GILSHENAN & LUTON
LEGAL PRACTICE

Case Management in Complex Criminal Trials

Practitioners in the criminal jurisdiction need be aware of Supreme Court Practice Direction No 6 of 2013, promulgated by Chief Justice de Jersey on 5 April 2013[1].

The practice direction applies to criminal trials in the Supreme Court which are expected to take fifteen (15) sitting days or longer. The stated objectives of the practice direction are to ensure that trials proceed expeditiously, and *"to enhance the fairness and efficiency of the trial"*[2].

As its heart, the practice direction seeks to promote the early and frank exchange of pre-trial information between the parties, and contemplates the active involvement of the judiciary in that process. One particularly notable aspect of the practice direction is the mandated exchange of detailed pre-trial memoranda between the prosecution and the defence, with copies to be provided to the judge case-managing the trial. The topics to be addressed in the memoranda concern a range of (largely, but not exclusively) administrative and procedural issues.

Pre-trial hearing

An initial pre-trial hearing will usually take place no later than eight weeks before the trial's commencement[3], at which the prosecutor and counsel for each defendant are required to be present. The language used in the practice direction would suggest that the attendance of an instructing solicitor alone is insufficient. The focus of the pre-trial hearing will be upon the memoranda already exchanged between the parties, as discussed below.

Prosecution Memorandum

The Prosecution's memorandum must be served at least 21 days before the pre-trial hearing (i.e. at least 11 weeks before trial)[4]. Clause 3.1 of the practice direction provides for the matters to be addressed in the memorandum, including (using that paragraph's lettering):

(a) The prosecution's estimate of the trial's duration;
(b) Any incomplete disclosure issues;
(c) Particulars of the charges;
(d) A summary of the alleged facts relied upon by the Crown;
(e) Any facts the prosecution considers are not properly in dispute;

[1] The practice direction is available on the Queensland Courts website at www.courts.qld.gov.au
[2] Paragraph 1.3
[3] Paragraph 2.1
[4] Paragraph 3.1

(g) Whether the trial may not be necessary, and if so, whether discussions have taken place with the defence;
(h) The prosecution's intention to call expert and other specified types of evidence;
(i) Witness availability;
(j) All relevant findings of any expert witnesses to be called;
(k) Any special arrangements required for disadvantaged witnesses;
(o) Any proposed use of video or audio equipment; and
(r) Any other issue the prosecution identifies as requiring determination of the section 590AA of the Criminal Code.

Defence Memorandum

At least 7 days before the pre-trial hearing (i.e. 14 days after receipt of the prosecution memorandum, and no later than 9 weeks before the trial date) the defence are to deliver to the judge supervising the trial and the prosecution a memorandum in response to the prosecution's pre-trial memorandum[5]. Clause 3.2 of the practice direction provides for the matters to be addressed in the defence memorandum, including:

(a) The identity of the defence legal representatives;
(b) Any suggested shortcomings in the Crown's particulars;
(c) Any suggested shortcomings in the prosecution's disclosure;
(d) Whether the trial may not be necessary and if so, whether discussions have taken place with the prosecution;
(f) Whether the defendant intends to adduce expert evidence;
(g) Whether notice of alibi has or should be given;
(h) Which issues or facts asserted by the prosecution are not in dispute;
(i) Any admissions that may be made by the defendant;
(j) Whether continuity of exhibits is not in issue;
(k) If the defence wishes, the general nature of the defence;
(m) Any unavailability of defence counsel or witnesses;
(n) Any concerns regarding the court venue or public/media access;
(o) Any proposed use of video or audio tapes and video links;
(p) The defendant's estimate of the likely length of trial;
(r) Any other identifiable pre-trial issues to be determined under section 590AA.

It is anticipated that at the pre-trial hearing the managing judge will review the pre-trial memoranda exchanged[6]. Legal representatives are to be prepared to discuss the full range

[5] Paragraph 3.2
[6] Paragraph 4.1

of matters that might usefully be addressed under section 590AA[7]. The judge may make such orders as considered appropriate for the resolution of any further pre-trial issues, including a direction that counsel confer on any of the issues contained in the pre-trial memoranda[8].

