C.L.A.N.T. CONFERENCE
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SERIOUSLY SEXY CRIMINAL TRIAL PRACTICE?

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The last decade has seen a significant increase in the use by police of video and audio taping facilities to record interviews with suspected offenders. Accordingly one of the greatest dangers of potential injustice as far as accused persons are concerned is diminishing.

If we leave aside the threatened diminution of civil liberties associated with the law and order rhetoric of politicians of all political persuasions who are promising to "get tough on crime", the main problems the current system presents for persons accused of criminal offending are **delay** and **cost**. I might say however that "delay" is not necessarily seen by all defendants as a problem and indeed some of those defendants who have been admitted to bail regard delay as the next best thing to acquittal. Similarly some defendants take the view that money is no object as far as their defence is concerned because they are receiving legal aid.

However, as the nation's pre-eminent purchaser of legal services in the criminal arena, Australia's Legal Aid Commissions are only too well aware of the fact that the unit cost of criminal cases is increasing to a level that neither we nor most self funding litigants can afford to bear. This is occurring despite the fact that in most jurisdictions legal aid fee rates have not increased for several years and Commissions are paying barristers and solicitors practising in crime a fraction of the commercial cost of doing the work. The prospect of us maintaining services even at existing levels is very much in doubt given the recent cuts to legal aid funding.

However, just as the community now accepts that the development of new life saving medical techniques has contributed to the increased cost of healthcare there are similar factors driving the cost of criminal justice higher about which there is not a lot we can do in the short term.

These include:

1. The complex nature of some serious fraud and drug prosecutions which arise out of lengthy and sophisticated investigations often involving listening devices and undercover agents or informers. In the past these matters may have gone undetected, but the community has an expectation that these offenders will be brought to account and this comes with an increased cost.

2. A realisation on the part of the judiciary and the criminal bar that in the past the system failed to deliver justice to some accused who were the victims of police impropriety. In my view judges are more likely to exclude suspect or unfairly obtained evidence than was the case in the past so there is therefore now a

greater reliance by defence lawyers on the voire dire as a means of challenging police evidence eg. Ridgeway v R.

3. Appellate courts have imposed additional burdens on trial judges to give detailed directions on a wide range of issues. Furthermore the complexity of the substantive criminal law has increased - "often without the legislature being aware of the difficulties faced by prosecutors in enforcing new laws" - (Dr Chris Corns - Anatomy of Long Criminal Trials p 37).

There are however some factors which are causing delay and contributing to the overall blowout in the cost of the trial process which we can do something about. The great hope for reform in the recent past has been "judicial case management", however it has in the main not succeeded in reducing the cost of criminal cases and in fact has probably had the contrary effect. We have all seen the false economy of Legal Aid and the DPP sending relatively junior practitioners off to listing or pre-hearing conferences with a swag of files. There is no meaningful dialogue between the parties representatives who, when in doubt, are all too ready to set the case down for trial as a means of passing responsibility for the future conduct of the case on to someone further up the chain.

All the players have to be prepared to challenge existing practices and redirect resources if we hope to achieve greater efficiencies in the determination of indictable matters. There have been many comments attributed to both State and Federal politicians who want to be seen to be doing something about the perceived problems. If we do not find solutions acceptable to us, unacceptable measures may be imposed. In my view, **Victoria's Crimes (Criminal Trials) Act 1999** typifies the "sledgehammer" response we will get from the legislators until we start using our collective experience to promote fair and workable reforms. The real risk with "solutions" such as the Victorian Bill is that it may shift the goal posts in favour of the crown without providing any real cost savings in the trial process.

