"Feeding the Chooks"

The first of the Public Defenders' Seminars for 1994 was held on 18 May 1994. The topic was "Feeding the Chooks". For those of us who were not sufficiently familiar with the phraseology of a recently retired northern politician, the seminar was given a subtitle:

"Should the media be given information by the Prosecution and the Defence in a criminal matter?"

The Crown case was presented by Lloyd QC, Senior Crown Prosecutor. The defence case was presented by Flood, Public Defender. A view of the relevant ethics requirements was given by McDougall QC, Ethics Convenor.

The seminar was chaired by Bowne, who brought to it not only her renowned sense of fairness and impartiality (demonstrated by maintaining the strictest of silence whilst first Lloyd and Flood, and then Lloyd and members of the audience, engaged in an at times heated discussion) but the significant benefit of a reptilian career prior to her admission to the Bar.

The views expressed by the participants were as follows:

1. Lloyd - the Crown View

When turning my mind to the topic from the viewpoint of a Crown Prosecutor, I've tried to bear in mind three basic principles of the criminal justice system. These are:

(a) unless good reason to the contrary be shown, the courts should be open to all;
(b) the press should have absolute freedom to report all that goes on in the courtroom, subject to the rules of defamation; but
(c) there is a significant public interest, which required recognition, in the protection of the names and reputations of the innocent victims of crime and of informers.

The basic premise and the Crown view is that the press should have access to all evidence. This includes transcripts, documentary exhibits, photographs, videorecorded interviews, "walk throughs" where the criminal re-enacts the crime for the benefit of police, and most photographs except for those that are particularly gruesome or are likely to cause distress to the victims of crime and their relatives, or offence to the public. There must be some good reason to justify denying the access. This applies to evidence tendered by the Crown and by the accused.

The reasons why the press should not have access to, or should not allowed to publish or disseminate, information relating to a trial, fall within some well-known and oft-quoted categories, including (and this is not an exhaustive list):

(i) proceedings held in camera in various sexual assault matters listed in section 77A of the *Crimes Act*;
(ii) incest prosecutions - section 78F of the *Crimes Act*;
(iii) the provisions of section 578 of the *Crimes Act* forbidding publication of evidence or part thereof in various cases (mainly sexual assault cases);
(iv) the inherent jurisdiction of every court to exclude the public (or to prohibit publication) if it is necessary so to do for the due administration of justice: *R v Lewes Prison Governor* [1917] 2 KB 254; *R v Hamilton* (1930) 30 SR (NSW) 277;
(v) protection of the names of informers;
(vi) the exclusion of young children from the court whilst particularly horrific or explicit evidence is being given;
(vii) non-publication of material so as not to prejudice a fair trial.

The reason for permitting access, and publication, is that everyone is entitled to see justice at work and how court proceedings are run. As a corollary, the press should be entitled to report proceedings. It is only in this way that confidence in the judicial system is maintained. It is an important precept, which must be remembered, that "justice must not only be done, but must be seen to be done".

The publication of court proceedings, including in relation to sentencing, will act as a deterrent to others from similarly offending.

It is important to explain to the public why a particular accused was dealt with in a particular way: for example, why a charge of murder was reduced to manslaughter upon the tender of psychiatric reports. Likewise, it is important to explain a reduced or lenient sentence. Publication will assist in this and will educate the public as to the workings of the legal system.

The publication of videorecorded records of interviews will show fair-minded and balanced police interrogation methods. It will educate the public as to the fairness of police and lead to increased confidence in convictions based on confessions.

Medical and psychiatric reports should be available in their entirety to explain the psychiatric motivations for the commission of crime.

In considering whether access should be allowed and, if so, to what extent, it is always necessary to bear in mind the possible need to exercise restraint in appropriate cases.

Often both the defence and the Crown are armed with inadmissible "background" or "hearsay" material. This may relate to the crime in question or to the background of the accused. If it is not to be used in court it should not be supplied to the press. However, it may be appropriate to put the press in contact with relatives to glean what they can.

