Criminal Lawyers' Association

REFORMING COURT PROCESS FOR LAW ENFORCEMENT - NEW DIRECTIONS

By John Tippett, President, CLANT

What are the problems from the Defendant's perspective?

This is an extract from a paper that was presented by Richard Coates - Chairman, National Legal Aid at the recent AIJA conference in Brisbane.

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", one of 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.

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.

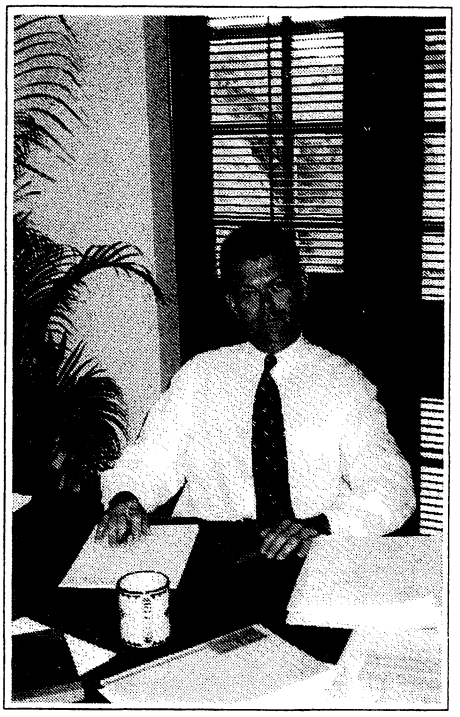
These include:

1. The complex nature of some serious fraud and drug prosecutions which arise out of lengthy and sophisticated investigations. In the past these matters would 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. I'm 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;

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 be 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 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 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

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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);

j) The need to identify and confine the issues in dispute at trial.

POSSIBLE SOLUTIONS

Some jurisdictions are dealing with these issues better than others and I believe by building on that experience Legal Aid, the criminal bar, the DPP and the courts can, through a redirection of resources and a willingness to change procedures contribute to the more efficient determination of indictable matters, without the need for major legislative change.

Whilst acknowledging that each jurisdiction has particular local issues with which to contend, the Directors of Public Prosecutions and National Legal (The Directors of Legal Aid Commissions) have been working co-operatively to identify measures which will contribute to the more efficient resolution of indictable charges without diminishing the presumption of innocence. We are in the process of finalising a document which identifies elements of a "best practice" approach to dealing with indictable crime and this will be circulated to the profession for comment over the next few weeks.

CONSUMER REPRESENTATIVE POSITIONS

- **Council of the Financial Services Complaints Resolution Scheme**
- **Board of Directors of the Life Insurance Complaints Service Ltd**

Individuals interested in either position must submit a written nomination.

Organisations who nominate individuals must submit a written nomination covering that person and must also obtain the agreement of the individual being nominated.

Duty statements can be obtained from the Law Society or by contacting Sue Barrett on PH: 02 6213 6122.

The closing date for the nominations is:

Friday 21 August 1998

ADDITIONAL JUDGE APPOINTMENT

The Hon. Justice H.W. Olney

The Hon. Justice Howard William Olney has been appointed additional Judge of the Northern Territory Supreme Court and brings a wealth of experience to this important position.

Born in Perth, Western Australia, Justice Olney later studied Law at the University of W.A. In 1957 Justice Olney was admitted to practice as a Barrister and Solicitor of the Supreme Court of W.A.

Before the appointment of Queen's Counsel, Justice Olney was a Stipendiary Magistrate at Carnarvon, WA and later joined the independent bar in Perth, WA.

In the last 20 years Justice Olney has been a Supreme Court Judge of WA, Federal Court Judge in Australia and Judge of the Family Court.

Justice Olney has had vast experience in a number of tribunals; Presidential Member of the Administrative Appeals, Deputy President, Federal Police Disciplinary and National Native Title.

In March this year Justice Olney was appointed Aboriginal Land Commissioner. Justice Olney had previously served as Aboriginal Land Commissioner for three years from 1988 to 1992.

PRESIDENTS COLUMN

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WELCOME JUSTICE OLNEY

The Law Society welcomes the appointment of Justice Olney as an additional Judge of the Supreme Court of the Northern Territory. Justice Olney is well known to the Northern Territory practitioners as a Judge of the Federal Court and as Aboriginal Land Commissioner pursuant to the Land Rights Act. His Honour has had a very distinguished career which commenced in 1957 in Western Australia.

LAW REFORM WORKING PARTY

The Law Reform Working Party (NT) met for the first time on Monday 13 July 1998. The Working Party is headed by the Chief Minister and Attorney General. It is anticipated that the Working Party will be looking at a wide range of law reform. If there are any particular areas of law reform that practitioners believe should be considered by the Working Party would they please advise Jim Campbell or myself.