prosecution. However, I am quite confident that the ingenuity of man is not beyond ensuring that those factors are taken into account and, at the same time, the length of the proceedings themselves reduced.

There have been occasions, too, where judges themselves have contributed to the delay in proceedings, either by failure to take control of the proceedings in a proper referee sense, or being so concerned with appellate courts that they allow the proceedings to drift, or, sometimes, even to abort. I might observe here that the Chief Justice of the High Court in *McInnes* v *The Queen* (19th December, 1979) has stated that a trial judge must also have in mind the interests of the Crown, and of witnesses, and of jurors. As a stronger expression of the obligations of a trial judge, I turn to the remarks of Moffitt P. in *Steel* v. *Mirror Newspapers Ltd.* [1975] 2 N.S.W.L.R. 48 at p.52, where the learned President was moved to say:

> . . . The Court remains the master of its processes, and, of its own accord, can and should insist upon proceedings being conducted in accordance with procedures and standards which it regards as proper and within the proper ambit of the issues. A judicial attitude of being a benevolent referee, commendable though it may at times be, must always give way to the Court's insistence of the standards referred to . . .

I conclude what I have just been dealing with by saying this; the cost of the administration of criminal justice in this State is staggering, and it behoves those who administer it to remember that it is the community's money which is being spent, and there should be a proper accounting for that by those involved in its administration, including by the courts. The view I have sometimes heard expressed, that there is no such thing as waste of judicial time, is, I would have thought, quite unacceptable to the community. It should be unacceptable to judges and the profession.

I now wish to say something about legal aid. There has been a proliferation of legal aid, and whilst this has undoubtedly shortened some cases which otherwise might have gone to trial, it has undoubtedly resulted in some delay in proceedings coming to trial and in prolonging the trial itself.

I strongly support legal aid. Nevertheless, the rapid proliferation of it, without appropriate managerial and organisational steps being taken into account for its effects on the system, has been a cause of delay.

Ten/fifteen years ago, the average trial took appreciably less time than now. I am of the view that a principal reason for that is legal aid. Of course, some may think it is a good thing that trials are becoming longer. Be that as it may, they are, and there must be a policy and administrative response to that fact if the courts are not going to be eventually completely bogged down with a backlog of work.

As I indicated at the outset, I do not expect that the vast majority of accused persons want an early trial and, indeed, one could be forgiven for observing that there has been a development along the lines of postponing the evil day as long as possible, with the inevitable well known consequences that it is much more difficult for the Crown then to prove its case. I believe, here again, that legal aid has been a factor in accused persons, particularly seasoned accused, becoming all too well aware of the advantages to them, and the disadvantages to the Crown, of delay, not only before the appointed time of trial but at the trial, where there is quite often hot pursuit of every herring irrespective of its colour and every rabbit to more than one burrow, habitable or not.

One of the techniques used from time to time, which has had some effect on alleviating congestion in the higher courts, has been to extend the jurisdiction of magistrates. The extensive amendments to the *Crimes Act* in 1974 giving magistrates a wider jurisdiction did have some quite beneficial effects in relieving pressure on higher courts. Perhaps the time is opportune to conduct a further review in this area.

One particular crime that might be looked at in this regard is culpable driving which occupies some 15-20% of the cases coming before the District Court. The plain fact of the matter is that in the vast majority of these cases, particularly since *Griffith's* case in the High Court, judges are either giving bonds, or are not sentencing persons convicted of culpable driving to custodial sentences for periods which would actually be served over and above what magistrates presently have the power to sentence in relation to a number of offences, including driving under the influence. Why then, might one ask, should the community pay for what, to many, might be seen to be the luxury of expensive trial by judge and jury which does not result in a more severe penalty than could be awarded summarily by a magistrate for what is, very often, the only issue in the charge of culpable driving, namely, was the accused under the influence of alcohol?

I am conscious of the social and policy issues involved in this question, particularly the fact that the object of the legislation was to impress upon the community the seriousness of the offence. I think we may merely now be spending too much money and time for too little result in a very significant percentage of the work of a superior court.

In any event, I think there is room for streamlining s.52A in aid of less delay at trial. For instance, very rarely now is a culpable drive (DUI) case put before a jury without expert evidence as to blood alcohol. Without going into a great detail, where there is a death, or grievous bodily harm has been occasioned, and the police are on the scene shortly after a collision and they ascertain that the accused has been drinking or they are suspicious, then the accused is placed on the breathalyser. If the reading is in excess of .08, then the Crown will try to adduce evidence that, at the time of the collision, this reading had some significance, in trying to establish that the accused was under the influence of intoxicating liquor.

In many instances there is not a true and completely accurate drinking

history prior to the breathalyser as an additional factor for consideration by the jury. Experience has shown that because of the often inaccurate drinking history, the expert opinion is such that it gives a range which goes below 0.1, and goes anything up to, say, 0.16. In these circumstances the expert will not express a firm opinion, and this is no doubt one of the reasons why juries are reluctant to convict in this category of case.

It seems to me, now that the breathalyser legislation has been in operation in New South Wales for over ten years and quite accepted as part of the machinery of law enforcement, that the legislature might consider making it a specific offence to drive with the prescribed concentration and occasion death or grievous bodily harm. Perhaps to that end, s.52A might be amended by providing that it would be an offence to drive with the prescribed concentration of alcohol.

It may be useful now to direct the attention of the seminar to pre-trial procedures. I am of the view that some form of pre-trial conference should be introduced in New South Wales as a means of reducing the length of trials, eliminating unnecessary proof by oral evidence of formal or uncontroversial issues at the trial, and as a possible safeguard against "trial by ambush" tactics by Crown and defence counsel.

Without treating the matter exhaustively, and as a basis for discussion, I suggest the hearing take the form of a conference between counsel in the presence of a judge (preferably the judge who is to preside over the trial) either in chambers or in the open court. Matters raised at the conference should generally be settled by agreement between counsel, with the judge acting as referee and a spur to agreement where the parties are in dispute. Some matters to be decided at the conference will be determined by the judge and be the subject of formal orders.

Obviously, the success of pre-trial hearings depends largely on the co-operation of counsel and solicitors on both sides. It is probable that the defence will tend to be wary of pre-trial hearings, at least, initially. To allay some fears, I would agree with the suggestion by the Criminal Bar Association of England, that an indication by an accused at a pre-trial hearing that he intends to plead guilty on arraignment, should not be used by the court to alter his status, e.g. as to bail. More importantly, it is clearly essential that counsel be fully instructed (i.e. prepared) before the pre-trial hearing. I find considerable support for my view in Studies in Comparative Civil & Criminal Procedure undertaken by The Law Reform Commission of New South Wales which may be found in Volume 2, *Innovations in Civil & Criminal Procedure* prepared in 1978 by Mr J. Bishop, B.A., LL.M. (Sydney). In that paper, he refers to some overseas practice and, at p.48 of his paper, makes specific recommendations as to the procedure which might usefully be adopted in this State.

Whilst the matter to which I shall now refer primarily affects the Magistrates Courts Administration, and it may be that Mr Bruce Brown will be referring to it in his paper relating to the problems of delay in that administration, nevertheless, as the position there ultimately influences the

delay in disposing of charges coming before the higher courts, I feel that some reference by me would be pertinent to procedures adopted in relation to committal proceedings.

In England and Wales, the *Criminal Justice Act* 1967 (U.K.) introduced substantial changes in respect of those proceedings. Briefly, the provisions of that Act provided for dispensing with the calling of oral evidence at committal proceedings, subject to certain safeguards being adopted to protect the accused. These provisions are dealt with in detail by Mr Bishop, in the paper to which I have referred, at p.49 *et seq.* It may be that adoption of this procedure in whole or in part in this State would provide some reduction in the time it takes to dispose of committal cases.

I mention a couple of interesting observations which are pertinent to what I have just referred to. Of the 489 cases listed for trial before the Sydney District Court last year, in 124 cases a plea of guilty was entered on arraignment. In all cases there had been full committal proceedings. In addition, before being listed for trial, there were pleas of guilty in a further 100 cases. Again, full committal proceedings had been held in those cases.

I might throw in at this juncture that the procedure under s.51A of the *Justices Act*, allowing an accused to withdraw a plea of guilty and have the matter remitted to a magistrate for full committal procedures, could be looked at.

This paper has dealt with what I believe to be some causes of delay in cases coming before the higher courts, and raised a couple of matters which law reform authorities might consider as techniques for reducing delays. I want to conclude by turning to what I believe should be our aim, namely, reducing to a minimum the total time involved between when an accused is charged and the final disposal of the case. By final disposal, I include result of any appeal. It is one thing to identify delays in Petty Sessions and in the Supreme and District Courts and remedies specifically directed to those delays. It is quite another thing to look at the entire system, and I believe it should be, as one integrated system of criminal justice through which the accused can fairly and efficiently travel, at reasonable cost to the community.

Governments can go on appointing more magistrates and judges and building new courts until the cows come home, but unless that is accompanied by efficient organisational and management procedures, coupled with a comprehensive (not a piecemeal) law reform programme, the udders will be finally producing in real terms less and less, but more expensive, milk.

I mention the simplest but most illustrative example of the sort of thing I am referring to. An accused, charged with indictable crime in this State, can travel through several administrative and legal bottlenecks. First of all, Petty Sessions opens a file on him. If he is committed, I open a file on him either in my Supreme Court or District Court administration. If he appeals to the Court of Criminal Appeal, another file is opened on him and, finally,

assuming he is a person of stout persistence, the High Court will open yet another file. Moreover, each jurisdiction has different procedures for dealing with him, many of which are prescribed by legislation.

It would seem to me that the time has come where the administration of justice is such an important social issue, attracting the attention of the press and legislatures almost every day of the week, for those responsible to sit down and look at the entire system. Whilst that process might take a few years, I think it well worthwhile. It should not be overlooked by lawyers that much emphasis needs to be placed upon management and administration. There is not a bit of use reforming the law without having the machinery to deal with it efficiently and effectively.

I likened, at the outset of this paper, the process of criminal justice in this State to the monumental disaster of The Long March. The march was based upon belief in an ideology. It was an exercise founded on a principle. As a practical exercise it was a tragedy because it was devoid of efficient organisation and management, and totally lacked proper logistic support. It is difficult to see today that there is much left of The Long March other than Mao's body reposing in a crystal sarcophagus in the mausoleum in Tien An Mien. Any law reform exercise embarked upon in the field of criminal justice must not suffer a similar fate. Law reform must march hand in glove with good organisation, administration and management. The system of criminal justice in this State has tended to concentrate too much on supporting what seems, at particular points of time, to be good principle, and not enough on putting such principle into effect.

Change, of course, for the sake of change is wrong. Equally wrong is the belief that, because certain ideas and ways of doing things have proceeded for a long time, they are right. This is especially so in the theatre of present dramatic social change, on the stage of which the administration of justice, particularly criminal justice, should be a principal actor. One of the most important things in this democracy, after the procreation of children, should be the administration of criminal justice. An important requirement in that area is sound organisation and administration. There must be good management of a sensible legal machinery. That machinery must surely lie somewhere between the revolutionary courts in Iran, and the nineteenth century Chancery suit described by Dickens in "Bleak House".

PRESENTATION OF PAPER

John Hogan

Delay in criminal proceedings is a subject which can expose some very controversial issues. I see no reason to avoid such issues and I hope nobody else here does. There is little point in holding meetings of learned institutions unless there can be frank discussion even though some participants may be quite disturbed by certain aspects of such a discussion. The real beneficiaries of such discussions ought to be the public, not any particular vested interests. The public should be those who most benefit from our collective experience and professional training. We live in a very fast moving era. Life is becoming increasingly complex and the law has to move with the times and to take account of the growing complexity of social issues, because the law is a living expression of social regulation. Society is fast making the material world much easier to live in but it is greatly complicating itself in the process. We seem to have forgotten that simplicity is the beginning of all wisdom.

Delays in criminal proceedings are many and manifold, and arise from a great number of different causes, and, of course, the solutions to delays are as many as there are delays themselves. I have tried in my poor attempt at racy journalism to indicate some of these matters that do cause delay. There are, of course, many others and I have indicated that I see the problem being tackled in two ways.

Firstly, I believe there has to be a very wide ranging programme of law reform coupled with strong managerial and organisational input. It is one thing to have a law, it is another thing altogether to make the law work. I feel that we tend to concentrate too much on the production of law to conform to a particular policy or philosophy, and in that process we have not taken into account the fact that we need to make the law work. Nowhere is that more evident than in the field of the criminal law. It is not a bit of use in my view to tackle this problem piecemeal. It has to be attacked on a wide front such as a combination of law reform and organisation and management. Of course, the obvious way to solve delays in criminal proceedings is to build many more courts and appoint many more judges and all the necessary infrastructure. That in many ways would heal the symptoms of delay, not the cause. But that poses problems, not in the least of which is to the government to find the money. Even if we commenced tomorrow to build a massive court complex in Sydney it would be many years before we would feel the benefit of having such an advantage. I do not really think we can wait that long. If an attack is not made upon some of the problems that we do have very soon, we will by the year 2000 be presiding over what I can only envisage as being a complete shambles.

Some of the matters that I have raised in my paper will no doubt create a lot of discussion and some of the matters have been commented upon by the commentators. There are two other matters in which I would like to have the benefit of advice and experience, not only from the commentators, but from members of the audience.

Firstly, we do subscribe to a lot of notions in the law that appear to be regarded like mysteries of religion and I sometimes wonder if we know why, in fact, we do subscribe to them without question. Some of these notions are related very much to the question of delay. For example, consider majority verdict by juries. Unanimity of twelve on a jury is the only thing that I can think of in a democracy that is required to be unanimous. I do not know why it has to be unanimity of twelve. It perhaps has some magical biblical significance. There were twelve tribes of Israel and there were twelve beasts of the apocalypse. I used to think it had something to do with the twelve apostles but I abandoned that notion because even Christ had to put up with a majority verdict.

The second matter I want to throw in is our current method of handling committal proceedings. The delay factor, of course, starts operating from the time a person is charged until he has been right through the process. I have in mind a system which is not novel by any means but in which committal can be done by the presentation of documentary evidence by the Crown to the defence, and superimposing upon that a system of *ex officio* indictment. Committal is becoming a very significant part of the delay factor in the criminal process.

I think that we really have to look at such matters and try to put aside any preconceived notions that we might have about how the system should operate according to time honoured tradition. We are living in a time when we have to make very rapid response to the social change. Things are starting to overtake us in the administration of criminal justice and it is going to be a long while before we can catch up, but we must start to do something about it now. We have to, in my view, abandon the way in which we have been treating the whole process of the administration of criminal justice, which seems to me to be very much like the old English foxhunt — Tallyho! there he goes, let's see if we can catch him! We must attack with a composite far reaching programme coupled with a very deep look at our organisation and our management.

COMMENTARY

W. D. Hosking, Q.C.
Deputy Senior Public Defender

The suggestion by John Hogan that "some form of *pre-trial conference* should be introduced in N.S.W. as a means of reducing the length of trials" is, to my mind, the most controversial and drastic proposal contained in his paper. It imports a new dimension to the practice of the criminal law and deserves a better fate than summary rejection. In my view such a conference should be conducted formally, be recorded and held in the presence of the accused and in fact be part of the trial itself, although of course preceding it by some weeks.

Whether such a procedure would save time in an overall sense is problematical. Much would depend on the personalities involved in each case. The delivery of briefs to Crown Prosecutors by the Solicitor for Public Prosecutions weeks ahead would be necessary. These days informal pre-trial talks are often not possible because of the late briefing of Crown Prosecutors.

Further incursions into the right of the defence to say nothing lack appeal. No additional safeguards are necessary to prevent "trial by ambush" tactics by the Crown. Such tactics would be improper and in my experience exceptionally rare. The right of an accused to present his defence for the first time at trial is fundamental. That right has recently been cut down by statute in the case of an "alibi" defence but for reasons of policy and commonsense.

Whilst the Crown is a party to criminal litigation its stake in the outcome of a particular case can be viewed in indirect and philosophical terms. To the accused the outcome is seen in starker terms, loss of reputation and the clanging shut of prison doors. Some accused are in fact innocent.

Plea Bargaining?

The investigation of this vague and proscribed process is inherent in Mr Hogan's interesting revelation that of the 489 cases listed for trial last year 224, or almost half, produced pleas of guilty. The decision to "fight all the way" or "brazen it out to the last" depends on many factors, some of which do not emerge until the day of trial, or may arise suddenly when the matter is listed to fix a date for trial.

Often the Crown or the listing authority are astute enough to anticipate the possibility of a plea of guilty and thus another trial can be listed for the same day in the same court with no waste of judicial time. Moreover it would be interesting to know what percentage of the guilty pleas were to different or lesser charges. A goodly number I would suggest.

The suggestion by Mr Hogan that the procedures under Section 51A of

the *Justices Act* be reviewed is sound. The suggestion is often made that the "reversal of plea" technique is sometimes employed in cases where it will never be seriously maintained that the accused is not guilty. If the section is being abused a simple expedient, often suggested, would be for the judge to be able to fix a date for trial and not remit the matter for committal proceedings. Such an innovation would require a statutory amendment.

Delays where the offender is prejudiced

Where an accused is in custody and desirous of pleading guilty to an offence which does not call for a custodial sentence or if it does an effective one of around six months he has, in general, to wait from four to six months and even longer before being sentenced from the time of his arrest. This is a delay for which in practical terms it is difficult for credit to be given despite backdating, etc. Another matter would be to seek to achieve some mitigation of the ultimate penalty. The introduction of degrees of murder would enable this to be carried out across the board. The traditional right of the Crown to grant itself an adjournment by declining to present an indictment is another area of concern but is not a major problem because of the sense of responsibility of Crown Prosecutors.

Suggested Pre-Trial Disclosures to Accused

Upon request all unprivileged information within the prosecution's possession (unless public policy requires suppression) including

(i) Names and addresses of all witnesses and copies of all statements by them either oral or written.
(ii) Expert Reports (e.g. pathologists, handwriting, ballistics, etc.).
(iii) Criminal histories — if any — of all witnesses and of the accused.
(iv) Any material which would tend to negate guilt or mitigate the punishment.

A provision for experts and witnesses to be available to the defence for conferences would in the majority of cases save court time and advance the interests of justice. Already there is "pre-trial disclosure" by the accused in his interrogation by police, photographing of him in some cases, the arranging of line-ups, and statutory requirement to disclose an alibi defence and psychiatric examination by Government Consultant Psychiatrists often before he is legally represented.

This suggestion is not as radical as it sounds because much of this material would be obtainable on subpoena. Any subpoenas could be returnable at the pre-trial conference suggested earlier.

Legal Aid

Mr Hogan's observation that the "proliferation of legal aid" is the principal reason that trials take longer these days may or may not be valid.

However, it is proper to observe that police investigation is more skilful and becoming increasingly more sophisticated with the provision of scientific and electronic aids. This makes trials more complex. In the ultimate this may achieve a saving of court time. Hours and days are expended in the forensic investigation of the circumstances of alleged confessions. The tape recording of police interrogations may be the answer provided proper safeguards for both interests exist. The saving of court time would be enormous and, more importantly, the interests of justice would be advanced.

Culpable Driving

Mr Hogan's proposals to "streamline" culpable driving trials lacks appeal. The section is already in strong terms. The so called "proviso" defence reverses the onus of proof. One might well observe that if the Breathalyser Experts referred to by Mr Hogan are reluctant to express a firm opinion the Legislature might well be reluctant to intervene.

Might I conclude by saying that the views expressed are my own and that time did not even permit me to have the benefit of the views of my colleagues.

PRESENTATION OF PAPER

W. D. Hosking, Q.C.

I find myself in a novel and happy situation in having the right of last word so far as the Crown is concerned. Normally, as you would all know, during the course of a criminal trial the evidence on both sides is called and then defence counsel address the jury. The Crown has the last word. Tonight the situation is reversed.

Mr Hogan is to be congratulated on the constructive way in which he has approached this all important subject. As a civilization we cannot endure unless we have law and justice in the way we have come to expect over the years. But having said that I would seek to sound a note of very real caution about suggestions which involve tampering with the jury trial as we know it. The jury trial is expensive and it is time consuming. It involves great inconvenience to members of the community who are called upon to render service as jurymen, but, nonetheless, it does represent a very real bulwark against injustice. Our faith in the commonsense of juries is reflected by the fact that the verdict which they return is for practical purposes final in relation to the determination of factual issues. The sanctity of the jury system is fundamental and is preserved for a very good reason — to guard against, as best we can, the absolutely appalling prospect of a miscarriage of justice, i.e., a person who is, in fact, truly innocent of a crime being sentenced to a long term of imprisonment or being punished at all. Lest I am accused of being emotional about it let us assume a person truly innocent of murder is convicted. In those circumstances justice in which we all seek to play our part is shown not to be perfect and would have miscarried to an appalling degree. The only perfect justice, of course, is divine justice and being entrusted to human beings circumstances can interact, and do interact, to cause miscarriages of justice. We have the appellate courts and we have all sorts of other safeguards, but the jury system is right at the root of it. In a practical sense the community is playing its part in the administration of justice. Any system or any proposal to whittle away to any degree at all the great rights and authority of a jury would be one that I personally would not favour. This overlaps with the proposal, constructive though it is, of Mr Hogan's that we look at the question of majority verdicts. True it is, they operate in England and there is perhaps much to be said for them. In my experience with the criminal law on a daily basis of indictment I consider that the need for unanimity by a jury is a very important part of our law. Disagreements by juries are comparatively rare. In the absence of evidence that disagreements by juries are a problem which operate to the detriment of justice I for one would be very much against any proposal to disturb the *status quo*.

Mr Hogan refers to the presentation of *ex officio* indictments and "abbreviated" committal proceedings. This is also a matter which would require careful consideration because committal proceedings are, to my mind, basic to the proper preparation of a defence of an accused person prior to trial.

Mr Greg Woods, who is a Public Defender and is Director of the Criminal Law Review Division of the Department of Attorney General and of Justice, is examining this whole question with a view to making some submissions to the Attorney General. He circulated widely asking for views on the question of some form of abbreviated committal proceedings with adequate safeguards. That type of approach, if I might say so, with respect, would seem to be on the right track: that a person who wants a full hearing obtains one or can obtain one. On many occasions committal proceedings are conducted where there is no real contest. The witnesses are almost permitted to read their statements or they are led by the police prosecutor, so that tendering of statements under those circumstances would cause no injustice to anybody. That is the area to which we can look for reduction in delay.

But having opted for the *status quo* with one small reservation, nonetheless, I agree with Mr Hogan that we must in an ongoing sense keep looking at the administration of justice. We are not talking of a company with shareholders which must show a profit and be efficient in that sense; in the ultimate its efficiency is measured by the fact that true justice is done.

COMMENTARY

Detective Inspector R. J. King
C.I.B., Police Department, N.S.W.

Firstly, permit me to introduce myself. I have been a member of the New South Wales Police Force for a period of 34 years and have spent the major portion of that time as a plain clothes officer investigating criminal matters. I am currently a Supervisory Detective Inspector attached to the Criminal Investigation Branch, Sydney, and am responsible for supervising the activities of several specialised squads attached thereto.

My role at this seminar is to act as a commentator on matter submitted by Mr John Hogan who is Solicitor for Public Prosecutions and Clerk of the Peace for New South Wales. It is indeed a difficult task to comment on material submitted by such an eminent person as Mr Hogan and I intend to confine my remarks from a law enforcement officer's point of view. I do not propose to make lengthy mention of any legal references because I believe that there will be others present much more capable in this area than I. I am pleased to comment on this subject on behalf of police who are after all responsible for bringing offenders to justice. Without the police there would be little need for criminal courts and no need for this seminar. At the beginning I would like to stress that my remarks contained in this paper are my own based on my experience over the past and do not necessarily coincide with police departmental policy unless where official instructions are quoted.

Before commenting on reasons for delays in criminal proceedings the exact extent of those delays should first be determined and whether they are avoidable. I believe that we all agree that there are delays and in the opening paragraph of his paper Mr Hogan likens the extent of those delays to "The Long March" in China which lasted more than 10 months. Many members of the judiciary have remarked on the subject and I refer to remarks reportedly made by Mr Justice Yeldham in the Supreme Court in November last year when dealing with "assault occasioning actual bodily harm" and other minor charges on 7th November, 1979, and was remanded for committal proceedings which were not expected to take place until July, 1980. The accused person was unable to raise the allowed bail of $3,000 and Mr Justice Yeldham remarked that it would be outrageous for him to remain in custody until then and reduced bail to $1,000. The justice instanced two other cases where he had granted bail against his wishes, because of delays in hearings at Magistrates' Courts. The justice also commented that he was aware that magistrates were overworked with long lists which were becoming longer because of lengthy and complicated committal procedures. In explanation but without criticism he stated that the introduction of legal aid and the activities of bodies such as the Aboriginal Legal Service contributed greatly to the delays.

I think we can confidently assume that there are at times lengthy delays, and proceed to determine the cause of those delays. There will

always be delays, some of them unavoidable and we can only hope to identify their cause and reduce them to the least possible minimum. Mr Hogan sets out in his paper that there is little delay so far as matters listed at the Supreme Court are concerned. I agree with him and intend to confine my remarks to matters listed for the District Court.

I would like to say here that it is difficult to confine my remarks to the subject matter of this paper. I am convinced that the delay in criminal proceedings commences from the time an accused person is charged and continues through the Petty Sessions Court proceedings through to the higher court until finality. I am aware that others are preparing papers on delays in the lower courts but I think it wrong to deal separately with each jurisdiction whether for the purpose of this exercise or otherwise. The question of the delay must be considered as a whole and remedies suggested as a result therefrom. If therefore I transgress on others' area of discussion it cannot be avoided.

Let us now consider who is mainly affected by these delays. I believe that the administration of justice itself is the main sufferer because as the delay in the finalisation of proceedings lengthens so does the desire for punishment of the wrong-doer diminish. It follows that lengthy delays in the administration of justice creates disrespect against law and order in the minds of the community including the wrongdoer himself.

I agree with Mr Hogan's suggestion that some accused persons, particularly persistent offenders, are in favour of lengthy delays for reasons he has set out. As a police officer I am always particularly concerned also about persistent offenders obtaining lengthy remands and committing further criminal offences whilst on bail.

I now intend to comment separately on each of the causes of delay set out by Mr Hogan in his paper and will suggest alternative remedies where possible. Broadly, I consider that Mr Hogan has most efficiently uncovered the main causes of delay and appropriate action to lessen delays in the areas mentioned would accelerate the hearing of criminal proceedings.

First of all, Mr Hogan lists as a cause of delay the dual role performed by his own department. In view of Mr Hogan's remarks in this regard it seems obvious that steps should be taken to transfer the duties of Registrar of the District Court to another department, or alternatively, to appoint additional units to his department to perform this particular duty. I am not fully *au fait* with the volume of work shouldered by the Registrar of the District Court but it is apparent that the officers attached to Mr Hogan's department should be permitted to carry out their instructing duties without other distractions.

Mr Hogan suggests that consideration be given to the elimination of court vacations to relieve delays and it is obvious that such action is necessary if delays are to be shortened. I see no reason why all courts should not operate throughout the whole year and all officers of the court be permitted to select their holiday periods at suitable times throughout the year

without affecting staffing problems. This system effectively operates in all other essential services and I see no reason for its failure in the court system.

Mr Hogan next makes reference to inefficiencies within the legal profession as a cause of delays. I am of the opinion that this cause does not only apply to the legal profession. I believe that if a greater sense of responsibility in this regard could be impressed upon all parties including not only the legal profession, but the prosecution and judiciary alike then much will be achieved to reduce delays. I am greatly impressed with Mr Hogan's suggestion of pre-trial conferences between defence counsel, the prosecution and trial judge to reduce the length of trials by dispensing with unnecessary lengthy oral evidence dealing with uncontroversial issues at forthcoming trials. I consider that providing acceptable and impartial guidelines are devised, such conferences would prove successful in reducing delays without interfering with the course of justice.

I also agree with Mr Hogan's suggestion that even trial judges at times contribute to delays by not effectively controlling proceedings and over concern for appellate courts. I also consider that Mr Hogan's suggestion concerning pre-trial conferences would do much to improve this situation.

Mr Hogan also lists the proliferation of legal aid as a major cause in increased delays and his opinion in this regard is shared by many others including eminent members of the judiciary. Like most others I support the legal aid system but agree that there exists a need for responsibility in making quick decisions respecting its approval. Legally aided accused persons should certainly be afforded the best possible representation but because the community is providing that service there should be no waste or unnecessary consumption of time. The Chief Justice of Australia, Sir Garfield Barwick, made reference to this expectation in his address to the Australian Legal Convention in Adelaide in July, 1979.

