



The Law Reform Commission of WA

*Review of the Civil and Criminal Justice System -
10 years on*

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It is a great pleasure to have been invited to address this seminar convened to consider the recommendations of the Law Reform Commission of Western Australia relating to its review of the criminal and civil justice system 10 years after publication of the Commission's report (in September 1999).

A Brief Overview of the Project

As both a decade and a millennium have elapsed since completion of the Commission's project, it may be appropriate to start with a brief overview of the project and its achievements.

At the time the project was undertaken, the Commission comprised Ralph Simmonds, then Dean of Law at Murdoch University, and now a Judge of the Supreme Court; Robert Cock QC, who was appointed to the Office of Director of Public Prosecutions during the course of the project and is now a consultant to the Premier of Western Australia, and me, then a Barrister in private practice. We were assisted by many in the course of the project, but particular mention should be made of Marion Brewer, who was the Executive Officer of the Commission, and who worked tirelessly and effectively throughout the project, and Dr Jeannine Purdy, who was responsible for the preparation and drafting of the Final Report giving effect to the views of the Commissioners.

The project was a major undertaking for a small Commission with very limited resources. Notwithstanding the limits upon our resources, 30 consultation drafts were produced by 66 consultants, totalling about 2000 pages of published material inviting public comment. Ten public

meetings were held around the State and 650 written submissions comprising about 5000 pages were received from the public of Western Australia. 447 recommendations were made. Dr Purdy's achievement in bringing widely disparate views and subjects together in one coherent readable report was remarkable in itself. All this was achieved within a very limited budget, and over the course of 2 years between September 1997 and September 1999.

Implementation

There is an understandable tendency to measure the success of Law Reform Commissions by reference to the extent to which their recommendations are implemented. I agree with those who have expressed reservations about this approach. Nevertheless, in the balance of this paper, I will endeavour to review the major recommendations of the Commission, the extent to which they have been implemented, and their success. In very general terms, it is fair to say that the area in which implementation has been the greatest is the area in which responsibility for implementation rested with Government. That is largely because of the efforts of an Attorney General with great zeal for reform, the Hon Jim McGinty, whose enthusiasm for implementation of the Commission's report never flagged, and who I would like to take this opportunity to acknowledge and thank.

Viewed on a purely mathematical basis, if implementation is a legitimate criterion of success, the Commission's report on the civil and criminal justice system has been extremely successful. According to advice I received from the Department of the Attorney General during 2007, at that point the status of the 447 recommendations made by the Commission was as follows:

Implemented:	299
In progress:	32
Considered but not implemented:	68
Considered but deferred:	10
Outstanding - major projects:	29
Outstanding - minor legislative:	9
Total:	447

I'm afraid I don't have ready access to the current figures, but on any view, this is an exceptional record of achievement in the area of law reform.

Civil Justice

The Woolf Reforms

The Commission's recommendations were heavily influenced by the seminal report of Lord Woolf published in 1996, and which has provided the blueprint for most procedural reform in the civil justice area in common law jurisdictions since then. The general approach embodied in Lord Woolf's reforms has stood the test of time, and has been built upon incrementally.

Proportionality

A central theme of the Woolf reforms is the notion of proportionality, which has been embraced in many Australian jurisdictions, including the Supreme Court of Western Australia. The general principle is that the

time, effort and expense involved in any process or procedure in civil litigation must be proportional to the benefit derived in terms of producing a just, timely and efficient disposition of the case. That principle now informs the case management decisions made by the Supreme Court and is the criterion by which we assess any proposals for procedural reform or change. This was a recommendation of the Commission.

Uniform Rules of Procedure

The Commission recommended that there be uniform rules of civil procedure across all Western Australian jurisdictions. This prescient recommendation has been implemented in other jurisdictions, notably New South Wales and Queensland, by the Civil Procedure Acts of each of those States.

A recommendation to adopt a similar approach was made by the courts of Western Australia to Government in this State, and was accepted by the last Government. The position of the current Government of Western Australia in relation to that proposal is unclear.