In order to make real progress we need to collectively address the following issues:

a) The declining relevance of the committal as a filtration process for unmeritorious prosecutions.
b) The need for early and comprehensive disclosure by the prosecution of all material relevant to the guilt or innocence of the accused.
c) The need for lawyers with sufficient experience and the authority to make decisions regarding the ultimate resolution of the case to be engaged earlier in the process by both prosecution and defence.
d) The double handling of cases that currently occurs because the committal and trial are treated as a two stage process.
e) The difficulties both parties experience in securing continuity of counsel.
f) The availability of legal aid for indigent accused prior to committal.
g) The disparity between the resources available to the prosecution and the publicly funded defendant.
h) The lack of any real incentive for defendants to enter a plea of guilty at committal (even though they intend to plead guilty in the superior court).
i) The need to identify and confine the issues in dispute at trial.

Possible Solutions

National Legal Aid (the Directors of Australia's Legal Aid Commissions) and the Directors of Public Prosecutions have been working co-operatively over the past two years to identify measures which might contribute to greater efficiencies within the trial process without diminishing the presumption of innocence.

In August last year we settled upon a "best practice model for the determination of indictable charges" this has been circulated widely in the hope that it might inform and promote national debate in an area where there has been significant reluctance on the part of defence lawyers to consider any change.

The Commonwealth Attorney General recently announced the formation of a S.C.A.G. Working Group to consider the potential for reform of criminal trial procedures. The A.I.J.A. is also seeking to continue the impetus for reform that emerged at its conference in Brisbane last July on "**Reforming Court Process for Law Enforcement**" – through the establishment of a number of specialist working groups.

The New South Wales Law Reform Committee looked at the issue of pre-trial defence disclosure[1] and in Victoria, the Criminal Trials Consultative Committee's review of criminal trial proceedings was used by the Victorian Government to justify its Crimes (Criminal Trials) Act. Although it is unclear whether that Act does in fact represent the view of the majority of the Committee.

In my view, by building on our collective experience, the criminal bar, legal aid, the DPP and the courts can, through a redirection of resources and a willingness to change procedures and cultures, contribute to the more efficient determination of indictable matters, without the need for major legislative change.

The NLA/DPP Best Practice Model (a copy is attached) aimed at achieving a change in "legal culture" without diminishing the presumption of innocence.

How might it work in practice?

The following, is an outline of the basic steps in a criminal trial process which would comply with the Best Practice Model.

MAGISTRATES COURT FIRST MENTION

On the first mention the issue of bail should be determined, defendants should be advised to obtain legal representation and to make application to Legal Aid where appropriate. Matters would be adjourned to a committal mention date not usually more than 6 weeks away.

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[1] New South Wales Law Reform Committee Discussion Paper 41 "The Right to Silence" - May 1998.

HAND UP BRIEF

In accordance with the relevant Prosecution Disclosure Guidelines, police would provide the DPP with all relevant witness statements, together with a list of any outstanding inquiries. The Officer in Charge of the investigation would be required to "sign off" on the fact that all material relevant to the guilt or innocence of the accused had been disclosed. The statements would be included in a hand up brief, prepared by the DPP and served on the defence. This should occur no later than 2 weeks before the committal mention date and ordinarily within a month of the defendant having first appeared in the Magistrates Court.

The defence should also be advised of any material which may be outstanding eg. forensic reports such as DNA profiling. In many cases the fact that the brief does not include all the material will not be a bar to the case proceeding through the committal stage. In those cases where the issues are straight forward or which are likely to proceed by way of plea, the police should not be required to compile an extensive brief unless it is necessary. However if it is essential for defence purposes that full disclosure be made it should occur prior to committal.

Within a week of receiving the brief the defence should advise the DPP whether it requires the outstanding evidence before proceeding further and also whether an oral committal is required, together with a list of those witnesses that would be required for cross examination.

COMMITTAL MENTION

This should take place before a specialist Magistrate and be conducted in a similar fashion to the system which currently prevails in Melbourne following recommendations of the Pegasus Committee. [See also section 36 of **Crimes (Criminal Trials) Act 1999** which amends the Magistrates Court Act and provides for "post – committal conferences".]