The reasons for exceptions to publication are clear, both in the cases of victims of assault and in the cases of the names of informers. As to the former, the innocent victims of crime have had their lives shattered. Publications of names and details could only cause further unnecessary stress and trauma. As to the latter, it is clear that if names or identifying material were published, their lives may be put at risk. It might also be necessary to edit psychiatric reports before they are made available to the press: for example, where what is stated may expose by hearsay the names of others not on trial as having committed wrongdoing.

Access should be given at least when material is tendered. In my own view, the Crown should have a "media relations" officer who, subject to consultation with Crown prosecutors,

can provide information on a confidential basis earlier than this so as to allow timely and balanced (as well as accurate) reporting. This involves giving trust to the press to maintain confidentiality until the appropriate time so as not to be held in contempt of court or to compromise a fair trial or so as to cause the discharge of a jury.

The same principles should apply to the dissemination of material by the defence. Crimes occur for a reason. It is important that the reasons be explained and that material in mitigation which reduces the sentence be explained.

There are many common misconceptions by the public as to the law and sentencing principles. Dissemination of defence material will help to explain what takes place and why.

There are very good reasons for publishing and disseminating Crown and defence material. This can work in the interests of both the Crown and the accused. It ought to be an area where the Crown and the defence substantially agree.

2. Flood - the defence view

Flood noted:

"Judges are in a better position than anyone else to give an account of what they are doing and enhance media and public understanding of the role of the courts."

Sir Anthony Mason (as reported in *The Financial Review* 17 March 1994. The author, Chris Merritt, stated in his report that the Chief Justice welcomed a closer relationship with the media).

I believe that there are cases when the defence can derive benefits for their client's cause by having a closer relationship with the media.

Last year my instructing solicitor and I decided that in a matter of a person who was charged with various serious offences after eliminating all possible defences, pleas of guilty should be indicated at the earliest opportunity. After devising a formula which was reduced to writing, the Court was advised on the first remand date that he would be pleading guilty and the extent of his guilt would be indicated to the Crown as soon as psychiatric assessments were completed. The media were provided with copies - there was wide and accurate reporting.

At the next appearance another document was prepared for the media and, after the Court was advised that my client would not require any witnesses called by the Crown and that his burden of guilt was beyond measure, that document was handed to the media and, again, accurate reporting occurred.

When the case came on before the judge, a social worker's report and psychiatric reports which were tendered were given to the press. Again, the result was wide and accurate coverage. There was extensive quotation from those documents.

The accused appointed his solicitor and a psychiatrist to act as spokesman to the media on his behalf.

Why? It was a sensational case and the accused could have easily been portrayed as a monster. Our aim was to get the best coverage possible of our client's version of events - also we hoped for a sentence less than life. In the long run we hoped, and still hope, that with the passing of time our client will one day secure his freedom. Some cases get into the collective consciousness of the community so that the eventual outcome may well be affected by or dictated by the folklore surrounding a particular matter. Remember Baker and Crump.

In this case I have been considering, one headline before sentence quoting a friend of the accused read:

"Just a poor bastard pushed over the edge."

Later in the article the friend was quoted as saying:

"Don't crucify him. He wasn't a total arsehole."

We couldn't improve on that.

The second case I want to consider involved a battered woman.

Looking at the big picture I believed that the time was ripe for the media to present a very sympathetic view of the accused. Again, reports from psychiatrists and psychologists which became court exhibits were made available to the press.

I took the view that, while a good behaviour bond was achievable, it was important to get a good press so that the Crown would not appeal. In my previous assessment the DPP was influenced by media pressure and a number of Crown appeals had been brought as a result.

I think that Allpas was one, so too were appeals against bonds in culpable driving cases resulting in death.

The battered wife case, however, threw up some pitfalls.

Although reports which become exhibits are on the public record, the media usually ignore them. If they are given to the media and reported, some sensitive and embarrassing material may be published.

Also, an accused who has knowledge that personal details of their lives may be broadcast to the world at large may be inhibited from full and frank disclosure to those experts who enquire into the matter and this could impede or frustrate accurate assessments.

