Misconceptions about the role of defence lawyers

By Dina Yehia

While it may be understandable that some members of the general public sometimes confuse the reality of the work defence lawyers in New South Wales carry out with that of American defence lawyers on the 'Practice' or 'Law and Order', it was thought that people within the profession understood the role of defence lawyers.

Not so. The recent remarks made during the Sir Ninian Stephen Lecture at Newcastle University reveal that misconceptions exist even within the profession about the role of those defending people accused of criminal offences.[1] The text of the lecture includes a reference to some in the criminal justice system who suffer from a 'kind of misplaced altruism that it is somehow a noble thing to assist a criminal to evade conviction'. This accusation appears to be levelled at 'some' defence lawyers.

The remark is of course both patronising and offensive. But more importantly it demonstrates a dangerous distortion of the presumption of innocence and the onus of proof. The accusation is based on the false premise that just because an individual is charged with a criminal offence they become 'criminals' attempting to evade conviction.

Fortunately, that is not the approach taken in our legal system. It is precisely to ensure against such impermissible reasoning that trial judges all over NSW are careful to direct juries about the presumption of innocence and the onus of proof.

What are potential jurors now to make of the accusation contained in the text of the lecture:

An accusation that some in the criminal justice system engage in a conspiracy to assist people they know to be 'criminals' to evade conviction? How do potential jurors reconcile that view with the directions they are given by judges?

It is also regrettable that the lecture did not take the opportunity to correct the erroneous perception that the 'pendulum has swung rather too far in the direction of the rights of the accused'. Instead, some of the remarks contained within it perpetuate this misconceived view.

For instance, there was no mention during the lecture of the initiatives taken by the New South Wales Government to protect the position of complainants. A number of legislative amendments in recent history have been directed toward assisting complainants by introducing measures to reduce embarrassment and emotional trauma in the trial process. For example:

- Defence counsel cannot cross-examine complainants in sexual assault trials about past sexual experience except in some limited circumstances and only with the leave of the court.[2]
- Defence lawyers generally cannot access the counselling notes of sexual assault complainants.[3]
- They cannot obtain access to files relating to victims' compensation claims.[4]

Our community expects the diligent application of the processes that protect against wrongful conviction. Our community expects the legal system to provide a process whereby allegations made by the state are tested.

- Complainants under the age of 16 give their evidence by way of closed circuit television and their evidence in chief is presented by way of their initial video taped account to police.[5]
- Unrepresented accused are prevented from personally cross-examining sexual assault complainants.[6]
- The state government has put together the 'Sexual Offences Task Force' to consider 'reform' to the process of dealing with allegations of sexual assault including the presentation of the evidence of complainants by way of transcript in re-trials.

By simply making no mention of these initiatives the lecture suffers from the very same limitations it accuses defence lawyers of suffering from, namely presenting an unbalanced and incomplete view.

The *New South Wales Barrister's Rules* require that defence counsel protect their client's interest to the best of the barrister's skill and ability.[7] Their task necessarily involves making appropriate applications for the exclusion of evidence. That task is of course to be carried out in a manner that is not inconsistent with the barrister's duty to the court.

Decisions by trial judges to exclude evidence are not taken lightly and, in my experience, are only taken in circumstances where there has been a serious impropriety or, where to allow the evidence would lead to a miscarriage of justice.

Such decisions are not 'decisions in favour of the defence and against the community'.[8] Our community expects the diligent application of the processes that protect against wrongful conviction. Our community expects the legal system to provide a process whereby allegations made by the state are tested. Indeed our community would accuse us of negligence if this were not done with skill and determination.

Defence counsel test evidence in a number of different ways. One way is to challenge methods used by investigating police. Another is to object to 'expert' evidence. For instance, there is a misconception about the evidentiary value of DNA evidence. A misconception, which was demonstrated by remarks made during the Sir Ninian Stephen Lecture.

During the lecture DNA evidence, in certain circumstances, was referred to as proof of guilt 'beyond any shadow of a doubt'. Of course in certain cases DNA evidence is compelling evidence against an accused. However elevating the science

to evidence beyond a shadow of a doubt points to a misunderstanding of the science. Indeed some judgements of the Court of Criminal Appeal have referred to this misconception as 'the prosecutor's fallacy'.[9] The expression refers to the error inherent in treating DNA evidence as evidence that the accused is the person who committed the offence as opposed to the proposition that an accused, in a given case, cannot be excluded as a suspect.

That DNA evidence is not infallible was demonstrated in the Western Australian decision of *R v Bropho* [2004] WADC 182. That was a case involving an allegation of sexual assault against the accused. The accused was Aboriginal living in an Aboriginal 'camp' just near Perth. The assault was alleged to have taken place some years prior to the complaint. As a result of the incident the complainant became pregnant.

DNA evidence was being relied upon as strong circumstantial evidence to support the proposition that the accused was the father of the child and therefore the sex offender. An initial report was provided by the Western Australian equivalent to the Division of Analytical Laboratory, which expressed the opinion that the probability of paternity was 99.999%.

A paternity index of one in 233,000 was provided as well. In other words, it was being asserted by the prosecution that the DNA results established that it was 233,000 more likely that the accused was the father than a randomly chosen member of the public.

Aboriginal elder Robert Bropho outside the West Australian Parliament on 20 June 2003, alleging a government conspiracy in sexual assault charges against him. Photo: Ian Munro / News Image Library

Defence counsel sought a second opinion from experts outside Western Australia. As a result of the litigation it became clear that the use of the product rule in calculating the statistics could produce misleading evidence in circumstances involving an Aboriginal person. When there is a sub-population that has not randomly bred, the product rule will not comply with the Harvey Weinberg equilibrium.

The objection to the DNA evidence was successful and as a result the National Institute of Forensic Medicine Standing Committee on sub-population data was convened. Part of their brief is to investigate whether an appropriate mathematical formula can be used to compensate for the effect of sub-population on the product rule.

And to think that without the challenge to the DNA evidence by some 'tricky' defence lawyer in Western Australia we may have continued to rely on statistical interpretation of DNA evidence which is not necessarily reliable in cases involving sub-populations.

The *Bropho* decision is only one of many cases which demonstrate the need for defence lawyers to continue to fulfil their role of challenging and testing evidence with vigour and determination.

It is the prosecutor's role to fully disclose all material relevant to the guilt or innocence of an accused. It is also the prosecutor's role to present their case objectively, dispassionately and in a balanced way. Those who do should be applauded and encouraged.

It is not the role of a defence lawyer to prosecute. It is no part of their role to moralise. It is their role to diligently protect against the prospect of wrongful conviction. Perhaps it is apt to remind ourselves of the full text of Rule 16 of the *New South Wales Barrister's Rules:*

> A barrister must seek to advance and protect the client's interest to the best of the barrister's skills and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these rules'.

That we as defence lawyers are sometimes unpopular with members of the public is a burden we necessarily bear. However, it is highly regrettable that such burden was added to in and by a lecture that mis-characterizes the proper role of defence counsel and the operation of the criminal onus of proof.

1 'Living Within the Law', the 2005 Sir Ninian Stephen Lecture, delivered by Margaret Cuneen at the University of Newcastle, 10 March 2005.

2 *Criminal Procedure Act 1986*, s293

3 *Criminal Procedure Act 1986*, ss295-306

4 *Victims Support and Rehabilitation Act 1996*,:s84.

5 *Evidence (Children) Act 1997*, s9.

6 *Criminal Procedure Act 1986*, s294A

7 Rule 16

8 'Living Within the Law' 2005 Sir Ninian Stephen Lecture

9 *R v Keir* [2002] NSWCCA 30.