In addition to listing the main causes of delays in criminal proceedings, Mr Hogan offers suggestions to accelerate proceedings. He requests that his officers attend complicated and lengthy committal proceedings at lower courts to familiarise themselves with the brief before its arrival at the District Court. He sets out his proposal at length in his paper and makes reference to a matter referred to as the "Croatian Conspiracy" case where this course was taken recently at Central Court of Petty Sessions. This particular matter was handled by detectives attached to a specialised squad which I supervise and I am fully aware of great advantage this course will have upon the impending District Court hearing. There is no doubt that the suggestion would greatly assist in shortening District Court trials and in essence I agree with it and suggest that suitable cases could be selected by the Senior Police Prosecutor and the Detective Inspector in charge of the detectives preparing the case in liaison with a nominated member of Mr Hogan's staff.

I have tentatively agreed with Mr Hogan's suggestion contained in the preceding paragraph although I submit an alternative suggestion for consideration. I do not entertain a great degree of hope that the suggestion will

be acceptable particularly to members of the legal profession, but I believe that it would greatly reduce the time taken to conclude criminal proceedings. I propose that indictable matters that can only be determined by judge and jury should be handled at the lower court committal proceedings in the same manner as "hand-up-briefs" under section 51A of the *Justices Act*. This would eliminate the need for the same oral evidence being duplicated and would only require the magistrate to read the brief completed by the police officer in charge of the case to decide if the matter should be committed for trial. Records show that very few of such committal matters are not committed for trial and in any case the magistrate and the Attorney-General have the necessary power to refrain from sending the matter for trial if they consider there is insufficient evidence.

In support of my suggestion I would like to highlight the high standard demanded in the preparation of "hand-up-briefs" by police and I firmly believe that such briefs are much more intelligible than the majority of depositions forwarded from committal proceedings. For the purpose of impressing upon those attending this seminar the criteria to be followed by police in the preparation of "hand-up-briefs", I now quote the following extracts from Police Instructions:—

> Section 51A of the Justices Act is designed to expedite and facilitate court proceedings insofar as pleas of guilty to indictable offences coming within its ambit are concerned. The effect of the section is to remove the necessity for the calling of all the evidence before a magistrate for the purpose of establishing a prima facie case in such matters. It has the further effect of obviating the attendance at court of the witnesses who would be required under normal circumstances to give the evidence necessary to establish the case. The officer in charge of the case, or some other member of the Force connected with the particular matter, must attend the court in question when a matter under section 51A is being dealt with, in order to assist the Prosecutor, if required, and to attend to the admission to bail, or return of the defendant to custody, as the case may be.
>
> Subsection (1) of section 51A provides that a plea of guilty before a justice or justices under that section cannot be entered where the offence charged is punishable by penal servitude for life. In regard to such offences, it is still necessary to call all witnesses to give their evidence orally before the justice. Whilst subsection (1) of section 51A provides that a plea of guilty may be entered "at any stage of the proceedings", it is the practice to take the plea immediately after the defendant is charged. The defendant, of course, would previously have indicated to the police his intention of pleading guilty. Clause (a) of the abovementioned subsection provides that the justice "may accept or reject the plea". To enable the justice to decide whether he will accept or reject the plea, the Police Prosecutor should tender for his perusal the original copy of the brief which contains statements of all witnesses and any other necessary documentary evidence. After having read the evidence contained in the brief handed to him, the justice will accept the plea of guilty if he is satisfied that the evidence in the

matter handed to him supports the charge or charges laid. If he is not so satisfied, he will reject the plea. In the latter instance, there are two courses open to the police —

(i) seek a remand in order to gather further evidence by way of statements from witnesses which, with the former evidence available, may on a future occasion justify the acceptance of a plea of guilty; or
(ii) seek a remand and call all witnesses to give oral evidence which may or may not result in a committal for trial.

If the justice accepts the plea of guilty, then he will commit the defendant for sentence to the District Court (Criminal and Special Jurisdiction).

Police in charge of a matter which is to be dealt with under section 51A are required to take certain steps to ensure that the case is properly presented. Dealing with the ordinary circumstances associated with such a case, it generally follows that after arrest the defendant makes a statement admitting the offence and indicates to the police that he proposes to plead guilty. It then becomes necessary for the police in charge of the matter to secure a remand for a reasonable period and, during the remand, to collect the evidence necessary to prove the offence. In this connection, when taking statements from witnesses, or when preparing their own statements, police will ensure that sufficient copies are made to allow the brief to be presented to the Prosecuting Branch in the city or to the District Prosecutor, as the case may be, in duplicate. Each of such copies is to have the usual covering sheet (Form P.139A) attached.

If the defendant's statement is in his own handwriting, it must be copied accurately and verbatim by typing. The exact language and spelling must be copied. The handwritten statement and one typed copy is to be included in the brief containing the original statements, which is referred to as the "original brief", and one typed copy included in the brief containing duplicates, referred to as the "duplicate brief". The latter will, after the committal for sentence, be forwarded to the Modus Operandi Section for filing.

The statements of all witnesses for the prosecution must be signed, and in the case of witnesses other than police, their signatures must be witnessed by the police officers taking them. In taking statements from witnesses, Form P.190 should be used and for continuation of a statement beyond one page, Form P.190A. The witness's full name, including Christian names, occupation and address should be set out and, in the case of a married woman, the husband's name and whether living with him or not. All alterations must be initialled by the witnesses and care should be taken to ensure that each signature does not include initials inconsistent with the full name given at the top of the statement.

The order in which the brief for presentation should be assembled is as follows:

(i) covering sheet (Form P.139A);
(ii) further statements of charges (if necessary) in chronological order;
(iii) statement of interrogating officer;
(iv) statements of other police, if any;
(v) statement by defendant, if any, relating to first-mentioned charge in the brief;
(vi) typewritten copy of the defendant's statement, if handwritten;
(vii) statement of owner (where property concerned) or complainant, as the case may be, in relation to first-mentioned charge in the brief; and
(viii) statements of other witnesses relating to that charge.

All briefs prepared for the purpose of section 51A of the Justices Act should be forwarded so as to reach the Prosecutor who will be presenting the matter to a court of petty sessions at least three days before the date set down for the hearing of such matter. In complicated cases, a greater time is required.

All documentary exhibits necessary for an understanding of the case should be submitted to the Prosecutor with the brief for checking. This is specially important in connection with certified copies of entries in registers of births, deaths and marriages. In addition, in complicated cases involving fraud, etc., where a large number of documents are to be tendered with the brief of evidence, it is of assistance to the Prosecutor and the court if a comprehensive list of such exhibits is attached to the brief.

Police preparing briefs for tender under the provisions of section 51A should note that the only indictments to be shown on the covering sheets to the briefs should be those upon which it is intended to proceed by virtue of the section. If other charges have been preferred against the offender, which it is intended should be dealt with at the District Court by way of placing them on a certificate under Schedule 9 of the Crimes Act and having them taken into account at the District Court on the question of penalty by virtue of section 447B of that Act, or, if they be offences to be dealt with summarily, then, although charge sheets would have to be made out in connection with such matters, no reference should be made to them on the papers relating to the matters to be dealt with as a hand-up-brief under section 51A of the Justices Act.

Where a person is charged with a large number of indictable charges, there is no set ratio as to the number of such charges which should be proceeded with by way of section 51A or placed upon the Schedule mentioned, but police in preparing the brief should develop and prepare cases in respect of a reasonable number covering a cross-section of the various offences committed.

As previously stated the foregoing is only an extract from Police Instructions dealing with "hand-up-briefs", the whole of which is very comprehensive. For instance, I have not set out the instructions regarding multiple offences, co-defendants, method of setting out charges, and other legal requirements.

I have quoted the extract set out for the sole purpose of stressing the care which must be exercised by police in the preparation of such briefs and the confidence magistrates may have in accepting similarly prepared briefs for determining all committal proceedings. I am convinced that my proposal along the lines suggested would successfully decrease the delay in criminal proceedings and if not acceptable at the present time will be acceptable in the near future.

Whilst on the subject of "hand-up-briefs" Mr Hogan suggests that the procedure be examined where accused persons be permitted to alter their pleas of "guilty" to one of "not guilty", when appearing for sentence at District Courts after being dealt with at lower courts under the provisions of s.51A of the *Justices Act*. This results in the matter being returned to the magistrate for full committal procedures and creates a ridiculous waste of the court's time simply because the accused person is only intent upon being sentenced by a judge of his own choice. If the procedure set out in my proposal was adopted, of course, such a situation would not occur but nevertheless, I alternatively suggest that under those circumstances the judge accept the altered plea and the "hand-up-brief" papers as a type of ex-officio indictment and proceed with the trial in the usual manner.

Another remedy suggested by Mr Hogan to reduce delays is to increase the jurisdiction of magistrates to deal with indictable matters under the provisions I assume of s.476 of the *Crimes Act* or similar sections. There is no doubt that similar amendments to the legislature over the past has relieved the congestion in the higher courts but has of course increased the pressure on lower courts. As I have previously mentioned however, the whole system must be examined if delays are to be shortened and on this account Mr Hogan's suggestion merits consideration. If the magistrates' jurisdiction was widened duplicate court hearings would be eliminated resulting in an overall decrease in time taken to finalise hearings.

Mr Hogan points out in his paper that a big percentage of cases dealt with at District Courts are "Culpable Driving" charges where the question of the accused person's sobriety becomes the main issue for deliberation. Because of this factor expert evidence is frequently called resulting in lengthy trials. I agree with Mr Hogan's suggestion that consideration should be given for s. 52A of *Crimes Act* to be amended to include an additional offence of causing death or grievous bodily harm by driving with the prescribed concentration of alcohol in the blood as defined in the *Motor Traffic Act*.

In conclusion I would like to say that the time has come for constructive thought and positive action if delays in criminal proceedings are to be reduced to the least possible minimum. To this end, I suggest that a well

balanced committee be formed as a matter of urgency to inquire into all facets of the subject matter and make very firm recommendations to the Attorney-General to implement amending legislature where necessary. A well balanced committee should include a representative from say the Magistrates Court Administration, Clerk of the Peace, Law Reform Commission, Law Society of New South Wales and the N.S.W. Police Department. I believe that such a committee properly motivated towards their single goal would achieve success and promote greater respect for the process of criminal justice.

THE PROBLEMS OF DELAY IN CRIMINAL PROCEEDINGS IN THE MAGISTRATES COURTS

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During the 1960s the Joint Committee for Effective Administration of Justice appointed by the American Bar Association adopted the following statement of its objective:—

> Justice Is Effective When —
> Fairly Administered Without Delay
> With all litigants, indigent and otherwise, and especially those charged with crime, represented by competent counsel.
>
> By Competent Judges
> Selected through non-political methods based on merit,
> In sufficient numbers to carry the load,
> adequately compensated, with fair retirement benefits,
> With security of tenure, subject to an expeditious method of removal for cause.
>
> Operating in a Modern Court System
> Simple in structure, without overlapping jurisdictions or multiple appeals,
> Businesslike in management with non-judicial duties performed by a competent administrative staff.
> With practical methods for equalizing the judicial work load,
> With an annual conference of judges for the purpose of appraising and improving judicial techniques and administration.
>
> Under Simple and Efficient Rules of Procedure
> Designed to encourage advance trial preparation,
> Eliminate the element of surprise,
> Facilitate the ascertainment of the truth,
> Reduce the expense of litigation, and
> Expedite the administration of Justice.

Expedition in the administration of justice occupies a position of very real importance in all modern concepts of justice. There is also a general recognition of the need for effective judicial administration to achieve expedition in practice.

Delay in criminal proceedings in magistrates courts has to be considered as part of the overall problem of delays within all jurisdictions presided over by Stipendiary Magistrates. The approach taken in criminal and quasi-criminal matters is dictated by a desire to preserve recognition of the liberty of the subject as a cherished principle. Concern for those persons who have been deprived of their liberty and are in custody by virtue of hav-

ing been refused bail, or being unable to obtain the bail which has been fixed, manifests itself by ensuring that criminal charges against them are speedily heard and determined.

Competing for priority in the magistrates' work calendar, particularly in those courts exercising multiple jurisdictions, are matters of urgency occurring in other jurisdictions, e.g., applications for injunctions and infants custody cases arising under the *Family Law Act*. These matters of their very nature frequently also demand priority over other matters already listed for hearing. They occur without notice, or at short notice, and thereby upset and interfere with administrative planning for the court involved.

But the problem of delay is not a problem relating only to criminal custody cases and urgent applications under the *Family Law Act*. Delay in the hearing of any cases in magistrates courts is a matter for real questioning. For magistrates courts are summary courts originally set up to provide speedy and effective justice in all matters.

Some of the questions for consideration at this seminar therefore are these:—

A. Are there delays in magistrates courts, and what are they?
B. Are these delays acceptable?
C. What is the cause of them?
D. What effect do they have?
E. Can they be remedied fully or partially?

In an endeavour to answer these questions, I examine matters of practical significance as they confront me in my administrative role, it being my function now to monitor the performance of N.S.W. magistrates courts (Sydney, Metropolitan and Country), and to devise and implement schemes for the better planning and functioning of these courts.

Nowhere in the paper have I made any attempt to deal with the matters raised under any heading in order of importance, choosing rather to deal with them in order of convenience. Obviously certain matters raised will be seen to be of greater importance than others, but irrespective of the degree of importance, all are in my opinion, worthy of consideration. At times there may be some overlapping of subject matters but this too has been done for the sake of convenience.

A. Are there delays in Magistrates Courts and what are they?

In the metropolitan areas, including Newcastle and Wollongong, delays in the hearing on non-custodial cases over the last three years are set out in **Schedules 1** and **2** (pages 61 and 62).

In the country circuits it can be said that delays have rarely, if ever, exceeded three months. Generally speaking where they have occurred they have been confined to Coffs Harbour, Lismore, Grafton, Katoomba and Moree, and assistance has been provided to overtake arrears and reduce

delays. To prevent unacceptable arrears accruing in the country, assistance has been regularly provided. **Schedule 3** at page 64 shows the spread of assistance since 1974, and readily shows that some country circuits were in greater need than others.

It is important that the data in **Schedules 1** and **2** be assessed in the light of the total work load, including defended cases and the numbers of stipendiary magistrates on establishment strength. This data is available from the statistics assembled by the Operations and Planning Division of the Magistrates Courts Administration, and I acknowledge the assistance provided by Mr R. M. Mathison of that Division. The 1979 court statistics are not available at the date of writing of this paper. The relevant statistics form **Schedules 6 (1)** and **6 (2)** and are on pages 67 and 68.

I have attached also for consideration other useful statistics in respect of the operation of magistrates courts between 1974 and 1978, although I make no further reference to them herein.

Schedule 2 (page 62) shows that as at January, 1979, suburban courts carried arrears causing delay in non-custodial defended cases to range between, e.g. eight weeks at Campsie and Newtown courts upwards to 22 weeks at Sutherland court.

Various fluctuations occurred throughout the year attributable to a number of factors, including additional or reduced assistance, change by normal rotation of magistrates at various centres, and different patterns emerged later, e.g. Blacktown, which in January, 1979, had a delay of 15 weeks as at November, 1979, had that delay reduced to six weeks, and Liverpool, which was 16-18 weeks in arrears in January, 1979, was only eight weeks in arrears as at November, 1979. The court then at 119 Phillip Street, Sydney (now at St James Centre) had increased delay by November, 1979, to 20 weeks from the six weeks period which existed in January, 1979.

It has been the practice for some years, for matters of some days duration arising in the suburbs to be heard at Central Court of Petty Sessions. This has contributed to a situation having arisen at Central Court of no date being available for the hearing of a non-custodial defended matter of one or more days duration earlier than approximately five months ahead.

In other jurisdictions where Stipendiary Magistrates preside the delay situation is also variable:

e.g.
i. special juvenile court magistrates have no significant delays (five magistrates preside daily);
ii. Metropolitan Children's Court — custody and maintenance proceedings under Family Law Act and other legislation delay ranged between five and seven weeks throughout 1979 (one magistrate presides four days per week);
iii. civil claims courts at Wynyard House — the position has gradually worsened to a current 22 weeks delay (two magistrates preside daily);

iv. traffic courts — varying in some suburbs from 9-10 weeks delay up to 20 weeks at the City traffic courts at 302 Castlereagh Street (**Schedule 4**, page 65, shows the delay situation for traffic courts).

It is expected that further patterns will emerge in the future in respect of certain courts where different listing procedures and hearing arrangements have been made, e.g. all charge (arrest) cases from the Merrylands police station have been redirected from Fairfield court to Parramatta court. This will cause a corresponding fluctuation in figures at these courts of some 2000 cases per annum.

Additionally, the rostering of additional courts at Parramatta has enabled defended cases from other courts, e.g. Burwood, Ryde, Lidcombe and Fairfield to be heard at Parramatta. Whilst this does not provide a significant reduction in numbers of cases disposed of at the original courts, nonetheless it makes a substantial inroad into the period of delay which would otherwise exist if the cases were retained to be heard at the original courts. The effect of this arrangement was that during November, 1979, assistance was allocated at Parramatta for the hearing during the period 21st January, 1980, to 29th February, 1980, of defended cases from other courts as follows:

Lidcombe cases — 5 days
Burwood cases — 4 days
Ryde cases — 4 days
Fairfield cases — 4 days

Schedule 2 shows that these cases would not have been able to have been set down for hearing under normal circumstances at their original court earlier than:

Lidcombe — 24 weeks from the date of adjournment
Burwood — 12 ,, ,, ,, ,,
Ryde — 9 ,, ,, ,, ,,
Fairfield — 10 ,, ,, ,, ,,

The rather alarming increase in delay at the court at St James Centre referred to above is to be considered on the basis that the Commonwealth authorities are seeking to have their cases disposed of at that court (a special state court exercising Federal jurisdiction) rather than have them heard at another court or courts, e.g. at Central Court as has been the past practice.

It must be accepted, of course, that there cannot be a uniformity of approach to cases by all stipendiary magistrates and some magistrates are able to deal with their case loads in shorter time than other magistrates. Some think it appropriate to address remarks to a defendant at greater length than do others, and some magistrates have a longer approach to other facets of the case than do others. Style and approach therefore, are matters for each individual magistrate to consider and it is his duty to assess those and other relevant factors in the light of his ability to carry the allocated caseload.

B. Acceptability of arrears

In theory, any delay is unacceptable. In practice, custodial cases are required as a matter of justice to proceed as soon as the parties are ready to proceed. In non-custodial cases, a delay of up to eight weeks is not regarded as serious, although undesirable, but any delay in excess of 12 weeks is regarded as quite serious.

An understanding of the causes of the delay is necessary to understand the significance of setting standards of acceptability or unacceptability. Those courts then, which operate at an unacceptable level can be clearly seen from a consideration of schedules 1 and 2. The steps taken to improve the situation are referred to elsewhere in this paper.

C. Causes of delay

1. *Insufficiency of magisterial numbers*

An examination of statistical figures provides some insight into the problems of administration of the magistrates courts. The growth in matters coming before the courts needs to be looked at in association with the number of magisterial appointments made to hear the cases.

A table showing the number of magistrates available to sit since 1963 is attached as **Schedule 5** (page 66).

The number of appointments of magistrates as at 31st December, 1979, 98, shows those magistrates who are engaged full time as stipendiary magistrates and does not include the four S.M.s at the metropolitan Licensing Court or three other persons holding commissions as S.M.s who are engaged in other non-Bench duties.

Of the additional six appointments made in 1979, four appointments became effective at the start of 1980, and these have not yet been of any practical significance or advantage.

The disposition of the magistrates is as follows:

50 metropolitan magistrates (Grade 1)
22 country circuit magistrates (Grades 1 and 2)
5 Wollongong and Newcastle magistrates
5 special juvenile court magistrates
5 relieving magistrates
10 traffic magistrates
1 Fair Rents and Strata Titles Board (providing part time assistance to the Metropolitan Bench)

It will be understood of course that relief for all magistrates proceeding on recreation, sick, special or extended leave is provided from within the existing number of magistrates. The schedule shows that there were 92

magistrates in 1974 through to 1979, when the increase referred to was made.

There was a substantial increase in jurisdiction of stipendiary magistrates in 1974 by reason of the amendments to the *Crimes Act*, giving a right of summary disposition of indictable offences previously the subject of a district court hearing. These amendments apparently provided some relief to the delay situation in the District Court, and will no doubt be discussed during this seminar.

There was also an increase in jurisdiction of magistrates courts in respect of proceedings under the *Courts of Petty Sessions (Civil Claims) Act*.

Notwithstanding the additional work generated in the magistrates courts by increased jurisdiction, some balance occurred by the substantial saving of magistrate's time by the introduction of s.75B of the *Justices Act*, which allowed a shortened form of *ex parte* hearing in a wide range of matters (e.g., traffic cases, Local Government prosecutions, Main Roads Department prosecutions for overloading, Corporate Affairs Commission prosecutions for failure to lodge annual company returns, etc.).

In traffic cases, a similar provision had existed since 1965 under s.18C of the *Motor Traffic Act*, which section was replaced by s.75B of the *Justices Act*.

A consideration of the monthly returns of the state of business at various courts suggests that there was a progressive build up of cases over the years since 1974, and that the impact of increased jurisdiction, the numbers and length of defended cases was not felt immediately. This factor was quite evident at the Central Court where many of the lengthy corporate matters did not proceed to a hearing due to the unreadiness of the parties or the unavailability of court time until as long as two years after the commencement of the proceedings.

Schedule 6(1) (page 67) shows a reduction in the number of hearings in defended cases between 1974 and 1978, with the pendulum swinging upwards again in 1978, but of course these figures are silent as to the time occupied in the hearing of defended cases. The figures provided in relation to numbers and duration of sitting relate to all sittings including list work as well as defended cases. Nonetheless, there was no increase in establishment strength from 1974 until 1979, when the additional appointments were made as indicated.

With increases in jurisdiction in civil claims cases expected in the near future, and with the increase in lengthy prosecutions, no great confidence can be expressed however, in the ability of the present numerical establishment of magistrates to meet the expected demand of matters to be heard and determined.

2. *Growth of Defended Cases:*

Despite the figures in **Schedule 6(1)** (page 67), to which I referred above, which suggests a reduction of hearings of all defended matters, there has been a substantial increase in work loads generated by defended cases. This is clearly demonstrated by the figures in **Schedule 6(2)** (page 68) which show a fluctuation in the number of defended cases, between 1974 and 1978.

It can be seen that the figures in that schedule do not include juvenile and maintenance cases (which I have indicated present no problems of delay) and that they show that the number of defended traffic cases has substantially dropped from 7,516 in 1974 to 4,957 in 1978. This means that the increase has been related to cases to be heard by stipendiary magistrates sitting on the general bench and not in other specialised jurisdictions.

The figures detailed therein of defended cases, excluding juvenile, maintenance and traffic cases, are:—

1974..... 8,338
1975..... 8,829
1976..... 7,991
1977.....10,358
1978.....11,566

The number of cases, dealt with by stipendiary magistrates, has significantly increased from:—

in 1974.....583,090 to
in 1976.....632,306 and
in 1978.....645,538

In 1978, 19,294 or 2.99% of those cases were defended. There were 19,602 sittings of magistrates courts in 1978 throughout N.S.W. Nonetheless, the defended cases figure, alone, provides no real insight into the problems facing magistrates. A wealth of other information lies in the statistics attached to this paper, but I have not needed to refer to them.

During 1979, defended cases have been of varying duration: e.g., a Social Security fraud case, which I am hearing began in March, 1979, has occupied 130 sitting days to 31st January, 1980, and is likely to continue on a four days per week basis until well into 1980. (Some estimates suggest to June, others to September or later.) Other allegations of conspiracy have ranged in duration from one to four months hearings.

In the period 30th July, 1979, to 30th December, 1979, at Central Court of Petty Sessions there were specially fixed for hearing 62 cases of three or more days duration. These are of course in addition to the lengthy cases referred to above, and an analysis of these reveals the following:—

1 × 23 days	
1 × 20	
1 × 19	These cases total 351 days
2 × 15	of hearing or on a five hour sitting
1 × 14	day equal 70 weeks, or just less
5 × 10	than one magistrate sitting five days
3 × 7	per week for 1½ years.
12 × 5	
5 × 4	
31 × 3	

Estimates of hearing time, made by lawyers for the parties, more often than not are conservative, and whilst a number of these 62 cases have concluded in less than the allocated time, a substantial number have required additional time, even up to double the time originally estimated. An attendant difficulty consequent upon such re-arrangements is referred to elsewhere in this paper.

As at mid-December, 1979, there were already specially fixed 44 cases ranging up to 40 or more days estimated hearing, for hearing in 1980 up to the end of April, 1980. This figure will naturally be increased by custodial cases and other urgent cases coming into the list.

3. *Growth of Corporate Crime*

Prosecutions based on allegations of corporate crime have substantially increased in the past few years. Whilst I have not been able to gather any figures as to numbers of cases, it is clear that these cases have occasioned many lengthy and complex hearings. The increasing incidence of these cases has been the subject of considerable comment in parliament and in legal and commercial circles, as well as gaining considerable media coverage.

Problems associated with the length and complexity of these corporate cases, both at Petty Sessions and District Supreme Court levels, resulted in part in the enactment of legislation giving powers of summary jurisdiction to the Supreme Court.

Elsewhere I make reference to their effect on committal proceedings. Doubtless, Mr John Hogan, the Solicitor for Public Prosecutions and Clerk of the Peace for N.S.W., will make reference to these matters during this seminar.

4. *Increases in the Length of Pleas of Guilty*

There has been a substantial increase in the time occupied for the proper disposal of matters, the subject of a guilty plea, over recent years. Some of these are related to:—

i. Legal aid — An unrepresented defendant put little, if anything in mitigation of penalty. Since the introduction of legal aid, pleas of varying lengths in mitigation are made. In some cases,

e.g., driving offences (P.C.A., etc.) where loss of license arises, a substantial increase in the time occupied by the case has occurred.

ii. Recent legislation — e.g., environmental and consumer protection legislation, which provides substantial penalties and attracts a high degree of public interest. These frequently involve lengthy pleas, where expert, technical and other evidence is adduced.

iii. Increased Jurisdiction — e.g., the recasting in 1974 of s.476 of the *Crimes Act* providing for certain indictable offences to be dealt with summarily with the consent of the defendant in appropriate cases. Many more lengthy pleas in mitigation have resulted.

5. *Changed sentencing procedures*

These have led to increased time being required and to the inability of the court to complete the case on the date of the plea of guilty or hearing.

i. Pre-sentence reports from the Probation and Parole Service:—

The case has to be adjourned to enable preparation of the report, which then has to be considered in the light of the matters admitted or, established at the earlier hearing.

If the magistrate constituting the court is not the magistrate before whom the plea was earlier entered, further time is required for a reconsideration by him of the facts and circumstances of the case.

ii. Drug or Alcohol Diversion Schemes

The placement of a defendant as a participant in such a scheme causes similar delays as in (i) above.

iii. Use of *"Griffith's Case"* Remand Bonds

This requires re-familiarisation with all relevant facts and circumstances at a much later date, than in (i) and (ii) above.

6. *Procedural and Technological Inadequacies:*

Matters which I would raise under this heading are included under the same heading in my reference later in the paper to suggested remedial action for the delay problem. That reference will suffice.

7. *Increased work generated by*

i. Prison disputes and riots;

ii. Prison escapees on the run.

A considerable amount of work has been generated into Courts of Petty Sessions over recent years by the apparent failure or inability of the prison system to:—

a. Maintain good order and discipline within its establishments, and

b. Keep confined within the prison system, those whose sentences have not expired.

This apparent failure or inability to maintain good order and discipline has resulted in a considerable allocation of available court sittings to deal with criminal charges arising from physical damage to property during riots and other serious disturbances in prisons.

Hand in hand with this situation, the increasing number of prisoners, who are able to escape from lawful custody within the prison system, results frequently in the generating of further proceedings in Courts of Petty Sessions, as a result of the activities alleged against those prisoners, in respect of their escape and self-maintenance, whilst at large on the run.

