CHAPTER 3

ISSUES

3.1 In general, submitters and witnesses gave in principle support for the Bill but commented on specific provisions. This chapter deals with those provisions, regarding:

- the choice of venue;
- pre-trial disclosure (obligations, abrogation of privileges and sanctions);
- disqualification from and empanelment of the jury;
- rights of appeal;
- bail (applications, presumption and criteria); and
- the issue of dual jurisdiction.

3.2 This chapter also briefly discusses the capacity of the Federal Court of Australia (Court) to handle an indictable criminal jurisdiction.

Choice of venue

3.3 The first provisions of the Bill to attract comment were those relating to committal proceedings, and in particular, proposed subsection 68A(3) of the *Judiciary Act 1903*. This provision requires a committal court to invite the Director of Public Prosecutions (DPP) to suggest the court before which a person is to be tried or sentenced, either the Court or a superior state/territory court.[1] The committal court must consider specifying the suggested court in the committal order.

3.4 Some legal representatives questioned whether this provision should be more inclusive with one expressing concern over the lack of a formal role for the Defence[2] and others suggesting that the Accused should have a statutory role in this regard. The Victorian Bar Association stated its position that at some stage the Accused should have a say as to the appropriate trial venue,[3] and the Law Council of Australia agreed that the Bill could include such a provision after an indictment is laid before a court.[4]

3.5 Proposed subsection 6(2F) of the *Director of Public Prosecutions Act 1983* is also relevant to determining the court in which a person is to be tried or sentenced.

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1 Proposed subsection 68A(2) of the *Judiciary Act 1903*

2 Law Institute of Victoria, *Submission 2*, p. 1.

3 Victorian Bar Association, *Submission 3*, p. 5. Also, see Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 44.

4 Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, p. 36.

This provision allows the DPP to institute proceedings in a court other than the court specified in the committal order.

3.6 This provision raised the prospect of the prosecutor 'forum shopping' that is, selecting the venue most suited to the prosecution's case. The Victorian Bar Association submitted that the Bill should include some form of curial control, such as the Court having power to make venue changes of its own volition,[5] and cited a proposal currently before the Victorian Parliament as a possible model. That provision reads:

> **Court may act on application or on own motion**
>
> Unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion.[6]

3.7 However, other witnesses queried the need for the insertion of this 'safety valve' into the Bill,[7] and in evidence, the Attorney-General's Department (department) noted the inherent power of the Court to stay proceedings in the event of an abuse of process:

> …the courts will ultimately have power to prevent a case from proceeding if they think there has been an abuse of process. If one of these courts thinks that the DPP has commenced proceedings before it when it is more appropriate to go in another court, and if the DPP has done so because it wants a forensic advantage or a logistic advantage, the court will have power to stay the proceedings. That is an inherent power.[8]

3.8 The committee heard no evidence to suggest that 'forum shopping' is a concern,[9] even though the prosecution has traditionally determined the hearing venue, and the department could see no reason for departing from tradition:

> The prosecution decides whether to file an indictment. It decides which witnesses to call, which charges to prefer. We trust the prosecution to do all of that without review and oversight of the court. Choosing the appropriate venue for the trial is part of that continuum. Of course, the prosecutor will have to do that having regard to the interests of justice.[10]

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5 Victorian Bar Association, *Submission 3*, p. 5.

6 Proposed section 337 of the Criminal Procedure Bill (Vic)

7 Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 54. Also, see Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 10.

8 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 31.

9 For example, see Mr Phillip Priest QC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, pp 36.

10 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 31.

3.9 Rather than 'forum shopping', the Commonwealth Director of Public Prosecutions (CDPP) identified the rationale for proposed section 6(2F) as the enhancement of the prosecution's flexibility to decide on an appropriate venue:

> …given that changes may occur between committal and indictment as to the charges to be preferred, particularly if those charges are to include State offences or other Commonwealth offences over which the Federal Court does not have jurisdiction.[11]

3.10 Witnesses agreed that the prosecutor's discretion is primarily logistical. Officers from the CDPP, for example, gave evidence that Constitutional reasons would determine the prosecutor's choice of venue,[12] evidence consistent with both the Explanatory Memorandum and Justice Mark Weinberg, a sitting judge on the Victorian Court of Appeal. His Honour perceived no advantage to an Accused being tried in either the Court or a state/territory superior court:

> …if this bill goes through in something like this form, there will be little advantage to be gained for an accused in seeking to be tried in a state court rather than the Federal Court or vice versa. Both courts ought to be able to provide, I would hope, a fair trial. The Federal Court, being better resourced and more familiar with this sort of work, would probably be able to bring the case on, I would think, significantly more quickly than some of the state courts, particularly in the larger states.[13]

3.11 In stark contrast, the Law Council of Australia indicated that there would be a bias toward the state/territory courts on account of the Court's lack of experience conducting jury trials.[14] There was, in fact, some suggestion that the cartel offences be framed in such a way as to give greater jurisdiction to the state/territory courts.[15]

Pre-trial disclosure

3.12 Submitters and witnesses were also concerned with pre-trial disclosure provisions in the Bill. While the NSW Attorney-General noted the discretionary nature of these provisions,16 the substance of specific provisions concerned most submitters and witnesses. Concerns regarding the parties' obligations, the abrogation of privileges and sanctions are described below.

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11 Commonwealth Director of Public Prosecutions, *Submission 1*, p. 2, and Explanatory Memorandum, p. 3.

12 Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 40. Also, see Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 31.

13 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 10.

