

AUSTRALIAN ACADEMY OF FORENSIC SCIENCE

Speech by the Director of Public Prosecutions John Champion S.C.

29 February 2012

CHALLENGES OF FORENSIC EVIDENCE – SOME OBSERVATIONS OF A NEW DPP

INTRODUCTION

From 1 November 2011, after four months in the position of Acting DPP, I was appointed to the permanent position of Victoria's DPP. As it turns out, this address represents the first real opportunity for me to speak publicly about my new role, and to highlight some of my aspirations in the role. By comparison to the subject of an address last year by Nick Cowdery QC where he spoke about "reflections" of a DPP coming close to retirement after a long career as NSW DPP, I don't regard myself as being in a sensible position to possess too many "reflections". Rather, I do have some observations about matters I have become better acquainted with since I started the new role. It has been, and will doubtless continue to be, a steep learning curve. To these observations of a new DPP I am able to add some of my own experiences from over 30 years practising in the criminal law. When the time comes, there may be some reflections, or perhaps even confessions, but about those possibilities we shall wait and see.

This is an occasion for me to say a few things about how I see the role, as it is impacted by, or indeed impacts on, the role of expert forensic evidence, for it is that topic about which we are all more interested this evening.

In saying what I do I am mindful of the stated roles of this Academy, which I loosely paraphrase as being to encourage the study, improve the practice, and advance the knowledge of forensic sciences; to further the objects of the Academy; and, to generally widen, improve and develop the education and knowledge both of those actively concerned in the pursuit of the forensic sciences.

It is important also for me to say that I am very pleased to see that this Academy has been "re-born" in Victoria. I think it will prove to be an excellent vehicle for an exchange of

information, and of views, that will advance the learning on the role of forensic evidence, and thereby, should contribute to the advancement of justice in this State. As Victoria's DPP I support and encourage the work of the Academy.

I hope any observations I make might be of assistance to those here with forensic backgrounds, and those with legal backgrounds.

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Let me make a few focussed remarks about my role.

I came to this position in the circumstances where the provisions of the *Public Prosecutions Act 1994* apply in a particular way. Many have observed that the way in which the Act currently sets out the roles of the key participants is clunky, and not especially conducive to the requirements of a modern prosecuting service.

We now know there are going to be a few changes which will come into effect when the *Public Prosecutions Amendment Act 2012*, having received royal assent on 14 February, is proclaimed shortly. By virtue of the new amendments, the previously stated role and function of the DPP will be subject to some changes. Under the present provisions, the functions of the Director are to "institute, prepare and conduct on behalf of the Crown, proceedings in the High Court, Supreme Court or County Court in respect of any indictable offence", as well as to carry out a series of quite specific functions contained in s.22 (1)(b) – (d) and (1A) of the Act. Pursuant to s.24, in the performance of these functions the Director has to have regard to various factors including the need to conduct prosecutions in an "effective, economic and efficient manner".¹ The focus is on the conducting of prosecutions.

For the purposes of these remarks it is sufficient to identify the relevant change which provides that there will be a body called the Victorian Public Prosecutions Service, or VPPS, which will encompass the role of the DPP, the Chief Crown Prosecutor, and his Crown

¹ *Public Prosecutions Act 1994* s. 24(a) – (c)

Prosecutors, Associate Crown Prosecutors, the Solicitor for Public Prosecutions, and the Office of Public Prosecutions (OPP) itself. The description does not include other prosecution agencies.

The fundamental role of the Director will be to be the head of the public prosecutions service, and to ensure that what will soon be the VPPS functions in an efficient, economic and effective manner.

It seems to me, without question, the role carries with it the stated requirement to assume and show leadership. This requirement is not only to those working directly in the VPPS, but very importantly, to show leadership in the Victorian criminal justice system. Indeed, my job description includes the expectation that the Director should play a key role in the criminal justice system, and be a significant contributor to government's ongoing reform agenda focussing particularly on the reduction of court delays, and complexity of the legal process. Hence, a vital part of my role will be to ensure that the VPPS, consistent with what I perceive legislative intent to be, operates as one cohesive unit, with a common set of goals and objectives. The DPP is expected to provide effective leadership in a time of change.