8. *Loss of Sitting Time* due to:—

a. Unpunctuality of magistrate, legal practitioners, police officers and witnesses.

b. Unnecessary "short" adjournments, due to personal reasons, or to a failure to recognise in advance foreseeable circumstances or events arising in the case. Not all unscheduled short adjournments are unproductive but the time lost thereby can frequently be avoided.

c. Readiness of some stipendiary magistrates to grant adjournments for unsound reasons. These frequently take matters out of the list leaving no work on hand. The matter adjourned goes over to another date, when an appropriate degree of firmness by the bench, could properly have resulted in the matter being concluded that day.

d. Unreadiness of witnesses for the prosecution or defence or of solicitor or barrister. These matters are outside the control of the court to a degree, and those charged with the responsibility of prosecution and defence need to critically examine their role in the causation of this type of delay.

e. Failure of the defendant charged with an indictable offence to appear at the appointed time —

This results in the fact that the matter *cannot* proceed and there is a total loss of court time and inconvenience to witnesses.

The late attendance of the defendant with an apparently acceptable excuse for his late attendance, will probably result in the restoration of the matter to the list, and necessitate a further adjournment to enable the dismissed witnesses to be again produced at the next hearing, whenever in the future that might be.

f. i. Failure to notify court in advance of intention to change plea of not guilty to a plea of guilty.

ii. Failure to notify the court and other party of intended application for adjournment.

iii. Out of court agreement by parties to an adjournment without notification to the court of such agreement.

How many times could some other practitioner and the court have properly utilized the time wasted unnecessarily and selfishly?

g. Deliberate delaying tactics by both prosecution and defence. This is usually seen when one party has been forced to proceed when his application for adjournment has been refused — he simply "Bats out time".

It also occurs where an adjournment is obtained for some dubious reason, and time allocated cannot be used.

h. Prolix counsel — who add substantially to court delay by undue repetition, overstating the obvious, being unnecessarily over cautious, or perhaps even demonstrating to the client that the client is getting good value for money.

One can readily appreciate difficulties encountered by counsel in the conduct of a case, and it is easy with hindsight to be critical, but many cases ought to be completed in substantially less time than they actually occupy.

i. Poor listing procedures and general court administration.

These are to be found existing in inadequate planning and programming of work, not only on a day to day basis, but in the overall management of the court. It is necessary for the magistrate to assess in advance the likely work load to be carried at his court and to plan the spread of work so far as is required to discern and take into account changing trends in the work coming into his court.

9. *Variations in Approach* by individual magistrates

I have already made reference to this topic in considering the "Delay" schedules attached **(Schedules 1 and 2).**

10. *Arrears Generate More Arrears*

Parties and/or counsel can take advantage of an arrears situation, by pleading not guilty to a case, knowing that a lengthy adjournment will result. In so doing, they frequently obtain an adjournment which otherwise may not be granted. The time allocated to the case on the future date is not usually required, preventing a proper usage of that time.

11. *Delay caused by Language difficulties*

There has been a marked increase in the number of lengthy cases coming before the magistrates courts, in which parties or witnesses are unable to speak or properly understand the English language.

Despite the existence of a large and co-operative panel of government interpreters it is not always possible for an interpreter to be present when required.

12. *Court Accommodation*

The lack of available accommodation is causing some delay in certain centres.

A recent reappraisal of available court room accommodation has revealed almost maximum use of a number of suburbs. So much so, that in respect of two courts, Manly and Kogarah, the unavailability of court room accommodation has resulted in arrangements being made for cases from the Manly lists to be heard on specified dates at North Sydney court house and for Kogarah cases to be heard on set dates at Sutherland court house. Whilst this helps to contain arrears at those centres without adequate available accommodation, it correspondingly reduces the availability of accommodation at the alternate centres for work generated from those alternate centres.

13. *Delays occasioned through the introduction of Legal Aid*

Let it be said, clearly and unequivocally, that stipendiary magistrates welcome and support *the principle* of legal aid being granted to those persons who cannot afford or do not have private legal representation.

The benefits to the person charged, to the court, and to society generally, by reason of legal representation, are well recognized and need no elaboration.

One may ask, however, would many of the cases now occupying such lengthy periods before the court, be so lengthy if the defendant had to provide his own legal representation or appear unrepresented. Clearly the answer is that proceedings would be much shorter. Obviously the legal representative fortified by the knowledge that his remuneration is secure, can expend greater time in probing more obscure matters than he might have, had he looked to his client for payment of his fees. Just on that aspect, it is interesting to note a changing approach now in committal proceedings. Whereas in pre-legal aid days, committal cases usually were simply a parade of prosecution witnesses with little challenge or intervention from defence counsel, now a greater deal of activity from the defence occurs.

This naturally lengthens the proceedings before the magistrate, and has played a big part in causing and increasing delays in magistrates courts.

Criticisms are sometimes levelled, perhaps unfairly, that lawyers, i.e., barristers and solicitors, prolong cases unnecessarily for their own pecuniary advantage. However, it is thought that the legal aid system is open to abuse by lawyers from time to time, not necessarily directly for that purpose, but as a consequence of taking longer to conclude than before legal aid was available. Doubtless, there is a school of thought, which suggests that it is proper to probe all matters now that direct cost to the client is not involved.

Another by-product of the legal aid scheme is the entry into the advocacy role of many practitioners, who hitherto have not personally practised and appeared in magistrates courts. Surprise and concern has been expressed by magistrates from time to time at the poor quality of representation, and the detrimental effect on the defendant of certain ill-considered lines of cross examination. In this regard it is worthwhile to note the remarks of the Chief Justice of New Zealand on 29th May, 1974, at New Plymouth, when in passing sentence on four men convicted of rape, he said inter alia, in relation to legal aid:—

> On the other hand it is undoubtedly right that a confession of guilt made before or even during a trial can be counted in the offender's favour as a mitigating element in fixing sentence. This needs to be remembered in these days of ample legal aid in criminal cases. Legal aid is intended to help those who need it and cannot afford it. It is not designed to provide a training ground for counsel or for an opportunity for offenders to reject wise advice . . . .
> *(New Zealand Law Journal* 30.7.74 p. 318).

Despite what may be seen to be criticisms of the scheme, I reaffirm support for the principle of legal aid. The delay to which I refer arises in the operation of the scheme.

Quite clearly the presence of the Public Solicitor's staff in magistrates courts has had a significant impact. Many cases, where doubt or uncertainty has existed in the mind of a person charged as to his position in law, have been resolved by the presence of a legal aid solicitor and many cases, which may otherwise have been protracted due to the lack of skill or uncertainty in the mind of an unrepresented defendant have been shortened by the intervention of a legal aid solicitor.

D. Effects of Delay

1. *Problems confronting the Magistrate*

a. Quite unlike the Supreme Court and District Court, in which, generally speaking, all criminal trials are conducted by a judge and jury, the trial of criminal and quasi-criminal cases in Courts of Petty Sessions is conducted by a stipendiary magistrate sitting alone. (A Supreme Court judge exercising the summary jurisdiction of that court, and a District Court judge sitting on appeal against a stipendiary magistrate's decision are excepted.)

It follows of necessity, consequent upon empanelling a criminal jury that from the commencement of the trial until the jury verdict, the trial must proceed on a day to day basis. No risk can arise that a juror through delay or postponement of the trial will lose the basic value of remembering and understanding current and recently given evidence, and no obstruction is permitted to be put in the path of the jurors, who must be free to concentrate, without outside diversion or confusion, on the subject matter of their deliberations. So much so, that there cannot fall upon their decision any taint of outside influence arising from e.g., confusion, or loss of memory occasioned by the passage of time.

Not so the trial of a criminal matter (or indeed any matter) before stipendiary magistrates, which carries over beyond the (previously) allocated time span. Under the current scheme prevailing in Courts of Petty Sessions, unless advance arrangements are made, an incomplete trial may well be adjourned for a number of weeks, or months, before it is resumed. The effect of this is that notwithstanding the most meticulous and detailed notetaking, and careful transcript reading, unless the case has some outstanding feature which provides some indelible or lasting impression on the magistrate, it is becoming increasingly difficult to recall all important issues to be considered in coming to a proper decision (e.g., demeanour of a witness, hesistancy in answering, tone of voice, etc., may well have passed from the memory of the tribunal).

The actual result may well be that the tribunal which deals with the balance of the case upon the resumed hearing, whilst physically the same person, is quite different in effect to that tribunal which began the hearing. One may ask, "How can justice be seen to be done in these circumstances?" and the answer must fall well short of acceptability. The situation is of course compounded by the distinct likelihood that the magistrate will, in the meantime, be involved in concurrent proceedings of great similarity to that case which remains unconcluded, and indeed that situation may well extend to three or four concurrent proceedings of similar nature.

A few years ago, one magistrate was involved in a series of committal proceedings in relation to allegations of criminal abortion, in which evidence of great similarity but with significant differences was being given on dates ranging over some months during which the hearings were intermingled. The possibility of confusion of evidence in one case with that in another was real and caused the magistrate considerable concern.

b. In cases, where congestion in the Court lists has caused a real delay, the problem can become aggravated in a twofold way:—

i. A delay of weeks (or months) in obtaining a commencing date for a hearing.

ii. Further delay of weeks (or months) if the case does not conclude in the allocated time span.

Frequently the best made plans are frustrated, by reason of the need to

set aside a non-custodial case already listed for hearing, because of the necessity to try or hear speedily, a case of perhaps greater or lesser importance, where the defendant is in custody in respect of that charge by reason of being refused bail or being unable to raise bail.

2. *Problems for the Defendant*

In some instances, defendants may well be advantaged rather than disadvantaged by delays. Earlier reference was made to the knowledge of the existence of arrears being used to obtain an adjournment where it may well not have been granted but for the court's inability to hear the matter.

A further advantage is that witnesses for the prosecution may die, or become unavailable or suffer genuine memory loss as to important details.

Nonetheless, disadvantages very frequently flow to a defendant because of delay. These include:—

i. Loss of time and/or salary, or other inconvenience (e.g., suspension from duty during the pendency of proceedings).
ii. Loss of defence witnesses, or reduction in the value of their testimony.
iii. Additional expense in the continued retention of their legal representative.
iv. Suspense and other emotional or physical trauma arising from the matter remaining unresolved.

I think it worthy of comment however, that in these days of increased legal representation, whether or not under legal aid, the chance of lost testimony through impaired memory is diminished by reason of solicitors promptly obtaining statements or proofs of evidence from defendants and witnesses, thereby enabling them to refresh their recollection from those documents, as prosecution witnesses freely do.

3. *Problems of witnesses*

These include:—

i. Loss of time and/or salary or other personal inconvenience.
ii. Diminution of recollection of persons, objects or events.
iii. Suspense or other emotional or physical trauma occasioned by non-resolution of the matter.

4. *Problems for the Prosecution*

These are bound up with the problems facing the court and witnesses, because it is the prosecution which bears the onus of proving the guilt of the defendant beyond a reasonable doubt. Additionally, there can be frustration of the principle that punishment should follow the crime as soon as possible.

An example of such frustration, which creates problems for the prosecution is to be found in cases where a defendant charged with an indictable offence is able to obtain a number of adjournments at Petty Sessions before being forced to have the case proceed. He then agrees to the case being listed for the taking of evidence, and just prior to that date he notifies the prosecution that he desires to enter a plea of guilty and be dealt with under s.51A of the *Justices Act*, and in fact he does enter that plea. He then obtains as lengthy a period of delay as he can before coming before the District Court, and then at that court does not adhere to his plea and asks that the judge make an order remitting the case to the Court of Petty Sessions for committal for trial proceedings to again be arranged.

Sometimes as long as two or more years may elapse between the date of arrest and the final committal for trial. Frequently prosecution witnesses, including victims, are itinerant persons, who have moved on and cannot be located. Sometimes they have died. Their evidence has never been taken on oath and is consequently lost.

5. *Arrears Generate Further Arrears*

This aspect has been referred to under "**Causes of Delay**" (page 49).

6. *Manipulation of System and Circumvention of Proper Justice by Unscrupulous Defendant and Counsel*

These have been referred to elsewhere and need no repetition here.

7. *Adverse Publicity of Delays*

It is timely to publicly and emphatically dissent from certain allegations recently made and published in the daily press of long unwarranted delays of persons in custody awaiting a hearing in magistrates courts.

Allegations, regrettably sometimes made on affidavit in support of bail applications in the Supreme Court, that a person refused bail, or unable to raise bail, will be caught up in the general arrears in Courts of Petty Sessions and languish in custody for months before his case is heard, are quite baseless and are untrue.

Arrangements are made, and will continue to be made, for a hearing within two or three weeks in such cases, except where such arrangements are beyond the control of the administration, e.g., absence through illness of a magistrate before whom the case is part heard.

E. Can the Delays be Remedied?

1. *Improved procedures and Elimination of Procedural Inadequacies*

Revised procedures could ensure better usage of court time and cut down on delays. There are a number of areas, some examples of which include:—

a. in summary matters, a pre-trial definition of the issues in dispute in respect of which non-contentious areas witnesses need not be called, and a statement be permitted to be tendered in lieu.

A widening of the use of provisions such as s.404 of the *Crimes Act,* in relation to admissions made by an accused person, on the advice of his counsel.

In a modern society, does it remain necessary or appropriate to leave the defendant in the privileged position of being entitled to say nothing, whilst the prosecution assembles its witnesses to prove each and every ingredient of the charge? Ought there be cast upon the defendant some responsibility to indicate the areas of contest and of non-contest? Can a modern society afford the luxury of retaining old principles, such as the right to silence and the presumption of innocence in favour of the defendant, without the defendant giving some indication of his attitude in the proceedings?

Perhaps greater use ought to be made of averments, allowing the prosecution to aver as a fact a matter of allegation, without further proof unless the defendant puts the averred fact under challenge.

A "reversed onus" provision may also help curtail proceedings, by placing greater emphasis on the defendant to participate in the formulation of the proceedings. The defendant would then be required to disclose the area of challenge he was making to the allegation. I do not suggest, however, that there be a change in the general law of requiring that the onus of proof overall be other than on the prosecution.

b. In Indictable matters dealt with Initially Under s.51A of the *Justices Act,* 1902

At the time of initial entry of the plea of guilty, the defendant is served with or given the opportunity to read the entire prosecution brief. The plea of guilty is then entered with the knowledge of all matters which the prosecution relies on.

There is an entitlement in the defendant to change that plea, when he is put before the District Court for sentence, and consequent upon that, the matter is remitted to the magistrates' court for ordinary proceedings. In many instances, the change of plea occurs because the accused person was not prepared to maintain his plea of guilty before a particular judge, and the committal proceedings which result, are simply uncontested. Upon committal, a date is fixed for the matter to be listed for plea, and frequently the plea of guilty is then entered, and the matter disposed of.

The time taken in the formal committal proceedings seems to be unnecessarily expended. It would appear appropriate that in cases of a remitted matter for committal proceedings there be a requirement that no witness, whose statement has been examined at the time of the s.51A proceedings, need be called unless notification is given to the prosecution within a time to be prescribed, that there is a desire to cross-examine that witness.

Alternatively, consideration ought to be given to allowing a second committal for sentence under s.51A, but that would not be proper, if the effect was to enable a defendant to choose a judge of his liking. Safeguards would have to be in-built to prevent an abuse of process.

A further alternative approach could be for amendment to allow the presiding judge rather than remit the matter back to the magistrates court for committal for trial proceedings, to commit or remand the defendant for trial at the District Court.

A review of the existing law in relation to all committal proceedings is presently being undertaken.

c. In Ordinary Committal For Trial Cases

"Paper committals" in the form of statement and documents intended to be relied on, would be served on the defendant prior to the hearing, and no witness would need to be called, unless the defence indicated a desire to cross-examine. Variations of this procedure are in use in the United Kingdom, and in certain States of Australia.

d. Generally, it may be appropriate for a revision of procedures and proofs under the *Evidence Act*, to enable formal identification and production of documents to be by affidavit, and for such documents to be "marked" prior to the hearing. Coupled with such a provision, would be a need to provide a readily available photocopying service for the speedy production to the parties of copies of all such documents.

e. Statutory Limitation of Time, Within Which Trial must Occur

Is there a need for introduction of legislation in N.S.W. such as The Speedy Trial Act, 1974, introduced into the American Legal system, which, with certain exceptions requires that a "criminal defendant" be tried within 100 days of his arrest, or service of a summons?

I should add that the object of the legislation in America seems rather to have been to stop the defendant from obtaining

postponement of his trial indefinitely, than to ensure that there be no administrative delay in arranging and holding the trial.

2. *Technological Inadequacies*

a. Sound Recording

The recording of evidence and addresses, etc., on the typewriter by a deposition clerk in defended cases really belongs to the horse and buggy days yet, is still the accepted and only available method of recording in some courts. Happily, this method is falling into disuse, accelerated by the non-supply of replacement typewriters. Nonetheless, whilst recording has been done by shorthand in selected courts for many years, further progress is being made in the phased introduction to all metropolitan courts and country circuit headquarters of modern sound-recording equipment. The completion of this introduction is expected during 1980 and should result in a much speedier disposition of both list work and defended cases.

b. Computers

These, together with stenotype machines, can be used for the purpose of transcribing evidence. Their superiority and sophistication will doubtless ultimately result in the replacement of sound recording procedures.

The introduction of computers into the legal system may well reduce the overall cost of maintaining and servicing the judicial system, and such reduction may well make available additional funds for the payment of increased number of magistrates and support staff.

3. *Should there be a System of Introduction of Court Complexes?*

In modern times, with efficient transport, there appears to be a lessening need for courts to continue in places where they now sit. In many of the country circuits certain places where the courts used to sit have been abolished as court centres, and in other places, the court sits there only as required. It seems appropriate that there should be some rationalisation of the system, to enable a court to remain stationary and have the litigants come to it. Certain suburban courts seem to have outlived their usefulness, and in cases, e.g., Lidcombe and Glebe, it would seem more appropriate that the business normally conducted there be heard at Parramatta and Central Court respectively.

It would certainly allow for better management and administration of the courts, if complexes were built, in which a number of magistrates working in concert, would be more able to reduce time wastage, than in cases where they sit at separate centres alone. The ability to "overlist" cases at complexes at lesser risk of inconvenience to parties than at single court centres is obvious.

A further example of the utility of such an arrangement is seen when a magistrate disqualifies himself from hearing a further matter between certain parties. The ready availability of another magistrate, lessens inconvenience, expense and delay.

4. *Proper Listing Procedures, Both at Court Complexes and Single Court Locations*

I have made reference earlier to the need for the implementation of proper listing procedures and proper court administration. (*See* paragraph 8h i under causes of delay, page 49).

In considering this aspect however, I should make reference to a practice of trying to ensure a day's work is on hand by overlisting. I mentioned this aspect in passing in the preceding paragraph. It has become well recognized that in practice listed cases have a habit of not proceeding when scheduled. The practice of deliberate overlisting is not without pitfalls.

To try and create a sufficient work load, a court may well list work with a face value of perhaps eight hours for a five hour court day. Where this happens, the day becomes a day of chance so far as the parties are concerned.

i. If three hours work "drop out" of the list, then there is left a convenient and comfortable residue so that there is no wastage of time.
ii. If no work drops out, then cases listed for hearing cannot proceed and parties and witnesses are sent away distressed and disappointed, and frequently out of pocket, to be required to come again at some later time.

Apart from the inconvenience and expense under ii the court is also forced to compromise itself in certain circumstances by permitting adjournments in cases of no, or limited, merit under circumstances where otherwise than because of the court's inability to hear the matter, no adjournment would or should be granted. In other circumstances, the court may well be exposed to a criticism that it appeared to be unduly hurrying through earlier cases to reach other cases further down the list.

It will be noticed that most courts now follow a system of planning which involves the allocation of specific days and times for list work and for defended cases. This has proven highly beneficial wherever implemented.

5. *Consent Adjournments to be Granted by the Clerk of Petty Sessions or Chamber Magistrate*

There would be a considerable saving of time if matters to be adjourned by consent, or without objection, were removed from the magistrates list. In some of the bigger court centres the period from 10.00 a.m. to 11.00 a.m. or 11.30 a.m. is frequently occupied in granting adjournments and sorting out work which is *not* proceeding on that day.

6. *Self Enforcing Penalty Notices*

Where provision is made for the issue to a person of an infringement notice, e.g., traffic infringement notice or "on the spot litter" fine, and the notice is not met by payment, there seems to be little value in continuing to proceed in respect of the breach by way of information and summons, with court proceedings to establish the commission of the offence charged.

It seems that the interests of justice could be met in these minor matters, by making provision in the infringement notice for the recipient to challenge the matter if he so desires by giving notice within a time limited in the notice, in which case the matter would be referred to the court for a conventional hearing of the issue involved. In the event of no dispute arising, then the matter would not be litigated and provision would be made for the enforcement of the penalty stipulated in the notice without recourse to the court.

When one considers the vast number of, e.g. parking cases which are dealt with by stipendiary magistrates without the defendant appearing in answer to the summons, it seems impractical that a person who has not complied with an infringement notice request for payment should be afforded all the conventional safeguards of the law in respect of a matter in which he has apparently little interest, and which in many cases is just another business expense.

7. *Night Courts*

These were used with limited success in respect of traffic cases only, and their provision has now been discontinued.

Their use for criminal cases was never contemplated, and whilst their use might have assisted in respect of reducing the strain on available court accommodation, they had little other utility.

8. *Alternatives to the Present Conventional Justice System*

I have already made reference to the use of self enforcing penalty notices.

The introduction in this state of Community Justice Centres to divert from the courts, minor community disputes, will be watched with considerable interest.

In the field of Family Law, compulsory out of court counselling has been for some time a statutory requirement.

9. *The Need for Greater Responsibility and Interest in the Administration of Justice by:—*

a. Stipendiary magistrates
b. Police officers
c. Members of the legal profession

Under paragraph 8 (page 48) relating to causes of delay I set out a number of matters occasioning the loss of sitting time, attributable to the conduct of those involved in the conduct of court proceedings. One question often raised however, is this "Does the duty of a lawyer to his client exceed his duty to the court?"

It is openly said by many practitioners that it is the duty of a solicitor or barrister to shield his client from a forum not of his liking, and that a failure to have a matter adjourned away from a magistrate, who in the opinion of the solicitor or barrister, would deal severely or unfavourably with the client, borders on a breach of the duty owed to the client.

On the other hand, it is said by others that the duty to the court owed by the practitioners is for the practitioners to be ready to proceed before the court, irrespective of whom is presiding, and to proceed according to the instructions he has been given. It is clear that a sudden or apparently sudden unreadiness to proceed, plays havoc with court planning and administration and contributes substantially to delays in the magistrates courts in the criminal justice system.

It would be unfortunate if attempts to avoid magistrates became so rife or fashionable that to reduce their incidence a magistrate, in adjourning a case set down for hearing, would be required to adjourn it to a future date but for hearing by himself, at the time appointed. Surely the court should never need to take such drastic and calculated action, but one wonders if that time is not approaching.

Conclusion

It is clear that to overcome present and prevent future delays in magistrates courts there must be implementation of the principles so concisely set out by the American Bar Association in the quotation with which this paper opened.

In the meantime a policy has been implemented of providing assistance both permanent and casual in those areas where assistance is more urgently needed. The problem of delay will continue to inspire the quest for better planning and better procedures which will be adaptable for current and future needs. No doubt the cost factor relating to the provision of magistrates, support staff, equipment and accommodation will continue to act as a buffer between what can be provided and what is necessary and desirable.

Nonetheless each one of us involved in the criminal justice system might very well ask himself critically, "Am I in any way to blame?"

GRADE 1 METROPOLITAN COURTS DELAYS

	Quarterly							*Monthly (4th Quarter)*		
Court	*3/77*	*6/77*	*9/77*	*12/77*	*3/78*	*6/78*	*9/78*	*10/78*	*11/78*	*12/78*
Central										
4-6 Phillip St										
Bridge St (Wynyard House)								14-26w	14-26w	15-26w
Children's Court (M)						4w	4w	4w	4w	4w
Phillip House	3m	10w	3m	4m	4m	2m	2½m	8w	8w	n/a
Balmain	9-10w	11w	n/a	4½m	5m	21w	14w	12w	15w	15w
Bankstown	6-8w	6-8w	14-16w	18-22w	18w	5m	3-5m	4m 8w(t)	12-14w 10w(t)	14-16w 13w(t)
Blacktown	8-10w	11w	12w	12-13w	13w	13w	2m	n/a	12w	n/a
Burwood	6w	8w	9w	13w	13w	14w	13w	13w	13w	13w
Campsie	11w	12w	10w	11w	8w	4w	4w	4w 5w(t)	6w 6w(t)	6w 6w(t)
Fairfield	14w	10-11w	12w	5m	5m	17w	15w	n/a	16w	n/a
Glebe	7-9w	9-11w	16w	5½m	4m +	21w	20w	19w	17w	16w
Hornsby	6w	6w	10w	13w	16w	16w	13-15w	n/a	14-15w	14-17w
Kogarah	6-8w	8w	3m	4m	3½m	4m	5m	n/a	5m	5½m
Lidcombe	9w	7w	8w	8w	8w	7w	11w	n/a	n/a	11w
Liverpool	6w	5w	5w	14w	12-14w	14w	12-14w	n/a	n/a	n/a
Manly	12w	10w	10w	10w	12w	12w	13-27w	n/a	23w	18-24w
Newtown	8w	9w	7w	6w	6w	7w	8w	n/a	8w 10w(t)	12w 10w(t)
North Sydney	6-8w	5w	9-10w	3m	16-18w	14w	12w	n/a	12w	12w
Paddington	4w	4w	3w	3w	n/a	n/a	n/a	n/a	n/a	n/a
Parramatta	8w	8w	9-10w	11-12w	11-12w	10-12w	10w	n/a	10w	11w
Penrith	8-9w	8-9w	6-7w	5-7w	5-7w	7w	4-5w	n/a	3-5w	3-5w

GRADE 1 METROPOLITAN COURTS DELAYS (continued)

	Quarterly							*Monthly (4th Quarter)*		
Court	*3/77*	*6/77*	*9/77*	*12/77*	*3/78*	*6/78*	*9/78*	*10/78*	*11/78*	*12/78*
Redfern	2m	2m	5w	9w	9-10w	12w	12w	n/a	13w	15w
Redfern Transport					Not Available					
Ryde	8w	7w	7w	8w	8-9w	10w	8w	8w	8w	8w
Sutherland	10w	10w	10w	10-12w	14w	16w	16w	16w	18w	20w
Waverley	13-14w	13-14w	14-16w	16-17w	16w	12w	14w	14w	14w	15w
Newcastle								6-7w	8-9w	3-7w
Gosford								2m	2½m	n/a
Wyong								2m	2m	n/a
Woy Woy								6w	6w	n/a
Wollongong								10w	11w	12w

Note: w = weeks, m = months, n/a = not available, t = transport.

