From the D.P.P.

No Bills

It seems to me that there are some misconceptions abroad about "no bills". It might be helpful for criminal practitioners to know what happens when a "no bill" application is made to the New South Wales DPP. It might also save some time and energy for my officers.

It is not a secret or mystical process. Section 7(2) of the *Director of Public Prosecutions Act* 1986 gives to me the functions, inter alia, of determining that no bill of indictment be found or that no further proceedings be taken against a person who has been committed for trial (or sentence).

An application may be made prior to committal proceedings or between committal and trial. Once an accused has been put in the charge of a jury I have no power to "no bill".

There may be more than one application in a matter. They are most commonly made by solicitors, although they are sometimes made by counsel or by unrepresented accused. They must be made in writing. Oral submissions (in person or by telephone) will not be acted upon. Statistics are kept on such applications and are published in the Office's Annual Report.

The procedure is straightforward. A letter addressed to the DPP identifying the matter and setting out the reasons why the proceedings should be discontinued (or perhaps a bill found for a different charge) is all that is required. The earlier in the prosecution process the application is made, the better.

In general: the letter goes to the solicitor handling the matter who writes a report and expresses a view. The file goes to a Crown Prosecutor who writes another report and makes a recommendation to me. The file then goes to a Deputy Director who makes a further recommendation to me. It may be considered by others along the way. It then comes to me for decision, which is final.

An application for discontinuance of proceedings made prior to committal for trial or sentence is dealt with as follows: the solicitor handling the matter writes a report and the application is usually determined by a Deputy Director or a Crown Prosecutor (if the matter is being handled by one of my regional offices, except where the matter involves a death).

There is no secret about what all these people are looking for. The questions being asked along the way are:

1. Is the evidence sufficient to establish each element of the offence? If not it will be directed that there be no further proceedings.
2. Can it be said that there is no reasonable prospect of conviction? If it can, then it will be directed that there be no further proceedings.
3. If that cannot be said, are there discretionary considerations such that it would not be in the public interest to continue the proceedings? (Such considerations are set out in the Prosecution Policy and Guidelines, a public document. It is presently being reviewed.)

Such tests are also applied when considering the appropriate charge/s.

Unless you consider that one of those questions can be answered in your client's favour, it will be a waste of time and of your client's money to make an application. You may assume that if a matter is proceeding at all, it has been carefully screened by a legal practitioner. Indeed, "no bill" applications are initiated frequently from within my Office.

I regard hopeless applications, one-paragraph requests (except in obvious cases) and repeated applications where there are no new considerations as a total waste of everybody's time, effort and money.

Legal and factual submissions on matters that may have the effect of weakening the Crown case should be included. If there is evidence in support of a defence, it should be put (preferably) in the form of a statutory declaration or expert's report and sent in. If you are not prepared to do that, your client might have to take his or her chances at trial.

I am not interested in clogging up our "Rolls Royce" system of criminal justice with hopeless cases. The community cannot afford it. I will always have to exercise judgment and if you can satisfy the tests described above on a rational basis, then the proceedings will be terminated. If you cannot, don't bother trying to bluff me or appealing to sympathy or irrationality.

Pleas of Guilty

There are two Crown Prosecutors appearing regularly in arraignment hearings in the District Court at the Downing Centre (for the time being, Alex Dalgleish QC and Terry Wolfe). When they appear in a matter they will be thoroughly familiar with it. If it is adjourned, they will stay in it.

Those Crown Prosecutors have wide discretion to accept pleas of guilty to the indictment or to appropriate alternative counts and will assist an accused to obtain all due credit for an early plea.

In that regard the role of sentence indications should be clearly understood. In *R v Hollis* (unreported, CCA, No. 60564/94, 3.3.95) Hunt CJ at CL said:

> "A plea of guilty entered after a sentence indication, however, should not be thought to disclose any such contrition at all. What an accused is saying when he seeks a sentence indication is that, unless I receive a sentence indication which is acceptable to me, I will plead not guilty and I will put the complainant [this being a sexual assault case] to that pain and embarrassment. That is no contrition at all. It is seeking a result which is expedient only to the accused himself."

