

EROSION OF RIGHTS OR REFORM OF CRIMINAL PROCEDURE IN WESTERN AUSTRALIA?

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Reforms 2002 & 2004

The Law Reform Commission of Western Australia in its *Review of the Criminal and Civil Justice System in Western Australia, Report No 92 (1999)*¹ made more than 100 recommendations dealing with reform of the criminal justice system. Many of the recommendations were implemented by the *Criminal Law (Procedure) Amendment Act 2002* ("CPA(WA) 2002") *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* ("CPA(WA) 2004").

Key recommendations implemented were:

- (a) Disclosure requirements -
 - (i) The prosecution is obliged to provide full disclosure of all evidence to be relied upon in indictable matters;² and
 - (ii) The defence is required to disclose expert evidence, notice of alibi and notice of factual elements of a dispute;³
- (b) Abolition of preliminary hearings ("committal hearings");⁴
- (c) Partial abolition of double jeopardy, by allowing the prosecution to appeal on the ground of judicial error against an acquittal on a charge attracting a penalty of at least 14 years;⁵
- (d) Removal of the defence of provocation to murder.⁶

Abolition of committal hearing

The LRCWA in its 1999 report recommended that the committal hearing be replaced by a statutory regime of disclosure on the grounds of avoidance of -

- (a) cost and delay, citing committals being listed for hearings which did not proceed;⁷
- (b) witnesses, including victims, being required to give evidence more than once.⁸

¹ <http://www.justice.wa.gov.au/092-FR.html>.

² CPA(WA) 2004, ss 42,61 and 95.

³ CPA(WA) 2004, s 96.

⁴ CPA (WA) 2002.

⁵ CPA (WA) 2004, S 24(2).

⁶ *Criminal Law Amendment (Homicide) Act 2008* (WA), which also abolished the distinction in the *Criminal Code* (WA) between "murder" and "wilful murder".

⁷ *Ibid*, pp 242-3.

⁸ *Ibid*, p 243.

The LRCWA expressed the view that the purpose of a committal is to screen charges and determine which charges could be proved at trial and that function could be entrusted to the Office of the Director of Public Prosecutions, assisted by the disclosure obligations.⁹

The LRCWA placed no weight on the advantage to the accused of testing the case at a committal hearing.¹⁰

This approach crossed a bridge which was probably beyond the contemplation of the LRCWA as it was constituted in May 1970, when it recommended to the Minister for Justice that the law be "amended to permit, subject to prescribed limitations, written statements of witnesses to be admitted in evidence for purposes of the committal, trial and sentencing of persons charged with indictable offences and to permit an accused person to elect to go to trial without any preliminary hearing."¹¹ The only empirical evidence upon which the recommendation proceeded was the report of a Superintendent of the Criminal Investigation Branch that in his many years experience he could only recall one case where a magistrate had failed to commit an accused for trial.

The LRCWA in 1970 identified the advantages of committal proceedings as –

- (a) reducing evidence to an acceptable form and excluding inadmissible evidence;
- (b) giving the prosecution and defence the opportunity to test witnesses which may result in the reduction of the charge or a change of plea;
- (c) publicity bringing forth new witnesses and fresh evidence.

The 1970 report traced the movement in Western Australia for reform of committal proceedings to a recommendation of the Solicitor-General that suggesting that where an accused pleads guilty and is legally represented then the Magistrate might accept a written statement admitted by the defence or verified on oath and that the Magistrate could decide whether or not a witness should give oral evidence where an accused is unrepresented and pleads guilty or pleads not guilty. An ad hoc Committee, established with the approval of the Minister for Justice, to consider recommendations of the Chief Crown Prosecutor, recommended that in all cases of indictable offences where a plea is not forthcoming or a person indicates an intention to plead not guilty normal committal proceedings should be held and in other cases hand-up briefs should be prepared.¹²

The shift in emphasis from the interests of the accused to the interests of the prosecuting authority between 1970 and 1999 is apparent from the way in which they expressed their respective recommendations; the focus of the 1999 report being on the role of the DPP and the 1970 report being on the election of the accused .

Current committal procedures

The CPA(WA) allows for -

⁹ Ibid, p 245.

¹⁰ See Douglas *et al*, *Criminal Process in Queensland and Western Australia*: Lawbook Co 2010, p 162 [6.100].

¹¹ The Law Reform Commission of Western Australia, *Committal Proceedings*, Project No 4, Report May 1970, [31].

¹² The Law Reform Commission of Western Australia, *Committal Proceedings*, Project No 4, Report May 1970, [8], [9].

- (a) a 'fast-track' sentencing procedure upon a plea of guilty;
- (b) a committal/disclosure hearing; or
- (c) an "administrative committal".