The core principles of the OPP, and equally applicable to the new VPPS, as I see them, are worth re-stating.

The Goals

- To deliver high quality prosecution services
- To achieve just outcomes effectively, economically and efficiently
- To enhance our responsiveness to victims of crime
- To influence policy and law reform
- To deliver our goals through strong governance and professional capability.

The Values

- To act fairly
- To act with integrity
- To respect others
- To work together

- To strive for excellence.

Acting fairly, with integrity and excellence are three values that are of particular relevance to the work of the criminal prosecutor. They are really just re-statements of values that underpin our criminal justice system. The VPPS will be a model litigant, and must remain so. I add my own that the VPPS should be regarded as a modern prosecuting service, and be accountable, and act in a transparent way.

RELEVANT DIRECTOR'S POLICIES

How will the prosecution service achieve and promote a consistent approach to the prosecution of criminal cases? One very important tool in achieving a standard approach is by the development and publication of what are known as Director's Policies. I suspect these are not sufficiently well known or understood. Currently there are 86 such policies, 36 of which appear on the OPP website. Almost all of these existed well before I arrived at the OPP in July last year. They have been developed over many years and doubtless will be developed and if needed, carefully and suitably modified to suit various needs as they arise from time to time.

Why are they there and what do they do? The short answer is that they give guidance and are aspirational in nature. But there is more to it than that.

Director's Policies provide guidance for those involved in the prosecution of summary and indictable matters – such as OPP solicitors, Crown Prosecutors and the private bar – about how certain functions should be carried out.

They are also designed to ensure fairness by promoting consistency in decision-making, in particular by establishing recognised criteria to be applied when making discretionary prosecutorial decisions; giving a degree of certainty in decision making, which will be expressed by reference to the applicable criteria in relevant Policies.

Thus, Policies can also promote efficiency within the Prosecution Service by providing instructions about matters such as how particular issues ought to be addressed or what

factors are relevant when exercising a particular discretion. They embody and promote clear and specific instructions, which in turn allow decisions to be made more efficiently and accountably.

Some Policies are designed to set out “best practice” in preparing particular types of prosecutions, which will help to ensure consistency in the levels of service provided by the OPP.

Some Policies aim to clearly set out the obligations of OPP solicitors and prosecuting counsel (such as prosecutorial ethics, duties of disclosure, Crown’s role on plea and sentence), while others are concerned with specific statutory provisions such as outlining the particular criteria to be applied by the DPP when exercising his discretion whether to consent to the commencement of a certain type of prosecution. I shall return to this in a moment, in a broader sense.

The publicly-available Policies serve a further function; that of educating the legal profession and the wider community – including the Victoria Police Forensic Services Department (VPFSD) – about the role and functions of the DPP and OPP and how those functions are carried out. For instance, recently I was able to put the final touches to the Director’s Policy on Family Violence, and took part in the announcement of it.

It is to be observed, by publishing its major Policies the Prosecution Service opens itself up to greater public scrutiny, which in turn makes the Service more open and accountable.

In Victoria, Director’s Policies can provide guidance to police or other external agencies but are not binding on those agencies.²

² Note that the DPP may issue “Guidelines” which are then formally Gazetted pursuant to section 26 of the *Public Prosecutions Act* 1994. Only 3 DPP Guidelines have ever been formally Gazetted, of which only one is current, being the Guideline issued in December 2011 relating to Police Affidavits.

I have taken a few moments to talk about the Policies, because one of them impacts on the issue under consideration this evening.

I refer particularly to Director's Policy 2.1 – the *Director's Policy as to the Exercise of the General Prosecutorial Discretion*. It is a comprehensive policy that gives guidance and sets important benchmarks defining the matters to be given consideration when deciding to initiate, continue or discontinue a prosecution. Relevantly, the policy specifically mentions DNA evidence. The policy provides that where DNA evidence is wholly or substantially relied on in a case, the prosecution should not be instituted, or continued, until specific instructions have been given by the Director, or in my absence, the Chief Crown Prosecutor.

2.1.1.13 In any matter in which the prosecution case is wholly or substantially reliant upon DNA evidence, the prosecution should not be instituted or continued until specific instructions have been sought from the Director or in his absence, the Chief Crown Prosecutor. The purpose of this requirement is to ensure that very close scrutiny is given to this category of cases, to ensure that they proceed only if the DNA evidence is clearly reliable and highly probative, and/or where there is sufficient non-DNA evidence available to support the prosecution case.

