CRIMINAL BAR ASSOCIATION MEETING (28.05.18)

FILE NOTE

Present:	Len Andersen Steven Zindel Chris Wilkinson-Smith Douglas White Jo Dinsdale Yasmin Moinfar-Yong Chrystal Tocher
Notes:	Chrystal Tocher

Chapter 3: Evidence of Sexual Experience

Question 4

The Criminal Bar Association has no particular concern with an amendment to section 44 to deal expressly with sexual disposition evidence (e.g. evidence of the complainant's sexual fantasies).

Question 5

The Criminal Bar Association has concerns about extending section 44 to cover the complainant's sexual
experience with the defendant:

- *Artificial not to mention previous sexual experience to jury:* not being able to question the complainant about their sexual experiences with the defendant would be artificial, and juries would struggle to understand why such evidence is not being raised.
- *Previous sexual experience usually relevant:* the defendant's previous sexual experience with the complainant, or the relationship between them, will often be relevant to a defendant's belief as to consent. There may be subtle aspects of propensity, some of which only become apparent during the defendant's evidence.
- *Practical difficulties:* requiring the defence to seek leave to give evidence of the sexual experience between the complainant and the defendant would simply lengthen the trial, and make sexual trials even more difficult and prolonged. It would also be hard to ensure that the defendant does not refer to their previous sexual experience/s with the complainant, and the judge would likely have to make rulings, which would interfere with the trial. Also, whether or not previous sexual experience is relevant is often not known until the trial develops, which

would make it difficult to know in advance of trial whether it is necessary to apply for leave.

- There is a need to keep down the number of pre-trial applications generally as the defence case is often an evolving one, particularly as the defendant may not concentrate properly on a case until the eve of trial.
- *Current position not causing problems:* the section as it currently stands is not causing any issues. The evidence still needs to be relevant, per section 7 of the Evidence Act 2006, and the trial judge has the ability to rein in questioning in this area.
- *Leave threshold in s 44(3) too high for sexual experience with defendant:* it is currently difficult to obtain leave under section 44(3). Such a strict leave requirement should not apply to evidence of the complainant's sexual experience with the defendant.
- *Would create avenue to appeal based on trial counsel error:* currently many appeals are based on counsel error; extending section 44 to the complainant's sexual experience with the defendant just creates another potential appeal ground in situations where trial counsel didn't make an application.
- *Sexual privacy in relation to complainant and defendant of a different nature to complainant and others:* it makes sense to respect sexual privacy for a complainant in relation to persons other than the defendant, but there is less of a justification for this where the relationship is between the defendant and the complainant.
- *Overseas approaches:* the fact that other jurisdictions are tightening up rules in this area (if they are, in practice) does not necessarily mean that it is a good decision.

The Criminal Bar Association would have less of a problem with a 'halfway house' provision, where evidence of the fact of a sexual relationship and basic information can be given without leave, but leave needs to be obtained if evidence of the nature and details of the sexual experience is sought to be given. However, there are still concerns about whether the heightened relevance test should need to be satisfied, as in practice the threshold is applied quite strictly. There is also a fear that counsel may be put off from applying for leave because of the perception that the threshold is difficult to satisfy.

Question 6

The admissibility of a false complaint of previous sexual offending should be treated the same as evidence of an allegedly false complaint. If the allegation is demonstrably false then section 44 is not engaged, although some overlap with sexual disposition evidence.

Question 7

The Criminal Bar Association believes *Best* is working well, and does not think there is any better, alternative approach, or ways in which the *Best* approach could be simplified.

Question 8

The Criminal Bar Association has no view on whether section 44 ought to be amended to apply to civil proceedings.

Question 9

The Criminal Bar Association has no issue with amending section 44A to require a written application to include the grounds relied on for admission under section 44(3). This currently happens in practice anyway. It repeats its concern that natural justice is important but that time limits and formal representations for writing need to give way to justice considerations in the individual case.

Chapter 4: Conviction Evidence

Questions 10 – 13

The current rule in section 49 is not appropriate. There was concern that the section does not differentiate between convictions that are a consequence of a finding of guilt and convictions that are

the result of a guilty plea, and it was noted that defendants may enter a guilty plea for many different reasons. They may not accept the summary of facts and yet not raise a disputed facts hearing.