Under the 'fast-track' procedure, if the accused pleads guilty to an indictable offence before the prosecution discloses the prosecution brief, the magistrate, without convicting, commits the matter to the District Court or Supreme Court for sentence.¹³

If the accused pleads not guilty or does not enter a plea to an indictable offence, the matter is adjourned to a committal/disclosure hearing.¹⁴ If the Court is satisfied at the committal/disclosure hearing that the prosecution has complied with the disclosure obligations, the accused is required to enter a plea and the matter is committed for trial or sentence to the District Court or Supreme Court.¹⁵ If the court is not satisfied that the prosecution has complied with the disclosure obligations, the court may adjourn the charge and order that the prosecution serve the required material before the next hearing date. A failure to comply on another occasion may result in a dismissal of the charge for want of prosecution.¹⁶

An administrative committal occurs after the prosecution has made full disclosure and the accused consents, upon a written form of request sent to the accused by the prosecution¹⁷ and lodged with the court 5 days before the date set for a committal/disclosure hearing.¹⁸ The accused may state a plea on the form¹⁹; and the matter may be committed for sentence or trial in the absence of the parties.²⁰

Disclosure

The prosecution has a duty to disclose all relevant material to the accused.²¹ In Western Australia the prosecution's disclosure obligations are set out in the CPA(WA)²² and the Director of Public Prosecution's *Statement of Prosecution Policy and Guidelines*²³. It comprises an on-going duty to provide full disclosure as soon as practicable of confessional and evidentiary material in the possession of the organisation that investigated the offence.²⁴ The extent of the disclosure obligations is dependent on whether it is a "simple offence", "prescribed simple offence", "listed simple offence" or "indictable offence". After committal for sentence or trial the investigator has an obligation, subject to criminal penalties, to certify as to compliance with the disclosure obligations, detailing the grounds and inquires upon which the certification is based.²⁵ Non-compliance with

¹³ CPA(WA), ss 41 and 47.

¹⁴ CPA(WA), ss 41 and 42.

¹⁵ CPA(WA), s 44.

¹⁶ CPA(WA), s 10.

¹⁷ CPA(WA), s 43(2).

¹⁸ CPA(WA), s 43(3).

¹⁹ CPA(WA), s 43(4).

²⁰ CPA(WA), s 43(5), (8) and (9).

²¹ *Mallard v The Queen* (2005) 224 CLR 125.

²² Sections 41-43, 60-61 and 95.

²³ CI 101-118: http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf

²⁴ CPA(WA), s 42(6), 61(7), 95(9) and DPP's *Statement*, cl 118.

²⁵ CPA(WA) s 45(5) and (6).

disclosure requirements may result in adjournment or discontinuance of a jury trial, discharge of a jury or adverse comments to a jury.²⁶

Prosecutorial disclosure

Prosecutorial disclosure is a two stage process, initial disclosure and full disclosure and its requirements vary with the class of offence.

Initial disclosure

For a simple offence the initial disclosure obligation is to state whether the accused has a criminal record.²⁷ For a “prescribed simple offence”²⁸ or an indictable offence the prosecution must also disclose a written statement of facts for each charge and give notice of whether or not any “confessional material”²⁹ exists³⁰ and must make available a copy of the criminal record or confessional material as soon as practicable³¹ and, if requested, must provide a copy of the accused’s criminal record prior to the first appearance in court.³² A failure to comply with these obligations may result in an adjournment and an order to serve the material prior to the new court date and a failure to comply with that order may result in the matter being dismissed for want of prosecution.³³

Full disclosure

If an accused indicates a plea of not guilty to an “either way charge”³⁴ that is to be dealt with summarily, or a “listed simple offence”,³⁵ the prosecution must make full disclosure prior to the summary trial³⁶ and may be ordered by a court to make full disclosure in the case of any other simple offence.³⁷

If an accused enters a plea of not guilty or no plea to an indictable offence that must be dealt with on indictment³⁸ the prosecution must make full disclosure prior to the disclosure/committal hearing.³⁹ Full disclosure includes disclosure of confessional material, evidential material and the

²⁶ CPA(WA) s 97(2) and (4).

²⁷ CPA(WA) s 35(6).

²⁸ A “prescribed simple offence” includes stalking, seeking to induce a person to act as a prostitute, breaching a violence restraining order or police restraining order, and dangerous driving causing bodily harm: see *Criminal Procedure Regulations 2005* (WA) (“CPR(WA)”), reg 10 and Sch 3.

²⁹ “Confessional material”, for the purpose of initial disclosure, includes any relevant written statement signed by the accused, any relevant signed or unsigned written record of interview and/or any electronically recorded record of interview: CPA(WA), s 35(1).

³⁰ CPA(WA), s 35(4) and (5).

³¹ CPA(WA), s 35(11).

³² CPA(WA), s 35(12).

³³ CPA(WA), s 10.

³⁴ An indictable offence that can be dealt with either on indictment or summarily: CPA(WA), s 3.

³⁵ A “listed simple offence” includes the offences which comprise a “prescribed simple offence” (see fn 25) together with simple offences under a number of Acts, including the *Environmental Protection Act 1986*, the *Liquor Licensing Act 1988* and the *Occupational Health and Safety Act 1984*: see full list at CPR(WA), r 12 and Sch 4.