Case Management

The Commission placed great emphasis in its recommendations upon the role of case management. That philosophy has been actively embraced and implemented by all Western Australian courts - particularly in the civil area, but also, increasingly, in the criminal area. In the civil area, the Commission's recommendation to create an inactive cases list has been implemented by the Supreme Court.

Form of Originating Process

The Commission's recommendation to have only one form of originating process to be described as an application is one of the 68 recommendations not yet implemented. However, it formed part of the proposal to Government by the courts of Western Australia to which I have previously referred, and if accepted by the current Government, would be implemented in due course as part of package of reforms which would involve new legislation for the superior courts, together with a Civil Procedure Act, and uniform rules of court for each of the State's civil courts (together with jurisdictional variations to those rules where appropriate).

Pleadings

The Commission recommended that the process of pleading be preserved for exceptional cases, but that, in general, there be an alternative process which it described as a "case statement". This is another of those recommendations that has not yet been fully implemented, although in the judge-managed cases in the Supreme Court, it is increasingly common for directions to be made to the effect that pleadings are not required. In those cases, directions will often be made for the provision of a document which is not dissimilar to the "case statement" proposed by the Commission.

Summary Judgment

In relation to summary judgment, the Commission recommended that the hurdle which had to be overcome by an applicant for judgment be lowered, such that judgment could be granted if the claim, or defence, as the case may be, had "no reasonable prospect of success". That criterion has not yet been embraced by the Rules of Court in Western Australia, although it has been generally adopted in the Federal Courts and could be

expected to be implemented in Western Australia under the Uniform Rules to which I have referred.

Discovery

The Commission recommended that a much more restrictive approach be taken to the provision of discovery of documents in civil litigation. That recommendation is consistent with the views of many commentators on the subject, including experienced judicial commentators such as Chief Justice Spigelman. Unfortunately, it has not been possible to achieve a consensus view on this subject among Australian courts. In Western Australia, in the Supreme Court, general discovery of documents is not regarded as axiomatic, and the court will actively attempt to avoid unnecessary cost and delay as a consequence of the ambit of discovery being cast too wide.

Expert Evidence

The Commission made a number of recommendations in relation to expert evidence which, it must be said, have now been overtaken by more significant reforms in other jurisdictions, notably New South Wales. Pre-trial conferral of experts, agreement upon the issues to be the subject of expert opinion, earlier elucidation of the factual premises upon which the expert opinion is to be based, and the concurrent taking of evidence from experts is now all part and parcel of Western Australian practice. A project is under way within the Supreme Court for the adoption of specific Rules and Practice Directions aimed at consolidating these initiatives.

Interlocutory Costs Orders

The Commission recommended that orders made in relation to the costs of interlocutory proceedings be paid forthwith, rather than deferred until the completion of the case. The purpose of that recommendation was to discourage unnecessary interlocutory hearings. That recommendation has been implemented by the Supreme Court, and is generally thought to have been successful in achieving its objective.

Self-Represented Litigants

The Commission made a number of recommendations relating to the provision of assistance to self-represented litigants, and included a recommendation to the effect that there be a separate stream or list for such litigants. This is one of those areas in which many of the Commissioner's recommendations have not been implemented. In relation to the provision of assistance to self-represented litigants, Government has simply not made the resources available. In relation to the creation of a self-represented litigant stream, there has been concern that the creation of such a stream might be seen as a form of discrimination against either self-represented litigants or those represented litigants in cases in which there was one or more self-represented litigants. Accordingly, at the time of writing, it has not been thought desirable to implement such a stream. However, thought needs to be given to the ways in which judicial expertise in dealing with self-represented litigants might be increased - perhaps through judicial education.

Vexatious Litigants

The Commission's recommendation for the re-enactment of legislation relating to vexatious litigants was implemented through the *Vexatious Proceedings Restriction Act 2002*.

Alternative Dispute Resolution

The Commission placed great emphasis in its recommendations upon the significance of alternative dispute resolution. Time has reinforced the importance of that focus, as the vast majority of civil cases are resolved by means other than a trial - in the Supreme Court of Western Australia less than 3% of our lodgements are ultimately resolved by a trial. The Commission emphasised the need for the provision of ADR services by the courts and through community-based organisations. These recommendations have been successfully implemented, although there is, of course, always room for the provision of more resources.

Evidence Act of the Commonwealth

The Commission recommended the adoption of the Evidence Act of the Commonwealth in Western Australia. Similar recommendations to the same effect have been made by others, including the Supreme Court of Western Australia. The previous Government generally accepted that recommendation, but did not implement it prior to losing office. The view of the current Government on that recommendation is not known.

Legal Costs

Legal costs is one of those few areas in which a significant number of the Commission's recommendations have not been implemented. However, it must be said that some of those recommendations have been overtaken

by events in relation to practices within the legal profession, and the steps that have been taken in relation to the nationalisation of the profession and its regulation.

Court Structures

The Commission made a number of recommendations in relation to changes concerning the structures of the institutions available for the delivery of justice in Western Australia. They included the creation of a Magistrates Court, in place of the Local Court and the Court of Petty Sessions. That occurred in 2004. The Commission also recommended the creation of an umbrella administrative tribunal for the determination of administrative review on the merits, along the line of the Victorian Civil and Administrative Tribunal, which it characterised as the WA Civil and Administrative Tribunal. This recommendation has been implemented by the creation of the State Administrative Tribunal which has significantly expanded the institutions available for the provision of justice to Western Australians.

Criminal Law

There were a number of recommendations made by the Commission in respect of criminal law that have been implemented with great success. Some of the major areas involved follow:

The structure of offences

At the time of the Commission's report, there was a somewhat anomalous structure of offences in Western Australia including a distinction between indictable offences described as crimes and misdemeanours. The legislation has now been amended to provide a much more coherent

structure which involves crimes and offences punishable summarily, and, straddling those two categories, a category known in the vernacular as "each way" offences, in which the process to be adopted - either indictable or summary, depends upon the seriousness of the particular offence.

Committal hearings

One of the more controversial recommendations of the Commission was for the abolition of committal hearings. This recommendation was stridently and vigorously criticised by defence lawyers. The recommendation was implemented some years ago. Unfortunately, it was not accompanied by various other recommendations made by the Commission with respect to pre-trial case management in criminal cases, including mechanisms for the taking of evidence prior to trial on the application of the defence. However, with respect to the defence Bar, I do not apprehend that there have been any notable adverse ramifications from this recommendation. To the contrary, it has enabled much greater flexibility in criminal procedure, including the creation of the Stirling Gardens Magistrates Court, which is an initiative under which, in the Supreme Court, we can seamlessly manage cases within our jurisdiction from immediately after the laying of charges until trial. There cannot be any doubt that the abolition of committal hearings has also expedited the final resolution of many criminal cases, to the advantage of the community generally.

The right to silence

The Commission recommended that there be no change with respect to the so-called (and inaccurately described) right to silence at the investigation phase, but that it be modified at the time of trial. I remain

of the view that there is an appropriate distinction to be drawn between the situation at the point of investigation, and at the time of trial, where there will be a judicial officer available to ensure that the rights of an accused person are properly protected. At investigation phase, unlike in the United Kingdom, it will often not be possible to secure the provision of legal advice to a person under investigation, and in those circumstances there is a danger of injustice if an inference is to be drawn from an accused person remaining silent. That danger is greater in the case of Aboriginal offenders, whose facility with the English language may not be great, and who are at a significant disadvantage when interviewed by police.

Pre-trial disclosure

The Commission made sweeping recommendations with respect to pre-trial disclosure by each of the prosecution and the defence. The recommendations with respect to prosecutorial disclosure have been implemented by the *Criminal Procedure Act*, and have achieved something of a quiet revolution in criminal procedure. The obligations of disclosure imposed upon the defence are much more limited. In my view, for reasons I have enunciated on other occasions, there is room for the view that greater obligations of disclosure should be imposed upon a criminal defendant.

Alternative dispute resolution

The Commission recommended that a process analogous to alternative dispute resolution be adopted in the criminal area. This recommendation has been implemented by the Supreme Court of Western Australia, through what we call Voluntary Criminal Case Conferencing. It has been an outstanding success, and the statistics we maintain show that trial days

saved significantly exceed the cost of providing this facility. As in the civil side of the court's work, ADR has the considerable benefit of expediting resolution of cases and maximising the efficient use of the limited resources of the courts.

Joinder of charges and joinder of defendants

The Commission made a number of recommendations relating to the adoption of a more principled approach with respect to the joinder of charges and the joinder of defendants. Those recommendations have been implemented by legislation and have proven to be workable and successful. The recommendations providing for appeals against joinder decisions prior to the trial itself have created some difficulties, and resulted in substantial delays in some cases, but this problem may be overcome by fast-tracking those appeals - a process which is now generally adopted.

Trial by judge alone

The Commission's recommendations with respect to enabling either party to make application for trial by judge alone, the determination of which was to be left in the discretion of the court, have been implemented. Although there is some judicial difference of opinion as to the precise approach to be taken, the legislative provisions appear to be working well.

Order of addresses

The Commission recommended that defence counsel have the last say before the jury. This recommendation has been implemented and appears to work well.

Directions to juries

The Commission recommended a much more simplified approach in relation to the provision of judicial directions to juries. While some progress has been made in that area, by amendments to the *Evidence Act*, it must be said that there is significant room for further improvement in this area. This topic is under active consideration in other jurisdictions, notably New South Wales and Victoria, and it might be expected that Western Australia could follow a number of the recommendations made by the Law Reform bodies in those jurisdictions.

Appeals by leave

The Commission recommended a universal requirement for the grant of leave to appeal in criminal cases. That recommendation was implemented, and appears to work well. The recommendation had an added bonus in relation to appeals from indictable matters heard by the Court of Appeal, because the Western Australia Legal Aid Commission takes the view that if leave to appeal has been granted, the appellant's prospects of success are sufficient to justify the grant of aid. In practical terms, this has meant that there are very few self-represented criminal appellants in the Court of Appeal.

The Legal Profession

The Commission made a number of recommendations in relation to the legal profession, although it must be said that this is one of those areas in which implementation has been somewhat patchy. Perhaps this is because the Commission's recommendations were overtaken by the steps towards a national profession. The Commission's recommendation with respect to mandatory continuing legal education has been implemented, eventually, including a component relating to compulsory education in

ethics. The Commission's recommendations with respect to the review of the Professional Conduct Rules has not been implemented, nor has the Commission's recommendation providing immunity from suit for legal practitioners genuinely engaged in attempting to narrow the issues in dispute in a case. I am currently giving consideration to suggesting to the Law Society that the Conduct Rules should be amended to include a professional obligation upon all practitioners to use genuine efforts to narrow the matters in dispute in all proceedings before courts.

The Built Court Environment

Unusually, the Commission's recommendations extended to the built court environment. Those recommendations included openness and the creation of user friendly spaces. Many of those recommendations are evident in our newer court buildings, including most particularly, the District Court Building, which embodies many of the features recommended by the Commission.

Information Technology

When the Commission made its recommendations in 1999, the information age was only dawning. The development of new technology has, predictably, overtaken many of those recommendations. Regrettably, the lack of resources available to the courts of Western Australia has meant that the opportunities provided by that technology have not yet been fully realised. Perhaps the two exceptions to that general observation are in the use of audio visual technology, where we are well advanced, and in the use of electronic trial procedures, where we are again well advanced. However, in relation to things like electronic lodgement and filing, regrettably it must be said that Western Australia lags significantly behind other comparable jurisdictions.

Summary

I am indebted to the organisers of this seminar for providing me with the impetus to look back 10 years to gauge just what has been achieved as a result of the recommendations made by the Commission in 1999. It is, of course, impossible for one who was so heavily involved in those recommendations to undertake such a review with impartiality. However, doing the best I can to be objective, it does seem to me that the Commission's recommendations did herald a significant period of reform in the civil and criminal justice systems of Western Australia. This is, of course, no reason for complacency. The reform process initiated by the Commission must continue, and must respond to contemporary issues.