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Commentary on the Paper Prepared by Mr Ian Gray SM on Suppression Orders

Introduction

This commentary is not designed to delve deeply into the law or to necessarily fully argue the matters raised or reach conclusions on them. It is designed to illustrate issues that I consider are important, or perhaps interesting (if trivial), from Ian Gray's paper.

General

The major difficulty raised by the area of suppression orders has always been stated as concerning a matter of whether justice has been conducted in public. To my mind there has been a confusion of the concepts of conducting cases in public and having those cases subject to publicity.

I can put forward no valid reason why committals, hearings or trials should generally be conducted in Courts closed to the public. But this is a very different proposition from saying that those proceedings should then be reported without restriction by the media. It appears to me the problems

inherent in the question of suppression orders are not directed to open or closed Courts but to the communication of the proceedings in the media.

The problem identified in part by the then Chief Magistrate of South Australia, Mr Nick Manos SM, in his paper to the 1985 first International Criminal Law Congress, was that:

> "A public forum is to law as the light is to darkness. But premature, inaccurate, incomplete or too much publicity is to the law as the rumour-monger is to the community."

In discussing this problem, it is my view that we can and must take into account the way matters are treated by the media in reporting cases pre-conviction, especially in the Northern Territory.

I agree with Mr Gray SM that generally Jury's are not influenced by pre-trial publicity, however, that's not to say that it never happens. Can anyone honestly contend that the Chamberlain Jury were not affected by pre-trial publicity?

The worst aspect of this is that I don't believe Jury's are necessarily influenced by reports as to the facts of the particular case, but can be influenced by matters not directly relevant to the trial. For example, was it important in the Chamberlain case that the Chamberlain's were Seventh Day Adventists? Or

the meaning of the name Azaria? Did the Crown really rely on these matters for motive perhaps!

The reporting of Tim Anderson's cases provide another example where, though membership of the Ananda Marga Sect was relevant, the portrayal of this "weird sect" would inevitably colour the mind of potential jurors. Then there are those wonderful classics, the "Fitzgerald Inquiry" cases. In the Northern Territory, the Ti Tree case may well have provided the same type of concern.

The Murphy case presents yet another danger of the way matters are reported. The "journalist" quoted states: "All the adverse publicity in the world did not stop Justice Murphy from being acquitted." But did the publicity affect the result? How many Australians said to themselves "I'm always asking about my mates". That appeared to be the extent of the evidence against Justice Murphy from the media reports. Neville Wran was reported as supporting Justice Murphy's innocence. This was a man publicly elected to high office and known to be popular in New South Wales. Did this have any effect on the acquittal?

The problem is that we will never know. It may be the sheer weight of adverse publicity rebounded to the assistance of the defendant. It will never be possible to state categorically that the reason for the acquittal of Justice Murphy, and the convictions and acquittal of others, was based only on the evidence heard in Court. We must ask is this a satisfactory situation.

The biggest use of Judge alone trials in South Australia that I am aware of, is for sexual offences, mainly rape. This is not because of pre-trial publicity about the particular case, but because of the persistent portrayal of Adelaide as the "Violent Rape Capital of Australia".

Clearly, many lawyers, and I was one, felt that jury's in South Australia had a predisposition to convict in rape cases because of this. Maybe they and I were wrong but I don't think any of us were prepared to take the risks to our client's liberty.

Perhaps it was a bit unfair stating earlier that we can take into account the way matters are treated by the media, especially in the Northern Territory. With Derryn Hinch and the Truth Newspaper, perhaps the Northern Territory are extremely lucky. But with the present state of the media in Australia, we cannot expect the media to simply conform to reporting the evidence, pre-trial or during trial, in an objective and unbiased fashion.

This opens up the question of whether we should force the media to do so in some way.