14 This issue is further explored later in this chapter under the heading 'Resources and Capacity'.

15 Mr Tim Game SC and Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, pp 34-35.

16 NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 3.

Disclosure by both parties

3.13 Proposed section 23CD establishes the three-step process for court ordered pre-trial disclosure. Subsequent provisions detail what each party is required to disclose and when. Prior to commencement of the trial, the prosecutor, for example, is required to give the Accused notice of the prosecution's case, including:

- a copy or details of any information, document or other thing in the prosecutor's possession that the prosecutor reasonably believes contains evidence that may be relevant to the Accused's case;
- if the prosecutor reasonably believes information in the prosecutor's possession suggests the existence of evidence that may be relevant to the Accused's case—a copy or details of so much of that information as is necessary to suggest that existence;
- a list identifying:
  - (i) any information, document or other thing not in the prosecutor's possession that the prosecutor reasonably believes contains evidence that may be relevant to the Accused's case; and
  - (ii) for each item of information, and each document or other thing, a place where the prosecutor reasonably believes the item, document or thing to be.[17]

3.14 Justice Weinberg questioned the clarity of these provisions, telling the committee that the prosecutor is obliged to disclose certain material to the Accused, and the proposed section might appear to restrict this obligation:

> The traditional obligation that rests upon a prosecutor is to disclose any material that is potentially exculpatory…I wonder whether the various criteria that are set out within items (a) to (k) make it clear that the prosecutor's duty is to disclose any material that is potentially exculpatory to the defence…in paragraph (i) the test is 'if the prosecutor reasonably believes information in the prosecutor's possession' et cetera. I do not understand the insertion of the word 'reasonably'. If the prosecutor has a belief then the prosecutor's duty is, in my view, plainly to make the disclosure.[18]

3.15 When put to the department, its response was that the prosecution need not 'speculate about fanciful defences that an accused person may want to run': the word *reasonably* limits the amount of material held by the prosecution and which may have to be disclosed, according to the department, to 'non-fanciful' defences only.[19]

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17 Proposed subsections 23CE(h) - (j) of the *Federal Court of Australia Act 1976*

18 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 2.

19 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 2 (received 12 February 2009)

3.16 Proposed section 23CF sets out the Accused's response to the notice of the prosecution's case, including:

- a statement setting out, for each fact set out in the notice of the prosecution's case:
  - (i) that the accused agrees that the fact is to be an agreed fact for the purposes of section 191 of the *Evidence Act 1995* at the trial; or
  - (ii) that the accused takes issue with the fact;

  and, if the accused takes issue with the fact, the basis for taking issue;
- a statement setting out, for each matter and circumstance set out in the notice of the prosecution's case:
  - (i) whether the accused takes issue with the matter or circumstance; and
  - (ii) if the accused does take issue—the basis for taking issue.[20]

3.17 In general, legal practitioners supported the policy objectives of the pre-trial disclosure regime, that is, identification of matters in dispute prior to trial. However, they did not support disclosure by the Accused in accordance with proposed section 23CF.

3.18 The Law Council of Australia submitted that the provision conflicts with a fundamental principle underlying criminal proceedings: that the Accused has the right to remain silent while the prosecution bears the onus of proof and must discharge this burden with respect to every element of the offence. It was argued that, effectively, the proposed section requires the Accused to reveal his or her defence:

> The provisions currently in the Bill go too far in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute with the prosecution or the general nature of the defence.[21]

3.19 The department disagreed with this 'extreme' interpretation, agreeing instead with Justice Weinberg who regarded proposed section 23CF as not unusual, unbalanced or inappropriate:

> The defence is, after all, being required to do no more than indicate in broad terms whether it takes issue with a particular matter that the Crown asserts or alleges and, if the accused does take issue, the basis for taking that issue…Of course the defence does not have to indicate that the accused will

20 Proposed subsections 23CF(a) & (b) of the *Federal Court of Australia Act 1976*

21 Law Council of Australia, *Submission 5*, p. 4. Also, see Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, p. 26.

> or will not give evidence in relation to this matter; nor does the defence have to provide witness statements or matters of that kind.[22]

3.20 Neither the NSW Attorney-General[23] nor the Victorian Bar Association concurred with Justice Weinberg's interpretation of the *basis for taking issue*,[24] and representatives from the Association told the committee that the provision *basis for taking issue* is rarely, if ever, called upon, a view supported by the Law Council of Australia:

> …neither of us, each of whom have extensive experience in trials and in the monitoring of this legislation, have heard a judge insist on the statement of the basis for taking issue. Basically, what happens in practice is that the defence says: 'In relation to these matters, (1), (2), (3) and (4), no issue is taken. We do not require the prosecution to prove those matters. However, in relation to (5), (6) and (7), we do.' For tactical purposes, the defence may or may not then state a reason as to why.[25]

3.21 Notwithstanding these criticisms, the representatives of the department asserted that the pre-trial disclosure provisions form a package, and it is not possible to delete part or all of a provision without affecting the remaining provisions. In relation to the provision *basis for taking issue*, the resulting effect would be an obligation on the Accused to only state whether the facts set out in the prosecution's case were agreed or not, which would defeat the objectives of the pre-trial disclosure regime.

> There would be nothing in these provisions which would prevent the accused from simply saying, 'Everything in the prosecution case is in dispute,' as a one-line response. That is why those words are in there and that is why they are significant.[26]

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22 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, pp 2-3 & p. 10. Also, see Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 28; and Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 8 (received 12 February 2009) where the department notes that disclosure provisions in the UK go beyond what is proposed in the Bill.

23 NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 3.

24 Victorian Bar Association, *Submission 3*, p. 4.

25 Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, p. 26. Also, see Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 49; and Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 29.

26 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, pp 23-24 & 29.

3.22 Some submitters contended that the pre-trial disclosure regime is potentially unjust to an Accused,[27] a suggestion rejected by the CDPP[28] and also Justice Weinberg:

> …merely to indicate what matters are at issue and why they are at issue strikes me as perfectly compatible with a fair trial…I do not regard that, in this day and age, as being in any way antithetical to the conduct of a fair trial or in violation of any notion of the right to silence or any of the more traditional reasons why it is thought that the accused should simply be entitled to put the Crown to its proof.[29]

3.23 The department agreed with His Honour's comments, reiterating that proposed section 23CF is not designed to compel the Accused to outline its defence. While open to interpretation, the department expects the provision to be read consistent with the Explanatory Memorandum, as per current practice in Victoria.[30]

State/territory developments

3.24 As observed in Chapter 2, the Bill is modelled primarily on Victorian and some New South Wales legislation, yet both those jurisdictions are reviewing and revising their legislation. In relation to pre-trial disclosure, this led the Law Council of Australia to question the Bill's departure from the Victorian legislative model,[31] or alternately, its failure to implement a NSW review proposal for an Accused to respond to the prosecution's case statement only:

> That really bites in terms of cutting down on time and so forth. It is not intended to produce any unfairness and it does not stop the defence from doing anything in terms of what its evidence is. But we would expect that if that is adopted it will have a real visible effect, and it is a different kind of approach to the one that is being considered here.[32]

3.25 Officers from the department disagreed with the proposal to take into account reviews, recommendations and possible amendments to legislation, indicating that the

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27 Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, p. 28. Also, see Law Council of Australia, *Submission 5*, p. 4; and Victorian Bar Association, *Submission 3*, p. 4.