The client needs to be told at an early stage that her or his case lends itself to a close relationship with the media so that they can express their views about doing so.

Sometimes the person who is so directly involved in the drama is incapable through emotion to make a rational decision.

It then becomes a matter of balance when weighing up the options.

My answer to the question asked in this seminar is that the media should, in appropriate cases, be given information by the defence. But the accused should, so far as possible, be in agreement and fully informed. Also, clear objectives need to be established before doing so.

In the battered wife case the accused, during the hearing and after, was filmed by *A Current Affair* which went to air on the night she got her bond. She did very well in that programme. She has since given an interview to *Women's Weekly* which also was a good positive piece.

The DPP did not appeal and she has held her bond.

3. McDougall - the ethical considerations

The first point that I should make is that I am expressing a personal view. My view should not be taken as "the Bar View". I trust that none of you will ever have to justify yourselves to the Professional Conduct Committee to which I belong (or to any other professional conduct committee) in relation to the topic of this seminar or otherwise. But if you do, and if the occasion arises out of the topic of this seminar, please do not think that you can excuse yourselves simply by pointing to what I have to say.

There is a strong and readily identifiable public interest in the fair and accurate reporting of criminal proceedings. That interest can be seen to be served by counsel - prosecution or defence - answering questions from the media, to ensure that the media are in possession of facts relating to a trial or issues raised in it. For example, there would be no criticism of counsel who in accordance with the Rules - as to which see later - makes available to the media upon request copies of non-confidential exhibits: cf *Home Office v Harman* [1983] AC 280.

The "old" Bar Rules (Part L - Advertising and Public Appearances) imposed restrictions on the extent to which a barrister could properly communicate with the media. To the extent that those Rules, on a strict interpretation, might have been seen as impeding communications in aid of the fair and unbiased reporting of trials, I think that they should have been read down. In any event, and subject to the intervention of the Attorney General, we are about to be regulated by the "new" Rules. Although those Rules are presently expressed to be in draft form, you should assume that they will soon govern your professional conduct.

Those of the new Rules (as I shall call them) which deal with the subject matter are:

"59. A barrister must not publish, or take steps towards the publication of, any material concerning current proceedings in which the barrister is appearing or has appeared, unless:

(a) the barrister is merely supplying, with the consent of the instructing solicitor or the client, as the case may be, copies of exhibits admitted without restriction on access or of written submissions given to the court;

(b) the barrister, with the consent of the instructing solicitor or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial and:

  (i) the answers are limited to information as to the identity of the parties or of any witnesses already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court, the client's position on issues in the case, and the client's intentions as to further steps in the case;

  (ii) the answers are accurate and uncoloured by comment or unnecessary description; and

  (iii) the answers do not appear to express the barrister's own opinions on any matters relevant to the case.

60. A barrister will not have breached Rule 59 simply by advising the client about whom there has been published a misleading or coloured report relating to the case that the client may take appropriate steps to present the client's own position for publication."

It will be seen that these Rules do not extend to soliciting publication in the press; the "permission" which may be inferred from Rule 59 arises only when and to the extent that a barrister is answering questions from the media. When this situation arises, the extent of the communications which the barrister may make to the media is clearly limited. The importance of the solicitor's or client's consent should not be overlooked, nor should its non-existence be ignored.

I believe that the position, in relation to communications with the media, varies as between prosecuting and defence counsel. To be sure, the Rules to which I have referred apply to both. But, as the Rules recognise, a prosecutor has a special character. The Rules which indicate this include:

"62. A prosecutor must assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to carry weight."

This list is by no means exhaustive. However, it indicates (as do the following Rules 66-71, which I shall not set out) the restrictions arising out of the peculiar function which a prosecutor has, appearing not as the representative of a party in adversarial litigation but as the representative of the impartial State; the interests of the State lie as much in securing due process according to the rule of law as they do in securing the conviction of the guilty.

If the prosecutor owes to the court duties of the kind towhich I have referred, it would be an extraordinary and intolerable situation if the prosecutor, through communications to the media, were able to subvert those duties or the high purpose which they are intended to serve.