Another issue to be considered is raised by Ian Leader-Elliott in his article "Legislation Comment: Suppression Orders in South Australia: The Legislature

Stepped In" (1990) 14 Crim LJ 86. In an otherwise uninspiring article (he lost my support when he described the presumption of innocence as a "legal fiction") he points out at pages 104-5:

> "There is also a considerable element of incongruity in these attempts to stave off the harm which can result from public knowledge of unsubstantiated allegations. On most nights I can watch television programs devoted to allegations of criminal conduct, fraudulent business practices, or improprieties by public officials. In the print and electronic media, investigative journalism goads reluctant governments to act against institutionalised corruption. No presumption of innocence protects the subjects of these campaigns from publicity which may be calculated to drive them from public life or cause economic ruin. Nor is it ever necessary for these allegations of wrong-doing to be established beyond reasonable doubt. Hardship, of whatever degree, does not entitle people who are the targets of such publicity to the protection of a suppression order. The incongruous elements of the South Australian doctrine was that hardship amounted to a ground for suppression if and only if criminal proceedings were commenced. So long as there is no threat to the integrity of the trial process there can be no justification for creating a special enclave of protected anonymity for criminal defendants. There is simply no reason to discriminate, in this way, between those who have and those who have not been charged with an offence.
>
> I do not mean to suggest that no distinctions are to be drawn between individuals who are accused of offences by the State and those who are the subject of independent investigation or accusation by the media. There accurate reports of court proceedings are protected by qualified or absolute privilege. An essay in investigative journalism, by contrast, is undertaken in the knowledge that a damages award is likely to follow unsubstantiated allegations. When criminal proceedings are reported fairly and accurately, privilege absolves the media from the risk of liability

> for defamation and the expense of enquiry into the truth of the case against an accused. The media, one might say, owe some obligation in return for this immunity. The distinction does not justify the suppression of reports for criminal proceedings in order to avert hardship."

A major argument in favour of publicity is that there should be as few limitations as possible on the media's exposure of public corruption and dishonesty, as explained by the Fitzgerald Commission. (Note: A similar argument is used to justify the High Court's decision in McKinney and Judge v R). The importance of this principle cannot be overlooked and may well be used to argue for a freeing up of the rules in relation to reporting trials.

There must, however, be some sort of limitation even on this principle. The principles in favour of reporting may well be used to argue for a freeing up of the rules in relation to reporting Voir Dires. Do those in the Crown who support publication extend those principles to the pre-trial reports of decisions to exclude evidence? Do those who defend want such an extension if it leads to reports of unsuccessful challenges on the Voir Dire? Like committals, Voir Dires produce evidence that may not be led before a Jury. If the voir Dire is far enough in advance of a trial, how can it be argued that the Jury's decision will be effected or that the proceedings are any different to those of committals and therefore should be allowed to be reported.

I find it impossible to support any pre-conviction or acquittal Voir Dire

reporting.

The history of the extensive use of suppression orders in South Australia, which were not nearly as extensive as purported (at the highest 207 orders in financial year 87/88, 32% of which related to suppression of the accused's name, in all cases in all Courts in South Australia) came from an emphasis on the presumption of innocence and the punitive effect of media publicity.

Substantial hardship had to be shown. This reflected the Court's desire to ensure that as little punishment as possible should be suffered pre-trial by someone presumed innocent. This is exactly the same principle which applies to the reluctance of Courts not to grant bail in criminal cases.

One argument in favour of publicity must, in my view, be rejected. The possibility that pre-trial (and post arrest and first appearance) publicity can lead to further evidence being obtained for the Crown is, in my view, a very minor factor, almost as relevant as pre-trial publicity effecting Jury decisions, when it comes to actual numbers. But the influencing of Jury decisions is significantly more important.

Committals

I have similar concerns in relation to committals as I do to the question of the reporting of Voir Dires. I also think that there is a fundamental distinction

between committals and other Court procedures.

It must be noted that committals are administrative proceedings. They are not justice being done, and need not be seen to be done.

A report is made of a person being arrested in relation to a charge, the basic details of which have already been, or at the time of the first Court appearance, reported. A further report that the accused has been committed for trial or discharge should also be allowed.

But why do the public need to know, or indeed have a right to know, the Crown case at committal? The decision as to guilt or innocence should not be based on the evidence led at committals. As has been pointed out, evidence is produced at committals that may not be led before a Jury.

What of those cases where the accused is discharged at committal level followed by the DPP issuing an Ex Officio indictment? How does the knowledge of a "discharge" finding affect potential Jurors? Where Jurors generally, in my view, will follow the warning and not presume guilt, I find it difficult to believe that a Juror would not be affected having previously had information of a finding that to the lay person is a finding of "innocence". The procedure of committals leading to trials is a procedure well known to lawyers but in my experience little understood by people not directly involved in the

criminal justice system.