DELAYS IN THE LISTING OF DEFENDED CASES FOR HEARING SCHEDULE 2

	Month ended 1979											
Court	*Jan.*	*Feb.*	*Mar.*	*Apr.*	*May*	*June*	*July*	*Aug.*	*Sept.*	*Oct.*	*Nov.*	*Dec.*
Balmain	16w	18w	16w	n/a	16w	n/a	12w	15w	15w	15w	15w	17w
Bankstown	15w	17-20w	16-20w	16-20w	18w	15w	18w	18w	18w	18w	18w	16-17w
Blacktown	15w	n/a	n/a	18w	18w	19w	16w	12w	10w	7w	6w	6w

Burwood	13w	13w	16w	16w	14w	16w	14w	16w	14w	14w	13w	12w
Campsie	8w	9w	9w	11w	10w	11w	11w	12w	12w	12w	13w	13w
Central	n/a	n/a	n/a	n/a	n/a	n/a	n/a	20-22w	20w	21w	22w	n/a
Fairfield	16w	14w	15w	14w	16w	17w	16w	13w	13w	16w	12w	10w
Glebe	14w	n/a	14w	n/a	13w	n/a	12w	14w	12w	12w	14w	14w
Hornsby	14w	12-15w	16w	16-18w	18w	16-18w	15w	14-15w	14-15w	15-18w	15-16w	13w
Kogarah	5½m	4m	4m	3½m	3½m	4m	4½m	5m	3-4m	3-4m	4m	15w
Lidcombe	n/a	n/a	12w	n/a	n/a	13w	16w	20w	n/a	24w	n/a	n/a
Liverpool	16-18w	18-20w	13-15w	n/a	12-14w	8-10w	9w	8w	7w	7w	8w	n/a
Manly	24w	11w	11w	7-14w	13w	13w	17w	20w	21w	25w	20w	17-21w
M.C.C.	4w	6w	6w	8w	7w	4w	6w	6w	6w	5w	5w	7w
Newtown	8w	11w	10w	10w	8w	9w	11w	11w	12w	15w	15w	14w
North Sydney	12w	15w	16w	n/a	n/a	16w	16w	12w	8-10w	12w	10w	10w
Paddington			9w									
Parramatta	12w	14w	n/a	12w	n/a	n/a	15-16w	14w	12-16w	16w	14w	14w
Penrith	4-6w	3-6w	6-8w	5-7w	4w	4w	4w	4-5w	4w	6w	8w	
Phillip House	6w	n/a	6w	6w	6w	6w	6w	8w	8w	16w	20w	18w
Redfern	14w	14w	14w	14w	14w	15w	n/a	14w	14w			
Ryde	9w	9-10w	9-10w	8-9w	11w	11w	—	14-15w	15w	14-15w	10w	9w
Sutherland	22w	22w	22w	22w	20w	20w	22w	22w	23w	23w	23w	19w
Waverley	14w	11w	11w	11w	16w	18-19w	16w	15w	15w	16w	16w	16w
Wynyard House	10-15w	12-20w	18w	17w	—	17w	18w	18w	19w	21w	22w	22w
Belmont								6w	5w	5w	6w	10w
Gosford	10w	5w	10w	2m	2m	6w	6-7w	6-8w	2m	2½m	2m	2m
Newcastle	8-9w	6w	8-9w	n/a	n/a	8-9w	8w	8w	8w	8w	10w	n/a
Wallsend								6w	6w	9w	12w	13w
Wollongong	12-14w	12-14w	3m	3m	3-4m	3-4m	4m	13-16w	3-4m	4m	4m	4m
Woy Woy	10w	4w	10w	3m	2m	2m	5w	4w	10w	6w	2m	2m
Wyong	10w	5w	10w	3m	2m	2m	2m	6-8w	2m	6-7w	2m	2m

SCHEDULE 3

ASSISTANCE — COUNTRY DISTRICTS (WEEK)

	1974	*1975*	*1976*	*1977*	*1978*	*Arranged as at 17.8.79*	*Total 1979*
Albury	1	1	2	3	3	2	3
Bathurst	0	1	½	0	0	0	0
Broken Hill	0	1	3	1	3	2½	4½
Campbelltown	0	1½	2	2	9	4½	5½
Cooma	0	0	0	0	0	0	0
Cootamundra	1	1	0	2	0	3	3
Dubbo	3	5	5	1	0	6	6
East Maitland	0	0	½	0	1½	1	1
Glen Innes	2	5	5	¾	2	0	0
Goulburn	½	½	½	1	1½	2	2
Grafton	3	4	3	10	6	10½	10½
Lismore	2	3	3	6	0	6	7
Maitland	0	0	3	0	0	1	1
Narrabri	4	4	3	1	3	2	2
Narrandera	3	3	2	3	0	2	2
Nowra	1	6	0	3	0	0	0
Orange	0	1	0	0	2	2	2
Tamworth	0	0	0	0	1	1	1
Taree	0	1	2	0	2	2	2
TOTAL (weeks)	20½	37½	34½	37	34	47½	52½

NB: Country circuit Courts with headquarters at Katoomba, Wagga and Gosford have Metropolitan Status and are not included herein.

CITY ASSISTANCE: 1979: — About 400 days.

SCHEDULE 4

DELAYS IN THE LISTING OF DEFENDED CASES FOR HEARING

TRAFFIC COURTS

Court	*Month ended 1979*											
	Jan.	*Feb.*	*Mar.*	*Apr.*	*May*	*June*	*July*	*Aug.*	*Sept.*	*Oct.*	*Nov.*	*Dec.*
Bankstown	15w	13w	13w	11w	10w	10w	10w	10w	10w			
Belmont								6w	7w	5w	11w	6w
Campsie		8w	9w	9w	11w	12w	11w	10w	15w	n/a	16w	16w
302 Castlereagh St								10-12w	16w	13w	20w	
Fairfield								11w	11w	14w	16w	
Gosford									11w	15w	14w	18w
Hornsby							19w	4-6w	17w	21w	17w	19w
Kogarah						3m	3m	10-12w				
Manly			12w	12w	12w	12w	n/a	6w	8w			
Newcastle								6w	6w	6w	11w	6w
Parramatta								11w	11w	17-18w	17w	12w
Penrith								4w	4w	n/a	9w	10w
Redfern								15w	n/a	n/a	18w	26w
Wallsend								7w	7w	6w	12w	5w
Wollongong								6w	6w	4-5w	17w	21w
Woy Woy									11w	13w	7w	13w
Wyong									7w	5w	9w	6w
Sutherland												

SCHEDULE 5

LIST OF NUMERICAL STRENGTH OF STIPENDIARY MAGISTRATES

1963	74
1964	75
1965	76
1966	77
1967	80
1968	83
1969	84
1970	85
1971	85
1972	88
1973	91
1974	92
1975	92
1976	92
1977	92
1978	92
1979	98

SCHEDULE 6 (1)

ALL CATEGORIES — PETTY SESSIONS & CHILDREN'S COURTS
(JUVENILES AND MAINTENANCE)

	1974	*1975*	*1976*	*1977*	*1978*
Total cases	583,090	634,457	632,306	592,657	645,538
Charge cases, traffic	44,637	49,253	46,312	36,280	36,822
Percentage traffic charge cases of total cases	7.65	7.76	7.32	6.13	5.7
Summons cases, traffic	247,028	296,020	308,898	298,710	316,492
Percentage traffic summons cases of total cases	42.36	46.66	48.85	50.50	49.02
Total traffic cases charge and summons	291,665	345,273	355,210	334,990	353,314
Percentage total traffic cases charge and summons of total cases	50.02	54.42	56.18	56.64	54.73
Total cases excluding charges of drunkenness	523,273	579,516	575,338	543,499	593,927
Percentage of all traffic cases of total number of cases excluding drunkenness	55.73	59.58	61.74	61.63	59.49
Percentage cases of drunkenness of total cases	10.25	8.65	9.00	8.10	7.99
Total number of defended cases	—	18,497	15,693	17,956	19,294
Number of hearings in all defended cases**	—	14,419	12,363	12,476	13,216
Percentage defended cases of total cases	—	2.91	2.48	3.03	2.99
Percentage hearings of total cases	—	2.27	1.95	2.10	2.05
Total number of court sittings	18,445	19,279	19,364	18,537	19,602
Total duration of such sittings, hours	75,499	81,705	78,511	76,944	78,581
Average daily sitting time	4 hrs 5 mins	4 hrs 14 mins	4 hrs 3 mins	4 hrs 4 mins	4 hrs 1 min

**When a number of defended cases are heard together this is regarded as one hearing.

SCHEDULE 6 (2)

COURTS OF PETTY SESSIONS (EXCLUDING CHILDREN'S COURTS — JUVENILES AND MAINTENANCE)

CHARGE AND SUMMONS CASES

	1974	*1975*	*1976*	*1977*	*1978*
Charge cases and summons cases heard & determined	447,567	498,749	510,519	486,212	540,183
Charge cases and summons cases dismissed through want of prosecution	72,321	72,714	67,615	54,298	52,122
Total charge and summons cases	519,888	571,463	578,134	540,510	592,305
Percentage of charge & summons cases dismissed through want of prosecution	13.91	12.72	11.69	10.04	8.8
Total charge and summons cases, traffic	279,620	332,865	341,927	322,193	353,314
Percentage charge & summons cases, traffic, of total cases	53.78	58.24	59.14	59.60	59.60
Defended charge & summons cases, traffic	7,516	6,613	5,463	5,197	4,957
Percentage defended charge & summons cases traffic of total traffic cases	2.68	1.99	1.60	1.61	1.4
Total charge and summons cases excluding traffic	240,268	238,598	236,207	218,317	238,991
Defended charge & summons cases excluding traffic	8,338	8,829	7,991	10,358	11,566
Percentage defended charge & summons cases excluding traffic of the total cases, excluding traffic	3.47	3.48	3.38	4.74	4.8
Total of all defended charge & summons cases	15,854	15,442	13,454	15,555	16,523
Percentage defended cases of total cases	3.04	2.70	2.33	2.87	2.8
Number of hearings in all defended cases**	—	11,898	10,631	10,690	11,177
Percentage of hearings of total cases	—	2.08	1.84	1.97	1.89
Prosecutions, Commonwealth Acts	22,731	20,161	19,224	12,100	14,754
Percentage prosecutions Commonwealth Acts of total cases	4.37	3.52	3.32	2.23	2.5

**When a number of defended cases are heard together, this is regarded as one hearing.

(i)

COURTS OF PETTY SESSIONS (EXCLUDING CHILDREN'S COURTS — JUVENILES & MAINTENANCE)

CHARGE CASES

	1974	*1975*	*1976*	*1977*	*1978*
Charge cases heard and determined	154,910	157,270	156,277	150,025	162,911
Charge cases dismissed through want of prosecution	35,142	32,156	29,154	17,471	16,015
Total charge cases	190,052	189,426	185,431	167,496	178,926
Percentage of charge cases dismissed through want of prosecution	18.49	16.97	15.72	10.43	8.9
Charges of drunkenness	59,817	54,941	56,968	47,918	51,609
Percentage drunkenness of total charge cases	31.47	29.00	30.72	28.60	28.8
Charge cases dealt with by Justices of the Peace	30,192	26,419	26,897	26,770	28,501
Percentage of charge cases dealt with by Justices of the Peace	15.88	13.94	14.5	15.98	15.9
Charge cases — traffic	41,844	46,476	42,782	33,119	36,822
Percentage traffic charge cases of total charge cases	22.00	24.53	23.07	19.77	20.6
Committals for trial	2,638	2,300	2,908	2,851	3,245
Committals for sentence	6,323	3,262	3,713	3,521	4,579
Percentage of cases committed for trial	1.38	1.21	1.56	1.70	1.8
Percentage of cases committed for sentence	3.32	1.72	2.00	2.10	2.6
Total cases other than traffic charges	148,208	142,950	142,649	134,377	142,104
Percentage of charge cases (other than traffic charge cases) of total charge cases	77.98	75.46	76.93	80.22	79.4
Total charges excluding cases of drunkenness	130,235	134,485	128,463	119,578	127,317
Total charges excluding charges of drunkenness & traffic charge cases	88,391	88,009	85,681	86,459	90,495

(ii)

COURTS OF PETTY SESSIONS (EXCLUDING CHILDREN'S COURTS — JUVENILES AND MAINTENANCE)

SUMMONS CASES

	1974	*1975*	*1976*	*1977*	*1978*
Summons cases heard and determined	292,657	341,479	354,242	336,187	377,272
Summons cases dismissed through want of prosecution	37,179	40,558	38,461	36,827	36,107
Total summons cases	329,836	382,037	392,703	373,014	413,379
Percentage of summons cases dismissed through want of prosecution	11.27	10.61	9.79	9.87	8.7
Summons cases dealt with by Justices of the Peace	67	21	26	32	56
Percentage summons cases dealt with by Justices of the Peace	0.02	0.005	0.007	0.008	0.013
Total summons cases excluding traffic	92,060	95,648	93,558	83,940	111,212
Percentage total summons cases, excluding traffic, of total summons cases	27.91	25.03	23.82	22.50	23.4
Summons cases, traffic	237,776	286,389	299,145	289,074	316,492
Percentage traffic summons cases of total cases	72.08	74.96	76.17	77.49	76.6
Traffic summons cases dealt with ex-parte	3,859	1,759	1,069	1,030	1,127
Percentage of traffic summons cases dealt with ex-parte	1.62	0.64	0.36	0.35	0.36
Traffic summons cases dealt with 18c/75B	170,146	203,753	225,735	213,839	247,782
Percentage of traffic summons cases dealt with 18c/75B	71.55	74.96	75.46	73.97	78.3
Transport appeals	8,104	8,755	3,896	3,646	4,276
Bankruptcy examinations	32	15	38	26	49
Applications, Inebriates Act	678	549	479	343	815
Applications, Marriage Act	190	125	117	81	70
Shire & Municipal Appeals	75	103	414	25	49

(iii)

CHILDREN'S COURTS, JUVENILES

	1974	*1975*	*1976*	*1977*	*1978*
Charge cases heard and determined	26,523	25,833	26,814	24,298	24,529
Charge cases dismissed through want of prosecution	3,078	2,804	3,139	2,156	1,958
Total charge cases	29,601	28,637	29,953	26,454	26,487
Summons cases heard and determined	12,630	12,226	11,440	11,830	11,432
Summons cases dismissed through want of prosecution	972	802	768	656	502
Total summons cases	13,602	13,028	12,208	12,468	11,934
Total charge and summons cases	43,203	41,665	42,161	38,940	38,421
Total charge and summons cases dismissed through want of prosecution	4,050	3,606	3,907	2,812	2,460
Percentage of cases dismissed through want of prosecution	9.37	8.65	9.27	7.22	6.4
Committals for trial and sentence	260	358	404	230	550
Percentage of cases committed for trial or sentence of total cases	0.60	0.85	0.96	0.59	1.4
Charge cases, traffic	2,793	2,777	3,530	3,161	3,342
Summons cases, traffic	9,252	9,631	9,753	9,636	9,461
Total traffic charge and summons cases	12,045	12,408	13,283	12,797	12,803
Percentage traffic cases of total cases	27.88	29.78	31.50	32.86	33.3
Defended traffic cases	310	312	462	541	340
Percentage defended traffic cases of total traffic cases	2.57	2.51	3.48	4.22	2.6
Defended cases excluding traffic cases	—	990	1,160	1,114	1,239
Percentage defended cases excluding traffic of total cases excluding traffic	—	3.38	4.02	4.26	4.8
Traffic summons cases dealt with ex-parte	226	123	126	371	46

(iv)

CHILDREN'S COURTS, JUVENILES

	1974	*1975*	*1976*	*1977*	*1978*
Percentage of traffic summons cases dealt with ex-parte	2.44	1.27	1.29	3.85	0.5
Traffic summons cases dealt with 18c/75B	3,924	3,831	3,695	3,441	3,793
Percentage traffic summons cases dealt with 18c/75B	42.41	39.77	27.82	35.70	40.00
Number of cases dealt with at Albion Street, Yasmar & Minda courts	13,813	13,020	12,982	11,729	11,366
Percentage of total cases dealt with at those three courts	31.97	31.24	30.79	30.12	29.6
Total of all defended cases	—	1,302	1,622	1,655	1,579
Percentage of all defended cases of total cases	—	3.12	3.85	4.25	4.1
Number of hearings in all defended cases**	—	1,024	1,164	1,127	1,003
Percentage of hearings of total cases	—	2.45	2.76	2.89	2.6

**When a number of defended cases are heard together this is regarded as one hearing. Statistics not collected prior to 1975.

(v)

CHILDREN'S COURT
(Maintenance — Family Law)

	1974	*1975*	*1976*	*1977*
Total cases	19,999	21,329	12,011	13,207
Cases for disobedience of orders	7,559	7,690	2,143	1,980
Cases for disobedience of orders — percentage of total cases	37.79	36.05	17.84	16.54
Number of defended cases	2,543	1,753	617	746
Percentage defended cases of total cases	12.71	8.21	5.14	6.23
Number of hearings in all defended cases**	—	1,497	567	659
Percentage of hearings of total cases	—	7.01	4.72	5.50

		1978
MAINTENANCE —		
Enforcements —	Heard & determined	544
	Withdrawn	215
Other matters —	Heard & determined	808
	Withdrawn	316
Total maintenance cases		1,883
FAMILY LAW —		
Enforcements —	Heard & determined	2,044
	Withdrawn	978
Other matters —	Heard & determined	8,101
	Withdrawn	1,806
Total Family Law cases		12,929
Defended maintenance cases		126
Number of hearings**		120
Defended Family Law cases		1,066
Number of hearings**		916
Total defended cases		1,192
Total hearings**		1,036
Percentage defended cases of total cases		8.04
Percentage hearings of total cases**		6.99

**When a number of defended cases are heard together this is regarded as one hearing.

(vi)

TOTAL GRADE I CASE VOLUMES

Court	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*
Balmain	1,759	1,836	1,745	1,702	1,419	1,536
Balmain & Glebe	3,993	3,189	3,913	3,172	2,680	2,656
Bankstown	5,651	6,406	6,775	6,112	5,894	5,423
Blacktown	5,329	5,679	5,451	5,158	4,897	4,934
Burwood	4,013	4,326	4,378	3,225	4,000	4,198
Campsie	3,703	3,552	3,761	3,530	3,056	3,136
Central	34,967	34,640	35,249	31,968	39,286	44,362
Fairfield	6,948	7,461	7,512	7,337	6,589	6,499
Glebe	2,234	1,353	2,168	1,470	1,261	1,120
Hornsby	3,667	3,994	3,274	2,808	2,675	2,733
Kogarah	4,417	4,698	5,065	4,144	4,205	4,032
Lidcombe	2,596	3,270	3,109	3,343	2,906	3,224
Liverpool	5,509	5,424	5,571	4,514	4,771	5,120
Manly	4,900	6,255	5,241	4,414	4,713	5,267
Newtown	5,866	5,498	5,809	4,777	4,767	4,196
North Sydney	5,815	7,231	8,424	6,292	4,900	6,130
Parramatta	7,011	6,545	6,694	6,370	6,320	7,533
Penrith	6,251	6,478	6,126	5,089	3,910	4,904
119 Phillip St	8,913	9,218	9,123	8,108	5,134	5,683
Redfern	9,373	7,978	8,088	9,755	5,950	7,351
Ryde	2,640	3,011	2,503	2,153	1,840	1,898
Sutherland	3,966	4,045	4,207	3,646	3,138	3,364
Waverley	5,257	5,020	6,120	4,926	4,739	4,612
M.C.C.	3,332	3,142	2,642	848	1,014	1,889

(vii)

CASE LOADS PER MAGISTRATE

Court	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*
Balmain & Glebe	3,993	3,189	3,913	3,172	2,680	2,656
Bankstown	4,709	5,338	5,646	5,093	4,912	3,615
Blacktown	4,634	4,938	4,740	4,485	4,258	4,290
Burwood	4,013	4,326	4,430	3,225	4,000	4,198
Campsie	3,703	3,553	3,761	3,530	3,056	3,136
Central	5,828	5,773	5,875	5,331	6,548	5,545
Fairfield	6,316	6,783	6,829	6,670	5,990	4,999
Hornsby	3,667	3,994	3,274	2,808	3,344	3,416
Kogarah	3,673	3,915	4,221	3,453	3,504	3,360
Lidcombe	2,596	4,087	3,886	4,012	4,843	5,373
Liverpool	4,590	4,520	4,642	3,762	3,976	4,267
Manly	4,083	5,212	4,368	3,678	3,927	4,389
Newtown	4,888	4,582	4,841	3,981	3,972	3,814
North Sydney	4,153	5,165	6,017	4,494	3,500	4,379
Parramatta	5,008	4,675	4,781	4,550	3,950	4,708
Penrith	4,630	4,799	4,538	3,770	2,896	3,923
Redfern	9,375	7,978	8,088	9,755	5,950	7,351
Ryde	2,640	3,764	3,129	2,691	3,067	3,163
Sutherland	3,966	4,045	4,207	3,646	3,138	3,364
Waverley	2,679	2,510	3,060	2,463	2,369	2,307
M.C.C.	3,332	3,142	2,642	4,240	1,690	1,889

Case loads per magistrate are calculated on the number of permanently rostered magistrates at each court. Casual magisterial assistance is not taken into account.

e.g. Burwood — total cases 4,198 — 1 S.M. sitting daily — case load 4,198.
Liverpool — total cases 5,120 — 1 S.M. sitting daily and another on 1 day per week = 1⅕ S.M.s — case load 4,267.
Blacktown — total cases 4,934 — 1 S.M. sitting daily and another on 3 days per month = 1⅗ S. M.s — case load 4,290.

(viii)

COUNTRY DISTRICTS

CASES DEALT WITH BY THE STIPENDIARY MAGISTRATE

These figures represent all charge and summons cases dealt with by the Stipendiary Magistrate including Children's Court, and excluding charges of drunkenness and matters dealt with by local Justices of the Peace.

District	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*
Albury	4,975	4,837	4,680	5,199	5,684	5,980	6,329
Bathurst	4,981	4,827	4,703	5,239	5,200	4,479	4,843
Broken Hill	4,485	3,972	4,354	5,071	5,379	4,738	4,980
Cooma	5,153	4,310	3,822	4,792	4,758	5,368	6,118
Cootamundra	4,849	4,596	4,773	4,809	4,557	4,692	4,803
Dubbo	4,686	3,970	4,608	5,067	5,008	4,802	5,412
East Maitland	6,145	5,156	6,214	6,690	7,014	7,525	6,985
Glen Innes	4,959	4,704	5,202	5,598	5,596	4,764	4,725
Goulburn	7,392	7,228	6,273	6,714	7,399	7,421	8,473
Grafton	6,000	6,544	6,365	6,300	6,275	5,601	6,264
Katoomba	6,290	6,183	6,395	7,552	6,041	6,586	6,908
Lismore	8,187	6,729	6,233	7,285	6,448	6,845	7,791
Maitland	4,406	4,326	4,198	4,947	4,137	3,905	4,398
Narrandera	5,320	5,304	4,881	5,183	4,761	4,319	4,139
Narrabri	4,694	4,295	4,339	4,755	4,455	4,296	4,730
Nowra	5,689	5,494	6,435	7,185	6,500	6,642	6,756
Orange	5,321	5,036	4,677	5,351	5,069	5,037	5,577
Tamworth	5,838	5,758	6,737	6,829	6,179	6,016	6,765
Taree	5,473	4,968	5,675	6,466	5,919	5,843	6,345
Wagga Wagga	7,952	6,404	5,804	5,786	5,255	5,781	6,640
Campbelltown	—	—	—	—	—	—	6,458

(ix)

COUNTRY DISTRICTS

CASE LOADS IN ORDER OF VOLUME

	1974	*1975*	*1976*	*1977*	*1978*
1	Tamworth	Katoomba	Goulburn	East Maitland	Goulburn
2	Nowra	Lismore	East Maitland	Goulburn	Lismore
3	Katoomba	Nowra	Nowra	Lismore	East Maitland
4	Grafton	Tamworth	Lismore	Nowra	Katoomba
5	Goulburn	Goulburn	Grafton	Katoomba	Tamworth
6	Lismore	East Maitland	Tamworth	Tamworth	Nowra
7	East Maitland	Taree	Katoomba	Albury	Wagga Wagga
8	Wagga Wagga	Grafton	Taree	Taree	Campbelltown
9	Taree	Wagga Wagga	Albury	Wagga Wagga	Taree
10	Glen Innes	Glen Innes	Glen Innes	Grafton	Albury
11	Narrandera	Orange	Broken Hill	Cooma	Grafton
12	Cootamundra	Bathurst	Wagga Wagga	Orange	Queanbeyan
13	Orange	Albury	Bathurst	Dubbo	Orange
14	Dubbo	Narrandera	Orange	Glen Innes	Dubbo
15	Bathurst	Broken Hill	Dubbo	Broken Hill	Broken Hill
16	Albury	Dubbo	Narrandera	Cootamundra	Bathurst
17	Broken Hill	Maitland	Cooma	Bathurst	Cootamundra
18	Narrabri	Cootamundra	Cootamundra	Narrandera	Narrabri
19	Maitland	Cooma	Narrabri	Narrabri	Inverell
20	Cooma	Narrabri	Maitland	Maitland	Maitland
21	—	—	—	—	Griffith

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STIPENDIARY MAGISTRATE GOSFORD, GRADE 1
CASE LOAD (TRAFFIC SUMMONS CASES EXCLUDED)

	1974	*1975*	*1976*	*1977*	*1978*
Gosford	3,132	2,801	2,342	2,635	3,355
Woy Woy	1,291	1,464	1,171	906	1,192
Wyong	1,874	1,830	1,740	1,711	1,663
	6,297	6,095	5,253	5,252	6,210

Grade 1 Magisterial assistance of eight days each month provided for the district.

STIPENDIARY MAGISTRATE BELMONT-WALLSEND, GRADE 1
CASE LOAD (TRAFFIC SUMMONS CASES EXCLUDED)

	1974	*1975*	*1976*	*1977*	*1978*
Belmont	1,676	1,486	1,534	1,392	2,397
Wallsend	3,626	3,312	2,618	2,177	2,663
	5,302	4,798	4,152	3,569	5,060

STIPENDIARY MAGISTRATES NEWCASTLE (2), GRADE 1
CASE LOAD (TRAFFIC SUMMONS CASES AND JUVENILE OFFENDERS EXCLUDED)

	1974	*1975*	*1976*	*1977*	*1978*
Newcastle	7,085	7,580	6,728	5,234	6,517
Case load per S.M.	3,543	3,790	3,364	2,617	3,258

STIPENDIARY MAGISTRATES WOLLONGONG (2), GRADE 1
CASE LOAD (TRAFFIC SUMMONS CASES AND JUVENILE OFFENDERS EXCLUDED)

	1974	*1975*	*1976*	*1977*	*1978*
Albion Park Helensburgh Bulli (abolished 1976) Port Kembla Wollongong	7,752	9,070	8,720	7,333	7,714
Case load per S.M.	3,876	4,535	4,360	3,667	3,857

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TRAFFIC SUMMONS CASES

CIRCUITS, TRAFFIC MAGISTRATES, GRADE 3

	1974	*1975*	*1976*	*1977*	*1978*
Fairfield	9,613	8,540	7,123	5,409	7,768
Campsie	3,498	2,226	3,795	5,286	5,169
	13,111	10,766	10,918	10,695	12,937
Bankstown	5,337	5,175	4,662	6,124	7,373
Newtown	4,943	4,307	3,556	1,952	4,285
Burwood	3,831	1,804	—	—	—
	14,111	11,286	8,218	8,076	11,658
Kogarah	4,679	3,885	3,481	3,273	4,517
Sutherland	7,057	5,219	3,468	4,015	4,475
	11,736	9,104	6,949	7,288	8,992
Manly	4,422	4,322	3,075	3,755	3,720
North Sydney	6,037	3,453	1,746	3,710	5,385
	10,459	7,775	4,821	7,465	9,105
Parramatta	5,625	6,392	6,669	8,141	7,768
Blacktown	6,768	4,662	—	—	—
Penrith	47	2,454	6,542	6,992	5,688
	12,440	13,508	13,211	15,133	13,456
Phillip Street	100,871	152,153	177,409	161,792	178,664
Paddington	7,735	8,635	8,739	6,722	1,118
Hornsby	8,369	6,921	5,363	6,015	7,894
Woy Woy	457	396	425	347	682
Gosford	2,801	4,953	3,623	3,443	4,170
	11,627	12,270	9,411	9,805	12,746
Newcastle	5,291	6,199	5,637	6,260	5,862
Belmont	1,678	2,007	2,617	3,092	3,771
Wallsend	1,249	1,671	2,159	2,337	2,657
Wyong	1,345	1,286	1,603	1,382	1,338
	9,563	11,163	12,016	13,071	13,628
Wollongong	5,116	6,903	5,897	6,450	6,518*
Port Kembla	978	1,257	1,496	2,147	2,164
	6,094	8,160	7,393	8,597	8,682

*Traffic Magistrate sits two days per week. Other three days at Redfern Transport Court.