Reference should also be made to the now reported cases of *Warfield* and *Glass* amongst others, the dicta in which have been drawn to the attention of - and are occasionally referred to by - the judges of the District Court.

I urge all Criminal practitioners to be familiar with their matters by the time they first come for arraignment. That is the time at which, if you talk to the Crown, you may be able to do the best for your client.

Judge Alone Trials

There has been a practice in the past of the Crown consenting almost as a matter of course to elections by accused to be tried by a judge alone under s. 32 of the *Criminal Procedure Act* 1986.

That practice has changed. I take the view that the requirement for consent by the prosecution under s.32(3) requires the question to be considered case by case and therefore it must be given or withheld on a basis that is informed, rational and directed towards the doing of justice.

To assist in preventing such decisions from becoming arbitrary I have furnished guidelines as to the giving of such consent.

Copies of the guidelines have been provided to professional bodies concerned and to the courts.

Paragraph 11 provides that in cases of uncertainty a prosecutor should refer the matter to a Deputy Senior Crown Prosecutor, the Senior Crown Prosecutor or my Chambers. That is not an invitation to the defence to "appeal" a prosecutor's decision to any of those named. The decision is ultimately made in the exercise of the prosecutor's discretion.

Evidence of Recollections under Hypnosis (and EMDR)

The Director of Public Prosecutions, has forwarded the following advice to the Commissioner of Police.

As a result of the NSW Court of Criminal Appeal's decision in *R v Tillot & Ors* on 1 September 1995 it has become essential that your investigators be aware of important procedural guidelines that should be complied with if the evidence of witnesses who have undergone either hypnosis or EMDR therapy for whatever purpose is to be admitted in court.

The guidelines for hypnosis, now also applicable to EMDR, are not in themselves laid down as a test of admissibility - or a requirement - but failure to comply with any of the following guidelines will give rise to a high probability that the court will decline to admit such evidence, whether proffered by the Crown or from a witness for the defence. My officers will have regard to the guidelines when determining whether or not such evidence should be tendered on behalf of the Crown.

1. The hypnotically induced evidence must be limited to matters which the witness has recalled and related prior to the hypnosis - referred to as "the original recollection". In other words, evidence will not be tendered by the Crown where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of that restriction is that only detail recalled for the first time under hypnosis or thereafter will be advanced as evidence in support of the original recollection.
2. The substance of the original recollection must have been preserved in written, audio or video recorded form.
3. The hypnosis must have been conducted with the following procedures:

(a) the witness gave informed consent to the hypnosis;
(b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;
(c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and
(d) the hypnosis was performed in the absence of police, the prosecution and the accused, but was video recorded.

All of these criteria are capable of being met and are similar in terms to those recently determined by the Queensland Director of Public Prosecutions.

The fact that a witness has been hypnotised will be disclosed by the prosecution to the defence and all relevant transcripts, recordings and information provided to the defence well in advance of trial in order to enable the defence to have the assistance of their own expert witnesses in relation to that material, if desired.

Potential unreliability in the testimony of a witness (which is a separate issue) will ultimately have to be resolved on a case by case basis but (in the case of a prosecution witness) the onus lies on the prosecution to prove that it is safe to admit evidence of this character. That consideration is likely to be critical and compliance with the guidelines is of paramount importance. With this in mind, a potential witness should not be considered for hypnosis until all other reasonable avenues of inquiry have been exhausted.

Tillot has determined further that the testimony of a witness who has undergone the psychotherapeutic procedure known as EMDR (Eye Movement Desensitisation and Reprocessing) presents the same or significantly the same dangers as that deriving from hypnosis. Accordingly, the guidelines and considerations referred to above in relation to hypnosis will apply, as I have previously indicated, to evidence given following EMDR.

These considerations do not apply to the evidence of an accused person, but they do extend to witnesses for the defence.

I would be grateful if you would inform all investigators as early as possible. I have provided this information to my officers and I am sending copies of this letter to the Law Society and the Bar Association so that their members may be made aware of the approach that will be taken to this evidence in future. ❑