This provision was added to the General Policy 2.1 on 4 December 2009, shortly before the presentation of the Vincent Report on the Jama case, but undoubtedly as a response to the matters being investigated by Frank Vincent.

The provision represents the necessity for high level oversight within the OPP before DNA evidence which is important to a very significant degree is used. I think it is a significant provision that brings this particular type of evidence and its importance expressly to mind, and cements the important and sensitive nature of this type of evidence amongst staff at the OPP. By virtue of the educational and guiding role of Director's Policies in the broader

context, there is an impact on other people such as police officers, external lawyers, and forensic officers, who are involved in cases concerning the use of DNA.

Interestingly, the Policy carries the explicit requirement that the Director is required to form a view about the reliability and probative value of such evidence. As such, it presupposes that the Director is in a personal position to assess the reliability of the evidence. With the way in which the process works within the prosecuting service, this means that I will receive written advice on the merits of a matter (including some assessment of the DNA evidence) from lawyers more directly involved in a relevant case, including a Crown Prosecutor, as well having the opportunity for face to face consultation (all of which has occurred a number of times already). However, in the end, the prosecution shall not be instituted or continued without my specific instructions.

It seems to me that the consequence of this is that I must ensure that I possess at least a satisfactory workable knowledge of the subject – meaning DNA evidence – and of its place in any particular case, in order to make an informed decision as to whether the case should be started in the first place or whether, if started, it should be continued. Merely writing the words for this discussion re-affirms to my mind the importance of the role of the Director, and the responsibility that falls on my shoulders.

I pause at this point to reflect on the responsibility that falls on the DPP under the proposed amendments to the double jeopardy rule. There may be cases brought to my attention which involve evaluating the reliability of DNA , or other forensic evidence, in a possible decision to apply to the Court of Appeal for a re-indictment of a previously litigated case. It will be important that an orderly approach should be taken to this particular issue, given the possible consequences, and that specific Director's Policies will need to be developed to deal with such cases.

The role I have in respect to the evaluation of DNA evidence, when it forms a very significant part of a prosecution case, I regard is a matter which provides me with a particular challenge that I have to address.

RECENT EVENTS AND HOW THE OPP HAS REACTED

Within the past few years, a quite small number of criminal cases have been identified which have particularly involved significant reliance on DNA evidence or other forensic evidence, which cases have been judged to have resulted in miscarriages of justice. That there have been a small number is a blessing. That there have been any such cases has been a tragedy. It goes without saying that as a service the VPPS must be vigilant in maintaining its particularly important and responsible role in contributing to the avoidance of such events in the future. My role as the leader of this service involves relevant responsibilities that must be addressed in this area.

Well before I arrived, the OPP reacted in a positive way to the events that had occurred. I stress though – the process of reaction is not one that should be seen as finite. I regard it absolutely as an evolving and continuing process. Part of my role into the future is to do the best I can to ensure that there is an ongoing consciousness of the risk and consequences of miscarriages, and to take steps to avoid future like events. In other words, to learn from past events and address the challenges that have been thrown up.

I make particular reference to some of the recommendations in the *Vincent Report into the Jama case*, to which I have referred earlier. The author pointed to a number of circumstances identified as deficiencies, and advanced some suggestions for improvements.

It is appropriate to briefly reflect on one or two relevant aspects of the *Report of the Inquiry into the wrongful conviction of Farah Abdulkadir Jama - The Vincent Report*.³ For present purposes I don't think it is necessary to recite the facts. They are well known.

As a necessary part of the investigation, amongst a series of involvements of various agencies, Frank Vincent examined the prosecution process and the role played by the OPP.

He concluded that, "in common with the police investigators, there was.....no indication of any appreciation of the particular care that was required in dealing with a case dependent on DNA evidence or its proper probative use." The most disappointing feature was the total absence of any indication that any legal research had been conducted, bearing in mind that

³ Inquiry into the Circumstances that led to the Conviction of Mr Farah Abdulkadir Jama, 29 March 2010

the circumstances of Mr Jama's case had not previously been encountered in this jurisdiction".⁴

He acknowledged that since the matter came to his notice "the DPP has issued a directive requiring that in all cases wholly or principally dependent on DNA evidence are to be referred to him for consideration".⁵ I referred to this earlier as part of a Director's Policy. It was observed that whilst this was a laudable step it did not address the problem of limited understanding of the issues and what is involved in the preparation of these cases for the trial process.