This mention would have the following features:-

1. Both Legal Aid and DPP would endeavour to ensure that advocates with sufficient experience to deal with the issues that might arise at trial were engaged to deal with the matter at this mention. It would be the task of these legal representatives to actively explore any opportunity for resolving the matter by plea or to limit the matters in dispute. [**N.B.** The evaluation of the Brisbane Committals Pilot Project pointed to the lack of sufficient resourcing by the DPP as a reason for the limited success of the pilot.] [2]

2. Counsel for the DPP should have authority to make decisions on the final disposition of the matter including whether the indictable charge would be discontinued on the basis of a plea to alternative summary charges. Where committal to a superior court is necessary the parties would be expected to

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[2] Criminal Justice Commission "Evaluation of Brisbane Central Committals Project" – August 1996

conduct any negotiations with a view to resolving the matter by a plea at this stage rather than after committal. The facts upon which any plea was to be based would also need to be settled at the committal mention.

3. Where the matter is to be resolved by a plea in the District or Supreme Court, the accused would be encouraged to enter his/her plea at committal. Although the committing Magistrate may still be obliged to commit the accused for trial on a more serious charge it would be expected that the DPP would announce to the court that an indictment would be presented for a lesser charge and the defendant would be expected to announce an intention to plead guilty to that count.

4. Legal Aid grants would be restructured to reflect this change in emphasis and provide the necessary incentive for the defence to finally determine potentially contentious issues prior to trial.

When Sentencing Judges give a real and recognisable sentencing discount to defendants who have indicated a plea of guilty at committal then there is no reason why at least 60% of the people committed to superior courts should not be committed purely for sentence. [3]

COMMITTAL

In cases where the defence requires a part oral committal then the matter would be adjourned to an appropriate time and date for that hearing. In other cases where the matter was to proceed solely by hand up, the committal mention Magistrate would commit the person to the superior court for trial or sentence. Where the defence has given notice of the witnesses required for cross examination those witnesses would ordinarily be available, however the Magistrate should have an overriding discretion to excuse their attendance in certain circumstances. The Magistrate should also have the power of limiting cross examination to ensure that the committal is completed within a realistic time frame. Legal Aid Commissions also have a role to play in placing limits on the length of committals.

Cross examination of witnesses at committal can give both sides an excellent opportunity to assess the strengths and weaknesses of their respective cases. In jurisdictions such as the Northern Territory, disorganised, rather than organised, crime is our daily fare. In all too many cases the accused and most of the witnesses are significantly intoxicated. Often, it is only after an oral committal that the defence and prosecution get any real inkling as to what in fact occurred.

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[3] Damian Bugg QC "Committal Proceedings" A.I.J.A. Case Management Seminar Sydney 7/3/98

The Magistrate would use the appropriate test for the particular jurisdiction to determine whether to commit the defendant for trial.[4]

Regardless of whether the matter has proceeded purely by way of hand up, committal for sentence, or oral committal, the defendant would be committed to appear at a preliminary mention in a District or Supreme Court, either later that same day (possibly by video conferencing facilities at the Magistrates' Court) or at latest **48 hours after committal** at which time the indictment would have been filed.

DISTRICT/SUPREME COURT PRELIMINARY MENTION

As previously indicated this should take place no later than 48 hours after committal. The procedure should be available whereby an indictment can be filed electronically and if necessary the hand up brief and committal transcripts could be made available for the superior court mention. A represented accused should not necessarily have to appear personally at this mention and his formal arraignment could be subject to some other procedure.

This mention should have the following features:

(a) It would be conducted before a Listing Judge possibly by a specialist Committal Magistrate who could perform the joint role of a Supreme Court Judicial Registrar.

(b) It should be able to be held before or after normal court hours so that when necessary, both parties can still have appropriate counsel involved.

(c) It should also be able to be conducted by telephone conference in appropriate cases.

(d) The same counsel that appeared at committal would generally be expected to appear at this mention.

(e) If the matter was to proceed as a plea an appropriate date and time would be fixed at this meeting.