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COURT OF PETTY SESSIONS, 4-6 PHILLIP STREET, SYDNEY

	1974	*1975*	*1976*	*1977*	*1978*
Total cases dealt with	102,548	153,632	178,096	161,792	178,664
Traffic Summons cases	100,871	152,153	177,409	160,259	178,385
Percentage total cases of State total	17.59	24.21	28.17	27.35	27.68
Percentage total cases of State total excluding cases of drunkenness	—	26.51	30.95	29.76	30.08
Percentage total traffic summons cases of State total for traffic summons cases	40.83	51.40	57.43	53.65	56.36

CASES DEALT WITH BY STIPENDIARY MAGISTRATES

COURTS WITH 1,000 OR MORE CASES

(Courts in the Sydney-Metropolitan, Newcastle, Wollongong and Gosford Districts excluded)

1975		*1976*		*1977*		*1978*	
Goulburn	4,250	Goulburn	4,982	Goulburn	4,794	Goulburn	5,034
Albury	4,008	Albury	4,351	Albury	4,477	Wagga Wagga	4,912
Wagga Wagga	4,001	Wagga Wagga	3,485	Wagga Wagga	4,205	Albury	4,706
Tamworth	3,554	Bathurst	3,314	Queanbeyan	3,395	Campbelltown	4,273
Orange	3,170	Orange	3,000	Tamworth	3,095	Queanbeyan	3,939
Bathurst	3,140	Tamworth	2,789	Orange	3,016	Tamworth	3,574
Queanbeyan	2,956	Raymond Terrace	2,752	Bathurst	2,768	Orange	3,359
Nowra	2,842	Broken Hill	2,667	Campbelltown	2,726	Bathurst	3,082
Taree	2,839	Queanbeyan	2,553	East Maitland	2,563	Coffs Harbour	2,655
Campbelltown	2,739	Nowra	2,542	Nowra	2,562	Katoomba	2,546
Katoomba	2,545	Dubbo	2,429	Broken Hill	2,533	Broken Hill	2,531
Broken Hill	2,483	Coffs Harbour	2,427	Katoomba	2,526	Lismore	2,520
Lismore	2,455	Taree	2,332	Raymond Terrace	2,335	Nowra	2,462
Raymond Terrace	3,211	Campbelltown	2,227	Lismore	2,178	Taree	2,436
Windsor	2,285	Windsor	2,139	Dubbo	2,156	Bowral	2,427
Coffs Harbour	2,180	Lismore	2,070	Armidale	2,095	Raymond Terrace	2,407
Lithgow	2,164	Cooma	2,016	Taree	2,053	Armidale	2,384
Dubbo	2,151	Armidale	1,936	Coffs Harbour	2,034	Dubbo	2,293
Griffith	1,989	Moree	1,884	Kempsey	2,019	Windsor	2,210
Moree	1,877	Grafton	1,846	Windsor	1,979	East Maitland	2,146
East Maitland	1,837	Camden	1,842	Bowral	1,832	Cooma	1,995
Tweed Heads	1,781	Katoomba	1,842	Cooma	1,805	Moree	1,936
Grafton	1,777	East Maitland	1,839	Moree	1,726	Tweed Heads	1,880

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CASES DEALT WITH BY STIPENDIARY MAGISTRATES

COURTS WITH 1,000 OR MORE CASES (continued)

(Courts in the Sydney-Metropolitan, Newcastle, Wollongong and Gosford Districts excluded)

1975		*1976*		*1977*		*1978*	
Armidale	1,747	Griffith	1,797	Camden	1,586	Camden	1,822
Maitland	1,745	Kempsey	1,734	Griffith	1,552	Kempsey	1,806
Cooma	1,654	Lithgow	1,670	Lithgow	1,516	Grafton	1,630
Kempsey	1,613	Tweed Heads	1,571	Grafton	1,493	Maitland	1,497
Camden	1,566	Maitland	1,418	Tweed Heads	1,451	Lithgow	1,490
Cessnock	1,517	Inverell	1,367	Ballina	1,399	Griffith	1,431
Singleton	1,342	Cessnock	1,323	Cessnock	1,369	Ballina	1,358
Inverell	1,272	Bowral	1,269	Singleton	1,367	Cessnock	1,296
Bowral	1,207	Ballina	1,156	Yass	1,121	Singleton	1,260
Muswellbrook	1,203	Glen Innes	1,123	Inverell	1,100	Yass	1,231
Pt Macquarie	1,166	Singleton	1,123	Maitland	1,076	Pt Macquarie	1,222
Ballina	1,090	Bega	1,106	Pt Macquarie	1,047	Bega	1,129
Yass	1,057	Pt Macquarie	1,051	Kurri Kurri	1,046	Inverell	1,122
Leeton	1,019					Deniliquin	1,091
Glen Innes	1,005					Bourke	1,049
Cowra	1,005						

PRESENTATION OF PAPER

B. R. Brown, S.M.

On page 40 I posed five questions which I considered were the questions pertinent to discussion at this seminar. I propose to deal with only some of the matters to which I have made written reference, and also to make passing references to the paper presented by Mr Hogan and to the various commentaries on the paper. Having regard to the fact that my paper was written more than two months ago I will also give briefly and in general terms an updated picture of the delay situation as it is now shown to exist in the magistrates courts.

It will be readily seen that I have used the word delay in a number of different senses during the course of my paper. I have used, for example, the delay in the sense of a delay or a slowing down in the process of getting to the hearing as distinct from a delay or a slowing down in the actual hearing itself. It will, I believe, be just as readily seen that I recognise that some delays are avoidable and that others are unavoidable. In other cases some delays are said to be advantageous and others disadvantageous. When I speak of "advantageous delay" I mean an interruption to or postponement of proceedings for the better administration and the enhancement of justice in that nobody suffers or is prejudiced by such delay. In this regard I refer to adjournments for the purpose of obtaining pre-sentence reports or the use of diversionary schemes as a substitute for the use of purely statutory penalties or punishments. Elsewhere in the paper I have distinguished delays which are caused by the court system itself from others which are suffered by the court with detriment to the administration of justice.

At times I have looked at the problem of delay subjectively and at other times I have looked at it objectively. I have spared nobody from my criticisms and so far as the magistrates of this state are concerned I have made a somewhat searching self analysis of our role. We, the magistrates, must be prepared to accept our share of the blame in the areas indicated. I hope there will be general recognition and acceptance by others of the other areas of my criticism and comment. Without that there can be little hope of an effective remedy for the delay situation.

Whilst there must always be a sufficiency of magistrates, adequate staff and court accommodation it must be accepted that it would not be proper having regard to the public expense involved to create a situation where increased appointments would result in the total elimination of delays causing magistrates to be under employed waiting, as it were, for fresh custom to come through the courtroom doors. For many persons, going to court is a once in a lifetime experience and some slight delay for them may well be more acceptable overall than a waste of resources in having magistrates and support staff less than fully occupied.

Many of the observations made by me have been made also by Mr Hogan. He too found it important to make specific reference to the legal aid scheme and to the existing committal for trial procedures. May I assure you

all that our papers had been prepared independently without collusion or the benefit of conference or any exchange of ideas. Indeed there has been no conspiracy to divert the course of justice! Nonetheless similar themes can be detected running through his paper and indeed these themes have been picked up and expanded by most commentators. Mr Hogan made reference on page 20 to extending the operation of s.476 of the *Crimes Act* to give a power of disposition of other indictable offences and he, in particular, made reference to the offence of culpable driving. Now whilst this suggestion from him is obviously designed to assist the District Courts' criminal workload it would clearly add significantly to the magistrates court workload and worsen the delay situation in magistrates courts. I have made reference in my paper to the proposed and imminent increase in civil jurisdiction for magistrates and I suggested therein that the present establishment strength of the magistracy will then be unlikely to contain the present delay situation. Adoption of Mr Hogan's suggestion, whilst not unacceptable, nonetheless will produce its own problems.

In my comments on s.51A of the *Justices Act* I made reference to the need to tidy up or tighten the procedures under that section. Mr Hogan's comment on page 22 of his paper and the figures quoted by him I submit lend support to the arguments that I have advanced. They apply also with equal force to my comments in respect of committal for trial generally.

Both Mr Hogan and Inspector King made reference to the lack of fairness by trial judges in controlling proceedings and that reference is no doubt in part applicable to magistrates. However, whilst the nature of the Crown's allegations and the thrust of the defence have been disclosed in the committal proceedings the magistrate has not had the benefit, in advance, of such indications.

Mr Bone in his commentary suggests that the implementation of a pre-trial call over would be of substantial value. I would add that some six months ago I caused to be implemented in the country and suburban courts a procedure whereby the Clerk of the Court, some fourteen days prior to the date set for the hearing, sought confirmation from the police and the solicitors on the record of the readiness of the parties to proceed. This procedure has nonetheless achieved only limited success, as frequently non-criminal cases in the nature of civil claims and family law matters with time previously reserved for their hearing and apparently then some fourteen days prior to the hearing ready to proceed were subject to last minute settlement. Little can be done to overcome this circumstance.

Sgt Taylor made reference in his commentary to s.33 of the *Justices Act* as affording protection to defendants by limiting the period of adjournment of indictable matters to not more than eight days unless with the consent of the defendant. Whilst most defendants acknowledge the existence of some period of delay and are prepared to consent to a longer period of adjournment than eight days there is a small but growing number of more experienced defendants insisting, perhaps unreasonably in all the circumstances, on the adjournment not exceeding eight days. This, of course, can be disruptive to court management. It is time consuming in coming to

fix an earlier date for hearing, moving some other fixture, and in the long run is in no real sense profitable to the defendant.

Sgt Taylor, like me, made reference to the use of s.75B of the *Justices Act* as a streamlined *ex parte* procedure and, in fact, the benefits have proved quite substantial in relation to the conservation of time. One must question, however, the use of such a procedure which can permit, as it sometimes does, one magistrate to dispose of a list of up to 1,000 separate cases in one five hour court day. A list of 1,000 parking cases to be disposed of in a five hour day, even generously making allowance for the fact that for up to say 200 of those matters the summons will not be served, still provides a balance of 800 cases to be completed. Allowing for pleas in mitigation by solicitors and unrepresented defendants in some of the balance of 800 cases, a court is then required to deal "judicially" with the remainder in that court day. Now no calculator is needed to show that the disposal of at least 800 cases in five hours requires a rate of 160 judicial decisions per hour or 2½ such decisions every minute. This is a "sausage machine" process. It can be described in no other way and it certainly reflects no credit on the system of justice and perhaps evidences the pressing need for the introduction of self enforcing penalty notices, a matter to which I have referred in my paper (page 59).

In making reference to this sausage machine processing I intend to reflect no discredit on magistrates who are able to get through that workload. They are able to adapt by reason of the limited scope of those type of cases to come to something in the nature of a fixed working scale or guide, and that provides for easy reference and consistency in those penalties. But it is a frightening proposition that somebody would be asked to come to a judicial decision at the rate of 2½ every minute.

Mr Grove, on page 104, was troubled by my reference on page 55 to reversed onus. Perhaps I did not express myself clearly. The reversed onus provision I had in mind is such as is demonstrated in the legislation in a case such as "possession of property reasonably suspected of being stolen" as enacted originally in the *Police Offences Act* then into the *Summary Offences Act* and now in the *Crimes Act*. It is colloquially called "goods in custody". Such a provision of the legislation is that a person who has in his custody any property reasonably suspected of being stolen or otherwise unlawfully obtained shall be guilty of an offence and liable to a specified penalty. However, the legislation goes on to provide that it shall be a sufficient defence to such a charge if the defendant notifies the court that he had no reasonable grounds for suspecting the property was stolen or otherwise unlawfully obtained.

A further example is to be found, of course, in a charge under s.178B of the *Crimes Act* of obtaining a property by passing a cheque not paid on presentation. The onus on the defendant in these cases is, of course, a civil onus.

I do not intend now to traverse my written thoughts in relation to committal for trial proceedings. Suffice to say that with an apparent intention in

the Crown to make more use in appropriate cases of the summary jurisdiction of the Supreme Court more defendants will be facing trial without having undergone committal proceedings. The rules made under the *Supreme Court (Summary Jurisdiction) Act* set out a procedure whereby there is virtually a pre-trial disclosure to the accused of the matters on which the Crown proposes to rely. Safeguards against trial by ambush are inbuilt, granting of inspection of documents, including statements of all witnesses can be required by the Court under its order. Does this differ in essence from proposals made by myself and others and over some years for the introduction of a system of "paper committals"? Is the disadvantage to a defendant of not participating in committal proceedings real or imagined? If real, is it not exaggerated?

As a further example of the cumbersome nature of present day committal proceedings I instance the committal proceedings I am still currently involved in hearing. As at today there has been since the Crown opened its case in March 1979 some 150 sitting days. Eight hundred documents and other items have been admitted as exhibits and a further 4,000 documents and other items have been marked for identification. The transcript has now reached 12,000 pages. Senior Counsel for the Crown has indicated that he does not expect the prosecution will complete the calling of evidence before the end of October. I was too frightened to ask and he was too frightened to say in which year! On the assumption that it will be this year and on the basis of a four days per week hearing, that will entail approximately a further 125 days before the Crown has adduced all the evidence that it seeks to call in its case. That will total 275 days approximately to complete the evidence without making provision for addresses at the conclusion of the evidence, or indeed for the reception of further evidence if a *prima facie* case is found established on the evidence. Can this be said to be in the spirit of the legislation? True it is this is an exceptional case in many respects, but as I have indicated already there is a substantial increase in the number of lengthy committal for trial proceedings. In fact three cases of 40 days estimated duration are listed for hearing at Central Court over the next few weeks. There are a whole host of other matters and I indicated some of those in my paper. I could provide a substantial list in addition to that.

The recent restatement of the purpose of committal proceedings by the Court of Appeal in *Moss v Brown & Anor* touching on the subject matters of my present committal was indeed timely. Magistrates have a duty, as do Counsel, to keep proceedings within the confines of that judgment. In view of the figures that I have just given you you might think that my performance then is a prime example of a classic failure to adhere to those principles and if that is the situation then, of course, I will have to bear that responsibility.

Turning briefly to the current delay situation I am pleased to be able to report that the cutting and pruning exercise to which I made reference in my paper (page 60) has brought about improvement at almost every court centre and that the delay period set out in **Schedule 2** in my paper had been reduced by some two or three weeks at most centres.

For the reasons previously given courts at Central, Wynyard House and St James Centre are in the worst position but fortunately are not worsening. It is perhaps noteworthy that a steady volume of work mainly at Central Court over recent years consequent upon the arrest of persons taking part in demonstrations and processions has substantially diminished. Nonetheless, despite the loss of these time consuming cases from the court list, no real improvement has occurred in the position of Central Court. I add there of course that that court by reason of the concentration of magistrates at that centre finds itself at all times making itself available to bring in urgent custodial cases from the suburbs.

An air of pessimism exists among magistrates generally as to the likely impact the introduction next week of the *Bail Act* will have on list courts. It is generally thought that the attention to detail required by that Act will cause a significant further delay to the proceedings. Only time will tell in that regard.

COMMENTARY

C. J. Bone
Deputy Public Solicitor
Public Solicitor's Office, N.S.W.

Any *unnecessary* delay in finalising criminal proceedings is to be deplored because, apart from any justice that might result in a specific case, there is a general lack of public confidence in any legal system that allows such proceedings to be unduly protracted.

There is no doubt that many cases have to be adjourned for varying periods for quite valid reasons. It may be that a witness is not available, that proper scientific tests have to be performed or that legal advice is sought by the defendant. It is perhaps trite to state that cases are adjourned every day in magistrates courts because of reasons such as this. Obviously there must be some delay in finalising criminal proceedings. It is only when that delay is unnecessary that there should be cause for concern.

Effect of Delay

Unnecessary delay can have quite devastating effects on the course of criminal proceedings. It is quite common to hear witnesses attempt to give evidence of something that occurred a long time ago state that they find it difficult to recall the events precisely and this problem is aggravated when they are attempting to give evidence of conversations. Certain witnesses overcome this problem to some extent by refreshing their memory from a statement made at the time of the incident or shortly afterwards but quite often they will have no independent recollection of the incident. It may be that material not considered by that particular witness to be relevant will be omitted from the statement. It may then transpire that that lost material is of crucial importance.

Lengthy delay can result in witnesses dying, leaving the jurisdiction or otherwise becoming unavailable to give evidence.

Many witnesses in criminal proceedings are what might be termed "lay" witnesses and will quite often suffer from stress prior to their appearance in court. Any lengthy delay will of course have an increased effect in this regard.

Many defendants ask that their case be disposed of as quickly as possible and it is apparent that they are more concerned about waiting for the outcome than the outcome itself. An innocent person who has been charged with an offence will be anxious to secure his acquittal at the earliest possible time and unnecessary delay can have quite serious effects on that defendant.

Unnecessary delay often involves the parties in quite heavy expense. If a matter is fixed for hearing on a certain day and does not proceed legal representatives and witnesses who have to attend again require additional payment.

All of the effects so far mentioned are significant but none is as important as the effect upon a defendant who is in custody awaiting the disposition of his case. In the majority of cases the concern of magistrates, combined with statutory provisions, ensures that matters involving defendants in custody are disposed of without unnecessary delay. There have, however, been cases where persons have been kept in custody for quite lengthy periods and have then been acquitted. In such cases there is generally no provision for any compensation. In cases where the defendant is subsequently convicted the time spent in custody may form part of a sentence but in other such cases the appropriate sentence might be something less than the period spent in custody.

Mr Brown has indicated in his paper that magistrates may have difficulties in recalling certain aspects of the evidence when matters are adjourned part heard for lengthy periods. This difficulty is encountered, although probably to a lesser extent, by the legal representatives of persons appearing.

Causes of delay

There are many factors which contribute towards delay. Mr Brown has referred to the increase in the number of cases dealt with by magistrates, the increase in the number of lengthy and complex defended matters, various technical inadequacies, lack of accommodation and the increase in the number of cases where language difficulties are encountered. He also examines two other areas, namely procedural inadequacies and delays occasioned by legal aid.

There is no doubt that revised procedures could reduce delays but extreme care must be taken in this area. The whole subject of committal proceedings is being reviewed and it may be that contemplated alterations to the current procedure will result in a proper saving of the court's time. It should be stressed, however, that time saving procedures should not be adopted at the expense of rights and principles that have been introduced into the criminal justice system over a long period.

Because there is a variety of factors which contribute towards delay it is difficult to ascertain if the provision of legal aid in magistrates courts has had any effect and, if so, the extent of that effect. A paper presented to the Seventeenth Conference of the International Bar Association in 1978 considered, among other things, the effect of legal aid on the volume and length of litigation. Many of the conclusions reached were based on the results of a questionnaire distributed in 20 countries and in a number of those countries there had been an increase in the length of cases. The response in New South Wales was most cautious and the consensus revealed a tendency towards increased length of litigation. In my opinion, a lack of financial resources and an ignorance of the law has prevented many people from securing the due protection of the law. If there is an increase in the number of defended matters because of the provision of legal aid no apology should be needed. Legal representation if desired in criminal proceedings should be a right rather than a privilege and any increase in the length of cases caused because

of representation is not unnecessary delay. It has been suggested that where a person charged with a criminal offence is legally aided his or her representative should carefully examine the matter before a plea of not guilty is entered. I consider that there should be no difference in approach by a practitioner whether his client is legally aided or not.

Miscellaneous

As indicated earlier the concern of magistrates, combined with statutory provisions, ensure that persons in custody are given priority when cases are adjourned. In practice, the magistrate will give the earliest possible hearing date to a defendant who has been refused bail or who is unable to obtain the bail sought. If it appears likely or certain that the defendant will raise bail the case is generally adjourned for a longer period. Persons who expect to raise bail are occasionally disappointed and because of a lack of any satisfactory review procedures can remain in custody awaiting the hearing for quite lengthy periods.

There has been a great deal of publicity given to the provisions of the *Bail Act* and there have been some suggestions that implementation of the Act will cause delay. It is difficult to ascertain whether these fears will be justified.

Remedies

As a response to any problem it is possible to suggest several solutions such as an increase in the number of courts, more efficient court facilities and the appointment of more magistrates. My own experience indicates that, whilst in some individual cases and at some specific courts, delay is serious, in most instances there is no undue delay in criminal proceedings in magistrates courts. I agree with Mr Brown that greater responsibility is required from everybody involved to ensure that maximum use is made of available court time and I am of the opinion that a compulsory pre-hearing call-over system should be introduced. At present a case might be adjourned for three months and no attempt by either the prosecution or defence or both will be made to make the necessary arrangements for witnesses until shortly before the date of hearing. It might then be discovered that a witness is unavailable and that this information could have been made available earlier. At that stage it is too late for the court to use the time that is lost if the matter cannot proceed. Some improvements would flow from a system which compelled the representatives of the informant and the defendant to advise the court say two weeks before the hearing that all witnesses had been contacted and were available.

PRESENTATION OF PAPER

C. J. Bone

I would like to thank the Institute for presenting this topic for discussion because as far as I am concerned this particular topic goes to the very heart of our criminal justice system. I think that it would be fair to say that one often hears criticisms of the criminal justice systems in different countries, and that the criticism is quite often based on the fact that citizens of those countries are kept in custody for lengthy periods without being brought to trial. I think it is equally important for us to realise that we should examine our own system regularly, and we should take every step to ensure that any unnecessary delay is identified and eliminated if that is possible.

Mr Brown in the Schedules to his particular paper, has presented us with a wealth of detail as far as statistics are concerned, and these statistics show quite clearly the extent of delay over the last three years in Courts of Petty Sessions, particularly when one looks at defended cases involving people who are not in custody. My own arithmetic would suggest that at the beginning of 1977 the average delay in the setting down for hearing of those cases was approximately nine weeks. At the end of 1979 the average delay was around 13 weeks. Mr Brown in the presentation of his paper has said that there has been some improvement. There has been the appointment of additional magistrates, and, no doubt, that has had, and will have, some effect.

Thirteen weeks, as far as I am concerned, for people who are not in custody is probably a reasonably tolerable limit. It is three months, and there would be some suggestions that witnesses would find it difficult to recall specific instances after three months. It was fairly clearly stated by Mr Hogan in his paper that the delay in the Supreme Court, for example, is tolerable and that that was some three to six months, so I think three months in Courts of Petty Sessions is reasonably tolerable if one bears in mind the fact that the people we are talking about are not in custody. I think however, that the real problem that we have to face is where the defendant is kept in custody awaiting his hearing. Mr Brown has indicated in his paper that as far as he is concerned every effort is made to ensure that a person in custody is brought to trial as soon as possible, and I think that I would have to agree that in nearly all cases absolute priority is given to such a defendant.

There are a few problems which concern me in relation to that particular matter and perhaps I could give an illustration. About the middle of last year a defendant appeared in Central Court of Petty Sessions. He was unrepresented when first arrested and he entered a plea of "not guilty" to the particular charge which was a fairly minor matter, he was charged with using a restricted substance. This particular defendant indicated to the magistrate that he would be able to obtain approximately $200 in bail. The matter was adjourned for some 13 weeks, which was the average period at the time, and bail was allowed at $200. Now, unfortunately, the defendant did not raise the bail. As a result he spent that 13 weeks in custody, he ap-

peared before a magistrate, adhered to his plea of "not guilty". The magistrate held that there was no *prima facie* case and he was immediately released. Had anybody had any idea when he first appeared that he could not raise bail then that case would have been set down for hearing very quickly and presumably the defendant would have been released very speedily. It was an offence, for which if convicted, he would have expected to receive a fairly minor sort of penalty. He would probably have been fined a couple of hundred dollars at the most, and yet he remained in custody for some 13 weeks through no fault of his own. There was no suggestion that he was a particularly bright person, and apparently he was quite content to remain in custody for that period of time. The point that I make is that there was no really "fail safe" review procedure which could draw this particular problem to everybody's attention.

It has been suggested to me that the provisions of the *Bail Act*, which is due to be implemented next week, could improve this situation to some extent. I also believe that the Criminal Law Review Division is examining a proposal that was originally suggested some years ago, i.e., visiting justices should review regularly the cases of people who were allowed bail but were unable to raise bail. I think it is very important that we look at that because if we do concede that 12 or 13 weeks is a tolerable period to allow defended matters to be adjourned, we must also realise that some people who expect to get bail will not get bail and those people will not draw that particular fact to anybody's attention.

There are obviously a number of causes for delay in any system of criminal justice. These problems are, of course, quite complex and it is very difficult to ascertain exactly what cause produces exactly what delay. Committal proceedings are being reviewed at the moment and we all hope that there might be some improvement caused as a result of those particular reviews. I hasten to point out however, that change should not be made lightly and I think we all should be very careful that we do not affect basic fundamental rights purely and simply in an attempt to speed up the process.

Legal aid has certainly been mentioned very specifically in the papers by Mr Hogan and Mr Brown. Both of the speakers have indicated their full support for legal aid and yet I seemed to detect somewhere in those papers a note that perhaps the increase in delay caused by the legal aid scheme could be avoided in some way. I think I should make my position very clear on this particular point.

I would be the first to concede that the increase in legal aid over the last three or four years in the Courts of Petty Sessions has had some effect upon delay. The Public Solicitor in 1979 in Newcastle, Sydney and Wollongong represented around 20,000 people. Similarly a lot of people were represented in the country areas through legal aid schemes and also in Children's Courts. Six or seven years ago the overwhelming majority of those people would not have been legally represented and I have no doubt that things would have gone through a little bit quicker because of that. Because legal aid has been introduced and because it is conceded that the introduction of that scheme has resulted in some delay, I do not think that

there is any need to make any apology for that particular fact. Legal representation in criminal proceedings is a basic right, and if the introduction of a legal aid scheme adds a week or two weeks or even more to these cases, then I think that that is something that has to be faced. The answer to the problem caused is *not* to get rid of legal aid or to diminish legal aid in any way, shape or form, but to consider the problem itself which lies well and truly with the administration. The administration has to accept the fact that extra facilities must be made available. I am fairly convinced that legal aid enhances any system of criminal justice rather than detracts from it, and if there are some minor increases in delay and other problems caused by the introduction of such a scheme then that is something that I think we have to accept.

Mr Parnell (page 123) makes a number of interesting observations and one of those observations relates to statements from the dock. Personally I do not think that statements from the dock actually add to any great extent to criminal trials. In fact, I think that in a number of cases they would probably result in trials taking a little shorter time. But, by the same token, I think that the point made by Mr Parnell is a very important one. This particular idea has been subject to some criticism in recent years. I fully support statements from the dock. They give people, who may be quite underprivileged, the chance to put their story to the court in a way that they probably would not be able to if they followed the strict rules of examination and cross-examination. I do not think that that does lead to delay, and I think that to change any type of system purely and simply for the sake of change would be a bad thing. I would certainly ask all those associated with the administration of criminal justice to ensure that before changes are made they ensure that no basic fundamental right was prejudiced in any way.

COMMENTARY

Sergeant 1st Class O. Taylor,
New South Wales Police Prosecuting Branch.

As a commentator on the paper prepared by Mr B. Brown, Deputy Chief Stipendiary Magistrate, it was necessary for me to read and understand his thoughts and the principles on the subject of "Problems of Delay in Criminal Proceedings".

At the outset, I wish to state that there is nothing incompatible to that contained in Mr Brown's paper to that which in my mind, should apply to all matters coming before Courts of Petty Sessions and therefore I feel free to express the views on behalf of the New South Wales Police Department that an early determination of all prosecutions initiated by members of the Police Force is a most desirable commodity.

The problems of delay in criminal proceedings is always a matter of concern whether it is looked at through the eyes of the judiciary or through the eyes of the law enforcement agency. I don't always see it as a problem though, when looked at through the eyes of the defendant or accused person. The judicial concern, particularly at the magistrate's level, is kept paramount through legislation governing the conduct of Courts of Petty Sessions. Section 33 of the *Justices Act* when dealing with indictable matters, makes provision to adjourn proceedings where from the absence of witnesses or for any other reasonable cause, a justice considers it necessary or advisable to do so. Under this section the justice is bound to obtain the consent of the defendant, if such adjournment is to exceed eight clear days.

Section 68 of the *Justices Act* enables the justice to adjourn the hearing of summary matters in the exercise of their discretion to a time and place to be nominated by them in the presence of the defendant. There is no specific statutory restriction placed on the justice as in s.33, but a clear control is maintained through the discretion given them and no doubt the *ejusdem generis* principle is applied as in indictable matters when considering the length of adjournment in summary matters.

Section 56 of the *Justices Act* is yet another legislative provision highlighting the necessity to deal swiftly with detected offences of a summary nature. The laying of informations or making of complaints is limited to six months from the time when the matter of the information or complaint arose. There are a number of specific summary offences that allow for a greater period for the commencement of summary proceedings, but the *Justices Act* does limit most summary offences to a period of six months. However, in relation to indictable matters, they being more serious in nature, an unlimited period exists in which to commence proceedings.

It is all very well to quote axioms and utopian ideals such as "Justice delayed is justice denied" and "Justice must not only be done, but must be seen to be done". Regard must always be had to the practicalities of the problem that causes the delay in criminal proceedings. There is no doubt

that the originator of the title to the discussion tonight, was aware that a problem exists and Mr Brown acknowledges that the problem exists and he enumerates the following as possible causes:

1. An increase in the work load on magistrates. (Or better put, the lack of a sufficient number of magistrates.)
2. A questionable accent on legal aid.
3. The lack of available court accommodation in certain areas.
4. The absence of alacrity in the installation of technical facilities for the recording of evidence.

I now support the proposition that there is a problem arising from the delay in criminal proceedings and perhaps I can itemise some of those problems as seen through the eyes of the prosecution.