Section 49 should be amended so that only a presumptive proof rule applies in cases including where the conviction of one defendant is used in a trial involving a co-defendant. The fact of conviction could still be referred to if the defendant does not admit the prior offending.

If leave to offer contrary evidence under section 49(2) is granted under paragraph (a), it would probably be easier for a jury to make sense of this if a direction under paragraph (b) is also given.

Chapter 5: Right to Silence

Question 14

There should be an absolute right to silence; it does not make sense to abrogate it. However, the Criminal Bar Association does not think it is problematic to refer to the fact that a defendant was silent in response to non-official questioning.

Question 15(b)

If adverse inferences are permitted, there is some appeal in requiring suspects to be cautioned about that possibility. On the other hand, a caution along those lines could become overly complicated.

Question 16

The Criminal Bar Association is not aware of the relationship between section 32 and the veracity provisions causing any practical problems.

Question 17

Judges should not be allowed to comment on the defendant's silence at trial. However, currently judges rarely do this anyway. A possibly related trend is that counsel are more frequently calling the defendant to give evidence.

Chapter 6: Unreliable Statements

Questions 18 – 19

The truth of a defendant's statement should not be considered when determining its admissibility under section 28. It is inappropriate for a determination as to whether a statement is true to be made at the threshold admissibility stage rather than at trial. It would almost always require counsel to call their client to say it is untrue. That could expose the defendant to jeopardy if there is any inconsistency under section 15 of the Evidence Act.

However, if the truth of the statement can be established through the production of independent evidence (e.g. body in a trunk) then there might be a case for it to be considered. If it is to be considered, the defendant needs to be given the opportunity to be heard.

Chapter 7: Improperly Obtained Evidence

Questions 20– 24

The Criminal Bar Association would ideally prefer a rule that automatically excluded all improperly obtained evidence, but accepts that such an amendment is unlikely. It is not entirely happy with section 30 (as lawyers can find it hard to predict the outcome), but cautions against tinkering with the

provision. The best approach is to just leave the balancing exercise to the good sense of the judges; cannot see how it would work otherwise.

It was noted that if improper conduct by the police was deliberate i.e. known to be against the rules, the evidence should generally always be inadmissible. That should not be a reward for gross negligence.

Question 25

The admissibility of evidence that has been previously excluded on the basis it was improperly obtained should be assessed in subsequent proceedings on a case-by-case basis. The balancing assessment is proceeding-specific: each case needs to be balanced on its own facts.

Question 26

The Criminal Bar Association does not have a particular view on whether the Act should be amended to contain a provision dealing with the admissibility of improperly obtained evidence in civil proceedings; but noted the factors relevant to any balancing exercise were likely to be quite different to those in the criminal context.

Question 27

The Practice Note could generally do with a spruce up. Some of the language (e.g. "refrain") is not well understood by suspects. However, the Practice Note cannot realistically be applied to undercover operations, as it was designed for a different situation. That said, it may be desirable for there to be some limits on the questioning of suspects in the context of undercover operations.

Chapter 8: Identification Evidence

Questions 29 – 31

If the witness cannot positively identify the defendant then the evidence should not be categorised as "visual identification evidence"; however, there is no particular difficulty in admitting it as circumstantial evidence (the judge would need to give a s 126 warning anyway). Except that would allow any identification attempt and a jury may be influenced by "possibly" or "could be".

Section 45 does not prevent police from including more than one suspect in the 8 person photo montage, which can unfairly restrict choice.

Chapter 9: Giving Evidence in Sexual and Family Violence Cases

Question 32

The Criminal Bar Association has no particular concern with evidence-in-chief being pre-recorded, although it is important for the video record to comply with the rules of court. Gave example of a case where the interviewer in the video record was identifying the defendant by name before a positive identification had been made.