(f) If the matter is to proceed to trial, the parties will be asked whether there are any pre trial issues to be resolved prior to impanelling a jury eg. admissibility of a confession or claim of privilege in relation to a subpoena etc. If a voir dire is necessary then both counsel appearing at the mention would be expected to be in a position to deal with that matter as soon as it could be listed and the Listing Judge/Registrar would fix a convenient date well before the trial, for determination of these preliminary issues.

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[4]The difference in Committal rates between those jurisdictions which have a "sufficiency of evidence" test and those which don't, doesn't justify the effort involved in changing the test.

Once those preliminary matters had been determined the matter would be allocated a further preliminary mention.

(g) In complex matters, cases could be assigned to a particular Judge for ongoing active case management.

(h) Where there are no pre trial issues, or these had been determined following a voir dire, the prosecution should confirm that all relevant material has been disclosed to the defence. The prosecution would be precluded from adducing any additional evidence at trial, other than that which had been disclosed, unless it met the "fresh evidence test".

(i) The defence would then be required to advise which witnesses were not required for trial and what facts were admitted. If the accused unreasonably failed to admit facts which were not ultimately in contention then the court would be able to take that into account in any sentence ultimately imposed on the defendant. (See s.380 Criminal Code NT)

Where the defence is prepared to make appropriate admissions in relation to otherwise disputed facts the prosecution should not be entitled to call witnesses to testify to those facts unless the evidence is otherwise relevant.

(j) Where the prosecution has fully disclosed all relevant material, counsel for the accused should be asked to disclose the essence of the defence and the facts in dispute in order that the issues alive at trial might be further confined. Where the defence responds, the prosecution would be required to confirm whether there was any further material possibly relevant as a consequence of defence disclosure.

(k) Both counsel should then be in a position to provide a fairly accurate estimate of the duration of trial and it would be fixed for hearing on a date which would generally suit the availability of both counsel.

TRIAL/PLEA

It is imperative that where a plea of guilty has been entered at the committal stage the sentencing court imposes a penalty which can be objectively seen to be below that which its criminal gravity would otherwise demand (see Hellings v R., Malcolm CJ, Unreported CCA Supreme Court of WA 24th August 1997). There will be those rare cases, where this will not be possible, especially where matters carry a mandatory minimum penalty. In most jurisdictions existing legislation should not preclude a sentencing Judge from applying a discount in respect of early pleas, however if this does not follow through in practice then it will not be possible to get defence lawyers to continue to encourage their clients to enter a plea at committal.

After the Crown's opening at the commencement of a trial the defence would be required to provide a defence opening in order to indicate those matters that are not in contention and to focus the jury's minds on the real issues. As well as assisting

the jury, a compulsory defence opening should have a "flowback" effect in favour of encouraging appropriate pre-trial defence disclosure.

APPEALS

There would be a condition on the grant of legal aid that following conviction and sentence, counsel who was engaged in the trial would be required to identify and certify as valid (not arguable) any proposed grounds of appeal as well as providing a brief outline of the argument in support of the grounds with transcript references where applicable.

Such practice would assist legal aid in determining whether to extend aid to cover an appeal and should reduce the numbers of unrepresented appellants. Government could also consider legislating to dispense with the need to obtain leave to appeal where trial counsel has provided the necessary certificate.

CONCLUSION

As indicated earlier in this paper, most crime in the Northern Territory is of the **disorganised** variety.

The overwhelming majority of defendants are all too ready to assist the police in securing their own conviction through their participation in a video taped police interview. If the matter is to be defended at trial then the basis of the defence is usually apparent from the record of interview.

Defence lawyers in the Northern Territory are rarely presented with the mixed blessings of a "no comment" record of interview so the issue of pre-trial defence disclosure which is raising the testosterone levels of practitioners down south is not all that "sexy" in the far north.

The earlier identification of pleas is the real issue here. If we can get eighty percent of those defendants, who ultimately plead guilty to enter their plea at committal then the current delays with trial dates in the Supreme Court will be significantly reduced. There will be flow on cost savings for both legal aid and the DPP. More importantly, the earlier resolution of cases may go some way to restoring the community's faith in our system of criminal justice.

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