1. Firstly, it is not unusual, but now accepted as the norm for defended matters to be adjourned for up to three months and more in Courts of Petty Sessions. The reasons are all too obvious when a study is made of the remand diaries maintained by Police Prosecutors and Magistrates. In fact, one wonders whether it is fair to police, witnesses, litigants and defendants to jam cases in for hearing on days already obviously over-listed. I know that many adjournments are made to a day with a strong prayer or a hope that time will be made available through a collapsed list or additional judicial assistance. Phrases such as "Not reached", "Priority" and "Part heard" only seem to test the ability of a typist to spell and adds to the frustration of hopeful parties in the court.

2. A number of ways exist to make more time available in Courts of Petty Sessions. As an example of this type of thinking, in 1973 s.75B of the *Justices Act* was introduced to alleviate the heavy listings of traffic matters and do away with the necessity of calling large numbers of police and civilian witnesses to prove traffic cases in an ex parte manner. Thankfully, this section is working most satisfactorily and certainly is time saving.

3. A further time saving innovation begging to be introduced is in the area of extradition. In order that a person be extradited from another country to this State, it becomes necessary to establish to a *prima facie* degree, the offence for which extradition is required. When that person is so extradited, it seems a redundant exercise to require the prosecution to establish once again in the presence of the defendant, a *prima facie* case in order for that person to be committed for trial. In the event of that person's committal for trial, all the witnesses are called for a third time before a judge and jury during the trial of that person. Surely a more functional system would be for the Attorney-General to exercise his inherent power to file an ex officio indictment. Any criticism of unfairness to the accused is nullified as he is made aware of the case he is required to meet when he appears before

the court in the country of arrest and made fully aware of the evidence the prosecution will rely upon to establish the offence for which extradition is required.

4. Another way to overcome the problems of delay in criminal proceedings in Courts of Petty Sessions lies in the sphere of those indictable offences not covered by s.476 of the *Crimes Act* or s.51A of the *Justices Act*; those serious felonies and indictable misdemeanours that can only be determined by a judge and jury. I particularly refer to complicated fraud matters and serious sexual offences against females and young people. Whilst there is a wide difference between the two types of offences, they each present their own time consuming procedures from a prosecution's point of view. The fraud matters often require the calling of many witnesses and the tendering of volumes of documents to establish the link between the defendant and the many transactions that have taken place. In sexual matters against females and young persons, I am always amazed or aghast at the privilege or advantage given to the accused, to exercise his right of silence, to sit in coward's corner and have the benefit of two bites of the apple. On the other hand, how distasteful it must be for a victim to suffer the traumas and indignities of a double cross examination in the witness box at committal level and subsequently before a jury.

   When considering the dispensation of justice, particularly in the area of early hearings, regard should be had beyond that of a defendant or an accused person.

   The constancy of the phrase "In fairness to the defendant or accused" gives rise to a belief that the defendant is the one to receive the greatest consideration. There is certainly room to believe that society, the complainant or the individual offended against, is not entitled to equal judicial consideration as is an accused person. I am supported in this assumption by the words of Lord Goddard in *Grondkowski's* case[1] when he said,

   > 'The judge must consider the interests of justice as well as the interests of prisoners. It is too often nowadays, thought or seems to be thought, that the interests of justice means only the interests of the prisoners'.

   This verbage of Lord Goddard and the principles he enunciated in *Grondkowski's* case were mentioned recently by our Supreme Court of Appeal in *Moss v. Brown*,[2] over decisions made by Mr Brown in relation to the supply of particulars and the hearing of groups of defendants in lengthy conspiracy charges currently part heard at the Central Court of Petty Sessions. It was held in *Moss v. Brown* that the non-supply of particulars and the method adopted by the court at committal level as to the number of persons to be dealt with at one time, was not unfair to the defendant and that the rights of the Crown were being ignored.

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[1] Marian Grondkowski, 31 C.A.R. 116.

[2] *Moss v. Brown and Another* (1979) 1 N.S.W.L.R. 114.

This is yet another example of a superior court reminding other courts that the interests of justice means that an equal balance must be maintained between the interests of the defendant and the interests of the prosecution. A solution to this problem and a time saving innovation would lie in either the tender of affidavit evidence or the submission of a full brief of evidence to an examining magistrate for perusal and a subsequent forwarding of the papers to the Clerk of the Peace, if he considers the evidence justifies the action.

5. Mr Brown has mentioned s.51A of the *Justices Act*. I am pleased to see that he has highlighted an area that exists in that legislation enabling a defendant to select his own judge. To back-flip in relation to his plea — call it what you will. In s.51A of the *Justices Act* or a hand-up situation where the defendant has indicated his intention to plead guilty to the charge, a full brief of evidence is compiled by the investigating police, examined by an experienced Police Prosecutor, viewed by the defendant, almost without exception scrutinised by the defendant's legal representative, accepted by the Stipendiary Magistrate as a correct charge and supported by the documented evidence, acted upon by the Clerk of the Peace, and yet when that individual appears before the wrong judge, he changes his plea and the papers are remitted back to the Clerk of Petty Sessions for a full hearing. A great waste of time and a further indication of a judicial indulgence in favour of an accused. Why not make provision for a judge to acknowledge his change of plea and simply list the matter for hearing accepting the papers before him as a formal indictment.

6. I applaud Mr Brown for his comment and forthrightness in discussing the delays occasioned through the introduction of legal aid. Like him, there is a certain trepidation lest it be construed that my criticism of the legal aid system be taken as total opposition to the scheme. Far from it, and should I fail to reveal my correct views on this most delicate area, I wish to quote the words of the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, taken from his address at the 20th Australian Legal Convention in Adelaide on the 2nd July 1979.[3]

> One aspect of the workload of the courts, State, Territorial and Federal, ought at once to be mentioned. The increase in the demand for judicial service in the disposal of criminal proceedings has been very considerable. In the case of some courts, so great and continuous is this demand that the disposal of civil disputes may be impeded or delayed. Not only has the number of criminal charges to be tried increased: but the length of the trials themselves appears to be increasing. How far the availability of legal aid has contributed to this latter phenomenon may be a real question. Probably no adequate statistics are available on which to form a satisfactory conclusion. Statistics of the length of time it takes to deal

[3] Reported in the *Australian Law Journal* volume 53, 487 at 489.

with legally aided cases compared with the time taken in cases which are not so aided and of the number of acquittals which have resulted from legally aided defences as compared with a general average would, amongst other figures, be helpful. I mention elsewhere in this address the need for responsibility in the decision to grant legal aid. Here I would refer to the professional responsibility on the practitioner when handling a legally aided case. I would not for a moment suggest that a legally aided litigant should receive less then the profession's best service. On the other hand, I would expect that the fact that the community is providing representation perhaps on a per diem basis would not lead to any unnecessary lengthening of a case. The profession has a great responsibility to hold the balance; to do justice to the case, efficiently without waste or unnecessary consumption of time. For his part, no doubt, the judge will also see that public time is not needlessly occupied.

Conclusion

I am grateful for the opportunity to be called upon to comment on Mr Brown's paper, enabling the voice of a policeman to be heard in this obviously concerned audience, not necessarily in criticism, but in the hope that the system that exists might be improved upon for the good of all, particularly the law abiding community of our society. In concluding this address, and perhaps expressing a hope by the Department I represent, may I remind you that the motto of the New South Wales Police Force is, *Culpam Poena Premit Comes* which is translated as, "Punishment Follows Close on Guilt" or succinctly, "Punishment Swiftly Follows Crime". It follows that our motto cannot be fulfilled if there are delays in criminal proceedings.

PRESENTATION OF PAPER

Sergeant O. Taylor

As a police prosecutor sitting in the various courts of Petty Sessions throughout New South Wales one unwittingly draws comparisons on the quality and the work pattern of various magistrates. They do vary. Some of them are good and some of them are a little better. Mr Brown in his paper partly supports me in this proposition when he refers to the occurring fluctuations attributable amongst other things to the rotation of magistrates.

All of us have differing work patterns whether we be police prosecutors, judges or advocates and it follows that some of our magistrates are more cautious than others. Some of them are more charitable than others, or perhaps more gullible. Some of them are too quick at times to set a matter down as a defended matter when the defendant is insisting upon his guilt. Some magistrates, like some judges, develop a clear reputation and that reputation precedes them wherever they go. There are many people who will take advantage of situations of frailties, of charities extended, and all these advantages unfortunately add to the respective delays in criminal proceedings.

Practical solutions are needed, not criticisms of frail or inadequate administrators. Effective legislation is desperately needed providing maximum protection for the masses, not loopholes for the criminal element. Permit me to draw your attention to just two recent amendments in our legislation in New South Wales that were primarily designed to overcome this problem of delay.

Firstly, let me refer to the most recent amendment in our *Crimes (Amendment) Act* of 1979 making provision for a defendant to elect to be tried for an offence in the Supreme Court in its summary jurisdiction. This is a half hearted attempt to introduce effective legislation. What irresponsible white collar criminal would lucidly elect to go before a Supreme Court judge in a difficult fraud matter in the absence of a jury? No criminal in his right mind would allow the prosecution such a luxury and the court such expediency. This particular amendment in the *Crimes Act* will slowly choke in its gathering dust.

On the other hand let me relate back to what Mr Brown said about s.75B of the *Justices Act*. This section came into effect in 1973 and has proved to be working most satisfactorily. It enables many of our magistrates to deal with thousands of cases a year in the absence of defendants. It does away with the necessity of the police and the many civilian witnesses to give evidence. We all welcome these facilitating pieces of legislation.

Each of the speakers to the various papers has made particular reference to s.51A of the *Justices Act*. If nothing else comes of this seminar it is hoped that something will be done to this piece of legislation that the criminal now uses to good effect. Section 51A of the *Justices Act* enables an indictable matter to be dealt with by a defendant through the tender of cer-

tain documents. What invariably happens is as follows: it is a section utilised by detectives and experienced police, who will arrest an individual and in that arrest a detective and the defendant generally develop a particular rapport, and in many instances the detective becomes aware that the defendant is anxious to plead "guilty". The defendant is charged with an offence and the detective will provide statements or evidence in statement form to support the charge. That detective will hand that brief to an experienced prosecutor who will likewise read the statement and makes sure it supports the charge. The third step is for that defendant to appear before one of our stipendiary magistrates who likewise reads the evidence and satisfies himself that the evidence supports the charge. He then having satisfied himself that the defendant wants to plead "guilty" sends the defendant on for a sentence to the District Court and those papers again are viewed by an officer of Mr Hogan's department. That is the fourth step. It then goes before a judge and the defendant says "I don't like him". I have a file in front of me at the moment where a prostitute has 500 convictions for loitering plus other offences. She would know as many magistrates as I would know. These criminals equally know their judges and what poor legislation is it that enables a criminal to select his own judge? But it is there. The judge then remits the matter back to the magistrate and the prosecution have to go into the evidence. Now in the context of the subject "Delay in Criminal Proceedings" is it not the answer for the judge to say "Thank you, you have changed your plea. I will now accept these papers as a formal indictment", and the matter is listed for trial? It is as simple as that, and you would find that very few defendants would be "back flipping to Petty Sessions".

Finally, we all look to our courts for the protection of the innocent but a balance must be struck, and too much unnecessary concern for an accused can cause not only calamitous delays but disadvantage victims of crime and frustrate progress in our judicial system.

COMMENTARY

M. B. Grove, Q.C.
Barrister-at-Law

Participants at this seminar have had presented two admirably researched, thoughtful and thought-stimulating papers. Upon each has been made two commentaries. Why then, might reasonably be asked, this final helping to digest after the pieces de resistance? I can only presume that it is intended that I add some sauce. My orientation may be slightly different from other speakers in that I am not in government service and although I, of course, acknowledge the statutory independence of the offices held by some of the speakers and commentators, I come wholly disconnected from the machinery of state which operates the courts. These views, opinions and ruminations are my own and I do not present them as an official view of the Bar Association to which I belong, nor even a surveyed consensus of my colleagues — they are nothing but that for which I must take full responsibility. As legal aid seems to have earned frequent mention in the papers — universal espousals of the availability of such in principle, and as many none-too-subtle hints that it is the *causa causans* of extended hearing time — I should add a caveat that my expressions of view are not made on behalf of the Legal Services Commission of New South Wales of which I have the privilege to be a part-time member.

May I refer to Mr Hogan's paper first.

Little difficulty is felt in supporting his proposition that an office responsible for the preparation of prosecutions should devote its efforts solely to that task unencumbered by registry or similar administrative burdens. Efficient prosecution surely justifies no complaint from an accused person. Inefficiency is to the detriment of all. It is a logical extension of such support that I endorse the opening of offices in a significant number of non-metropolitan areas.

However, I make mention of my support of such re-organization because, in the midst of the description of such, almost casually it appears, it is suggested that the present system of court vacations be "looked at" with a view to ascertaining whether their elimination would alleviate delay in disposing of cases. The prefatory exemplifications to the suggestion leave a distinct impression that the writer favours such elimination. There is some support for such in one of the commentaries already given. I do not seek to give to this subject what I believe would be an unwarranted importance by dwelling upon it too long. I would mention that, for better or for worse, the Supreme Court no longer recesses for a short vacation in mid-year. I am unaware of any increase in the efficiency of the disposal of cases for trial in the Supreme Court resulting from such abolition. Reference is made to police leave and no doubt members of that force are almost invariably witnesses in criminal trials. Attempt is made, quite properly, to accommodate listing to their planned leave and no doubt the needs of other anticipated witnesses. I do not perceive a contribution towards the elimination of delay emerging from a plan that would presumably attempt to accommodate the separate vacation plans of Crown Prosecutors, defence

counsel and instructing solicitors on both sides as well. On the defence side, the numbers of lawyers to be accommodated are likely to increase proportionate to multiplicity of jointly tried defendants.

Observation indicates that some trials do proceed during vacation periods. No doubt such occur by special arrangement, but, short of grossly interfering with an accused concerning his choice of representative, it would then seem that all matters would require such special attention rather than the few. It is not the appropriate place here to debate the pros and cons of court vacations but it would be self evident that advantages accrue to the community from the capacity of legal personnel to convene, either informally or at formal convention, and exchange ideas and experience away from the routine pressures of office. Lawyers need breadth of experience not narrowness.

I welcome Mr Hogan's statement that he "strongly supports legal aid". I question the implication in his following remarks that legal aid is relevantly discussed in the context of delay unless it is intended to be asserted that legal aid or its availability is a cause or catalyst of the abuse of procedure. It seems to me that if a person exercises his lawful rights then he cannot be criticized if he takes time so to do. If the remarks really mean that, in the absence of legal aid, an accused person is unlikely to have been aware of his rights and therefore to exercise them, then the critic should be prepared to specify which rights he would remove. I note the statistical observation that trials are longer now (on average) than they were 10 to 15 years ago. It may be that the better equipped forces of the Crown were simply heard to some exclusion of the unassisted accused in the past. It may be of relevance to note that the 1969 edition of the New South Wales Law Almanac lists 20 Crown Prosecutors (metropolitan and country) whereas the 1979 edition lists 35 — an increase of some 75%. The same editions list three and 14 Public Defenders respectively. I offer the observation that there seems a general awareness in the community of individual rights, particularly contra the State whether in criminal or civil context and indeed legal rights are now taught or at least discussed at high school level and it may be that the awareness of citizens leads to a preparedness to contest allegations, and to insist upon due process of law which was not previously present.

I turn to some of the suggestions for reducing the number of trials in the District Court as distinguished from reducing the length of trials. I have the misfortune to disagree vehemently with Mr Hogan when he describes trial by judge and jury as a luxury. I need not remind those present of the history leading to the right of judgment by one's own peers. I readily acknowledge in our society the vast numbers of minor and not so minor offences, substantial and regulatory, wherefrom such right has been removed. I aver that such removal should be seen in proper context and from a correct starting point. Citizens charged with offences should be entitled to the verdict of their peers and this right is removed by the legislature for reasons, good or bad. I do not start at the other end with an assumption that alleged offences are triable summarily until you get, as it were, to a stage of seriousness whereat trial by jury is appropriate. Obviously offences triable

summarily properly have available upon conviction a lesser range of penalty than those the subject of a trial at which every legal right, including procedural rights, has been available. Surely, however, the touchstone for determination of whether a class of offence is to be stripped of such availability of full trial is not to be merely the penalty likely to be imposed. I pause to note that it is only in matters of contest that such full trial is required. I would perceive a community interest in the determination of guilt or innocence particularly in offences alleged against s.52A of the *Crimes Act* arising out of the very numbers of the matters coming before the court. Indeed the stated uncertainty engendered by the unreliability of tools with which the prosecution has seen fit to arm itself, or the legislature to provide, would seem to me overwhelmingly to call for active community involvement. A jury provides this. A great deal of the procedural law in this country is sensitive to the situation of the individual accused and the need to weigh and determine every piece of litigation upon the merits of evidence presented. The inexorable routine which Mr Hogan describes as surrounding the breath analysis instrument bespeaks a danger of perfunctoriness. In so saying, I offer no criticism of the motives and diligence of the magistracy or the judiciary but an observation of what I think would be the inevitable result of dull routine.

Specifically on Mr Hogan's paper I finally make reference to his suggested adoption of pre-trial conference procedures. I observe the terms in which he offers the matter for discussion. I am attracted to the concept of definition of issue. As distinguished from listing delays, I would think that in this area lies the best opportunity for eliminating delays during the trials themselves. More radical suggestions have been made elsewhere, for example an alteration in the style of definition of offences, and a requirement that charges be formulated in terms of particulars so that an accused, in effect, is required to put in issue those elements of a charge which he opposes. I respectfully commend Mr Hogan's suggestion as a means of experimenting available within the framework of our present system which would perhaps indicate whether worthwhile savings in time, without prejudice to either side of the litigation, can be achieved.

I have not perceived it as my function to comment upon the commentaries but I would record my dissent from the proposition so eloquently put by Detective Inspector King that the police brief of the style used for committals under s.51A of the *Justices Act* substitute for committal hearings. Admirable as I concede the police instructions in relation to preparation of such to be, I draw upon common human experience that not all who set out attain as high standard as set, and I fear for the consistent quality. More significant, however, is the nature of the material out of which the brief is prepared. It contains, for example, the statements of police officers and witnesses which may well have been taken, indeed, one would think are likely to have been taken, as an aid to detection and hopefully to solution. Such material would only accidentally emerge in accordance with the rules of evidence and I do not suggest that they should be so prepared. It would be likely to be unusual that the material collated for the purpose of investigation would be co-extensive with that to be presented to the court as evidence. It may be, that the case of s.51A committals which necessarily

import an admission of guilt there is some warrant for departure from adherence to strict standards and for reliance upon the committing magistrate to satisfy himself by selection of material contained in the brief which should be properly in evidence. Except in that circumstance of admission of guilt, however, it is not possible for me to agree with such departure.

May I turn to Mr Brown's paper. I refer to the series of questions commencing with the following:

> In a modern society, does it remain necessary or appropriate to leave the defendant in a privileged position of being entitled to say nothing, whilst the prosecution assembles its witnesses to prove each and every ingredient of the charge.

Accepting the rhetorical nature of such questions, I suggest avenues of thought along which answers might be found. Primarily, I suggest, one needs to distinguish the concept of the right to silence from a notion that the accused should indicate areas of contest. Such safeguards as are fundamental to or grafted upon the British-inherited system in currency in this State must be taken to presume the right to silence of an accused. Systems derived from continental Europe where accused persons may be required to participate in investigation and/or trial have no doubt developed their own separate systems of safeguards which are "geared" to accommodate to local procedures. In the absence or ignorance of such I see no justification for termination of what stands as a fundamental right and indeed the risk presents that such termination could well render nugatory those protections which exist upon the presumed presence of such right.

An obligation of an accused to define areas of contest is distinguished from the right to silence. I apprehend that the suggestion connotes an option remaining available for an accused to demand proof. In this context I refer to Mr Hogan's suggestion about a pre-trial conference and also the notion of "pleading to particulars" earlier mentioned in this commentary. I would be concerned that any such procedure would provide that an accused person be not at risk of penalty for requiring the Crown to undertake its onus of proof.

I have a contrary view to Mr Brown in relation to the use of averments of fact as a substitute for proof. At best, I see it as a licence for ill-prepared prosecution. It is contended that if a fact is an essential ingredient of an offence alleged to have been committed then, *ex hypothesi*, it is sufficiently important to require evidence. I do not contemplate how a provision of "reverse onus" can be compatible with there being no change in the general law of requiring the onus of proof to be and remain upon the prosecution.

May I offer some comment on the concept of "paper committals". Subject to the right of an accused person to object to and have excised any inadmissible material in a document to be tendered against him and to require the maker of a statement to attend for cross-examination, the giving of evidence in chief in documentary form is at first glance attractive. Nevertheless, I have some reservations, one of which is admittedly subjective.

Therefore, I offer these thoughts leading to such for your consideration in the light of separate experience. I have observed people who frequently give evidence, and these include police officers in particular, to appear to rely heavily upon written statements as *aides-memoire*, often it is suspected, to the exclusion of any real attempt at recollection of facts as they were at the time of happening. The leads to criticism that such witnesses rather than retelling events are simply "parroting" the written word. What occurs is not altered by euphemistic descriptions such as "refreshing recollection". I simply perceive a risk that witnesses might be attracted to adopting a posture of adherence to a formalised statement rather than making a real effort at recall of events, conversations or circumstances. This may have to be a tolerable circumstance when dealing with professional investigators such as police officers who no doubt have to describe the circumstances of numerous similar events. I question that it is in the interests of a tribunal trying to determine what a witness reliably attests to extend the potential of this situation. I would think that the presently required attempt at articulation of fact, circumstance and recollection far more likely to give opportunity for a tribunal validly to determine the weight of evidence.

Once again, in Mr Brown's paper, there is reference to legal aid in the context of delay. I do not repeat what I have earlier said but I emphasize that no one, least of all I, countenance the abuse of legal aid, but in the absence of some allegation of misconduct and the specification thereof it is difficult to perceive the relevance of its existence to delay in proceedings. That a hearing might take longer where a person is represented than it would if he were unrepresented is equally likely to be a condemnation of the quality of the presentation of the case of the accused in the first instance as an indication that the legal representative is extending the hearing in the second. It is surely unnecessary to argue that expedition should be obtainable at the expense of the due exercise of an accused of his rights.

I repeat that I do not seek to comment upon the commentaries. However, a fresh matter raised by Sergeant Taylor in his forthright words does induce response from me. I refer to his proposition concerning extradition. I have little doubt that most jurisdictions which would be prepared to extradite an accused person to New South Wales would require presentation of a *prima facie* case. However, what such a person "enjoys" is a determination satisfactory to the sending country by virtue of which it is prepared to despatch him or her to New South Wales. Any hearing required to make such determination may or may not be as rigorous as committal proceedings in this State but I debate whether it can invariably be presumed to be a sufficient substitute. May I also respectfully dissent from the description of the ideals "justice delayed is justice denied" and "justice must not only be done, but seen to be done" as Utopian. I am concerned for such as attainable and practical goals, as practical and attainable now as they must have appeared on Runnymede Islet to those who extracted similar terms in the Great Charter over three quarters of a millennium ago.

It is apparent that I have not sought to comment about the whole of the material in the two principal papers nor indeed upon the earlier commentaries. That I have recorded on occasions a different viewpoint should not

be taken as a general disagreement by me with sentiments expressed or proposals made. I seek to leave no impression that I resist change of any sort or that I see Messrs Hogan and Brown as it were as new iconoclasts. I disavow any such opinion and repeat the admiration first expressed in this writing and add to it my appreciation of the excellent commentaries already made. I have sought merely to advert to aspects upon which discussion might be stimulated and particularly those to which I offer consideration of a different viewpoint to that already expressed.

I conclude with some general observations. I accept that no civilized society would reasonably tolerate waste of resources be it money, material or manpower. Nevertheless, it must be axiomatic that in the passage of history a society can afford to expend resources more generously on some things at one period than at another. The accusation and potential condemnation of an individual member of our society is an exercise which is of its nature special. Each fellow member of that society must have a subjective share in the exercise by reason of the accused individual being part of our whole, as well as having what might be called an objective view of the situation. It is possible then that procedures which are categorized as extravagant from that latter view may be acceptable in another perspective. It may be valid to argue that a society which needs the energies and attentions of its citizens to the basic requirements for survival can expend less of its resources upon enquiry into departures from the norm and, if necessary, the punishment of them. It is an available perception of the present state of this society that technology is releasing greater numbers of people from industrial or agricultural toil and therefore it would seem legitimate to argue that in terms of manpower the society can afford to provide for this special exercise what is necessary for thoroughness. I certainly do not seek to perpetuate inefficient or wasteful procedures merely because such manpower may be available but it may well be that the lengthening of proceedings should be absorbed by the availability of a greater number of participants available to try and conduct the proceedings. I see no inherent necessity to maintain a more or less constant proportion between the number of judges, barristers, crown prosecutors, counsel, solicitors etc to population and, accordingly, see no vice in utilization of the maximum number of trained personnel. Indeed, it does not seem that the future portends a shortage of persons trained:

> 'Taking into account a population increase expected by 1982 (to 14.5 million people) and allowing for retirement of about 5 per cent of existing lawyers annually, Professor Richardson suggested that the profession, on a ratio of one lawyer to 1,250 persons, could absorb 4,000 lawyers in the six years 1977 to 1982. This appeared to be only one half of the 8,000 people (approximately) who could be expected to graduate from the 10 university law schools during that period. That figure did not allow for non-university courses such as that at the New South Wales Institute of Technology and the Admission Boards System' —
> *Legal Education in New South Wales: Report of Committee of Inquiry,* Chapter 4, paragraph 2.5, New South Wales Government Printer, December 1979.

DISCUSSION PAPER

A PROCEDURAL REMEDY TO DELAY IN CRIMINAL PROCEEDINGS IN THE LOWER COURTS: A COMPARATIVE REFLECTION

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Introduction

Delay in criminal proceedings is not a problem unique to the Common Law. The criminal courts in the "civil law" countries are equally, if not more so, afflicted with the problems of delay. One such civil law jurisdiction is Italy. In Italy, the problem of delay is the result of a number of factors, not least the principle, well entrenched in the Constitution, which denies to the prosecution any discretion whatsoever and requires the initiation of criminal proceedings in the case of every infringement of the Criminal Law, however trivial, which comes to the notice of the authorities. This principle is known as the "mandatory initiation of criminal proceedings": see A.112 Constitution.

Consequently, the problem of the overburdened courts has attracted the occupation of Italian criminal lawyers and proceduralists for some time. Since it is undesirable and, in a practical sense, impossible to alter the Constitution, the solution to the problem has had to be sought outside the constitutional arena. A major possibility has been through procedural reform.

The Ordinary Criminal Process in Italy

It may be fruitful, prior to coming to the major point of this commentary, to briefly describe the ordinary course of criminal proceedings in Italy. The ordinary procedure, as regulated by the *Code of Criminal Procedure* 1930, comprises three broad phases of activity. First, *the pre-instruction phase*. This phase, which does not strictly form part of the judicial proceedings, comprises the preliminary investigations by the police and prosecution to determine whether in fact the conduct under examination constitutes a breach of the criminal law and to determine the identity of the suspect. This phase closes with either a decision to initiate proceedings against the suspect, or a decision that the matter is wholly unfounded in which case the prosecution must seek an order of *archivation* from an examining judge who constitutes the judicial control upon the decision of the prosecution that there is no breach of the criminal law.

Second, *the instruction phase* which may be either *formal*, in which case it is conducted by an examining judge, or *summary*, where it is conducted by the prosecution. This phase consists of the assumption of evidence which is primarily at the initiation and direction of the examining judge, or, if relevant, the prosecution. The activities of this phase are technically directed to a determination of whether there is sufficient

evidence to put the accused on trial. In the case of either form of instruction, if there is insufficient evidence, the examining judge acquits the accused with a *"sentenza di proscioglimento"*. If there is sufficient evidence to put the accused on trial, in the case of a formal instruction the examining judge makes an *"ordinanza di rinvio in giudizio"*, or in the case of a summary instruction the prosecution requests such order directly from the trial judge, in this case called *"decreto di citazione"*.

Third, and final, *the trial phase* which is conducted before an adjudicating panel, except the *"pretura"*, the lowest criminal court which consists of a single judge only. This phase is, at least theoretically, characterised by orality and immediacy. However, it has degenerated into a formal confirmation of the activities and evidence collected in the previous instruction phase, such that the instruction phase, to the detriment of the defendant, plays a major role in the decision of the court.