I cannot see any benefits to the community, the Crown or the defence in the reporting of committals. Indeed, it appears to me the only argument in favour of reporting committals, is the general principle that everything should be open to publicity. There are a number of arguments against the reporting of committals which are canvassed by Mr Gray. In my view, there are no substantive arguments in favour of reporting and as there are no benefits to the community, the Crown or the defence, my view is that evidence led at committal should not be reported, only the fact of committal for trial or sentence or discharge.

The reporting of evidence at committals also raises the question of the wider public perception of justice being done when an accused person is acquitted in a Supreme Court. Those who have followed the committal proceedings and know of the committal proceedings have probably formed some view of the evidence. Here I'm not talking about jurors who are expressly told to put that evidence out of their mind, but I'm talking about members of the public looking at or discussing a decision after it occurs. In my view, this situation can only lead to a perception of justice not being done and that perception would be unfair.

What is "Publication"

The power referred to in John Fairfax & Sons Ltd v Police Tribunal of New South Wales and Another (1986) 5 NSWLR 465 was the inherent power of a Tribunal to prohibit publication, rather than a statutory right as contained in section 57.

However, as I read that case, it was decided that the name of the informer could be used and therefore "published" inside the confines of the Court room but not outside, as the situation applied prior to the judgment overturning the suppression order.

In Martin J's decision referred to in the paper he states: "I do not understand such an order to be limited to publication by the usual forms of media".

What of the private conversations between people outside of a Court room about matters suppressed pursuant to section 57?

The many definitions of "publication" refer to a public element in the manner of communication. A paper of this nature would almost certainly be a publication but I doubt it would extend to a private conversation between people.

However, in the misuse of drugs case dealt with by the author of the paper, I suspect the full order would be effective for all situations by the combined effect of the order made under section 26 and section 24 of the Act.

Misuse of Drugs Act

The most striking thing about sections 24 and 25 of the Act is that these provisions are absolute. No exceptions, no discretion, totally draconian.

If, in fact, in Mr Gray's case the name bandied about was the name of an informer, then it appears to me there has been a contravention of section 24. Mind you, there then arises the question of how to prove an offence under section 24 which would mean proving the informer was an informer. Is this the "public good" exception in subsection 3?

But a real difficulty occurs if the informer is also an agent provocateur. Consider the following facts:

> D is arrested for possession of a small quantity of cannabis. P agrees to become a police informer. He informs police that D is a known heroin dealer. The police instruct P to persuade D to sell heroin to a third party. D's instructions after his arrest include the statement that he had never sold heroin before and would never have sold heroin if P had

not pressured D.

Even if they want to, can the DPP reveal any of P's involvement to the defence or to the Court? In doing so, they are revealing an informer's identify contrary to section 24(1). There is nothing in section 24 that states that the identity of the informer must not be revealed, only in his status as an informer. He simply says that an informer's name will remain confidential in all cases.

Can the DPP reveal the information only concerning their instructions on the actual dealings between P and D? In doing so, they would clearly be giving information that would be likely to lead to the identification of an informer contrary to section 24(2).

Would these disclosures be for the public good? Is it for the public good that a person who trades in heroin, for whatever reason, should be supplied with information that may lead to a stay of proceedings or exclusion of vital evidence which may in turn lead to an acquittal? The decision for the Crown is to whether to call the person as a witness is based on the question of fairness to an accused (see The Queen v Apostilides (1984) 154 CLR 563), but this may conflict with "the public good".

The situation is of course even more difficult if P elects to use a false name

when dealing with D, as D's counsel cannot even ask questions about the right person.

Of course, maybe P loses the status of an informer. After all, "informer" is not defined, and section 24 applies only to an "informer" who provides information to the police, not a complainant, informant, accomplice etc. Does the status of an agent provocateur mean that P is no longer an informer?

Anybody who thinks that this scenario is so outlandish as to be beyond possibility should read R v Mandica & Ors (1980) 24 SASR 394, and of course our very own Mulholland Report, when fully available, regarding the role of "Rhonda".

In keeping with the usual Northern Territory drafting tradition, section 25 firstly places a ban on the asking of a question and then allows the witness not to answer a question that could not be asked in the first place. Again, the ban on asking is absolute. With the ban on the question being put in the first place, any question that may get any of the information mentioned in section 25 would be disallowed.

