

## **VICTIMS AND WITNESSES**

**A Workshop Paper presented by Damian Bugg AM OC**

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### Outline

I propose in this paper to examine developments which have taken place in Australia in the last 20 years, changes which have impacted on the way witnesses and victims are dealt with in the criminal justice system and consider whether the changes and reforms which have occurred are sufficient, or is there need for further change.

### **The Way it Was**

20 years ago, victims were largely treated as witnesses in the criminal justice system. They were eye witnesses to, or relatives of persons affected by, criminal conduct. It was expected that the victim would give evidence of what had occurred, if personal violence, by identifying the offender, describing for the benefit of the jury what they recalled of the incident. At the conclusion of their evidence the victim would leave court and probably learn about the outcome of the trial through the local press. In the case of a victim of sexual assault, their cross examination would be wide ranging and, possibly, oppressive and embarrassing. Their ordeal over the most direct communication they were likely to have with the Crown office would be when they filled in their witness expenses claim form.

Witnesses were in much the same predicament. I will however differentiate and break the witnesses in to three groups, police, civilian and expert. Police witnesses include those formal witnesses used to prove continuity of exhibits, crime scene evidence and photographs. Civilian witnesses were eye witnesses, identifying, proving property recovery etc. Experts in those days consisted mainly of medical experts, pathologists and psychiatrists, followed by fingerprint and firearm experts who were largely police trained. There were other experts, but their attendance at trials was not frequent.

Witnesses gave evidence from statements prepared by police officers at the time of the incident and depositions taken through the committal process. At that time the committal was the path to discovery, so cross examination was wide ranging, quite often pointless and very time consuming. Many a young counsel cut their teeth for the criminal jurisdiction asking questions about lighting, weather and distances with a great sense of achievement made possible only by liberal grants of legal aid.

Trials were largely a debate about what was or was not said at the police station, and what was or was not recorded by typewriter in the so called "record of interview". By the mid 1980's in Australia, the criminal trial had developed in to a contest over admissibility of the record of interview and a debate about the accuracy of its contents. It is not unfair

to generalise that investigations had a confession focus, forensic science was not widely supported, and this was reflected in what was produced by an investigation.

## **CHANGES**

Victims were, by the mid 1980's, beginning to have a voice. Advocates and victims lobbyists had begun to obtain traction and in 1986 the General Assembly of the United Nations adopted and published the 'Basic Principles of Justice for Victims of Crime and Abuse of Power. The Principles, which I have attached to this paper, later became identified as the Charter of Victims Rights, and this charter in very similar form, was to be adopted or recognised by all jurisdictions in Australia which had responsibility for investigating and prosecuting crimes against the person.

The Charter, so called, provided a guide to investigating agencies and prosecutors for a more understanding and sympathetic way of dealing with Victims and their families. SVUs were established in police and prosecuting offices. Earlier involvement of prosecutors in the charging process and closer involvement and contact between prosecutor and victim lead to, in my opinion, better presentation of matters before Court.

The process of keeping the victim informed throughout the passage of a matter from offence to verdict has taken much of the anguish and upset out of the process for victims and has given rise to a higher level of reporting. It is little wonder when you consider what was the norm 25 years ago, that so few people were prepared to complain and pursue a matter to completion. (see paragraphs of the Charter: attachment)

At about the same time in Australia the High Court was examining Police Powers. Juries were becoming sceptical about the sworn evidence of police officers that they regarded the seeming inability to turn on a tape recorder as implausible. In 1986 and following, the High Court in three decisions, (Williams, Carr and finally McKinney and Judge) the first two being successful appeals brought by John Kable QC, whom this Society honours each year, the High Court concluded that as a rule of practice a trial judge should warn a jury that it is dangerous to convict an accused only on the evidence of a confession alleged to have been made in police custody when there is no independent corroboration and the confession is disputed.

Within a week of the Williams decision i established a committee in Tasmania which recommended the introduction of a pilot project for video recording of police interviews. Within 6 months the system of video interviews was being used statewide. The focus of the trial was shifting.

Australia was just recovering form the sad confusion of the Lindy Chamberlain trials which exposed, among other things, an appalling weakness in our forensic science services and the subsequent Morling Royal Commission recommended the establishment of well resourced and objective Forensic Science laboratories which could be accessed by both sides of the criminal trial. The recommendations were followed to some extent and most jurisdictions obtained well resourced and professional State laboratories.

The arrival of DNA and the increased use of Listening devices and telephone intercepts completed the equation necessary to bolster public confidence in technology and science

such that a significant increase in evidence from these quarters gave rise to a further shift in the evidentiary load of trials.

Legislative protections for young and vulnerable witnesses also assisted in giving confidence to victims and witnesses and a measure of protection from the intimidation of the adversarial contest. (Evidence (Children and Special Witnesses) Act Tasmania 2001 Remote video evidence and the use of statements. Compulsory provision of samples.