28 Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 41.

29 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, pp 2-3 & p. 10.

30 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 24-25, 27 & 28.

31 Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 29. Also, see Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, pp 24-25.

32 Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 30. Also, see Law Council of Australia, *Submission 5*, p. 4.

Commonwealth can only work with the existing models.[33] In this they were supported by Justice Weinberg who described the Bill as comprehensive, well drafted, and containing sound innovations.[34]

Consequences of non-disclosure

3.26 Another controversial aspect of the pre-trial disclosure regime was proposed section 23CM. This provision allows the Court to make such orders as it thinks appropriate in the circumstances when a party fails to fully comply with a disclosure order. Potential orders include that:

- a party be allowed to tender a statement or other document as evidence of its contents if:
  - (i) the document was disclosed to the other party; and
  - (ii) the other party did not disclose an intention to contest or require proof of the document's contents as required by the order under section 23CD;
- the Accused not be able, during the trial, to take issue with a fact, matter or circumstance if:
  - (i) the fact, matter or circumstance was set out in the notice of the prosecution's case; and
  - (ii) the notice of the Accused's response did not both take issue with the fact, matter or circumstance, and set out a basis for taking issue.[35]

3.27 The Law Institute of Victoria expressed concern with these provisions,[36] and the Law Council of Australia agreed that they significantly depart from the Victorian legislation. In that state, the trial judge may comment on inadequate or non-disclosure to the jury and state that there is a 'divergence'. However, this particular provision is modelled on section 148 of the *Criminal Procedure Act 1986* (NSW).[37]

3.28 The department informed the committee that it had considered but expressly rejected the Victorian model on the basis that it has greater potential for unfairness:

> …there is also a provision saying that the comment to the jury cannot suggest the defendant failed to comply because of a consciousness of guilt. You look at that and think, "Well, what other form could the comment

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33 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 24.

34 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, pp 2.

35 Proposed paragraphs 23CM(2)(c) & (d) of the *Federal Court of Australia Act 1976*

36 Law Institute of Victoria, *Submission 2*, p. 2.

37 See: Attorney-General's Department, answers to questions on notice, 12 February 2009, pp 7-8 (received 12 February 2009)

> take?" So there is a non-sanction in there –a sanction which cannot be used.[38]

3.29 Legal representatives did not comment on whether the Victorian model provides potential for a Judge to prejudicially comment on the Accused's case however, the Law Council of Australia told the committee that the NSW alternative more heavily penalises the Accused:

> These are a series of penalties which fall on both sides but which are going to fall much more heavily on the defence if there is a departure from either of the two criteria established in defence disclosure.[39]

3.30 Whether or not the statutory sanctions penalise any one party, some submitters and witnesses supported proposed section 23CM as a necessary component of the pre-trial disclosure regime. Justice Weinberg, for example, described it as an appropriate provision encouraging the reasonable and expeditious conduct of a trial by the Accused:

> It operates in this way: if the accused has conducted his or her defence in a manner that is reasonable and recognises the public interest…in a trial being conducted reasonably—in a manner that is moderately expeditious—then there is a reward, as it were…that is a matter that can be taken into account in sentencing at the end of the day by way of mitigation—not carrying enormous weight, perhaps, but some weight.[40]

3.31 In a similar vein, representatives from the department explained that, for the pre-trial regime to work, the real issue is, 'How do you ensure that the Defence plays the game?':

> For every defendant who is happy to cooperate and participate in getting the issues narrowed, there will be at least one, possibly more, whose instructions to their counsel will be, 'Contest everything; drag the thing out,' in the hope that the case will fall over…
>
> This whole process is designed to bring the parties together before the trial commences and get as much as possible sorted out as can be sorted out, without going so far as to require the defendant to disclose the defence and without producing an unfair result—that is the balancing act—but there have to be sanctions. These sanctions, of course, are all subject to the interests of justice and fairness to the defendant. The ultimate responsibility on the trial judge is to ensure that there is a fair trial.[41]

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38 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 25.

39 Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 27 & p. 25.

40 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 3. Also, see Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 41.

41 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 26.

Abrogation of privilege

3.32 Proposed section 23CL automatically abrogates legal professional and other privileges for the purposes of pre-trial disclosure. Witnesses to the inquiry described this provision as having both substantive and technical problems.

3.33 The Law Council of Australia, for example, questioned the rationale offered in support of proposed section 23CL,[42] and the NSW Attorney-General submitted that the provision is unnecessary and inappropriate in criminal matters. The NSW Attorney-General also argued that abrogation of privilege might reduce client-attorney disclosure, and more importantly, it would if difficult, if not impossible, to quarantine pre-trial disclosures from trial proceedings:

> The section purports to reinstate privilege over the disclosed information for purposes other than disclosure i.e. the trial itself. It is difficult to see how this reinstatement can be effective, given that the 'privileged' information will be known to the prosecution team that conducts the trial.[43]

3.34 A recent decision of the Court highlighted this concern, with the Court upholding *Cowell v British American Tobacco Australia Serviced Ltd* [2007] VSCA 301, quoting, in turn, Heydon in *Cross on Evidence*:

> …once information in a privileged document has come into the hands of a party to litigation even as a result of compulsive process which is later reversed, the fact that the document was and remains privileged does not of itself prevent that party from making use of the information.[44]

3.35 However, most submissions and evidence expressed concern with the clarity and purpose of the provision. Justice Weinberg, for example, had difficulty understanding the provision given that it was related to an apparently contradictory provision:

> Subsection (1) provides that 'A party is not excused from disclosing material under an order under section 23CD on the basis that to do so would involve disclosing material that is protected' et cetera 'by legal professional privilege'. Then you have subsection (2) which says: 'This Subdivision does not otherwise abrogate or affect the law relating to: (a) legal professional privilege. I think for completion one has to go to section 23CO which creates a kind of use immunity upon any material that is disclosed…I am not sure how these provisions all mesh together but it seems to me that

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42 Law Council of Australia, answer to question on notice, 9 February 2009, pp 3-4 (received 9 February 2009). Also, see Explanatory Memorandum, p. 14.

43 NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 3. Also, see Law Council of Australia, answer to question on notice, 9 February 2009, p. 4 (received 9 February 2009); and Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, pp 49-50.