It may be that the ordinary criminal process described above, comprises many favourable features. However, it is not the aim of this commentary to explore that aspect. But, it may be equally apparent that such procedure would encumber the activities of a lower court which has the onerous duty of dealing with a larger number of petty matters.

The Criminal Process before the *Pretura* in Italy

The procedure at the *"pretura"* is basically the same as the ordinary procedure described above except that all of the functions in the criminal process are concentrated in the *"pretore"* (judge). The instruction is conducted by the pretore in summary form: A.389(7) c.c.p. Consequently, the instruction and trial are conducted by the same person. Moreover, in accordance with A.74(1) c.c.p., the pretore has the function of prosecutor and as such initiates the criminal proceedings against the accused. Therefore, at the level of the pretura, the pretore has the functions of prosecution, initiation and collection of evidence and adjudication, an example of a true inquisitorial procedure. The passage from the instruction phase to the trial is not marked by any specific act except for the *"decreto di citazione in guidizio"* with which the pretore subjects the accused to a trial. The Constitutional Court has often been called upon to consider the compatibility of such accumulation of functions but in every case held it constitutionally legitimate, basically because of economic and practical considerations.

The pretore, however, has two special procedures available to him. First, the so-called *"giudizio direttissimo"* whose main characteristic is the absence of an instruction phase. It is used in cases in which, for example, the accused is apprehended during the course of the commission of a crime. In such cases the pretore may bypass the instruction phase and immediately place the accused on trial. Second, the *"giudizio per decreto"*, whose main characteristic is the absence of a trial. The purpose of this procedure is as an economy measure. This special procedure and its operation in Italy shall now be examined in some detail.

The *Giudizio per Decreto:* Judgment by Decree

The *"giudizio per decreto"*, regulated by Articles 506 to 510 of the *Code of Criminal Procedure*, is the most widespread of the special procedures prescribed by the Code. In substance, the pretore may enter by decree a criminal conviction, *"decreto penale di condanna"*, without proceeding to a trial. Moreover, although there is an instruction phase, it is often abbreviated and generally consists of an examination of the offending conduct and such other investigations as the pretore regards necessary, usually, evidence leading to the identity of the accused as the responsible party and the absence of a manifest non-foundation of the charge.

There are various necessary pre-requisites for a *"decreto penale di condanna"*. First, the crime must be one within the jurisdiction of the pretore. The pretore has jurisdiction with respect to all crimes which either carry a maximum penalty of not more than three years detention, or a pecuniary penalty either on its own or in conjunction with a period of detention as aforesaid: A.31 c.c.p. Second, it must be a crime which can be prosecuted *ex officio*. A *"decreto penale di condanna"* cannot be entered where the accused has been declared a delinquent or a professional or habitual offender or have delinquent tendencies, nor where there is a likelihood of applying a preventive security measure against the accused. Thirdly, a *"decreto penale di condanna"* can also be made where the pretore proposes to impose a pecuniary penalty. It follows, therefore, that it can also be made where the penalty for the crime in question is a period of detention or pecuniary penalty in the alternative provided that in the case in question the pretore intends to apply only a pecuniary penalty.

The two basic characteristics of the procedure, as evinced from A.506 c.c.p., are that it is *optional* at the discretion of the pretore and there is an *absence of a trial*.

Article 507 of the Code prescribes the formal requirements for this form of judgment. The judgment must include, first, the name, age and address of the accused and, if relevant, of the person civilly obliged to make reparation; second, the facts, name and circumstances of the crime; third, the factual and legal basis of the decision; fourth, the penalty imposed together with the articles of law applied; and fifth, the date and signatures of the pretore and clerk to the court.

The decree must then be notified to the accused and, if applicable, to the person civilly obliged to make reparation, together with the precept ordering payment of the fine or reparation and the costs of the proceedings. The accused must also be notified that he may *oppose the decree within five days of its notification:* A.507(2) c.c.p. If the decree is not opposed within five days of its notification the decree becomes executed and is equivalent to a *res judicata* decision: A.507(3) c.c.p.

An opposition to the decree must be proposed *personally* by the accused or through a *special procurator* armed with a special mandate: A.509(1) c.c.p. Although A.509(2) of the Code requires that the opposition

specify the reasons under penalty of its inadmissibility, the Constitutional Court held in judgment n.19 of 14th February, 1973, that A.509(2) c.c.p. is invalid because it offended A.24(2) of the Constitution which prescribes that the right of defence is an inviolable right at every stage or grade of the proceedings. The Constitutional Court was of the view that A.509(2) c.c.p. could only be legitimate so long as the *decreto* gave reasons to which there could be a replication. However, since most *decreti* did not give any reasons, notwithstanding that this was required under A.507(3) c.c.p., an opposition could not therefore be inadmissible for the lack of reasons. Consequently, the court held that the sanction imposed was excessive and A.509(2) c.c.p. was invalid in so far as it provided for inadmissibility for failure to specify the reasons for the opposition. Therefore, it is now sufficient that the document of opposition merely request a trial.

Where the opposition is either out of time, not presented personally by the opponent or his special procurator, or fails to comply with any requirement of law, the pretore declares its inadmissibility by issuing an *"ordinanza"* and orders execution of the decree. The only remedy against such order of inadmissibility is an appeal to Cassation which is only an appeal for error of law. If, on the other hand, the opposition is regular, the opponent is notified without delay of the *citation for trial.*

The *personal appearance* of the opponent at the audience fixed for trial is a necessary condition to an effective opposition; the decree is revoked only if the opponent appears: A.510(2) c.c.p. If the opponent fails to appear, in the absence of a legitimate impediment, the pretore orders the execution of the decree and makes an order for costs against the opponent. Therefore, there must be, for example, a medical certificate certifying inability to appear to obtain an adjournment. In any event, the proof of a legitimate impediment to appearance at the audience may be made out even after an order for execution of the decree by appeal to Cassation provided that the opponent show that the reason could not be timely deduced at the pretura by reason of fortuitous circumstances or *forza maggiore.* This additional burden upon the opponent to make a personal appearance is to guarantee a maximum economy of this procedure, that is, to discourage oppositions. Since in Italian procedure, a failure to appear gives rise to *contumacia* which means that the proceedings must continue in the normal way in the absence of the accused, or if the accused is legitimately impeded from attending, there must be an adjournment, it has often been argued that the requirement of personal appearance is incompatible with the right of defence, but the Constitutional Court has always refuted this argument and consequently the opponent must make a personal appearance for an effective opposition.

An opposition unfolds as an ordinary trial at first instance. It is not an appeal but only a means of reinstating the ordinary procedure at first instance. The pretore is not bound by his decision as to penalty in the decree and if the opposition fails he may impose a heavier penalty upon the opponent (i.e. the accused). This consequence also is an attempt to discourage oppositions to ensure a maximum economy of this procedure.

Article 510(4) c.c.p. provides that if the judgment in the opposition proceedings determines that the fact did not exist or did not constitute a crime, the decree is also revoked as respects others who were convicted of the same crime even though they did not initiate opposition proceedings. Moreover, A.508(2) c.c.p. provides that an opposition initiated by one only of the persons obliged to make reparation or the accused, extends its effects to the other party who did not initiate an opposition. Similarly, the decree is revoked by the appearance of one only of the said parties even if such party did not make an opposition: A510(3) c.c.p.

Finally, it should also be noted that a penal decree may be rendered null in an *"azione revocatoria del pubblico ministero"*, that is, a revocatory action initiated by the prosecution as guardian of the public interest. This action can be taken where the decree was made outside the situations permitted by law. It comprises a jurisdictional control through the initiation of an ordinary proceeding aimed at the revocation of the decree by judgment of the court.

Is the *Giudizio per Decreto* Compatible with the Fundamental Right of Defence?

The question whether the *"giudizio per decreto"* is compatible with the right of defence in A.24(2) of the Italian Constitution, and the principle of "equality before the law" in A.3 of the Constitution, has been raised on many occasions and on each occasion the Constitutional Court held that the *"giudizio per decreto"* does not violate A.24(2) nor A.3 of the Constitution.

The Constitutional Court has pointed out that the decree merely constitutes a preliminary decision against which the accused may initiate an opposition. The right of defence is therefore simply delayed to the time of the trial which is carried out in accordance with the ordinary procedure after the opposition has nullified the decree. In other words, the right of defence is merely delayed since, if the accused believes the decree to be unjust or illegal, he may request that the trial be restored whereupon he can oppose the decision of the pretore. Moreover, the court held that such procedure cannot be considered to be contradictory to A.24 Constitution since the *"giudizio per decreto"*, simple and speedy as it is, is not only advantageous from the point of view of procedural economy and the judicial officers but also for the accused who, by accepting the decree, avoids enduring a trial together with all the damaging consequences which can flow from it. Furthermore, the Constitutional Court held that this procedure does not violate A.3 Constitution since it merely represents a different regulation of the same and ordinary procedure.

Conclusion

The *giudizio per decreto* is an interesting procedure from the point of view of economy, simplicity and speed. It may, with local adaptation, be suitable for minor criminal matters. Moreover, it cannot be said to deny any of the basic rights, including the right of defence, since these are available *ex post facto* if a trial is requested.

PRESENTATION OF PAPER

Dr G. L. Certoma

I only wish to make a couple of points of clarification with respect to my paper. I thought that it would be appropriate to the seminar to also refer to comparative matters.

My paper is intended to draw attention to the fact that the problem of delay in lower courts occurs in other jurisdictions; to provoke some thought on a comparative level; and to provoke thought on procedural solutions, not merely of a piecemeal nature, but perhaps on a broader and more incisive basis. We ought not look with suspicion upon radical changes in our procedural law simply because such changes derive from other jurisdictions perhaps even non common law systems. We ought always fully appreciate the historical origins of our procedures and institutions and whether the reasons or premise for such institutions still exist or continue to be valid. Sometimes they do still exist and therefore it is proper and practical to continue the existing institution to which they gave rise. In other cases the very foundations for those institutions have changed or have become obsolete and in such case the time for reform is always ripe.

The paper does not purport to represent the procedure described there as appropriate for New South Wales. The description of the particular procedure is merely intended to indicate two broad matters. Firstly, that in other jurisdictions there has not been any great problem in extending a procedure similar, but not identical, to that which we find under the *Motor Traffic Act* to a range of crimes which we sometimes consider as serious in New South Wales, namely in the case of the procedure in question, to crimes which attract a maximum penalty of up to three years imprisonment although this short cut method is only available if the judge or magistrate in the case in question intends to impose a fine in lieu of a term of imprisonment.

The procedure that I set out is not identical to that in the *Motor Traffic Act* for several reasons, for example, the procedure we know is perhaps of an administrative nature whereas the procedure which I describe is *strictly* judical: It is a judge who makes the decision and imposes a penalty although without any contact at all with the accused.

Secondly, the procedure which is set out in the paper does not deny, in any manner whatsoever, the fundamental and basic rights, such as the right of defence. Even in those jurisdictions where this procedure is applied they are very aware of the fundamental right of defence and the other civil rights. The procedure does not endanger the right of defence since the defendant in every case has a right to full and proper trial *ex post facto* if he thinks that the decision passed down in the first place was in any way unjust or illegal. In such case, the defendant may subsequently consult his lawyer, or if he cannot afford a lawyer, seek legal aid and consider, outside the arena of the court, whether there is a sufficient defence to put the matter before a court with the full benefits of the normal procedures.

My intervention is only to seek to provoke some thought about short-cut procedures, different procedures. We ought not block out what is happening in other jurisdictions but we should consider their experiences and perhaps thereby improve the situation in our own jurisdiction.

DISCUSSION PAPER*

E. Sikk, LL.M.
Stipendiary Magistrate, Hobart

The subject of this seminar is particularly interesting to me because for several years past I have been engaged in a research project funded by the Australian Institute of Criminology. The purpose of the project is to investigate the causes of undue delay in dealing with criminal proceedings in courts of summary jurisdiction throughout Australia. The subject of delay in the courts is of course a complex and difficult matter but I welcome the opportunity to make some comments.

There is no time limitation against bringing criminal proceedings at common law and perhaps understandably so; when the corpus of criminal wrong doing consisted of felonies and misdemeanours over a much smaller range of human behaviour it is hardly surprising that the common law took an unforgiving stance. Presumably there was always the Royal pardon in reserve for exceptional cases. At any rate to this day there is no common law doctrine of time limitations either in respect of indictable or summary offences. A few statutes which create summary or simple offences contain special provisions limiting the time for bringing proceedings but they are rare indeed. So far as I can recall offhand there is no time limitation governing indictable offences anywhere in Australia. As for simple offences every Australian jurisdiction has a provision (if my memory serves me right) directing the time within which a *complaint* must be laid for a simple offence. However, in practice, these provisions have been evaded by the simple expedient of laying the complaint within the statutory period and then proceeding at leisure to issue the summons. Thus for example almost everywhere in Australia prosecutions for breaches of traffic laws are heard and disposed of often years after the commission of the alleged offence. Surely this is a futile exercise. This lack of a effective time limitation period prompted me to make a suggestion for law reform to the Tasmanian Law Reform Commission. Our Commission did eventually approve my proposal and passed it on to the government. Our government has not yet taken any action on this proposal but it may well do so when it considers proposed amendments to the *Child Welfare Act* perhaps later this year. I attach a copy of my letter to the Executive Director of the Law Reform Commission which is self explanatory.

It is perhaps appropriate to pause here and ask what is undue delay. The layman is, I think, misled by his childhood experiences into a belief that ideally punishment in the courts should follow swiftly after the commission of a crime or offence. However, what is the appropriate punishment for a childhood misdemeanour is by no means appropriate for the sentencing of offenders in the courts. This is well illustrated by the practice in our children's court jurisdiction so far as bringing proceedings is concerned.

* This paper was prepared without the author having the opportunity to sight and peruse the other papers.

Years ago we were too poor to build expensive remand centres for adolescents. So to this day, except in the most serious cases, children are not arrested but are brought before the court by summons say a month or two after the commission of the offence. This gives a welfare officer the opportunity to visit the child and prepare a report for the court in time for the court hearing. The great majority of children eventually plead guilty so that many children are dealt with and sentenced at their one and only court appearance. This is, in itself of course, a great advantage but more important I believe most child welfare workers would agree that if the offence is a matter of real substance then it is usually essential for some lapse of time to take place, not only in order to make an accurate assessment of the child but also for the family to settle down. Incidentally the remand centres on the mainland were envied by us years ago but those pangs of envy are now long forgotten. Instead I understand our child welfare authorities are now praised for their wisdom and foresight by their mainland counterparts. Of course, offences vary and the need for delay varies, nevertheless in the case of children I can see no need for a delay of more than three months or so even on a plea of not guilty except in special cases. At the other end of the scale there are relatively trivial simple offences where virtually no delay is warranted and no report is required. In these cases in my opinion no court proceedings are required either. South Australia has shown the way in this regard, while I personally do not completely agree with their system of juvenile panels, their diversion of juvenile offenders from the court process has undoubtedly been a great success. I believe the South Australian example is destined to be copied by other States and Territories. This leads me to my second point. Apart from traffic matters there is relatively little delay in disposing of cases in courts of summary jurisdiction throughout Australia. I have visited magistrates' courts in all the capital centres throughout Australia and according to my observations, cases are in practice mostly being heard and disposed of within six months of the commission of the offence (I except traffic cases and committal proceedings, white collar crime in particular in New South Wales). Our time lag for the disposal of a not guilty plea at present (including breathalyser cases or "p.c.a."s as you call them) would be three to four months, perhaps longer than the average in Sydney. This is certainly too long and there is admittedly no room for complacency. However, just as with regard to child offenders, a certain amount of delay is not merely inevitable, but even desirable from the point of view of all parties. As a general rule I would suggest six months as a tolerable outside limit for delay except in special circumstances.

I prosecuted for the Crown for some 17 years and therefore feel justified in saying something about indictable offences. I was in Melbourne recently and learned that the delay involved in hearing a defended criminal case in the County Court is presently at least 18 months. In other criminal jurisdiction in Australia the delay in the hearing of defended cases before a jury is quite commonly measured in years. Surely this is intolerable. Moreover this has been the situation for many years past and, if the solution is going to be confined to the appointment of more judges, then this situation is obviously going to continue for many years into the future. Indeed it would appear likely to me that the rate of crime in Australia is likely to continue to increase over the present decade. See figures recently published by

Biles, *"The size of the crime problem in Australia"*. Thus unless something is done delays are likely to get longer.

I suggest a time limitation period of say 12 months for indictable offences with a discretion to extend time just as in the case of summary offences. The most serious indictable offences should be excluded. My own experience is that there is simply no useful social purpose to be served in prosecuting most offenders in respect of offences committed more than a year previously. Often the experience involves considerable hardship to the witness and the offender, irritates the jury and poses sentencing problems for the judge. However, it must be conceded that the ordinary politician and member of the public know little of the facts of life in court. There is probably an entrenched view in the community strongly against letting off offenders because of the lapse of time. How can this unreasonable prejudice be overcome?

In my opinion New South Wales has led the way in being the first Australian State to set up a Bureau of Criminal Statistics a few years ago. It was because figures were collected systematically for the first time with regard to penalties imposed on drink drivers that Ross Homel was able to carry out work on the deterrent effect of penalties imposed on drink drivers. He informs me that his research is continuing but so far one clear conclusion has emerged. There is no difference between the deterrent effect of severe and lenient penalties imposed on drink drivers, i.e. given a similar group of offenders the rate of recidivism will not vary merely according to the severity of the penalty imposed. Homel's conclusion is in line with similar conclusions apparently reached almost unanimously as a result of similar research conducted overseas. His conclusions have led to experiments in the diversion of drink drivers from the court process in New South Wales and hopefully some success may be achieved. However, what is significant is the *method* of analysis based on statistical compilation. Recently the South Australian Government set up a Bureau of Statistics and last July the collection of statistics began in the lower courts. In my State the Attorney-General has asked me to prepare a plan for the collection of statistics in lower courts. Without discussing my report to the Attorney-General I believe the way is clear for all the Australian States and Territories to begin statistical compilations with regard to lower court proceedings. This could be done by treating the complaint or information filed in the court as the basic document and recording the court orders on the rear on sheets annexed until the complaint is terminated by a final order. The information can be coded and transmitted to a computer for storage. Other agencies concerned with an offender such as police, prisons, fine collection and so on, can similarly record basic information in a computer terminal thus eventually providing a moving picture, as it were, with regard to each *offence* as well as each offender. I have no doubt that with the aid of this basic raw material a qualified researcher can destroy once and for all some of the popular misconceptions in criminal law. Up to the present it has never been possible to demonstrate that stale prosecutions are simply a waste of time; given the necessary information I feel this can certainly be done. Accordingly I suggest that the pathway to eventual effective reform so far as delays in the court are concerned lies on the path along which New

South Wales is presently leading. It is relevant, too, to notice that the Law Foundation of New South Wales recently commissioned a firm of consultants in Vancouver to suggest alterations to the court system in New South Wales based upon changes made in British Columbia. I have a copy of this report which has, I believe, been released to the public by the Attorney-General of New South Wales. I am sure other States will be deeply interested in this report and the changes recommended since the court procedures in each State are basically the same.

Finally, I would like to make some further comment about traffic matters. In my opinion it is not enough to deal with the flood of traffic cases in the courts by temporary expedients. There is already enough information accumulated to indicate that the mere prosecution of increasing numbers of traffic offenders in the courts is not just a useless exercise so far as the road casualty is concerned but a serious threat to the efficient functioning of the lower courts. By all means have more traffic police on the roads and more enforcement. However, just as in the case of children much more effective means for the diversion of offenders are required, indeed what is needed is a wholesale re-appraisal of the traffic enforcement system. Ultimately this too can only be achieved by the method of statistical compilation which I have already discussed.

For these reasons I suggest that the computerisation of the criminal justice system is the key to overcoming the problems of delay in the courts. Indeed I believe the proper use of the computer will mark the beginning of a rational effective and humane system of criminal justice.

APPENDIX

13th September, 1978

The Executive Director,
Law Reform Commission,
HOBART, 7000.

Dear Bill,

Thank you for your reply about corroboration, it prompts me to offer a suggestion for law reform.

As you may be aware I am presently a member of a committee set up by the Minister for Social Welfare with the object of revising our *Child Welfare Act*. One provision under consideration is Section 26 of the *Justices Act* 1959 which is as follows:

> 26 In a case of a simple offence (not being an indictable offence) or of a breach of duty, unless some other time is limited for making complaint by the law relating to the particular case, complaint must be made within six months from the time when the matter of complaint arose.

In practice this provision has not succeeded in eliminating delay. Police practice is to lay the complaint within the period of six months allowed thus enabling the issue of a summons to the defendant at any time in the future. Of course in some cases, for example where the defendant has deliberately evaded service say by leaving the State, delay may be fully justified. In perhaps the majority of cases however delay has been caused by administrative error or no particular fault on either side. Understandably the police are loath to exercise a discretion and simply abandon stale prosecutions. The result is that from time to time stale cases are brought to court and often dismissed (after a hearing) under the Probation of Offenders Act because of their age without any penalty being imposed. Section 26 governs proceedings in the Children's Court where it is of course particularly important that proceedings should be disposed of expeditiously.

My own observation (corroborated by my colleagues) is that occasionally for example stale traffic complaints years old are brought before the court often with no good explanation for the delay except to clear police files. Section 26 has a counterpart in most if not all the other States and my impression is that it has not worked effectively elsewhere either.

At any rate I have drafted an alternative provision as follows:

> S26 (1) In a case of a simple offence (not being an indictable offence) or of a breach of duty alleged to have been committed by any person unless some lesser time is limited for making complaint by the law relating to the particular case complaint

must be made within six months from the time when the matter of complaint arose.

(2) No summons based upon a complaint referred to in sub section (1) shall issue to any person referred to in sub section (1) unless such summons requires such person to appear to answer the complaint within a period of six months from the time when the matter of complaint arose.

(3) No warrant based upon a complaint referred to in sub section (1) shall issue to any person referred to in sub section (1) unless such warrant is issued within a period of six months from the time when the matter of complaint arose.

(4) Upon application at any time made to a Magistrate by a complainant who has duly laid a complaint in accordance with sub section (1) such Magistrate may in his discretion and for good and sufficient cause shown by the complainant issue a summons or warrant otherwise than as required by sub sections (2) and (3). An application under this sub section may be made ex parte on a written application by the complainant in accordance with the form prescribed in the Rules. On the hearing of such application a Magistrate shall not be bound by strict rules of evidence and may hear such evidence or accept such statements as he thinks fit.

I understand you are soliciting proposals for law reform and submit my draft provision accordingly.

Yours sincerely,
E. Sikk,
Magistrate.

PRESENTATION OF PAPER

E. Sikk, S.M.

First of all, I am sorry that no one commented on my proposal to introduce a time limitation. There is nothing revolutionary in that proposal. (Indeed, there is nothing very revolutionary about any of the proposals submitted to this Seminar.) The time limitation of six months was actually introduced in England by a series of Acts called the *Jervis Acts* to regularise proceedings in lower courts. Time limitation for bringing proceedings within six months was instituted during the 1830s and copied by all the other Australian States up to the 1850s. At the present time Victoria and Queensland have time limitations for summary proceedings of 12 months, and all the other States for six months. I simply suggested fulfilling the original intention of the *Jervis Acts*, which go back a long way, and provide that proceedings must be brought within six months and terminated within six months except in special circumstances. I do not really see any reason why that should not apply to proceedings by way of jury trial. I have suggested that this is probably unpalatable to a lot of people. It sounds revolutionary but it is not. The proper way to test it I would suggest would be by way of a suitable research project which I am sure can be devised.

However, just to illustrate that it is really not revolutionary to toss cases out the window we can look back to the original history of Australia. I was in the Archives Department at The Rocks this afternoon trying to trace the very first case ever heard in New South Wales before magistrates and I traced it to the 19th February, 1788. That was the original meeting of the Bench of Magistrates in Sydney. David Collins and Augustus Hix heard that first case and the actual offence seems to be (I cannot decipher the writing very well) a lady charged with "unlawfully detaining a sailor's pants" for which she was reprimanded. Presumably in Australia in the magistrates' courts cases were dealt with expeditiously from then on, as they have been on the whole and still are being dealt with relatively expeditiously with a few exceptions which I have mentioned in regard to traffic and committal proceedings.

The story in the superior courts is a different matter. In my own State there were notorious delays because of a defect in the original Charter of Justice and the Governor's Commissions which meant that persons were unable to be tried for felonies in the colony of Van Diemen's Land. They had to be taken to Sydney to be tried, and that meant that many people or many persons who would have otherwise been tried and punished were not tried and punished at all because the witnesses and the accused simply could not be transported to Sydney. So undoubtedly many serious cases never came to court at all in the early part of the history of Tasmania. I do not think that that was a disaster so far as the colony of Van Diemen's Land was concerned. The administration of justice went on in its own fashion because the magistrates were able to meet and try cases, and presumably lesser charges were preferred, but there were those delays at an early stage in the history of Tasmania.

The proposal that I would have suggested is simply to eliminate those

delays by having, say, a 12 months time limitation on the less serious categories of crimes. For example breaking and entering, stealing, offences of dishonesty constitute half the crimes tried in New South Wales, and a profile of the prison population shows that over half the inmates are there for offences of dishonesty. Many of these offences of dishonesty can and should be tried within the period of 12 months. If they are not, then it does not seem to me to matter very much if a time limitation actually saves some of them from prosecution.

When I was prosecuting I had the privilege on many occasions of being able to prosecute with a fairly up-to-date list, i.e., prosecuting offenders or persons charged with crimes who were alleged to have committed those crimes within a matter of a few months previously. Possibly this is the sort of atmosphere which Crown prosecutors or defenders in this State have never experienced but it is, I suggest, a state of affairs which should be commonplace. If it is and you have an up-to-date list you can keep it up-to-date. In Tasmania the criminal list is relatively up-to-date in the superior courts and always has been compared to the other States. A time limitation on offenders, say, with regard to "break and enter" and "steal" would result in bringing the list up-to-date, and once it is brought up-to-date then very few would escape the net. There is no tragedy in so far as criminals getting off scot free is concerned. Most of these "break and enters" and "steals" are based upon confessional evidence. Very often it is just oral confessional evidence, or an unsigned record of interview, with a very high rate of acquittals. It does not seem to me that very much would be lost by getting rid of those stale cases so far as the superior courts are concerned.

There is one further comment, if I may make it, about "hand up briefs". We have had it since 1963 in Tasmania. Tasmania was the first jurisdiction in the British Commonwealth to introduce "hand up briefs". Now every State in Australia has a "hand up brief" system except for New South Wales. I earnestly suggest that New South Wales ought to consider the "hand up brief" system with the consent of the accused, but it does not work unless the criminal list is up-to-date. If the criminal list is not up-to-date, of course, defendants will opt for a committal proceedings and very properly so. If I were appearing for an accused person in this State I would most certainly suggest to him that he should take all legitimate opportunities for delay that he possibly can for two good reasons. The first reason is that if he comes to trial a year or two after his offence, even if he admits he is guilty, he is entitled to test the prosecution case and plead "not guilty". If he comes to trial a year or two after the commission of his offence it is very likely that the judge will take, and properly take, account of the fact he has been of good behaviour in the interim period and very properly decide to mitigate penalty. Secondly, there is always the possibility that witnesses may perhaps die or leave the jurisdiction. It is perfectly proper advice to point out to an accused person, with or without legal aid, that he is entitled to take advantage of these delays. If he does then, of course, the "hand up brief" procedure is of little effect.

In Tasmania the "hand up brief" is commonly used because there is very little delay so far as the superior courts are concerned. There is no

advantage to be gained by having a dress rehearsal for the police and other witnesses before one goes to trial and it is avoided. If I were defending in my own State of Tasmania, my advice would be to avoid at all costs committal proceedings, unless one is dealing with very complex white collar crime where there is advantage to be gained by committal proceedings.

The other matter I would like to mention is that of "majority verdicts". I think most jurisdictions surely have majority verdicts. I had not realised that they do not exist in New South Wales. It seems to me something of an anomaly as most jurisdictions have them. Certainly, we have had majority verdicts in Tasmania for many years and it has worked exceedingly well. Undoubtedly it has saved abortive trials.