Section 26(4)(c) then applies, not to the identity of the informer, but to the information itself and would apply to situations where people other than the class of people referred to in section 25, give evidence that reveals the same or

similar information.

As with the rest of this Act, I wish the Northern Territory Judges and Magistrates all the best in interpreting it. It's the type of Act that may provide lawyers with much work for years to come.

Minor Miscellaneous Matters

A. Section 57(ii) allows the Court to make suppression orders in basically any terms. Should the Court make consideration of orders allowing publication in any way except through the media? Should there in fact be another section 57 equivalent specifically for the media?

I should point out again that there are no reasons why Courts should not remain open and free to anyone who wants to hear a case. They can attend the proceedings and, of course, in most circumstances, can also obtain transcripts. Perhaps in some cases a suppression order specifically directed to forms of media may be appropriate and that power should be considered.

B. The question of media representation in relation to suppression orders is an important matter that should be looked at urgently. I can't see anything in the Misuse of Drugs Act that really allows a Magistrate to allow the media to make submissions in relation to suppression orders under section 26. I believe

the question of who or who may not attend in the Magistrate's Chambers or in Court on an application for suppression, is limited to the parties or counsel for the parties or possibly witnesses. I don't believe it can be said to extend as far as the media.

I believe that where there has been no opposition to a suppression order the media should be given a right of representation if they wish to present argument to oppose the order. However, where the suppression order has been opposed, it can be argued that the people who have already opposed the order have made the general principle for arguments that the media would make. The only argument that could be added by the media itself is the argument that publicity has already been given or that publicity would be given interstate. It seems totally wrong to me that the things that should amount to breaches of suppression orders should be used in an argument for the non-allowing of a suppression order at a time when the matter is before the Court.

C. Should suppression orders extend interstate? I believe that in most cases full faith and credit should be given to the decisions of State and Territory Courts to make suppression orders and those suppression orders should extend Australia wide as a matter of course. However, I would also suggest that the media should be allowed to raise arguments in interstate Courts as to whether the suppression order should or should not apply within the particular State or Territory other than the State or Territory where the matter is being

conducted. There may be valid reason for publications of proceedings in the Northern Territory of a South Australian case which do not apply to publication in South Australia of the same case.

D. Should Juvenile Court proceedings be open and publishable in the Northern Territory as they presently are under the Juvenile Justices Act? Full names may be used as well as the circumstances of the case. This appears to be a departure from the position in other States and Territories and it is difficult to see the justification for the publication of juvenile proceedings, which may very much harm a young person's prospects, particularly in relation to employment.

E. Does publicity encourage the bringing out of further evidence and can it encourage the bringing out of false evidence? One wonders what would have happened in the Tim Anderson case if there had been slightly less publicity. Did the publicity encourage the evidence of Raymond Denning and Evan Pederick, which evidence may be false. If it was encouraged by publicity, this is an adverse factor that we would have to consider.

F. The Sexual Offences (Evidence and Procedure) Act only covers specific sexual offences, missing out on the enormous number of other sexual offences contained in the Criminal Code.

Also, section 5 allows an alleged victim of one of the specified offences to give

evidence at committal in private but not at a summary hearing or Supreme Court trial.

Section 9(1) does not exempt articles, papers etc. based on authorised law reports.

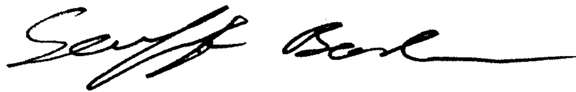
I understand these anomalies are presently being examined. I suggest that urgent review is required.

G. Section 57(1)(a) refers to "offending against public decency".

The only example of this type of prohibition I can even vaguely imagine is the publication of the Nixon Tapes. It may be remembered that President Nixon was not exactly reluctant to use language, both about issues and people, that may possibly be described as failing to meet the objective standards of the community test in an objectionable words case. Hence the common use of "expletive deleted" in the transcripts.

Imagine then the "Hawke" tapes needed to be transcribed for a Northern Territory Court case. If the same situation was discovered, a prohibition order "for the furtherance of ... the administration of justice" could hardly be appropriate.

Perhaps a "public decency" order could be sustained on the same basis as Nixon justified his editing, that is, that people would lose faith in the legislative and governing people and bodies which is not in the public interest.



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