44 *AWB Limited v Australian Securities and Investments Commission [*2008] FCA 1877 (11 December 2008) at 14 quoted in Bills Digest, No. 98 2008-09, 18 February 2009, p. 10.

> what is being said is at the first point, 23CO(1), that there is no excuse from making disclosure an order. Under 23CD such an order is made on the basis that legal professional privilege exists in relation to the document. So an accused who is ordered pursuant to 23CD to make relevant disclosure prima facie must disclose matters that are the subject of legal professional privilege, if I am reading that section correctly, but then we are told that the subsection 'does not otherwise abrogate or affect the law relating to: (a) legal professional privilege. I have no idea what that means.[45]

3.36 The Law Council of Australia was equally 'uncomfortable' about proposed section 23CL,[46] and agreed that proposed subsections 23CL (1) & (2) may not operate effectively together. The Council contrasted these provisions with subsections 30(3) & 30(9) of the *Australian Crime Commission Act 2002*, for which it has been 'held that Parliament had no intention to abrogate the common law rule of legal professional privilege through the operation of those sub-sections,' and submitted that litigation concerning these subsections affects the interpretation of the provisions in the Bill:

> While the context of the decisions relating to the Australian Crime Commission is different, these decisions indicate that there is potential confusion over the meaning of such provisions which seek to restrict the common law right of legal professional privilege…legal professional privilege is a fundamental protection and pillar of the Australian legal system and should not be abrogated by legislation.[47]

3.37 Representatives from the department gave evidence that proposed section 23CL is limited in its scope, necessary to achieve the purposes of the pre-trial disclosure regime, and will not unfairly affect the Accused:

> …if you go back and look at what the accused has to disclose under the disclosure regime, all the accused ever has to disclose is copies of witness statements they propose to rely on at trial and, if they propose to lead alibi evidence or evidence of mental capacity, then they have to disclose that material.[48]

3.38 On this point, the Law Council of Australia drew the committee's attention to the concluding words of proposed section 23CF, 'and may include other matters', and proposed section 23CH, which includes the Accused's on-going obligation to disclose something if issue is taken with something in the prosecution case on an alternative or

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45 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 3. His Honour also disagreed with the Accused ever being obliged to disclose legally privileged documents.

46 Dr David Neal SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 33.

47 Law Council of Australia, answer to question on notice, 9 February 2009, (received 9 February 2009). Also, see Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 33.

48 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 30. Also, see Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 2 (received 12 February 2009)

additional basis. The Council submitted that the effect of these provisions 'means that the obligation to disclose evidential material may not be restricted to expert reports and material relating to alibis and mental impairment.'[49]

Jury provisions

3.39 The Bill's jury provisions provoked comment in respect of two particular matters: disqualification from jury service; and empanelment of the jury.

Disqualification from jury service

3.40 Proposed subsection 23DI(1) details when a person is not qualified to serve as a juror. Disqualified persons include:

- persons convicted of an offence and sentenced to either life imprisonment or a term of imprisonment exceeding 12 months;
- persons tried for an offence and ordered to be detained in a hospital, juvenile facility or other detention facility either for life or a period exceeding 12 months; and
- persons tried for an offence within the past 10 years and ordered to be detained in a hospital, juvenile facility or other detention facility.[50]

3.41 The Law Council of Australia submitted that the proposed subsection is too broad: it assumes certain offenders are beyond full rehabilitation and reintegration to the community, and some provisions inappropriately apply to persons found unfit to plead or acquitted on grounds of insanity:

> It is not appropriate to treat people in this category as though they have been tried and convicted. If such a person is no longer detained and not excused from jury service on grounds of incapacity, he or she should not be disqualified from service on the basis of the outcome of a criminal trial at which he or she was not convicted.[51]

3.42 The NSW Law Reform Commission supported this position in its recently published report, 'Report 117 (2007) – Jury Selection', which also recommended that:

- the exclusion of people whose duties are connected with the administration of justice should be more tightly defined; and
- the exclusions in the Commonwealth *Jury Exemption Act 1965* should be reviewed to confine them to those who have an integral and

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49 Law Council of Australia, answer to question on notice, 9 February 2009, p. 4 (received 9 February 2009).

50 Proposed paragraphs 23DI(1) (a), (c) & (e) of the *Federal Court of Australia Act 1976*

51 Law Council of Australia, *Submission 5*, p. 9.

> substantial connection with the administration of justice or perform special or personal duties to Government.[52]

3.43 The Law Council of Australia argued that the Bill should reflect these current proposals as it is important for juries to be drawn from a wide pool with jury composition reflective of the broader community.[53]

3.44 Proposed section 23DQ allows a potential juror to apply to the Sheriff to be excused from serving on a jury. The Sheriff may excuse the potential juror if satisfied that there is good cause: for example, the potential juror's inability, in all the circumstances, to perform the duties of a juror to a reasonable standard.[54]

3.45 Justice Weinberg noted that the Sheriff must have regard to the *Disability Discrimination Act 1992* but queried how that provision is to operate:

> Is the sheriff, in effect, by virtue of that note, to discount the difficulties that a juror would have if the juror were sight or hearing impaired to the extent that they could not properly see or hear the evidence at the trial?[55]

3.46 His Honour suggested that the note to proposed section 23DQ be removed so as to not fetter the Sheriff's discretion:

> Nothing should be done to put pressure on the sheriff to allow somebody who has limited eyesight, limited hearing or some other disability that falls within that act to serve on a jury at very considerable inconvenience and risk to the integrity of the trial.[56]

3.47 When put to the department, its representatives stated that the amendments to the Act will not override the *Disability Discrimination Act 1992* however, 'nothing in the *Disability Discrimination Act 1992* will require the Court to allow a person to perform jury duties if they are genuinely incapable of doing so.'[57]

3.48 The committee suggests that, in the context of juror disqualification, the Sheriff might have difficulty applying the provisions of the *Disability Discrimination Act 1992*, and should instead have regard to the objectives of that Act. Alternately, the committee considers that further guidance or explanation is necessary to enable the

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52 NSW Law Reform Commission, 'Report 117 (2007) – Jury Selection', http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r117toc (accessed 31 January 2009)

53 Law Council of Australia, *Submission 5*, p. 9. Also, see proposed section 23DJ of the *Federal Court of Australia Act 1976*; and NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 4.

