QUEENSLAND LAW SOCIETY ACCESS TO JUSTICE AND PRO BONO CONFERENCE 2010

THE REFORM AGENDA AND THE IMPACT ON ACCESS TO JUSTICE

THIS PAPER IS DEDICATED TO THE MEMORY OF JIM KENNAN SC

1. Introduction

Access to Justice is a phrase that captures many different issues that regularly confront the criminal justice system. I will confine my comments to the criminal justice system, not because the civil justice system is not faced with serious Access to Justice issues. I have only been asked to consider proposed reforms to the criminal justice system. The issues include -

- Legal Aid funding
- Unrepresented litigants
- Inadequate or under resourced legal representation
- Discrimination against indigenous litigants
- Equality of representation between the Prosecution and Defence
- Serious delays in the administration of criminal justice
- Inadequate funding of courts and the judiciary
- The role of victims in the administration of criminal justice
- Pro bono representation and our responsibility as lawyers to work pro bono

No doubt many other issues can be captured under this heading, but it is plain that the administration of criminal justice in Australia is faced with serious problems that are directly or indirectly related to the issues that I have identified. It also plain that for a variety of reasons, the Commonwealth and State governments have failed to increase legal aid funding in response to the pressure on the criminal justice system.

In Victoria more people are being imprisoned for longer periods.

In 1985, 55 persons for every 100,000 were in prison in Victoria. That figure is now 84 persons. On the 3 August 2010 it was reported in the Melbourne papers that the metropolitan women's prison, the Dame Phyllis Frost Centre currently had 264 inmates, which is 4 times it's operating capacity. Portable beds and units are being used to accommodate the prisoners. 4268 men were also in the State's prisons - a record number.

Delays in the disposition of criminal trials in the County Court of Victoria are at record levels and there are over 600 criminal cases awaiting hearing in the

Victorian Court of Appeal. The average delay in the disposition of an appeal against sentence is 2 years. The heads of jurisdictions repeatedly call for more judges to assist in reducing the backlog.

Governments of all persuasions embrace the law and order lobby. Bidding wars occur between political parties as to who is tougher on crime. Longer prison sentences are continually called for.

I recently conducted an appeal against sentence in the Victorian Court of Appeal for a young man sentenced to 6 years imprisonment with a 3 ½ year minimum for a serious assault. He was 21 at the time of the offence, was extremely intoxicated and the offence had taken place amidst an affray involving another 15 or so young men. He had no relevant prior criminal history and had not been in prison before. In conference his father gave me a blog page from *The Herald Sun* that had taken place on the day of his sentence. The sentiments expressed by the bloggers were extremely disturbing.

It is hardly surprising that in this social and political context, legal aid funding and access to justice for persons charged with serious criminal offences is a not a high government priority.

We cannot expect that this will change in the foreseeable future and accordingly our responses to proposed changes to criminal procedure need to be considered in the context of more efficient trials thereby allowing the legal aid dollar to go further both in numbers of persons represented and the availability of legal aid funding for experienced criminal practitioners for persons charged with serious criminal offences, particularly homicide.

2. Defence disclosure

In Victoria, there are a number of procedures that operate at trial level that are designed to assist in the early identification of issues before a trial commences. These procedures are now contained in the *Criminal Procedure Act 2009* which became operational on 1 January 2010.

Prior to the enactment of this legislation, pre trial defence disclosure in the sense of identifying issues had been in place for many years and routinely occurred in the County Court by operation of the *Crimes Criminal Trials Act.* The relevant procedures were not followed in the Supreme Court although Defence Responses (in the form of an address) to the Prosecution Opening Address were routine in both courts.

The current provisions in the *Criminal Procedure Act* provide as follows –

- 28 days prior to trial the Prosecution file and serve a Summary of Prosecution Opening and Notice of pre trial admissions
- 14 days prior to trial the Defence is required to respond to the Opening and the Notice of Admissions
- The defence response must identify the acts, facts, matters and circumstances with which issue is taken and also identify the facts that are admitted without the need for formal proof
- At trial, following the Opening Address by the Prosecution the accused if represented by counsel must present to the jury the defence response although this need not be a verbatim reading of the documents.

Equivalent procedures have been in place in Victoria since 1999 and no doubt assisted in the efficient conduct of criminal trials. There still remains however, reluctance amongst practitioners to commit their client to a specific defence and many responses keep "all options open". Many defence counsel hope something will turn up in the running of a trial. In my view, this is both misconceived and unhelpful.

Currently there are no VLA incentives for defence counsel to respond in a detailed way to the Summary of Prosecution Opening or Notice of Admissions. Funding in Victoria is not linked to the level of defence disclosure, although funding is often limited in duration.

The renowned English silk (and mediaeval historian) Jonathon Sumption QC stated in an interview in *The Lawyer* that "In most cases 99% of the facts are irrelevant, either legally or factually, or both. The art of advocacy is to strip those facts away. When you're down to the last 1% the answer should be obvious". He is of course a civil lawyer but in many criminal cases, in my opinion, this proposition holds true. Yet we are scared to embrace it. Sumption is known for his meticulous preparation and capacity for hard work. He no doubt drills down to the essential issues in his cases.