The Criminal Bar Association is concerned about creating a presumption for cross-examination to be pre-recorded. The concern is about timing: the defence will be disadvantaged if it is required to conduct the cross-examination before full disclosure has taken place. As it stands, there is currently a real issue with regards to timely disclosure throughout the country and defence investigation and third party discovery take time. The initial police investigation is often not that thorough, and there tends to be two phases to the investigation (one before the defendant is charged, and one before trial). In addition to the practical timing issue, there is also some concern about unfairness to the defendant if the complainant is not present in court (whether in front of the jury or via CCTV link), but the defendant is. That is, the sense of immediacy and drama is lost where there is more reliance on DVD

interviews, prior statements (made out of Court and not on oath).

The Criminal Bar Association wondered whether fast-tracking of sexual violence cases would be a better solution to the issues raised, but also noted that this would result in other cases being pushed out even further.

It is important that counsel are educated about how to question children, and about the role of communication assistants (currently there is some misunderstanding as to what communication assistants do; namely help the witness understand the question, not give the answers).

Some concern was expressed that the Sexual Violence Pilot seems to operate from the presumption that the defendant is guilty. One issue that arose in the Pilot was that counsel were being required to submit their questions to the court in advance – there is no authority for courts to require this. It is important to keep defendants' rights in mind when introducing measures to help vulnerable witnesses.

Question 33

Prosecutors should be required to consult with complainants in family violence cases about their preferred mode of giving evidence, but this currently happens anyway.

Question 34

The Criminal Bar Association has no particular problem with a presumption for propensity witnesses and family members of the complainant to pre-record their evidence, as long as they are available for cross- examination. These are no different from other witnesses, however, and this can contribute to the immediacy of the trial. There is no urgency in recording their evidence as it will generally be about more historical matters anyway.

Propensity witnesses should essentially be treated the same as sexual violence complainants. There is potentially some uncertainty as to whether evidence of a propensity witness' sexual experience is governed by section 44.

Question 35

The Criminal Bar Association has no particular problem with vulnerable witnesses pre-recording their evidence, and noted that it benefits the defence too as they can see all the evidence well in advance of trial and can more effectively prepare their defence. However, the witness must still be available for cross-examination.

Question 36

The Criminal Bar Association believes that recording the entire evidence of sexual and/or family violence complainants at trial for use at a retrial would be very expensive. More evidence would be required at the retrial and it may look distorted to have two different approaches in front of the jury, particularly if there is a different defence counsel. It would lengthen the retrial. It is not sure whether the recorded material would be of enough use to justify the cost of recording all cases. However, there is no objection in principle.

Question 37

The Criminal Bar Association says that sections 106(4A) to (4C) and regulation 20B restricting access by defence counsel to evidential video interviews in sexual or violent cases has caused major problems. Restricted access causes problems when the client is in jail; if the client is reluctant to go to the police station; and where the police officer remains in the room whilst the video is being played, as defence counsel cannot properly communicate with their client. Also, these sections are being applied inconsistently, as some judges release the video to counsel, whereas others do not.

The Criminal Bar Association accepts that there need to be rules and restrictions around video recordings, but defence counsel should have access to the video recording and should be able to take it to the prison to show it to their client or the police should be able to supply it to the prison for the defendant to view if counsel may not visit. If the defence counsel has the video there is no way the inmate can show it to others.

It was also noted that it is illogical that defence counsel and defendants can access transcripts, but not evidential video interviews.

Question 38

(a) Judges already have the power to disallow a question asked in an unduly intimidating or overbearing manner, but there is no objection to section 80 being amended if this needs to be clarified.

(b) Judges should not be able to exclude particular types of questions as a whole, rather they should just respond to individual questions; there is nothing wrong with tag questions unless the witness is vulnerable.

(c) There should not be a duty on judges to intervene when the manner of questioning or the content or structure of questioning is unacceptable. Creating such a duty will just result in another ground of appeal, and judges do currently intervene in practice anyway.

(d) The Criminal Bar Association has no issue with a pre-trial ground rules hearing. It agrees the need to improve the courtroom experience for vulnerable witnesses should be recognised, and that ground rule hearings can help do this. However, counsel should not be required to submit questions in advance. Rather, the role of a ground rules hearing should be to explain the role of the communications assistant, and for the communication assistant to explain what a witness is likely to be able to understand. There should be a discussion and agreement on how the process will work.