54 Proposed paragraph 23DQ(2)(e) of the *Federal Court of Australia Act 1976*

55 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 4.

56 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 4.

57 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 6 (received 12 February 2009)

Sheriff to 'have regard to' a potential juror's inability to perform the duties of a juror to a reasonable standard without infringing the *Disability Discrimination Act 1992*.

Empanelling the jury

3.49 Submitters and witnesses also examined proposed subsection 23DU(1). This provision requires an officer of the Court to call the name or, if directed by the Court, number of a potential juror selected at random from the jury panel. Submitters queried whether it was appropriate for a potential juror to be identified in the courtroom.

3.50 The NSW Attorney-General submitted that any juror called by name was at risk of being investigated by either the Accused or persons present in the courtroom, and given the importance of juror anonymity, all potential jurors should be called by number. The Victorian Bar Association agreed that this should be the standard practice:

> Jurors are very concerned these days about security, particularly in trials that are regarded as security trials. Because of the use of mobile telephones with cameras and the like, jurors feel very much under the pump when coming and going from court. Their anonymity is being challenged in all sorts of ways. We would encourage anything that can be done to preserve the anonymity of jurors.[58]

3.51 However, not all witnesses agreed that this proposal was warranted in relation to serious cartel offences. Justice Weinberg stated that potential jurors have been called by name for hundreds of years with few problems, and sometimes the process is modified (such as in terrorism trials or trials involving people accused of crimes of extreme violence). His Honour also noted that the Bill provides for the Court to make such modifications, if appropriate.[59]

3.52 The department concurred with this view, adding that it might be unfair to the Accused to call potential jurors by number. The argument presented to the committee was that the name of a potential juror is one of the few things an Accused knows about that person, and if that information were withheld, then the ability of the Accused to challenge for cause might be denied:

> When we give accused a right to challenge jurors, they do not have a lot of information to do that with. One of the few things is the name of the juror. The relevance of that is that a juror is called by name and somebody on the defence team might recognise the name and say that person could be involved in the case. If we take the name away and give them a number, then someone is going to have to recognise the person. I just think that

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58 Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 46 & p. 51. Also, see NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 3.

59 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 5.

> those provisions do in fact detract from the rights of accused for no necessary purpose.[60]

Appeal rights

3.53 Part III Division 2A of the Bill deals with the Court's power to hear appeals in criminal proceedings. Proposed section 30AB requires an appeal against certain judgements to involve either a question of law only, or to have the leave of the Court or a Judge. It was this provision in particular which attracted the attention of Justice Weinberg.

3.54 His Honour considered proposed subsection 30AB(1) odd: 'normally it would be the full court that would determine whether leave to appeal should be granted or not rather than a single judge.'[61] However, the department advised that the provision is based on subsection 25(2) of the Act, and there is no apparent reason why that model should not be adopted for the Court's indictable criminal jurisdiction as well as its civil jurisdiction.[62]

3.55 Proposed section 30AD also relates to appeal rights, allowing an Accused to seek the Attorney-General's written consent to an appeal. Justice Weinberg queried whether this provision intends to give effect to an Attorney-General's reference or DPP reference.[63] However, the department assured the committee that this was not the case, and reiterated that the provision is designed to assist the Attorney-General deal with an application for the prerogative of mercy where a person convicted in the Court raises questions which, in the opinion of the Attorney-General, require the Court's further consideration.[64]

3.56 Justice Weinberg also raised 'a matter of some substance' relating to proposed section 30AI. This provision allows the Court to receive further evidence on appeal if satisfied that it is in the interests of justice to do so.[65] His Honour gave evidence that:

> That is quite a departure from the rules that operate right throughout Australia and in the United Kingdom which basically require that in order to receive new evidence in a conviction matter the material has to be what is called fresh evidence—that is, material that was not reasonably available

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60 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 34.

61 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 6.

62 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 3 (received 12 February 2009)

63 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 6.

64 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 3 (received 12 February 2009). Also, see proposed section 30CB of the *Federal Court of Australia Act 1976*; section 77 of the *Crimes (Appeal and Review) Act 2001* (NSW); and section 584 of the *Crimes Act 1958* (Vic).

65 Proposed paragraph 30AI(1)(c) of the *Federal Court of Australia Act 1976*

> or could not with reasonable diligence have been discovered by the defence at the time of the trial, and also that the material has to be of a particular cogency. It has to be evidence of such cogency that it could reasonably have influenced the jury's verdict.[66]

3.57 Justice Weinberg argued that the provision needs to be more carefully drafted to ensure that it does not significantly depart from the ordinary provisions that govern fresh evidence on appeal in criminal trials:

> …there is a whole body of jurisprudence on the distinction between fresh evidence and further evidence. There is an additional hurdle that has to be mounted if it is to be further evidence which could have been obtained previously—that is, that the evidence really has to establish innocence. All that jurisprudence and all that nuance are missing from the clause.[67]

3.58 The committee asked the department for its view on the interpretation of proposed section 30AI. Representatives stated that the standard practice in criminal cases is that only fresh and compelling evidence will be allowed on appeal, a position reinforced by proposed subsection 30AI(1).[68] Implicitly, the department did not consider the draft provision to be a problem.

Bail

3.59 The bail provisions are set out in Part VIB of the Bill. One main criticism regarding these provisions emerged from submissions and in evidence: inconsistency with state/territory laws as demonstrated by a limited right to apply for bail; the lack of a presumption in favour of bail; and differences in bail criteria.

Limited right to apply for bail

3.60 Proposed section 58DA enables an Accused to apply to the Court for bail for one or more offences during either indictable primary or criminal appeal proceedings. However, if the Court refuses to grant bail to an Accused for an offence, the Accused cannot apply again for bail for that offence unless there has been a significant change in circumstances since the refusal.

3.61 While this provision is similar to some state legislation, the approach has been criticised for trespassing:

> …unduly on personal rights and liberties, such as the right to liberty and the right to be presumed innocent. The provisions have also been described as eroding the presumption in favour of bail and concerns have arisen that the

66 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, pp 6-7.

67 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 7.

68 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 4 (received 12 February 2009).

> provisions are leading to delayed and/or lengthy applications for bail and are having a particularly detrimental impact on juvenile offenders.[69]

3.62 In its submission, the Law Council of Australia supported the contrary approach adopted by the majority of states/territories, that is, the ability of an Accused to make multiple bail applications.