I believe that it is essential for defence lawyers to have a clear path that their case will follow before a trial begins. If that is done, pre trial disclosure and defence openings are simply an opportunity to demonstrate to the tribunal of fact that there is a clear answer to the prosecution case.

A Defence Response, which is not an Opening Address, is a very useful tool in the armoury of defence counsel. It is an invaluable opportunity for defence counsel to –

- Introduce themselves and the defence team to the jury.

- Outline the issues in the trial that the jury will have to consider. The defence case concept can be conveyed to the jury in this way.
- In the case of multiple accused, the Defence Response may be an opportunity to explain to the jury the importance of separate trials.
- Explain the trial process in a way that is connected to the issues; for example the process of cross examination and how an issue such as identification may be considered by the jury.
- Identify who the key witnesses are from the defence perspective and why the jury should approach that evidence with caution or indeed embrace it. This carries the obvious advantage of placing cross examination in context.
- Confine the prosecution case. I explain to the jury the way the prosecution case is put and emphasise that is the case the accused is called upon to meet. If this changes when the prosecution closes it's case, this disadvantage can be highlighted if it is forensically advantageous to do so.

The procedure of Defence Responses in Victoria does not involve any derogation to the presumption of innocence, the burden of proof or the privilege against self-incrimination. In the event that the defence elects to put all facts, matters and circumstances in issue it is entitled to do so. The defence is required to give notice of any expert evidence it proposes to call, but having regard to the role of an expert witness in the court process, this would appear to be a reasonable requirement.

The process of Defence Responses both in writing pre trial and orally at the commencement of the trial increase trial efficiency and thereby the availability of legal aid funding and are also an important tool in the hands of well prepared defence counsel.

The proposals in the Moynihan Review regarding defence disclosure will, in my opinion, improve trial efficiency and thereby access to justice.

3. Jury Directions

The nature and ambit of directions to be given by a trial Judge to a jury is a matter of increasing debate both in the context of the requirements placed on the judge and jury and at the appellate level.

To say that it is a desirable reform that there be a degree of defence disclosure to identify the issues between the defence and the prosecution is not however an argument in support of those issues determining the directions that a judge is required to give to a jury. The identification of the issues in a criminal trial from a defence perspective will be based on counsel's instructions.

The recommendations of the QLRC that the parties inform the judge prior to the summing up what directions are required and that the judge is relieved from giving any direction that is not so required is a process that has not been adopted in the *Criminal Procedure Act* in Victoria. Section 238 of the Act provides that "the trial judge must give directions to the jury to enable it to properly consider its verdict". This accords with the constitutional responsibility of the judge to ensure that the accused receives a fair trial according to law.

In *Weiss v The Queen* the High Court explained that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence strictly followed. But the court also observed that this is not an unqualified right.

Where an error occurs at trial either by the wrongful admission of evidence or misdirection by the trial Judge, an appellate court will be required to consider whether on the whole of the record of the trial, including the guilty verdict, no substantial miscarriage of justice occurred. There is no single universally applicable description of what constitutes "no substantial miscarriage of justice", but the High Court has recognised that there are cases where a procedural error may constitute a miscarriage of justice in a case where the appellate court is satisfied of the guilt of the accused.

In *Wilde v The Queen* the High Court held that it would not be open to an appellate court to conclude that no substantial miscarriage of justice had occurred where the irregularity that occurred was a departure from the essential requirements of the law going to the root of the proceedings.

The QLRC proposals also provide that an appellate court in considering whether or not a substantial miscarriage of justice has occurred in a case where a direction has not been given to a jury, can take into account the fact that a particular direction was not requested by counsel. That is, the court can take into account the decision by counsel in respect of jury directions in determining whether no substantial miscarriage of justice has occurred. This is a quite different proposition to an appellate court taking into account counsel's failure to take issue with an aspect of the judge's directions to the jury.

The principles in *Weiss* and *Wilde* are fundamental to the preservation of the principle that every accused is entitled to a trial according to law. Whilst counsel will generally play an active role in the determination of the directions a jury should receive, the primary responsibility for ensuring that appropriate directions are given resides with the trial Judge. It is for the trial Judge to identify on the available evidence the directions that are required in a particular case.

In a climate of limited legal aid and representation in serious criminal trials being carried out by inexperienced practitioners, any proposal that qualifies the responsibility of trial Judges is fraught with danger and may lead to an increase in retrials following conviction.

In Victoria, it is now only in exceptional cases, that persons standing trial for murder are represented by senior counsel. Generally however, the prosecution is represented by senior counsel and often senior counsel assisted by a junior. My understanding from discussions with counsel in Queensland, is that the persons charged with murder in Queensland are generally defended by junior counsel. The reason for this is the same in both states; legal aid cannot afford to brief senior counsel. In Victoria, in the Benbrika trial only 3 of the 12 accused who stood trial in the Supreme Court for extremely serious and complex terrorist offences were represented by senior counsel.

The QLRC recommendations regarding jury directions are unlikely to increase trial efficiency or improve access to justice. It is also unreasonable to expect defence counsel (experienced or otherwise) conducting a trial on instructions to also have the responsibility of determining the appropriate directions the trial judge ought to give to the jury.

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A number of the issues discussed in this paper were raised by Jim Kennan SC at a conference in Melbourne shortly before his death.