DISCUSSION PAPER

J. Parnell, LL.M.
Public Servant

Delays can be attacked by:

1. Taking matters out of the system.
2. Altering the procedure in the system.

Although the former is not tonight's theme the future content of the criminal justice system will set off to some extent any gains by improved procedure. For the ramification of technological, environmental and consumer matters will greatly increase the scope of the system in future.

Mere gardening therefore will not achieve tonight's end. Revolutionary thinking and acting is imperative.

Generally, the introduction of one level of first instance jurisdiction across the board from piracy to parking appeals is an immediate starting point. Tailored with inbuilt reviews and limited appeals to the higher level this would achieve:

1. Optimum utilization of judicial hours.
2. Avoidance in the sentencing process of the maxim "specialization is the thief of compassion".
3. Maximum executive and administrative efficiency.
4. The elimination at a stroke of the time wasting preliminaries under Division 1 Part IV, of the *Justices Act*.

Inevitably such reform would focus attention on the future for criminal juries. From the standpoint of expediency, and much of our law is so orientated (e.g. *ignoratio juris),* there is no doubt that summary procedures are quicker and attract more pleas. But, would the public be satisfied to sacrifice the jury system in these interests?

Nevertheless, there can be little logic in a system which tries the thief of a $1,000 Holden summarily and the thief of a $1,001 Holden by jury (with the added luxury of an unsworn statement from the dock). Money ought never to be the criterion.

Accordingly, there may be a very good case for restriction of jury trials to the crimes of specific intent within Part III of the *Crimes Act*.

It is implicit in the issue between the A.B.S. and Mr Hogan's figures that a small number of the difficult cases are extending the delay in the higher courts. The $1,001 thief's entitlement to an unsworn statement causes some to blame this luxury for an reluctance to submit with the consequent delays. And, there may well be some force in this argument. This anachronism has been a strong survivor (*Kop's* case, 1923 and 1974) but on my interpretation of the 1974 debate it is doubtful whether any Government

has a mandate for continuing to extend the statement to other than the indigent and the uneducated.

Even if one level of first instance jurisdiction does not come there would appear to be a strong case to deny the present dock statement at least to those defendants set out in the 1979 Bill to abolish juries for certain classes of white collar offences.

Recent popularity in the use of s.412 also appears to be extending the time in individual trials. To the summary tribunal of fact and the experienced juryman or indeed, any juryman in a joint trial, the failure to call evidence of good character could raise an inference of bad character. So in the interests of uniform justice for all and the shortening of some trials there is probably a good case for repeal of s.412.

PRESENTATION OF PAPER

J. Parnell, S.M.

Obviously the main proposals are long-term proposals, although from the official silence in journals and otherwise I doubt whether the prospect of increased input into the system is fully appreciated, and the revolution presaged by Mr Grove may have to come earlier.

In quoting the figures of $1,000 and $1,001 I did not take into account s.476 in adding those figures. The mandatory levels are slightly lower but the principles are exactly the same. I did consider either as a complement or as an independent measure of taking the sentencing role away from the court. This would deal with the situation feared by Sergeant Taylor, but that is a matter for other considerations and I doubt whether that would be accepted by the public of New South Wales. There is some shift from the adversary system implicit in any consideration of the matters I have put forward.

One commentator referred to the statements from the dock. The thrust of my view was not that abolition of the statement might attract more pleas, but that the existence of the statement does inhibit pleas in certain matters. Detective Inspector King and Mr Hogan may have some views on that. On the question of insistence of guilt my experience is that such is usually accompanied by some explanation which is quite incompatible with guilt, and it can only lead to a trial.

DISCUSSION

His Honour Judge J. H. Staunton, Q.C., Chief Judge of the District Court, N.S.W.

I understood that this Seminar was to discuss and deal with possible causes of delay. The first thing we had better do is make sure that Mr Sikk gets on that plane tomorrow, because if his philosophy of the law combined with the younger generations learning of the law as per Rumpole of the Old Bailey "never plead guilty" becomes the philosophy of the defendants in this State, then instead of having 90% pleas of "guilty" and delays up to two years, we will certainly have to fail to prosecute every second prisoner or discharge him.

I wish to make two comments about Mr Hogan's paper. He refers to removing s.52A offences to the magistrates. I would not oppose that so much for the reason that Mr Brown gives, but rather because I do not agree with him that the judiciary seem to be taking that offence lightly, so that you can expect to get a bond if you kill a man on the roads of this State whilst driving under the influence of intoxicating liquor. Further, I think the offence is too serious to be dealt with other than by a jury; I think that would be a very serious inroad to the right of trial by jury in this State. We have seen in previous years how inroads have been made without very much protest from those people whom you would expect to protest. We have also seen how the powers of magistrates to impose sentences of imprisonment have risen from one year to two years, now to a cumulative of three years, and this proposal of course would allow five years. If that is acceptable to the people of this State then, so be it, but I do not think it would be.

The other matter to which I wish to refer is Mr Hogan's remarks about causes of delay and his reference to that quaint old phrase of our childhood, that you can appoint judges, magistrates and build courts until the "cows come home". I remark upon that because lest it be thought that that is precisely what is happening now. In fact, it is not. More magistrates are being appointed, more judges are appointed. Judges are not appointed to deal with criminal lists by and large, they are appointed to deal with civil lists. The reason they are not appointed to deal with criminal lists is that there is nowhere in this city to hear the cases. Mr Hogan knows that there is no delay outside the Sydney Metropolitan area and the periphery of Sydney. And he knows why there is no delay. There is no delay because there are courts elsewhere to hear the cases. He comes to me and asks "Could I have a judge for an extra week at Narrandera because there are five criminal cases there?" (as will be done in April of this year). I send him out a judge who is taken away from the civil list here. There is a court there for the judge to sit in, for the jury to be present at, and that is why the case can be disposed of. There is no delay around the State because judges are made available when delay is likely to occur. But that, of course, does not deal with this appalling state of affairs in Sydney where there are *not* five cases awaiting trial here but 500 odd at Darlinghurst alone. Not pleas of "guilty", but *500 jury trials* awaiting hearing. This figure, which has gone up from 423 in the last two years to 500 odd, will probably be 550 by June of this year. And this will get worse because we have not the courts to deal

with this situation. Indeed, what is proposed at this Seminar for reducing delay, and worthwhile though it would be (and I for one support any amendment for doing away with the disgraceful state of affairs that arises in terms of costs and inconvenience from the operation of s.51A or its misuse), would, if these various reforms were introduced, speed up the work through the magistrates courts and increase the delay in the District Court. If anybody can tell me how the delay in that Court can be reduced significantly without more courts to hear the cases I would be pleased to hear it.

There will be some ways that you will cut down some time in the hearing of cases. I do not think that abolition of the statement from the dock would be one, but pre-trial procedures of some sort could be one way if the profession will co-operate and if the accused will co-operate. If Mr Sikk is right they will not, they will cause further delay. So, you have got to get them into Court. You have got to produce a court and a judge and a jury to hear the case. That is when you might get a plea, but that is what has got to be done and it has not been done. It is going to be a mammoth undertaking but, of course, there are a number of things concerned with the law of criminal justice in this State that will be mammoth undertakings. One suggestion by Mr Parnell is a complete review of the criminal law. Probably an ongoing commission may take five or ten years to report. That is probably necessary, but delay in the courts because there are insufficient courts is a matter that I think has received too little attention. With great respect for my Registrar I think he has tended to brush it aside in his paper as being something that we can afford to ignore. He gives it a very minor part. Only two criminal courtrooms have been built in this city since 1964 and attempts to use courts designed for civil use have been attended by great inconvenience to the public and jurors. Properly designed and constructed criminal courts of adequate numbers are absolutely necessary.

Tom Kelly, Solicitor

Much has been said and written about delays in criminal proceedings in the magistrates and the District Courts and before single judges of the Supreme Court, but there are some matters in respect of the Court of Criminal Appeal that concern me. It is not a jurisdiction I practise in very often, only about once a year, and perhaps my experiences have been exceptional, there may be others who might be able to inform me if they have found the same thing. The delay is not in matters coming on, the court gets them on just as soon as possible, any delay would be because the appellant is not ready. It is the delay in the reserving of some of the decisions. I appreciate trying to have the court constituted by the most learned judges, the last time I was there I had the Chief Justice, the Chief Justice of the Common Law and the President of Appeal, does and must create certain bottlenecks but there are a couple of incidences in my experience that I might point out.

In 1976 Stephen Dowd's appeal was heard on the 27th May and that was reserved until the 11th June the following year. That is over 12 months. It was dismissed, but only five months of the time was ordered to count. There was another appeal of Desmond McEwan; it was heard on the 11th

March, 1979, and I understand the court reserved until the 23rd November, 1979. That is eight months and the verdict was one of acquittal. This man was able to walk away having had to wait eight months for the decision. In fact, I understand from the time of his arrest he served a substantial part of his non-parole period. There is another case I am aware of where the court has reserved for eight months. I think some attention could be given to this problem of delay.

Daryl Rees, Department of Corrective Services

A brief comment on the paper of Mr Brown particularly his comments in relation to prison and escapes (pages 47 and 48) where he says "the increasing number of prisoners who are able to escape from lawful custody within the prison system". In other parts of Mr Brown's paper statistics are quoted in quite some detail, and an analysis is made of these figures, but with regards to the claim concerning the increasing number of escapes there are no figures to substantiate his statement.

I would like to give the number of total escapes. These are total figures from Department of Corrective Services' institutions throughout New South Wales. They cover the period from the 1st July to 30th June in the years that I mention.

1974-1975	198
1975-1976	183
1976-1977	188
1977-1978	180
1978-1979	168

By whatever interpretation you place upon those figures I put it to Mr Brown that you would be very had put indeed to say that there is an increasing number of escapes, and I thought it may have been prudent in the light of the attitude which various sections of the media take towards escapes that these figures could well have been sought out and included in the paper.

B. R. Brown

I am certainly not concerned to get into any particular debate as to whether the numbers offer a marginal increase or a marginal reduction in the numbers of the persons who have been able to manage to escape from custody. The figures which I was recently given in relation to the rate of escapes for a period of seven months from June, 1979, to February, 1980, indicate that over that period 117 persons had been able to escape from lawful custody. The point that I make is not so much as in connection with the escape but on the basis that the work which is generated upon that escape. One can be almost certain that the escape will be accompanied by allegations of assault in respect of a prison officer. Then inevitably one or two motor vehicles will be taken in respect of the getaway situation, and indeed there may be a whole string of offences of the nature of break, enter and steal and the like which are committed by the escapee whilst he is on the run. I am not concerned so much in relation to the fact that a certain number of prisoners escape, but rather wished to indicate that it is one of

the areas which does bring to the lower courts a considerable amount of extra work by reason of the fact that they did escape. I do not want to be thought to be critical of a role which the Department of Corrective Services might play in relation to the humane handling of persons, and I am not so much concerned in relation to those who have gone from some of the activities on which they are released. But the point, so far as I am concerned, is connected with the offences committed whilst on the run, and indeed that is only part of the reference I made to the prison system.

My other reference to the prison system referred to the apparent inability to maintain discipline or good order in the institution. I can say now there has been quite a substantial number of cases in the Central Court of Petty Sessions since the activity which brought some 20 defendants on 38 serious charges into Central Court arising from the disturbances at the Central Industrial Prison just prior to the 18th October, 1978. Some of those matters still remain unresolved.

J. M. G. Callaghan, S.M.

As a practising magistrate I have been living with this problem in summary courts of both the delays and the days when you finish early and there is nothing to do. It seems to me that we have one fairly serious problem that we have not been able to solve and that is the case that is listed for hearing and on the day of the court nobody arrives, or the witnesses are not ready, or somebody else is not ready, or you get told the day before that this is to happen. I am particularly concerned with the free legal aid solicitor such as the Aboriginal Legal Service, the Commonwealth Legal Service, the Public Solicitor, and I have spent some time with my own Public Solicitor trying to work out a solution. For instance today I had two cases listed for hearing. The defendants just did not turn up. The Public Solicitor said that he had not been able to contact the client since the first day when he was given preliminary instructions. This situation does arise right throughout the whole spectrum of legal aid. Preliminary instructions are given, time is allocated, but on the day of the hearing the client is in some other part of the country or overseas. I cannot see the answer to this difficulty except for the person representing the client to spend some time chasing up the client. A private solicitor who is not properly instructed or is not paid will not continue with the case. If he has been paid it is fairly certain that the client will attend and the trial proceed. We try to do our best by perhaps adding an extra case to the list to replace those cases where the client may not attend.

Kevin Ryan, M.P., Barrister at Law

There is just one aspect of Judge Staunton's comments that I would like to take up. His Honour emphasised very strongly that there are not enough courts. There may have been an implication that also there are not enough judges, because presumably there are no judges either civil or criminal not being allocated, and that implies that if there are not enough criminal courts then the notionally excess judges are being allocated civilly. The District Court civil list has a tolerable delay at the moment and I am sure no one would want to see that lengthened. I think it would follow that if there are more courts to be built for criminal matters then some of these

judges sitting civilly would have to be reallocated to the criminal courts. That might result in a see-saw situation where now there is tolerable delay in the civil list but it may become lengthened because of the reallocation to the criminal list. I think if you do require more criminal courts to be built obviously you must also need more District Court judges to be appointed as well.

C. R. Briese, Chief Stipendiary Magistrate, N.S.W.

I would like to agree with the Chief Judge as to the situation applying in the District Court. It has reached the point where they certainly do need more courts and, indeed, more judges. The only alternative to this would be to increase the jurisdiction of magistrates and here you reach the point of deciding whether or not a person's innocence or guilt is to be determined by one man or by a jury. It seems to me, however, one could consider the jurisdiction of magistrates being increased not so much in the criminal field but in the civil jurisdiction. I would think it not impossible for magistrates to be of such quality that they might take from the District Court matters of up to say $5,000 or even $10,000. I know that there are some jurisdictions in other States, for example South Australia, where that is proposed to be the case. Magistrates will deal with civil matters up to a limit of $10,000.

A decision has to be made: either to have more judges and more courts for judges, or the alternative is to put more of the work from judges down among magistrates where we still have space. Our space too will run out and it may well be we are fast reaching the day where we need more courts and more magistrates.

Carolyn Simpson, Barrister at Law

My first comment concerns night courts. I understand that there has been some effort made in this State to introduce night courts, but it seems to me that that effort was not a very substantial one and only applied to traffic courts. It is accepted that most people charged with traffic offences do not turn up anyway, and there are many other matters that could very easily be dealt with at night both in the magistrates courts and in the District Court. There would be many advantages to the community by doing so other than the reduction of delays. It may be that only pleas of guilty could be dealt with in that way. That would clear the daily lists for committal proceedings in the magistrates courts and for trials in the District Court. It seems to me that that is one simple solution to some of the problems of delay in both of those courts.

Kevin Ryan, in answering to Judge Staunton, mentioned the question of the availability of District Courts. It seems to me that one of the reasons that courts are not available for trials in the District Court is that few of them have a dock available for the prisoner to sit in. There are many cases where the prisoner does not need to be confined to a dock. The accused person can sit behind his counsel, and any of the courts in the civil jurisdiction could be used. The provision of a jury box should be relatively simple in courts in the Barracks Building and in the old District Court. Many more District Court judges could be made available to hear trials with juries and,

certainly, to hear pleas of "guilty" and therefore reduce delays in those matters.

There has been some suggestion raised by previous speakers that some of the delays have been caused by the accused himself or his representatives, and some of the blame for this has been cast on the use of the dock statement. I would like to state that I and many of my colleagues would support those delays if it means the dock statement is to continue to be the right of an accused person. I do not believe that taking away the right of an accused person to make a statement from the dock to reduce delays in criminal proceedings is a reasonable means of coping with those delays. If it does cause any delay then some other means must be found for dealing with those delays.

Finally, again on the suggestion that some of the delays have been caused by the accused person, we all know that there are cases where people have to be represented at short notice by somebody other than the person they have chosen or the person who was prepared to represent them in the first place. Rule 4 of the Criminal Appeal Rules prevents under most circumstances an appellant from raising any matters that were not raised at the hearing of the trial. That may be for a number of different reasons but that Rule, together with the effect of *Dugan's* case, may mean that if the matters not raised at the trial cannot be raised in the criminal appeal the accused person, who thereby is a convicted person, no longer has a right to sue his solicitor or counsel, if he has that right at all, for negligence. A "Catch 22" for an accused person and I would suggest that if he brings about any delays in his own trial that that is a right that he has, and not something that the State should avoid by bringing on his trial unduly quickly against his wishes.

The Honourable Mr Justice Adrian Roden, Supreme Court, N.S.W.

My present calling precludes me from adopting Mr Parnell's suggestion that we should think or act in a revolutionary fashion. I believe nevertheless that we should perhaps not think and act in quite as contrary a fashion to that as lawyers are wont to do. In matters of law reform the approach in New South Wales, certainly so far as criminal matters are concerned, is this: nothing can possibly be considered for introduction in this State unless it has been tried somewhere else before, and has been proved somewhere else before. It is perhaps our good fortune that that attitude has not prevailed in all other common law States.

There are some suggestions which I have hoped for a period now of some years would find receptive ears. They are not all directed towards overcoming delays in the criminal justice system but many of them, I believe, would have that effect, and I would like to refer to some of them.

Many people see some of the safeguards that are built into our criminal justice system as causing delay, and so proposals to overcome delay tend to be seen as an attack upon some of those safeguards. I would rather approach the matter in a different way and say "Are we not tending,

particularly at the summary level, to clutter up our criminal justice system with a number of matters in respect of which it is not appropriate to consider the necessity for such safeguards?" There are myriads of regularity offences and other matters in respect of which the community attitude is "Yes, they call for penalties", but equally the community attitude is that persons who commit those offences ought not to be regarded as criminals. Elsewhere in a paper that was presented at another meeting of this Institute I characterised those as being matters such as offences involving bread in sausages, cockroaches in restaurants, dogs without collars, and companies without returns. And they are but a small sample of the type of matter that we persist in treating as criminal offences. We persist in saying that if a penalty is to be exacted in respect of them it will be exacted through proceedings in criminal courts. If the person charged disputes the claim, or wants to have someone adjudicate upon the amount not only do we go through the entirety of the criminal procedure at the summary level but at his whim he can have the whole procedure repeated again before a District Court Judge. Part of the proposal that I am hoping will fall one day on receptive ears is that we take out of the criminal justice system altogether such matters, which, I believe, have no place there.

The word "decriminalization" has been very popular in recent times in another context. I have never understood its meaning. I have never understood what is supposed to exist within our system that enables something to remain an offence that will attract a penalty, without being criminal, and without requiring to go through the criminal justice system. Perhaps something fitting that description could be created, and as social attitudes change so matters may be moved from one category to the other.

The next matter that I think is of very great importance so far as unnecessary delays are concerned is that of the compulsory full scale committal. Mr Sikk has mentioned that Tasmania did away with the necessity for it in 1963. It is, of course, a fact, as he says, that every other Australian State has done away with it. It is a fact that England did away with it in the *Criminal Justice Act* of 1967. New South Wales is proving the point that I made at the beginning of this address, by having allowed 1980 to arrive without having done anything about it at all.

In England, I am led to believe, it is very much the exception rather than the rule for an accused person to require a full scale committal, and I do not think it would be very long before it became the exception rather than the rule in New South Wales. In England a Section 1 committal under the *Criminal Justice Act* of 1967 is virtually identical to our now disreputable s.51A. The only difference is a very sensible difference that on the basis of the hand up brief there is a committal for trial instead of this peculiar thing that we have which is called a "committal for sentence". If that were adopted in New South Wales we would not be talking about what should be done with s.51A because it simply would not exist.

Mr Grove at page 103 refers to some more radical suggestions that have been made elsewhere. I suspect that I am the author of those more radical suggestions that have been made elsewhere; and they refer to the way in

which charges are defined, the way in which they are presented, the way in which they are prosecuted, and the way in which verdicts are taken — which I suppose is a pretty fair coverage of the whole business.

I believe that we have a quite unnecessary number of separate offences. I invite you to go to the *Crimes Act* and see how many sections there are that create an offence which we could call "stealing" or "theft" but prefer to call "larceny" on the basis that if we do, fewer persons who are not lawyers will be able to understand what it means. There is a whole array. Stealing cattle comes under a different section from stealing dogs; stealing wills, stealing in a dwellinghouse, all sorts of different stealings each of which it would seem to me is and could be expressed as the one simple offence, with the opportunity being there, if the legislature wishes, to say that the penalty will vary depending upon the object stolen or who steals it or where he steals it. These unnecessary complications are carried through when we come to matters such as culpable driving (referred to by earlier speakers) and others in respect of which you can go before a Court either on indictment or summarily, depending not only upon the charge that is laid, but depending also upon the charge that is left if one disappears. For example if a person is charged with culpable driving, based upon an allegation of dangerous driving and a death resulting, and he is acquitted, the next step, as I understand it, is normally for that same person to be charged or at least for a charge already laid to be pursued before a magistrate in respect of the summary offence of dangerous driving. There is no issue estoppel, there is no way in which the acquittal on indictment will serve to prevent that matter from going ahead.

The "more radical" suggestion is that every offence be stated in terms of the conduct that constitutes the basic offence, with any aggravating or mitigating circumstance that might be thought to change its character as something of an appendage to it. Take for example the case that I have just mentioned, culpable driving involving dangerous driving with a death resulting. The present situation is that the indictable offence is tried first and the jury is asked in the one question whether it is satisfied that all the ingredients of the aggravated offence are present and that the statutory defence is not available. If the jury says "no", by a verdict of "not guilty", it does not indicate which one or which ones of those ingredients it found to be not present, or whether it acquitted on the basis of the statutory defence. One doesn't know whether it found that the driving was not dangerous, or whether it found that the statutory defence was available through lack of causation. If the basic offence were stated for all purposes as "dangerous driving", and it were made indictable if the aggravating circumstance of death were alleged, then under this proposal the superior court would hear the charge, the jury would first say "guilty" or "not guilty" to the basic offence of dangerous driving, and would then, if it said "yes", answer the subsidiary question of whether the aggravating circumstance is found to be present, and the statutory defence unavailable. There would never be a need for a second summary trial.

The same would apply under the *Poisons Act*. If possession of more than the prescribed quantity is alleged, the Crown at present charges alleges

"supply" under the so-called deeming provision. The basic offence under the "radical" proposal would be possession; the jury would find the accused "guilty" or "not guilty" of possession. If "not guilty" that would be the end of the matter altogether, with no following summary trial. If the jury said "guilty of possession" then it would be called on to answer the second question: "Was the possession for the purposes of supply?", whether that be by proof or by operation of the deeming provision.

The same problem of unnecessary litigation through the manner in which offences are charged is seen even where there is not a separate summary offence. An example is the case of a person charged with murder, whose attitude is that he does not contest any of the elements which the Crown is required to prove, but does wish to set up a matter such as "diminished responsibility" or "provocation" in order to become entitled to a verdict of manslaughter. If the manslaughter plea is not accepted by the Crown, the trial proceeds, despite the virtual admission of all the elements of murder, with each one of those elements having to be strictly proved by the Crown. This may take days and days of involved scientific evidence none of which is to be challenged. The proposal would make it possible for a plea to be entered leaving only the mitigating circumstance such as I have mentioned, or in other cases the aggravating circumstance, if a person admits a killing but denies the requisite intent to make the killing murder. This involves what Mr Parnell might improperly describe as a revolutionary approach, but I do think that when we look to what might be done with the way in which the law is stated, and the law is administered, in order to prevent what seems a risk of the system being bogged down altogether, we have got to be prepared to look at it a little more deeply than lawyers tend generally to do when approaching these problems.

I do not want to say any more about specific aspects of those proposals, but I certainly do commend to this Seminar a rather deeper consideration of where the flaws in the system may be, than is involved in simply looking at a few matters such as s.51A which is working badly, or s.75B which is working well. The whole system I believe is due for a very thorough review. It has tended to grow like Topsy for a long, long time, and I think it is about time we had a good look to see where that has led us.

G. D. Woods (Public Defender), Director, Criminal Law Review Division, Attorney-General's Department, N.S.W.

I am also involved in some minor way in advising the Attorney-General about criminal law reform.

If I might say so with respect to His Honour Mr Justice Roden, the politics of criminal law reform are fairly straightforward. There are votes in having separate offences of stealing pigs, birds or whatever, although it may be more elegant to have one simple larceny or stealing provision. The reason why we have specific A's and B's and so on in the *Crimes Act* is not because people keep slipping through loopholes (as occurs under taxation laws) but because a particular pressure group in the community demands that "something be done" about problem X. If by the statutory repetition of

some criminal offence in a slightly different wording the government can say it has now legislated to deal with problem X then everybody is happy — or at least the particular pressure group which it was sought to placate is happy.

But this Institute, to the extent that it engenders public comment on criminal law reform, is to that extent a political organisation, although hardly "high pressure". Judge Staunton rather bluntly said that we need new criminal courts, as indeed we do, but the probability is that the press who will report on this meeting will have obtained copies of the printed papers in advance and they will draw any story which they put in the papers tomorrow from this material. It is most unlikely, I think, that anything said in this discussion period will be reported. The politics of it are very complicated. Although it is very probable that Judge Staunton's comments here will be communicated in one way of another to the relevant authorities they might not, with respect, necessarily be always communicated in the most politically effective way.

It is the complexity of the whole area of criminal law reform which gives rise to the problem of delay. If the present government, or another government, says that it is going to initiate a thorough-going reform of the criminal law, as was done in South Australia in the 1970s, you can quite possibly expect to see splendid reports such as the South Australians have indeed produced. There is a series of excellent reports which are now resting heavily on their bottoms in the Attorney-General's Department in Adelaide and there is very little prospect that they will be legislated into existence. That is simply the politics of it.

As far as delays are concerned, I can only agree with previous speakers (Mr Bone in particular), who said that if we are going to have amendments to the law which help overcome the problem of delay, they must not be at the expense of fundamental rights. I am sceptical frankly about the prospect of a complete overhaul of the criminal law (in the Justinian style) in the immediate future. The only alternative to overcoming the problem of delay is the hard slog of pointing out, as Judge Staunton has done, in the right political ears, those things which are problems, and pushing for them in whatever appropriate way available.

So I do not see any easy solution. Any solution which hacks away at fundamental rights will not be politically acceptable. No government, whether it be Liberal or Labor, is going to undertake criminal law reform the result of which is to provoke such a political backlash that it becomes non-productive. Those in the community who defend the traditional rights of criminal defendants (what Mr Taylor referred to as "loopholes for criminals") are, I hope, a determined and noisy group — I believe that the way to overcoming delays does not lie in the "slash and burn" approach, if I might put it that way. From my point of view, anyway, there is no alternative but the continuation of dialogue between interested people within the criminal justice system — the time-consuming process of committees, recommendations, argument and follow-up.

The Criminal Law Review Division of which I am a part is very willing and indeed eager to listen to proposals which bear upon these matters. I would, if I may, Chief Justice, extend an invitation to all here to communicate with me at the Attorney-General's Department if they have any particular ideas about delays in criminal law and indeed about criminal law reform generally. I will do my best to delay too long in replying to any such communication.

W. R. Wheeler, Clerk of Petty Sessions, Newtown, and Chamber Magistrate

The seminar is titled "Problems of Delay in Criminal Proceedings" and we have heard papers from members of the legal profession, but the question I would like to ask is "Which of you gentlemen has had any formal administrative training?". It is my view that a great cause of delay in the proceedings is in the Justice Department itself with the administrators. I administer one small part of this system and yet ten years of my life have been spent learning the law, 14 months was spent trying to practise it at the Public Solicitor's Office, and I am now administering it. We have a turnover at Newtown that a small businessman would be proud of — it runs into millions of dollars. We have a brilliant debt recovery service yet I hear tonight that my Department has commissioned a study by an American firm into management procedure. We look for better trained methods in the Department, and for better opportunities to discuss matters such as this with other people in the Department.

Is there really a problem? I have not heard of a defendant ever saying "This has gone on too long". The defendant of a once only crime kept in custody will complain, but I would like to hear his views. I have not heard them tonight.

Sergeant O. Taylor

One thing that distresses me and a lot of my colleagues is the stringent length lawyers, judges, magistrates, and other people go to protect the evil person in our society. There are 9,000 policemen in this State and the majority of them do a conscientious and most unrewarding service. Our Chief Justice had some rather unique words to say about the policemen in this State in the case of *R. v. Darrell Joseph Burke* in the Court of Criminal Appeal (No. 133 of 1978) and I am proud of his expressions. We have a good reputation with our Chief Justice and a good police service, but I am still amazed at the length some people will go to protect criminals.