³⁶ CPA(WA), ss 60-61.

³⁷ CPA(WA), s 60(5).

³⁸ As prescribed under the *Criminal Code* (WA) or by order of the Court, in respect of an “either way” offence.

³⁹ CPA(WA), ss 41 and 42.

accused's record. Full disclosure of confessional material comprises disclosure of material of the kind required to be provided at the initial disclosure stage together with material relating to conversations between the accused and a person in authority, whether or not it was electronically recorded.⁴⁰ "Evidentiary material" is defined to include, for example, inconsistent statements, written summaries of unrecorded witness evidence, the name and address of any person who may be able to give evidence that assists the accused, any material which can be expected and any document or object which may assist the accused's case.⁴¹

Accused's disclosure obligations

In Western Australia the accused has an obligation to disclose an intention adduce alibi evidence or expert evidence and provide notice 14 days prior to the trial of any such evidence.⁴² "Alibi evidence" is defined as "any evidence that tends to show that the accused was not present when the offence is alleged to have occurred or when an act or omission material to the offence is alleged to have occurred". In *Western Australia v Noble*⁴³ it was ruled that evidence from a third party that he had committed the offence, rather than the accused, was alibi evidence within that definition.

In Western Australia an accused is also required to give notice 14 days prior to the trial of a contention that the prosecution cannot prove a factual element of the offence and any objection to a document or witness forming part of the prosecution case.⁴⁴

Failure to comply with the accused's obligations may result in an adjournment or adverse comments to the jury.⁴⁵

Disclosure and a fair trial

The codification of disclosure obligations is consistent with the entitlement of the accused to a fair trial which is emphasised in *Mallard v The Queen*⁴⁶. The prosecution in that case tendered a drawing by the accused of a wrench with the name "Sidchrome" which was described as a reference to the murder weapon and failed to disclose experiments by police and a forensic pathologist using a Sidchrome wrench and a pig's head which showed wounds dissimilar to those suffered by the deceased. The prosecution also failed to disclose that blue paint and rust were found in the deceased's wounds, when Sidchrome wrenches are sold unpainted and rarely rust.

Kirby J in *Mallard* referred to *R v Stinchombe*⁴⁷ in which Sopinka J of the Canadian Supreme Court described the "fruits of the investigation" as "not the property of the Crown for use in securing a conviction but the property of the public so as to ensure that justice was done". Kirby J also referred to *R v Brown*⁴⁸, a case decided after the introduction of the *Criminal Procedure and Investigations Act 1996* (UK), legislation significantly altering trial procedure in the United Kingdom in similar ways

⁴⁰ CPA (WA), s 42(1).

⁴¹ CPA(WA), s 42(1).

⁴² CPA(WA), ss 62(4)(b) and 96(3)(a) and (b).

⁴³ [2006] WASC 79.

⁴⁴ CPA(WA), ss 62(4)(c) and (d) and 96(3)(c) and (d).

⁴⁵ CPA(WA), s 97(2) and (4).

⁴⁶ (2005) 224 CLR 125.

⁴⁷ [1991] 3 SCR 326 at 333 per Sopinka J; referred to in *Mallard* by Kirby J at 152.

⁴⁸ [1998] AC 367 at 377; Kirby J in *Mallard* at 153, and see Kirby at [81].

to the CPA(WA), in which Lord Hope confirmed that “fairness” requires that materials in the possession of the prosecutor which may cast doubt on prosecution witnesses “must be disclosed”.

Assessment of the reform

The current Chief Justice of the Supreme Court of Western Australia, the Hon. Wayne Martin, before going to the Bench was the Chair of the LRCWA⁴⁹ when it brought down its 1999 Report. He commented a decade later, in a speech delivered on 13 October 2009 to a Seminar convened to consider the reforms recommended by the 1999 Report, that he did not “apprehend that there have been any notable adverse ramifications” from the recommendation to abolish committal hearings, and that it had enabled “greater flexibility in criminal procedure” and “expedited the resolution of many criminal cases, to the advantage of the community generally”. His view is that the recommendations with respect to prosecutorial disclosure “have achieved something of a quiet revolution in criminal procedure”.

While one can acknowledge the advantage to case management of the reforms and the advantage to the public generally of a codification of the common law protections of a fair trial arising from the disclosure provisions in the CPA(WA), there remains an argument that the accused ought not to have been denied at least a capacity to exercise a right of pre-trial examination of witnesses where it could be shown that such a process would be in the interests of the public, including the accused by allowing the testing of evidence where such a process had a reasonable prospect of altering the case to be put by the prosecution or the plea of the accused.

⁴⁹ Martin CJ was at that time Senior Counsel at the Western Australian Bar with a history of practice only in civil jurisdictions and the other members of the Commission were Professor Ralph Simmonds, Dean of the Law School at Murdoch University, with no known history of Criminal Law practice (and now a Justice of the Supreme Court of Western Australia) and Robert Cock QC, then Director of Public Prosecutions and now Special Counsel to the State of Western Australia.