Chapter 10: Conduct of Experts

Question 39

There should be a separate code of conduct for expert witnesses in criminal proceedings. The general rules in the High Court Rules (apart from the obligation to confer) should and do apply to expert witnesses in criminal proceedings.

Question 40

The Criminal Bar Association is not comfortable with an obligation to confer being placed upon expert witnesses in criminal proceedings, even if it only applies when a judge makes a direction to that effect. The concern is that privileged information may be disclosed by the expert. There is also a risk that experts may make concessions while conferring, which can affect the defence. The best expert is not necessarily the best advocate in a conference. Conferring can become a question of which expert advocates their position and views to the other one most persuasively.

There are advantages of conferring, as it narrows the issues in contention and saves resources and time, but a decision as to conferral should be made on a case-by-case basis, and with agreement between the parties, not because a judge requires it.

Hot tubbing can be successful in civil cases, but probably not in criminal jury trials.

Chapter 11: Counterintuitive Evidence in Sexual and Family Violence Cases Questions 41-42

The Criminal Bar Association supports the use of section 9 statements being used to admit counterintuitive evidence. However, it believes there needs to be more uniformity in the statements that are being given. It would be helpful to have a standard set of statements that the prosecution intends to rely on made available to counsel.

Question 43

(a) The Criminal Bar Association does not believe that there is a need for additional judicial directions on counterintuitive evidence, due to the ability to admit this evidence via section 9 statements. However, it would not be a problem if additional judicial directions were created, and they could potentially help avoid the lack of uniformity that currently exists.

(b) If such directions are added they should be non-legislative, as this area is continually developing, for example there is currently disagreement between research psychologists and clinical psychologists about whether children can distinguish between something that happened to them, and something they were told.

The Bench Book should be published and publicly available, or at least available to counsel. Currently, the Bench Book not being publicly available means that in some cases both judges and counsel are overlooking judicial directions that should have been given.

Chapter 12: Judicial Directions on the Impact of Significant Delay

Questions 44 – 45

The Criminal Bar Association has no particular view in relation to these questions. It agrees there may be some logic in amending section 122(2)(e) to expressly confine its scope to the effect of delay on the reliability of evidence if it is necessary. If section 122(2)(e) is amended in this way, there should be a separate ability to give a fair trial direction on the impact of delay on the defence.

Chapter 13: Veracity Evidence

Questions 46 – 48

The Criminal Bar Association believes that the veracity rules are adequate, but that the term "veracity" is confusing and should be changed to honesty or truthfulness. The term "propensity" is also quite difficult to understand. It could be "similar conduct".

Chapter 14: Co-Defendant's statements

Question 49

The Criminal Bar Association sees no particular difficulty with amending s 22A so that it does not only apply to hearsay statements. The limitation of that section to hearsay statements was probably a legislative oversight.

Chapter 15: Privilege

Question 50

There are no problems in practice with third party communications.

Question 52

The Criminal Bar Association agreed that it would make sense to clarify whether (and when) litigation privilege terminates.

Question 53

There is uncertainty about whether (and if so, when) the privilege for plea discussions terminates. If the privilege does not terminate, the fact that there has been a without prejudice plea bargain offer could not be used as a factor in mitigation at sentencing. It should be possible to offer a plea "without prejudice except as to any sentencing".

Chapter 16: Regulations

The Criminal Bar Association had no view on the Regulations, other than the Regulations that affect access to video records (this issue was fully discussed under Chapter 9).

Te Ao Māori Considerations

No particular Evidence Act issues in relation to Māori were raised.

As a general observation, it was noted that Māori defendants are more prone to plead guilty. And that Maori complainants don't wish to have their whanau disrupted by long sentences or tough bail conditions for family violence or sexual cases. They wish to be able to withdraw their complaints if the behaviour ceases and expansive use of the hostile witness provisions takes away their autonomy. Complainants should have their lack of autonomy explained before they make a statement so it may be taken with their informed consent.

The Criminal Bar Association doubts whether adding a limb into section 6 requiring te ao Māori to be taken into account would assist in practice; it would likely cause confusion. If anything, such a section would be more relevant in the Criminal Procedure Act 2011.