Recommendation 10

Frank Vincent made a relevant recommendation, as follows:

"That the Judicial College of Victoria, the Law Institute of Victoria and the Victorian Bar Council be approached to conduct courses to instruct legal practitioners and members of the judiciary involved in areas where DNA evidence is used with respect to nature and appropriate use."

I cannot speak on behalf of those three organisations as to what steps may have been taken, but I can speak as to some of the steps the OPP took.

The Introduction of the Forensic Liaison Officer

A role was created in September 2010 that meant that one person has assumed the role of managing issues concerning forensic evidence where it is relevant to the work of the OPP. This innovation, I am told, is particularly welcomed by the VPFSD. The position description for this role is to:

1. Develop and enhance expertise in the law as it relates to sexual offences and forensic evidence, promote knowledge and understanding of those areas within the

⁴ Ibid p. 56

⁵ Ibid p.56

OPP, and liaise with the nominated corresponding Legal Prosecutions Specialists in relation to those specialisations.

2. Contribute to the OPP's Continuing Professional Development program by assisting in the preparation of and/or delivering CPD lectures and seminars to OPP staff on topical legal issues, with particular emphasis on the law as it relates to sexual offences and forensic evidence.
3. Develop and enhance the OPP's legal practice in relation to forensic evidence law, including developing internal processes and policies relating to DNA and other forensic evidence, forensic sample orders, and related procedures.
4. Establish and promote effective working relationships with external agencies in relation to forensic evidence and processes, including Victoria Police, VIFM, VPFSD, and other agencies or experts, as appropriate.

I think this has been an important innovation. The role reflects the recognition of the ongoing importance of enhancing the understanding of OPP employees as to forensic evidence generally (not restricted to DNA evidence, and not restricted to VPFSD-based evidence), developing working relationships with forensic officers, identifying training opportunities, putting in place processes to ensure the timely flow of quality information, ensuring that each agency (the OPP, VPFSD and Vicpol) understands the needs and constraints of each other, and providing a central liaison point between the three agencies mentioned.

All these components comprising the role are very important, but one or two particularly resonate with me. These are training opportunities, and the need for each agency to understand the needs and constraints of the other.

Mutual Visits

As it turns out only a handful of weeks ago I attended a presentation at the Victoria Police Forensic Centre at McLeod. The topic presented concerned the commercial use of synthetic DNA, and its application in marking and identifying offenders. The presentation gave me the opportunity for my first visit and tour of the facility.

Not unexpectedly it stimulated my interest in the area – and calls me to re-visit the centre to spend some more intensive time, particularly to gain access to the botanical garden to learn about some of the benefits that unbeknown to me exist in my own garden.

I would like to see staff at the OPP visit the VPFSD in an educational setting and not just in a specific case setting. In my view, there needs to be a dedicated lecture program which should be given in each direction. In other words, staff at the OPP should be visiting the McLeod Centre, gaining an appreciation of the work of the centre and also receiving instruction on particular areas of the work of the centre. I would like to see an ongoing, set curriculum. In reverse, I think it is particularly important that forensic officers – who will be witnesses – receive assistance with not only the giving of evidence, and what is required, but also the general requirements and expectations of the OPP with respect to the preparation of the engaged lawyers for the court based tasks. I will return to this in a few moments.

Training

Appropriate training of the parties involved in the prosecution process is of critical importance.

What has been done so far? The following are some of the things that the OPP has done since the Jama Report and VPFSD change in DNA methodology in late 2009.