The trial is now no longer one which is concerned with what happened in the police station, but rather what happened at the time of the crime and what was obtained from the crime scene. The spotlight is now on witnesses who are not trained police officers but civilians and experts. Committal proceedings were once the process by which the defence would attempt to discover the extent of the prosecution case, now disclosure is the battle ground for that source of information.

## **WHAT HAVE WE GAINED**

In my view, we have achieved a lot, but in the process we have lost some ground.

There is no doubt that the improvements for victims have helped significantly. I am sure that the pre charge involvement of prosecutors has reduced the number of discontinuances and late amendments to charges, but the closer association of the victim with the prosecutor has exposed the victim to allegations of coaching and compensation schemes have also provided a basis for contending that the allegation is motivated by compensation. These are manageable issues and the advantages far outweigh the negatives.

The requirement that the prosecutor give reasons to the victim for discontinuing a charge or amending it has created a problem. In my view the victim should be informed but the reasons do not necessarily have to be made public in every instance. There may be very good reasons for not publicising. Credibility issues for one. However the communications between victim and prosecutor are arguably discoverable if the matter goes to trial.

Suggestions that the victim be separately represented should be ignored. We do not want to create a different class of litigation, we have already gone far enough by creating different classes of witnesses.

I applaud the advances made with forensic science and the development of greater fields of expertise. But the strength is still with the State in that the defence are reluctant to use or rely upon the results and opinions of State forensic specialists. In some instances that is because the laboratories are still part of the Police organisation and investigative process. That is unfortunate and should be changed. Trials also should not descend in to battles between experts, particularly in areas of precise science.

The role of the expert has been blurred as well in those jurisdictions which now permit the expert to express an opinion on the ultimate issue or a fact in issue (Evidence Act Tasmania Section 80). The growth in use of experts has been uncontrolled, again because many judges are reluctant refuse leave.

While the improvements in transparency and accountability in the investigation process have gone a long way to restore public confidence in the police disclosure and the paper

war which has developed there is an increasing problem. The task of complying with every disclosure requirement has become almost impossible, especially with the multiplication of record keeping with the advance of technology.

The expansion of records, increasing length of transcripts of listening devices and telephone intercepts is at risk of overburdening not only the disclosure requirements but also the trial process itself. While the focus has shifted from the confession the inquiry before the jury now has seen an increase in the length of cross examination of otherwise formal witnesses on compliance with procedure and form without any apparent forensic purpose. The victim has been provided with a measure of protection whereas the civilian and police formal witness is now the subject of an ever increasing examination of compliance. The consequence is that trials are taking longer and becoming more technical.

Formal witnesses should be spared attendance at court unless and until the defence discloses the issues in the trial which require the attendance of that witness, in other words a form of defence disclosure where the issues still at large are explained by the defence. The jurisdictions which have legislated to achieve better definition of the issues at the start of the trial have all abandoned the attempt or the legislation has not worked in the courtroom.

## **CONCLUSION**

I believe that many useful advances have been made but the courts are not coping with the changes in focus and the introduction of technology. Firmer control of cross examination and a requirement for limited defence disclosure will overcome most of the concerns I have expressed.

This Charter recognises that a victim (as defined) shall have the right:

1. To be dealt with at all times in a sympathetic, constructive and reassuring manner with due regard to the victim's personal situation, rights and dignity.
2. To be informed upon request about the progress of investigations being conducted by police (except where such disclosure might jeopardise the investigation).
3. To be advised upon request of the charges laid against the accused and of any modifications to such charges and the reasons for such modifications, and where appropriate, the reasons for charges not being laid.
4. To be advised upon request of the reasons for accepting a plea of guilty to a lesser charge.
5. To be advised of the entering of a nolle prosequi, the filing of a no bill or the adjournment of charges sine die when the decision is taken not to proceed with charges, and, upon request, the reasons for taking such action.
6. To have property held by the Crown for the purposes of investigation or evidence returned as promptly as possible. Inconveniences to victims should be minimised wherever possible.

7. To be informed about the trial process and of the rights and responsibilities of witnesses.
8. To be protected from unnecessary contact with the accused and defence witnesses during the course of the trial.
9. To not have his/her residential address disclosed unless deemed material to the defence.
10. To not be required to appear at preliminary hearings or committal proceedings unless deemed material to the defence.
11. To have his/her need or perceived need for physical protection put by the prosecutor before a bail authority which is determining an application for bail by the accused person.
12. To be advised upon request of the outcome of all bail applications and be informed of any conditions of bail which are designed to protect the victim from the accused.
13. To have the full effects of the crime upon him/her made known to the sentencing court by the prosecutor in matters relating to offences of sexual assault or other personal violence.
14. To be advised upon request of the outcome of criminal proceedings and be fully appraised of the sentence when imposed and its implications.
15. To be notified upon request of an offender's impending release from custody, where the offender has been imprisoned in relation to offences of sexual assault or other personal violence.