3.63 A corollary of the limitation is the test in proposed subsection 58DA(2): that there have been a *significant* change in the Accused's circumstances. Legal practitioners giving evidence to the committee resisted use of the word *significant* on the basis that the test might be more onerous than that currently operating in other jurisdictions. Mr Phillip Priest QC from the Law Council of Australia, for example, submitted that the Bill sets the bar considerably higher than in Victoria where legislation perhaps recognises that:

> …you are dealing with the liberty of the subject and that one should only deny a person's liberty in particular circumstances. People should have a right to make bail applications so long as their circumstances have changed, albeit not significantly.[70]

3.64 The Victorian Bar Association agreed that a change in facts and circumstances should be sufficient to justify a further application for bail.[71] However, the department did not countenance amending the provision to exclude the requirement for a significant change in circumstances. Representatives simply stated that the provision is a mechanism for preventing the lodgement of multiple bail applications by the Accused.[72]

Lack of a presumption in favour of bail

3.65 Among the bail provisions, the second matter concerning submitters and witnesses was the Bill's lack of an express presumption in favour of bail. Most legal practitioners interpreted this to mean that there is no such presumption.

3.66 The Law Council of Australia noted that:

- the presumption is founded on the common law principle of presumption of innocence and a *prima facie* right to be at liberty until convicted; and

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69 Law Council of Australia, *Submission 5*, p. 5.

70 Mr Phillip Priest QC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, pp 32-33. Also, see Law Council of Australia, *Submission 5*, p. 5.

71 Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 49.

72 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 32.

- international human rights law, specifically Article 9(3) of the International Covenant on Civil and Political Rights, is consistent with a presumption in favour of bail.[73]

3.67 Submitters argued that the states/territories variously recognise the continued existence of a presumption in favour of bail, and a number of jurisdictions specifically identify types of offences or circumstances of offending which justify a reversal of the presumption.[74] However, there was a general consensus that there should be a presumption in favour of bail for serious cartel offences.

3.68 Justice Weinberg, for example, gave the following evidence:

> I cannot see why the normal rule that applies in relation to most offences, which is that there is a presumption in favour of bail, should not apply in relation to serious cartel offences. I would have thought that these are not cases where there is a serious risk that witnesses are going to be interfered with, at least in the form of violence or anything of that kind. If you are talking about the capacity to approach witnesses, that can be done from custody as well as while not in custody. I would have thought, frankly, that these are not cases where there is a serious risk of absconding. The people who are charged with these sorts of offences are likely to have close ties to the community and in my view are unlikely, prima facie, to abscond…this is a case where there ought to be a presumption in favour of bail.[75]

3.69 The Law Council of Australia agreed, hypothesising that perhaps the draftsperson assumed that a court looking at the bail provisions would apply the common-law presumption in favour of bail: 'of course, it would be much better if that presumption was enshrined in legislation, in the same way that it is recognised in Victoria.'[76]

3.70 The committee notes evidence from the department that the courts do make such an assumption, and for that reason, the department considered it irrelevant whether or not a presumption in favour of bail is provided for in the Bill:

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73 Law Council of Australia, *Submission 5*, p. 6. Article 9(3) of the International Covenant on Civil and Political Rights states: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

74 Law Council of Australia, *Submission 5*, p. 7.

75 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 8 & pp 9-10. Also, see Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, pp 44 & 48.

76 Mr Phillip Priest QC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2008, p. 32. Also, see section 4 of the *Bail Act 1977* (Vic) and Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 49.

> A court, considering a bail application, whether it is in this bill or not, whether it is in the act, will take into account that the person appearing before them has not been convicted of any criminal offence. The court will look at the criteria: is there a risk of flight, is there a risk of suborning witnesses, and all the rest of it. But that fact—that the person is entitled to be considered innocent until proven guilty—is there as part of the common law, as part of the principles that come with the territory.[77]

3.71 Nonetheless, the committee inquired as to why the Bill contains no presumption in favour of bail, effectively reversing the onus on the prosecution to establish grounds on which bail ought to be refused. Officers from the department responded that the Bill balances competing interests and rather than adopt a highly prescriptive approach, relies upon the experience and judgement of the Court:

> …we looked at whether there should be a presumption for or against bail and thought, 'These are serious offences, 10 years imprisonment, about to be enacted. There is the need to control white-collar crime.' To then put a provision in saying, 'But there is a presumption of bail,' seemed to be slightly contrary to that message. On the other hand, of course, it has been pointed out that these are going to be long trials; people have got ties to the community. The position we came to was, 'This is the Federal Court. These bail provisions are designed to be applied by Federal Court judges.' State bail laws are applied by the whole range, from bail sergeants up to Supreme Court and Court of Appeal judges. There is not the same need for prescription and guidance. We can trust the Federal Court judges to consider those matters and to make appropriate orders.[78]

3.72 The CDPP agreed with this view, commenting that:

> …the important thing in relation to bail is that the courts are well placed to make those decisions, balancing the different interests between the rights of the public and the rights of the defendant.'[79]

Differences in bail criteria

3.73 Proposed section 58DB empowers the Court to grant bail to the Accused for one or more offences, and it specifies matters to be considered by the Court when determining a bail application:

- whether the Accused will appear in Court if bail is granted;
- the interests of the Accused;
- the protection of any other person;

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77 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, pp 32-33.

78 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 32.

79 Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 42.

- the protection and welfare of the community, including whether there is a risk that the Accused will commit offences if bail were granted;
- whether there is a risk that the Accused will approach witnesses or attempt to destroy evidence.[80]

3.74 Submissions and evidence raised a concern regarding these bail criteria, that is, a committal court will apply state/territory bail criteria, rather than these criteria, and the 'significant' variation between the jurisdictions will culminate in dissimilar treatment of Accused.

3.75 The Law Council of Australia cited by way of example the following bail criteria used in some jurisdictions:

- the character, antecedents, background and/or community ties of the Accused;
- the strength of the evidence against the Accused;
- the period that the person may be obliged to spend in custody if bail is refused;
- the Accused's previous failure to appear; and
- the nature and seriousness of the offence.[81]

3.76 The Law Council of Australia suggested that the Bill include provisions more consistent with the states/territories, not only to achieve greater legislative consistency and treatment of Accused, but also to enable the Court to consider the multiplicity of factors relevant to a grant of bail.