Presentations given by OPP staff to Forensic Science Organisations:

These have included:

1. A presentation by former Director, Jeremy Rapke QC and by the Chief Crown Prosecutor, Gavin Silbert S.C., to the Biology Division of the VPFSD in early Feb 2010 .
2. A presentation by Ray Gibson, then leading the OPP's Specialist Sexual Offences Unit to the VIFM Forensic Group Meeting in mid-2011.
3. A presentation by the Forensic Liaison Officer, Rebecca Heley, to the Biology Division at VPFSD in December 2011 on understanding courts and court processes.
4. A joint half-day meeting between senior officers at the OPP and VPFSD in December last year for the purpose of discussing current strategies of the respective agencies, their capabilities, and other critical issues.
5. Ongoing regular liaison meetings between the OPP and VPFSD.

All these activities have resulted in a significant improvement in lines of communication between the OPP and VPFSD.

OPP solicitors also regularly attend ANZFSS presentations on a quarterly basis, and VIFM Forensic Group Meetings.

Internal Training at the OPP

Internal training and education of OPP staff is a vital requirement in ensuring the organisation fulfils its special role as a prosecuting organisation, adhering to the core principles I have identified.

My view is that training in this area needs to be targeted at three specific groups within the OPP:

1. New solicitors – including trainees / young solicitors, and solicitors who have just joined the OPP, with training tailored to the needs of new practitioners who will be working at a more basic level.

The training program for the new solicitors should be a basic forensics introduction. I envisage that it should be repeated on a regular basis.

This type of training in basic DNA was provided by the OPP to staff in March last year and was an Introduction to the VPFSD – presented by Bernadette de Vere from the VPFSD; and, second, an Introduction to DNA - presented by *Samantha Logan*, Senior Scientist at the Biological Examination Branch of the VPFSD.

2. Experienced OPP solicitors – whose needs will be more advanced.

The training for more experienced OPP solicitors (although open to everyone) should be “one-off” type sessions of interest. Examples of this type of training provided by the OPP last year have included:

- a) Crime scene examination; ⁶
- b) DNA for OPP prosecutors; ⁷
- c) Blood pattern analysis; ⁸
- d) The new rape kits developed in response to the Jama case as part of the Interim Practice Arrangements for Crisis Care Units. ⁹

3. Crown Prosecutors – whose needs will be different yet again.

Finally, it is my view that forensic training and information sessions should be held for the permanent Crown Prosecutors. This will need to be developed in consultation

⁶ 22 Feb 2011 – presented by Sgt Wayne Kohlman from VicPol Crime Scene Examination Unit.

⁷ March 2011 – presented by Dr Rebecca Kogios and Dr Henry Roberts from Biology Division of VPFSD.

⁸ 14 June 2011 – presented by Max Jones Senior Case Manager at Biology Division of VPFSD.

⁹ 1 July 2011 presentation by Dr Angela Williams from VIFM to SSOU.

with Gavin Silbert S.C.. The permanent Crown Prosecutors, a highly experienced body of in-house prosecutors, possess a considerable acquired body of knowledge that should be enhanced, but also be called on to extend to OPP staff, and also to external counsel that are briefed to appear on my behalf.

Currently there are plans being formulated for sessions on clandestine drug laboratories and fingerprints to be held this year. This is also welcomed by VPFSD.

My intent is to explore training opportunities into the future which will be a consistent and cohesive program, in the form of a regular repeating curriculum, and including mooted sessions, addressing training of staff in forensic evidence. These expressions of intent are ultimately subject to the perennial issues of having sufficient resources to carry out the plan. This is another challenge I will have to address.

Before leaving my discussion about the things that have been achieved, and my intent for the future, I should briefly mention two innovations that are of some significance in keeping the DNA issue at the front of the minds of prosecutors and forensic witnesses. The innovations assist in maintaining a very important line of communication between the two agencies. The OPP and the VPFSD have been involved in developing the 'DNA Priority List' and the 'Forensic Report'.

Forensic Reports/Lab Reports

As a means of managing its own backlog of cases, the Biology Division of VPFSD developed a new type of report called the 'Forensic Report'. The benefit to VPFSD – and the reason I understand why they developed this reporting process – was that it helped to reduce a then existing backlog significantly. Basically, the report is a sort of preliminary report that precedes a full evidentiary statement, and is compiled at an early stage of the prosecution process. It is provided to the OPP, and also the defence. It gives early information without

requiring a full analysis and formation of the full statement. Essentially it provides the parties at least with an early sense of confidence that there exists relevant evidence.