Final Review

A final review will take place no later than 4 weeks before the trial date[9]. At that review, legal representatives are to be prepared to discuss a variety of matters[10], including:-

- The material to be given by the judge to the jury at the commencement of the trial regarding various legal and factual issues;
- Instructions to be given to the jury about any admissions made by the defendant;
- Whether the defendant will give an opening statement immediately following the prosecution's opening;
- The use of any visual aids and documents to assist the jury;
- The presentation of expert evidence, and
- Directions or warnings on specific defences that will or may need to be given to the jury.

Commentary

The practice direction provides a very prescriptive approach to the management of lengthy criminal trials in the Supreme Court. Based on the Chief Justice's comments[11] at the QLS Symposium on 15 March 2013, practitioners can expect there to be a push for the exchange of such memoranda to apply in the future to all criminal trials, regardless of their length.

There are certain matters of particular importance of which defence practitioners should be aware. Firstly, compliance with this practice direction will require a significant commitment to the advance preparation of trials, and the early retention and briefing of counsel. One would expect that would usually be the case for lengthy trials in any event, but given the timeframes involved here, it will be necessary to brief counsel significantly more than three months in advance of any three week trial.

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[7] Paragraph 4.2
[8] Paragraphs 4.3 and 4.4
[9] Paragraph 5.1
[10] Paragraph 5.2
[11] His Honour said "*I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where the players may keep their cards up their sleeves*". The full speech is available at: http://archive.sclqld.org.au/judgepub/2013/dj150313.pdf .

Certain aspects of the new pre-trial defence memoranda will need particular consideration. It is noteworthy that the inclusion of a paragraph concerning *"the general nature of the defence"* (3.2(k)) need only be given if the defence so agrees. There may be plenty of instances where to do so is unproblematic. On other occasions, the defence might have good reason to not reveal their hand.

There are at least a couple of other identifiable concerns regarding the application of the practice direction. Firstly, continuity has been singled out as a specific matter which the defence are to indicate whether it is *"not in issue"*. The very fact of its individual treatment (as opposed to it being grouped together with other topics which the defence can indicate are not in issue) effectively serves to flag for the prosecution in every case whether continuity is in issue.

Furthermore, a broad question exists about the use that might be made of the defence memorandum, both during the trial and afterwards in any appeal and re-trial[12]. For example, might an accused person be cross-examined by the prosecutor about the contents of the memorandum, particularly if issues raised at trial are different from those set out in the defence memorandum published months before trial? The Queensland Director of Public Prosecutions has recently issued a Director's Guideline that:

> *"Where the Court has ordered the preparation and delivery of a pre-trial memorandum the prosecutor must not use a statement in the defendant's pre-trial memorandum to cross-examine the defendant in the trial except in exceptional circumstances and with prior notice to the defendant or the defendant's legal representative.*"

It is suggested that the qualified language of the guideline would not give the defence complete comfort in respect of the use that might subsequently be made of a defence memorandum. That is a matter which practitioners must be alert to in the course of drafting these documents.

This practice direction represents a further step in the Chief Justice's publicly stated desire to increase the efficiency and disposition of criminal trials through more candid exchanges of pre-trial information between the parties in criminal trials. That notion sits uncomfortably with many defence practitioners who consider the onus of proof and presumption of innocence still entitle a defendant to *"tell them nothin' and take them nowhere"*. Of course, all practitioners have an obligation, to the extent the interests of their clients allow, to ensure that trials proceed efficiently. The challenge for practitioners with this latest practice

[12] Paragraph 5.6 provides that the pre-trial memoranda will not form part of the court file until after verdict.

direction will be to ensure that that is done in a way that does not derogate from the (ever-decreasing) rights and privileges "*enjoyed*" by defendants in our criminal justice system.