3.77 When asked about this aspect of the Bill, the department was adamant that the bail provisions summarise the requirements of existing state/territory laws, and there is no need to tell Court Judges to take into account the breadth of bail criteria.[82]

Dual jurisdiction

3.78 Dual jurisdiction was a pervasive issue throughout the inquiry. Some submitters and witnesses favoured the creation of an entirely separate federal criminal jurisdiction. Others took the opposite view, arguing that state/territory courts should continue to handle the prosecution of Commonwealth indictable offences. Yet others supported the Bill with its creation of an indictable criminal jurisdiction for serious cartel offences only.

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80 Proposed paragraphs 58DB(2)(a)-(e) of the *Federal Court of Australia Act 1976*

81 Law Council of Australia, *Submission 5*, p. 7.

82 Mr Geoffrey Gray SC, Attorney-General's Department, *Committee Hansard*, Canberra, 6 February 2009, p. 33.

3.79 Proposed sections 68A – 68C of the *Judiciary Act 1903* deal with situations in which both the Court and a state/territory court share jurisdiction. This is a slightly unusual position,[83] which arises due to the creation of the Court's indictable criminal jurisdiction and the existing investiture of state/territory courts with federal criminal jurisdiction under section 68 of the *Judiciary Act 1903*.[84]

3.80 Consistent with the Explanatory Memorandum, the CDPP submitted that the Bill will allow a state/territory superior court to hear cases involving either Commonwealth serious cartel offences and state/territory offences, or Commonwealth serious cartel offences and other Commonwealth offences: there will be no disjoiner.[85]

3.81 As noted by several witnesses, the Constitution does not permit state/territory jurisdiction to be invested in the Court. For that reason, and due to the charges preferred in most criminal cases, the Law Council of Australia envisaged most criminal prosecutions continuing to be heard in state/territory courts:

> As things currently stand, in most federal prosecutions there are state offences, particularly state dishonesty offences. If you federalise, move towards more creation of federal offences, the problem might dissipate, but people are not going to start cases in the Federal Court when they cannot have state dishonesty fraud type offences, which is the norm, for example, in corporations and tax type prosecutions.[86]

3.82 The NSW Attorney-General similarly questioned whether the Bill adequately addresses problems of dual jurisdiction, submitting that if the Court does not have jurisdiction to hear state/territory offences and the criminal proceedings are disjoined, then this would increase trial costs and delays for both an Accused and the relevant state/territory. Furthermore, disjoining criminal proceedings could create division, inconsistencies and inequalities between Accused charged with the same offence but prosecuted in the Court as opposed to a state/territory court.[87]

3.83 Officers from the department acknowledged that either court will apply its rules of evidence and procedure, which might differ in some respects but disagreed that this will result in dissimilar treatment of persons charged with the same offence:

> The fundamental proposition will remain that, before either court, the accused person must receive a fair trial…the Department has seen no

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83 Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 40. Also, see Commonwealth Director of Public Prosecutions, *Submission 1*, p. 4.

84 Commonwealth Director of Public Prosecutions, *Submission 1*, p. 1. Dual jurisdiction can also arise when criminal behaviour constitutes an offence under both Commonwealth law and state/territory law.

85 Commonwealth Director of Public Prosecutions, *Submission 1*, p. 2.

86 Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Melbourne, 29 January 2009, p. 24.

87 Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 1.

> evidence to suggest that an accused person has ever failed to receive a fair trial because of the choice of one Australian court system over another.[88]

Resources and capacity

3.84 The Court's capacity to handle an indictable criminal jurisdiction, and its available resources, are a factor in the provision of a fair trial. In evidence, witnesses indicated that state/territory governments do not adequately fund the state/territory criminal justice systems, which might have negative implications for Commonwealth matters heard in those courts.[89] However, the committee heard that, in general, the Court is highly equipped in terms of knowledge, expertise and experience to handle the prosecution of serious cartel offences.[90] For example, Justice Weinberg, a former DPP and Judge of the Court, stated:

> [The Court] has a number of judges who have extensive criminal trial experience from their former lives as state Supreme Court judges—and I do not imagine that there are going to be a huge number of these cases, frankly, or that they are going to be charged in the immediate future, so there is time for planning. But these are very special, very difficult cases. They require top judges to do them, and the Federal Court is well equipped to handle this work.[91]

3.85 Chief Justice Michael Black AC of the Court concurred, noting that some Judges have presided over criminal trials and criminal appeals as state/territory Supreme Court Judges, others routinely preside over criminal cases in their capacity as additional Judges of the ACT Supreme Court, and a substantial number of the Judges have previously appeared in important criminal cases at the Bar. In addition, His Honour noted that for many years the Court was the Court of Criminal Appeal for the territories, and also 'encounters' the criminal law in certain cases of judicial review.[92]

3.86 In relation to serious cartel offences, Chief Justice Black AC particularly noted the Court's expertise:

> The Federal Court has – and the Supreme Courts do not have – experience in dealing with complicated economic concepts in the field of competition law and the Federal Court has been responsible for the developing

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88 Attorney-General's Department, answers to questions on notice, 12 February 2009, p. 1 (received 12 February 2009)

89 Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 53; and Mr John Champion SC, *Submission 4*, p. 7.

90 The one exception was the NSW Attorney-General: see NSW Office of the Attorney-General and Minister for Justice, *Submission 6*, p. 2.

91 Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 11.

92 Chief Justice Michael Black AC, Federal Court of Australia, Correspondence dated 6 February 2009, pp 1-2.

> jurisprudence that field subject, of course, to the ultimate authority of the High Court.[93]

3.87 The committee also received some evidence regarding the CDPP's capacity and capability to pursue prosecutions in the Court. The CDPP acknowledged that it will be a challenging new area of work, both in terms of actual offences and the new jurisdiction. However, the CDPP was confident that it has sufficient funding and expertise to meet these challenges,[94] and other witnesses agreed with this assessment.[95]

Committee View

3.88 The Bill establishes the procedural framework which the Court will require to exercise the new indictable criminal jurisdiction to be granted by the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008.

3.89 The provisions of the Bill are, on the whole, well drafted and sound, and the committee is confident that the Court and the CDPP have the capacity and resources to professionally and expertly implement these provisions. However, the committee acknowledges the various concerns raised throughout its inquiry.