The benefit to the OPP of the Forensic Report has been that it 'front ends' the forensic process. That means rather than getting a statement just before trial, we get that information at a much earlier stage, for example, at the pre-committal stage.

The forensic report is of benefit to all parties – defence and prosecution. The hoped for benefits of these reports are that:

- a) They help both sides identify and narrow what the forensic legal or factual issues are.
- b) They help achieve early resolution of cases. In this regard there are at least a number of anecdotal cases where the OPP has been able to use the Forensic Report to achieve early resolution of a matter, that is, a plea of guilty.

I understand, through our Forensic Liaison Officer that the Forensic Report is now a well established process within Biology Division. I also am led to believe that the Botany Division is about to start a trial Forensic Report process for large commercial cannabis cases. I think the benefit is that the report keeps the DNA issue at the forefront of the process. It is a useful tool in that regard.

The DNA Priority List

The 'Priority List' was developed as part of the crisis management response to the 'DNA ban' and methodology change at VPFSD in 2009/10. It has continued past the DNA crisis and has become of significant importance to DNA Biology Division.

At this point in time it is limited to Biology (DNA).

On a practical level, it involves a member of the OPP staff sending an updated spreadsheet on a weekly basis to the Biology Division of VPFSD – advising them of upcoming court dates for matters which require a DNA statement.

The information contained in the Priority List enables VPFSD to prioritise their workload and to ensure that statements are prepared in time for trials and committals.

The immediate short term need for the Priority List (the DNA crisis) has now passed. The Biology Division, however, appear enthusiastic for the Priority List and the information which it provides (i.e. Court dates) to become a standard OPP – VPFSD procedure. In effect Biology Division could no longer work without it.

Interest has also been expressed by the other divisions of VPFSD in being included in the process.

The Priority List has become a 'de facto' way of operating, and there is ongoing discussion about expanding the list to all areas of VPFSD.

The Spider Case

I want to pause to reflect on a recent case involving expert evidence that I think is unusual and illustrates a point about the role of OPP lawyers. I had to recently consider a case in which discontinuance had been applied for. The case involved, of all things, the housekeeping work of a spider. Anyone who knows me well will tell you spiders are not my best friends. Some people find them fascinating, I suppose.

This case involved alleged offences of Making a False Report and Obtaining Property by Deception. The accused reported to police that a shed had been broken into and various items belonging to him were stolen. The sum involved was less than \$1500. A police report was made three days after he alleged that the break-in was discovered. On the same day as reporting the matter to police, he made an insurance claim in respect of the goods allegedly stolen. This was a circumstantial case in which the principal piece of evidence was that investigating police observed and photographed many cobwebs on the bolt on the shed door. Some webs were covered in dust. There were some unbroken webs on the door hinge. The police were suspicious – the cobwebs looked too old, and looked as though they had been in place for a considerable time. The accused could not have opened the door in

the time frame suggested. The inference sought by the prosecution was that the shed from which items were allegedly stolen had not been opened for at least three weeks.

The defence produced an expert report from a senior and respected zoologist who concluded that it was not possible using the police photographs to conclude whether the shed door had been opened on the day of the alleged theft. He was of the opinion that the silk between the door and the frame could have been reconstructed by a black house spider between the date of the alleged theft and reporting it to police and that silk between the door and the side of the door may not have been broken if the shed door opened. The OPP solicitor's interest was kindled, and the prosecution sought an expert opinion. The expert opinion from the defence raised an issue, and whilst not appearing to be conclusive enough, at least raised sufficient concerns in the solicitor's mind to ask for expert advice.

Consequently an expert opinion was provided by the Manager of Live Exhibits at the Melbourne Museum. His opinion was that there was indeed "a high probability" that the shed **was** opened in the three weeks before the reported theft. His opinion was that the shed could have been opened without damaging webs on the door, and that webs seen on the bolt by police could have been regenerated by a black house spider between the date of the alleged theft and the report to police. In light of the two expert opinions, the more valuable one having come from the expert engaged by the Crown, I entered a Notice of Discontinuance of the trial.

This was not the biggest case in the criminal calendar, but it was nevertheless, important. I thought the efforts of the solicitor were laudable, and the approach taken demonstrated that an inquiring mind, and the courage to press the inquiries further, are most desirable attributes in prosecutors. It is a story designed to illustrate what I expect in prosecutors at the OPP – that they remain vigilant about forensic science issues and are prepared to act on their initiative. It is, if there ever can be, a good spider story. As I read the expert reports, which went into some considerable detail about how such spiders carry out their day to day work, I found myself even beginning to like this little black house spider – if I may say, much more so than the giant that ran down my car window only a few mornings ago.

CONFERENCING EXPERT WITNESSES

I turn to the issue of conferences with witnesses. A criticism or complaint that appears frequently voiced by forensic scientists is a lack of pre-trial conferencing. In my opinion, this is a valid observation. Anecdotally, the views of forensic witnesses appear to be that they want to give assistance, and feel they do not receive enough. I would be very interested in hearing about this aspect during any later discussions this evening.

What are some of the reasons for this? My own experiences inform me that mostly, forensic witnesses are very willing to impart their knowledge and findings in a conference setting. For my own part I cannot recall any occasions over many years of trial practice where a forensic witness has proven uncooperative in attending a pre-trial conference. My own feeling about the reasons for the lack of pre-trial conferencing involves:

- a) Briefing practices – including the way in which the private bar is briefed, sometimes resulting in untimely changes in trial counsel – namely, counsel being briefed and then jammed, and so new counsel have to be found.
- b) Lawyers' attitudes to the proofing witnesses – probably arising from the fear that allegations will be made about coaching witnesses.
- c) The time and expense for barristers in pre-trial preparation – a reluctance perhaps to spend some time in consultation when there is no recognition of the conference as a part of the briefing arrangements.
- d) The sometimes lack of timeliness in VPFSD providing the OPP with forensic statements – particularly biological and DNA statements. In this respect I have already mentioned the advantages of the forensic report.

The Victorian Bar Rules

In my experience the approach and culture at the Victorian Bar is not always consistent on this topic of whether witnesses should be conferenced. There is in some quarters a reluctance to conference witnesses of any kind lest there be allegations made by opponents of unduly influencing witnesses, or even that coaching may have taken place. This may be a throw back to the situation that pertained, and possibly still does, that in England the conferencing of witnesses by counsel was disallowed as an ethical rule. My experience from

working in the United Kingdom was that counsel did not conference, or “proof” witnesses, but rather this was something that was the work of the instructing solicitor.

The Victorian Bar Practice Rules provide:¹⁰

Rule 44

(a) Under no circumstances shall a barrister advise or suggest to a witness that false evidence should be given.

(b) A barrister shall not coach a witness by advising what answers the witness should give to questions which might be asked.

Rule 45

A barrister will not have breached Rule 44 by expressing a general admonition to tell the truth or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness’s attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

My view is that the Bar Rules clearly provide for the conferencing of witnesses to take place, and that on those occasions testing the evidence, and exploring inconsistencies and difficulties with the evidence, can take place so long as nothing which happens can be seen to amount to coaching, or in any way suggesting that false evidence should be given.

My Position

¹⁰ Victorian Bar Incorporated Practice Rules, 22 September 2009

My position is pretty clear about this topic and I think it is important to convey the position on this to those from the VPFSD present tonight. I have for a very long time regarded the conferencing of expert witnesses as being essential. I have engaged in the process countless times, and to real effect. I bring to mind the *Pong Su* trial which involved the Crown calling expert witnesses on a large number of areas of expertise, including the politics of North Korea; the behaviours of wind, waves and currents on the movements of an ocean going ship; the workings of a diesel engines on such a ship; the movements of an inflatable dinghy in devastating surf conditions; the workings of an outboard motor, and the fatal consequences of the creation of a vacuum in a small fuel tank; and how a ship might be hired on a charter party arrangement.

Every one of these witnesses was the subject of conferences by counsel, solicitors and police officers – even to the extent of speaking with North Korean defectors and political scientists in Seoul, South Korea. An excursion of that kind demonstrates the value that was given to a well conducted conference.

I intend here to make it clear, if it is not already, that it is highly desirable that expert witnesses are conferenced by case officers and trial counsel. Precautions must of course be taken to avoid any suggestions of influence being exerted, and on most, if not all occasions, a police officer should be present in case the need arises to call evidence about anything that might be said. Reasons for conferencing include:

- the necessity to ensure the expert evidence is properly understood by those adducing the evidence
- that the requirements of the lawyers are understood by the expert, and vice versa
- to ensure that the evidence is presented to the court – both to the judge, and to the jury – in the most efficient and understandable way
- to avoid misleading or imperfect evidence being relied upon, when that evidence has such significant implications.

My strong belief is that adherence to these principles should act to reduce the possibility of miscarriages of justice.

I do acknowledge that in order for the participants to fully understand the nature and consequences of the scientific evidence, there is a responsibility to provide them with the tools to form that understanding. That is where a training program, and adequate mutual communication, comes in to the equation.

I adopt the advice expressed by Court of Appeal President Chris Maxwell in his remarks at the inaugural meeting of the Victorian Chapter of this Academy last October when he used the example of the problems encountered in *Klamo's* case that could have been avoided had Professor Stephen Cordner, of the Victorian Institute of Forensic Pathology, been invited to a pre-committal or pre-trial conference with the prosecutor, had been interviewed by defence counsel, and had given evidence on a voir dire. I pause to comment that evidence on a voir dire could be replaced by evidence at a committal proceeding properly conducted, but that particular issue might be left for discussion at a later time. Might I also stress that such conferencing should be timely – that is, well before a trial starts, so that any issues that might be thrown up can be addressed. It is, I believe, not acceptable that conferences with important expert witnesses occur at the door of the court.

It seems to me that a primary objective is to ensure that the evidence is thoroughly understood by the prosecutors and that its veracity and reliability is as certain as it can be before it is relied on. An absolutely essential part of this process is to ensure that the evidence can be explained, and understood, by the fact finding tribunal – in most cases, this means the jury of lay people. In saying there is a heavy responsibility on the prosecutors, I do not want it thought that I am excluding the important role of the defence in this area. Clearly there is as heavy responsibility on the defence to be fully prepared and across the material, and to act in the interests of the client. I comment briefly – there is no property in witnesses, and my personal experience is that too little time is spent by the defence speaking to prosecution experts.

I note that Maxwell P in his remarks also referred to the development of an “expert evidence protocol” – as I understand it, a series of structured questions, proposed by

Professor Cordner, that could be formalised into a document to assist lawyers and witnesses. For my part, I think this is an idea that is worth exploring.¹¹

Currently there is no Director's Policy that directly addresses the issue of conferencing witnesses in general. I intend to address this gap. A Policy is being developed which I anticipate will provide guidance and direction to lawyers engaged in the prosecution process who will be involved in witness conferencing. I consider that such a Policy should specifically include directions that relate to expert witnesses. The move to do this arises from not only the invitation to address this forum, but also being mindful of the remarks made by Maxwell P in his address to this body last year. It will be remembered that in that address Maxwell P put beyond doubt the expectation of his, and presumably that of the Court of Appeal, that such conferences are an essential part of the preparation of cases involving forensic evidence.

In Conclusion

The objective of the address this evening has been to inspire discussion and to inform. I hope that I have thrown open some issues.

I have attempted to identify a number of challenges ahead. The driving consideration for me is encapsulated by a comment from Frank Vincent in the Jama Report in which he reported being left with a deep impression that "at virtually every point, and by almost everyone involved", it (the DNA evidence) was handled with so little insight into the issues which it presented that no need was seen to explore further or conduct research into them".¹²

My aspiration is to do what I can to ensure that such a statement is not made again with respect to the area of evidence I have discussed.

A by product of my building the address was that I began to inform myself, and to gather ideas. To that end, the invitation to address this body has had the welcome consequence

¹¹ Something similar to this proposal is utilized by the UK Crown Prosecution Service (CPS), entitled "Low Copy Number DNA Analysis (LCN) – Prosecutors' Checklist of Questions". It is dated 22 January 2008, and appears to have been a response to the judgement in the Omagh bombing trial, handed down on 20 December 2007.

¹² Vincent Report on the Jama Case p.11

that in the preparation of these remarks the task itself has not only educated me, but also caused me to reflect on these issues, and attempt to identify issues and solutions. Thus it has been an extremely useful exercise for me. I hope it may have of some interest to you.

oOo