In general terms, it seems to me that the requirements of public policy and of the Rules can be served where:

1. both prosecution and defence counsel, armed with the appropriate consents, respond to requests from the media, and do not solicit contact or volunteer material;
2. both prosecution and defence restrict themselves to facts rather than opinion;

3. both prosecution and defence, bearing in mind that juries read newspapers, listen to radio, and watch television, bear in mind the desirability of fair and even-handed reporting;
4. both prosecution and defence avoid giving "background material" or anything other than factual matter arising from and relevant to the issues at the trial; and
5. prosecutors conduct themselves vis-à-vis the media as though the obligations which bind them in relation to the court bound them equally in relation to the media.

I should make it quite clear that the references to the role of the prosecution are not intended to suggest, by silence, that defence counsel have, or should assume, any licence either in relation to the court or in relation to the media. I remind them of their obligations to the court, which are set out in Rules 21 to 35 (and in fact encapsulated in the heading to those Rules - "Frankness in court") and again in Rules 35 to 50 (once again encapsulated in the heading "Responsible use of privilege"). Defence counsel, just as much as prosecution counsel, should ensure that their conduct outside court in connection with a trial is of no lower standard than the conduct which the court justifiably expects and receives from them in relation to that same trial.

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The speakers were followed by a "question and answer" session. Many interesting points of view emerged. At the risk of giving credit to some, it is particularly appropriate to note the view expressed by Zahra and others that the Crown enjoyed a significant advantage in relation to the press, first, because the Crown addressed first, secondly, because the press tended to concentrate on and report the "juicy" bits of the Crown case, and third, because the press rarely stayed to hear the exculpatory material elicited or presented by the defence. It is fair to say that Lloyd acknowledged the justice of this approach. One suggested solution - and certainly one which is seen to be emerging in civil trials - was that both sides should open before the evidence was taken. That being so, there would be, if not a fair, at least a balanced presentation of the cases for both sides and at least the opportunity for the press to print both sides.

Molomby, no doubt drawing on his reptilian past, suggested that the media had no interest in the fair and balanced reporting of trials. The interest of the media lay in publishing what would appeal to their audience. Given this, he suggested that it might be desirable to forbid all reporting of trials until they had concluded (and, by extension, of committal proceedings until any resulting trial had concluded) but to allow reporting - fair, balanced, or otherwise - thereafter.

Another oft-expressed view was that the standard of reporting of trials has declined to an abysmal depth. It was pointed out that whereas in the past the press gave considerable attention to trials, and printed lengthy and accurate reports, the position these days - particularly with the electronic media - was for the short article or the quick "grab". Neither of these approaches is consistent with fair and balanced reporting. (The reticent and discreet nature of the chair was even more apparent whilst these charges and counter-charges were exchanged.)

There was, among some of the participants, a view that the Crown from time to time was seen to go too far, particularly in relation to opening statements, to exploit the advantage which occurred by reason of the not unnatural tendency of the press to report that which is exciting and to report it as soon as possible. Other views were expressed that the press was not particularly interested in the public interest, or in fair and balanced reporting, but was interested only in printing what would sell.

Another view emphasised that a close working relationship between counsel and the press - such as occurs openly in America and, it was said, behind doors in the United Kingdom - could be unhealthy. It could take the trial out of the courtroom and into the media. The view was expressed that if the press could not be compelled to print fair and accurate reports, they certainly should not be used by one side or the other to attempt to engender a more favourable result for the client.

The seminar raised, and discussed, some very important issues. Of its nature, no resolution was reached in relation to those issues. Nonetheless, it was a thought-provoking and interesting discussion of a topic which is of vital importance to all of us. ❑

Fine Tuning

Mr Bathurst QC: "... If Your Honour pleases. This is the sixth version of the statement of claim."

Mason CJ: "I often heard that you never got a good statement of claim unless it had been amended about seven or eight times. Sir Garfield Barwick used to say that."

Murphy and Allen v Young & Ors, application for special leave to appeal to the High Court, 16 September 1994) ❑