3.90 Some submissions and evidence called for amendments to the Bill and provided argument in support of those recommendations. The committee did not agree with all the suggestions, for example, proposals to amend proposed section 23CM and proposed subsections 23DU(1), 58DB(2), 6(2F) of the *Director of Public Prosecutions Act 1983*, and 68A(3) of the *Judiciary Act 1903*.

3.91 The committee is not convinced that the traditional method for determining the trial venue is flawed, nor that whatever the prosecutor's choice, the Accused will be afforded a less than fair trial. Members of the committee have full confidence in not only the CDPP but also the Court, which has an inherent power to stay proceedings should an abuse of power occur.

3.92 Both the department and Justice Weinberg gave evidence as to the recalcitrance of some persons charged with offences against the Commonwealth. With this in mind, the committee agrees that statutory sanctions are appropriate to encourage and reward compliance with the pre-trial disclosure regime.

3.93 The committee accepts that there might be some advantage to calling potential jurors by number during the empanelment process. However, for the purposes of this

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93 Chief Justice Michael Black AC, Federal Court of Australia, Correspondence dated 6 February 2009, p. 2.

94 Mr John Thornton, CDPP, *Committee Hansard*, Melbourne, 29 January 2009, p. 39.

95 Mr John Champion SC, Chairman, Criminal Bar Association Victoria, *Committee Hansard*, Melbourne, 29 January 2009, p. 54; and Justice Mark Weinberg, *Committee Hansard*, Canberra, 5 February 2009, p. 11.

Bill, the arguments presented are not sufficiently compelling to abandon the traditional process of calling potential jurors by name. The committee notes, in any event, that the Bill provides for both options, if appropriate.

3.94 In relation to bail criteria, the committee accepts that the Bill summarises but does not limit the multiplicity of factors to be considered by the Court in determining an application for the grant of bail. The knowledge, experience and expertise of the Court is acknowledged, and the committee is confident that the Court will properly consider all bail applications.

3.95 As indicated by the Attorney-General, the Bill creates a national approach to the prosecution of serious cartel offences. While the committee received no evidence regarding the status of the Rules of Court, the ability of the courts to safeguard the rights of individuals is not doubted. The committee urges the Court to expedite the development and implementation of its Rules to ensure that accused persons are statutorily protected and assured of similar treatment regardless of jurisdiction.

3.96 Aside from these specific issues, the committee asked witnesses whether the Bill raises any foreseeable Constitutional issues. Most witnesses responded in the negative.

3.97 The committee did however agree that the Bill can be improved with certain amendments. In general, the expert comments of Justice Weinberg bear mention, and the committee considers that there is merit in the department continuing to consult with His Honour. In relation to particular provisions of the Bill, the committee does not agree with the following provisions and makes recommendations accordingly.

3.98 In relation to the Accused's pre-trial disclosure obligations, the preponderance of evidence from legal practitioners, in particular the Law Council of Australia and Victorian Bar Association, was that these provisions infringe upon established principles of common law to the detriment of the Accused. The committee acknowledges the objectives of the pre-trial disclosure regime but considers that the appropriate balance has not been struck between the rights of the individual and the public interest. Most of the disagreement revolves around a particular provision, *basis for taking issue*, and the committee suggests that this provision could be better drafted to reflect the competing interests.

3.99 On the other hand, the committee is not convinced that there is any case for the abrogation of legal professional and other privileges. There was no hard evidence before the committee supporting the rationale for this convoluted provision, and the committee cannot see how such disclosure can be effectively 'limited' to pre-trial proceedings only. Consistent with previous comments, the committee does not support specific disclosure by the Accused, including highly sensitive and otherwise privileged information.

3.100 As part of the pre-trial disclosure regime, the committee supports statutory sanctions as a means of encouraging both parties to reasonably and efficiently comply with court ordered disclosure. However, the committee is not convinced that the

relevant provision operates equitably. In particular, it is concerning that the conduct of the Accused's case could be significantly hampered at trial due to a failure to disclose during pre-trial proceedings. Evidence presented suggests that the Victorian sanctions might be more suitable. Again, the committee has faith in the judiciary to safeguard the interests of individuals when exercising its discretion, and for these reasons, the committee considers that the Victorian sanctions model should be re-examined by the department and incorporated into the Bill.

3.101 The committee notes the specific issue of further evidence/fresh evidence in appeal proceedings. While Justice Weinberg and the department agree that such evidence must be both fresh and compelling, this understanding is not apparent in the provision.

3.102 As regards the bail provisions, the committee received no evidence supporting the stated rationale and therefore questions whether a bail applicant should be limited to a single application for bail without a change in circumstances. The right to be at liberty is a fundamental consideration and should not be impeded lightly. Moreover, the committee considers the requirement for a *significant* change in circumstances to be onerous and inconsistent with other jurisdictions.

3.103 Most importantly, the committee does not accept that it is immaterial whether the Bill expressly includes a presumption in favour of bail, whether for serious cartel or other Commonwealth offences. While the committee has every confidence in the Court, it behoves the Parliament to clearly stipulate its intentions and support the right of a person accused of an offence to be at liberty until convicted.

Recommendation 1

3.104 The committee recommends that the proposed section 23CF be clarified to ensure that it is only intended to require a non-specific indication of the Accused's reasons for dispute.

Recommendation 2

3.105 The committee recommends that the proposed section 23CL be amended to ensure that it does not require a general removal of legal professional privilege but rather only clarifies the effect of an order of the court pursuant to the proposed section 23CD requiring the accused to disclose a limited range of documents such as draft witness statements and expert reports but not legal advice.

Recommendation 3

3.106 The committee recommends that proposed section 23CM be amended to reflect the sanctions regime embodied in Victorian legislation.

Recommendation 4

3.107 The committee recommends that proposed section 30AI of the Bill be re-drafted to clarify the jurisprudentially established distinctions between the terms 'fresh evidence' and 'new evidence or further evidence'.

Recommendation 5

3.108 The committee recommends that proposed subsection 30AB(2) be removed so that the granting of leave to appeals against an interim judgement or decision is not restricted to the trial judge.

Recommendation 6

3.109 The committee recommends that proposed subsection 58DA(1) of the Bill allow for multiple bail applications and that the requirement for a *significant* change of circumstances be deleted from proposed subsection 58DA(2).

Recommendation 7

3.110 The committee recommends that the Bill be amended to include a presumption in favour of bail.

Recommendation 8

3.111 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair