PRESS CLUB SPEECH

Thursday 14 May 2015

The Honourable Chris Kourakis, Chief Justice of South Australia

I have in the past referred to the Law and Justice system as community superstructure. We are all familiar with the concept of community infrastructure. Upgrading old and constructing new infrastructure is almost universally accepted as pressing and necessary. People readily understand how new roads, bridges and ports encourage and expand economic activity. In recent times it has also been accepted that the future of mature service economies depends on universally accessible high-speed Internet connection.

However it is not as obvious to many that economic growth is equally dependent on the regulatory systems which govern our society's industrial, commercial and community activities. Those systems include cultural norms, rules of good behaviour, professional codes of conduct and ultimately the law. Those regulatory systems are what I call social superstructure. Funding superstructure is as important as funding infrastructure.

Fortunately most people in our community can get on with their lives enjoying the benefits of living in a society ordered by the rule of law seldom troubled by legal proceedings. However it is important that when our laws are breached, or at least a dispute over legal rights arises, that society makes available to the persons involved cost-effective procedures to ensure that right is done. Today I wish to focus primarily on a vision of the justice system of the future. However because Law Week seems to have attracted some media attention, I will comment briefly on a few contemporary issues.

First some comments about the administration of the criminal law. Speaking generally, and without reference to any particular case or cases, South Australia has been well served by its police force, the office of Public prosecutions, the legal services commission, the private legal profession and the Courts.

In his relatively short, but productive, term Commissioner Burns set the police force on a strategic road which emphasises functionality and flexibility over static structures. I will return to Commissioner Burns and incorporate something of his vision of the future of policing in what I have to say about the future of courts. The point I wish to emphasise for now is that properly resourcing police means more than providing a strong presence on the street or a quick response to a crime scene. Police must also be resourced and trained to provide, in a timely way, the evidential material to support the prosecution of offenders.

From time to time police officers express frustration at decisions not to prosecute and, albeit rarely, to prosecute.

On the other hand criminal law defence lawyers often express dismay at decisions to prosecute and perhaps even more rarely not to prosecute. Prosecutors for their part sometimes express frustration over the absence from the police brief of the evidentiary material they need to establish the very high standard of criminal proof – proof beyond reasonable doubt and the unwillingness of defence lawyers to enter into sensible negotiations to resolve matters or to agree non-contentious facts. It is important that police, prosecutors and defence lawyers remember that they have distinct roles in the administration of the criminal law and attend to their particular role as best they can with the resources they have. Constructive criticism is good but even better when accompanied by a healthy dose of self-criticism. Speaking out is good but even better when accompanied by objective investigation.

From the perspective of the courts, the South Australian public has every reason to have confidence in its criminal justice system even though, as with all things, it must subject itself to a process of continuous improvement.

In 1991 the statutory office of the Director of Public Prosecutions was established. South Australia has been well served by its Directors of Public Prosecutions as it was, before them, by its Crown prosecutors. The current Director of Public Prosecutions Adam Kimber and his office continue that tradition of high standard service. Importantly the Director of Public Prosecutions Act 1991 gave the Director, in all save the most exceptional circumstances, an independent prosecutorial discretion. The exercise of that discretion, whether to prosecute, on what charges to prosecute or whether or not to prosecute, will not always please everybody. However few, if any, persons outside the office will ever be aware of all of the circumstances which are known to the Director. The Director must make an objective judgement on the prospects of success based on the evidentiary material provided to him. The Director must also consider public interest questions especially when deciding whether to accept a plea to an alternative charge.

It is easy to make retrospective criticisms of prosecution decisions. Criminal defence lawyers understandably would prefer the Director to withdraw more charges against their clients and to accept pleas to lesser charges more often. I have seen no evidence that the Director or his officers make decisions of this kind whilst looking over their shoulders in fear of public or political criticism. They are made of tougher stuff. On the other hand I have no doubt that they consult victims and consider the wider public interest before compromising prosecutions. But that is how it should be. That is the responsibility with which the Director of Public Prosecutions has been entrusted.

A well known matter in which I was involved as Solicitor General established that the Director of Public Prosecutions is ultimately subject to oversight by the Attorney General who in exceptional cases may give directions to the Director of Public Prosecutions. In my view the Attorney General is the only supervisory authority which is necessary and constitutionally appropriate. Importantly the Attorney-General is ultimately answerable to the people of South Australia through Parliament.

The Legal Services Commission has a long history of providing a high standard of in-house criminal defence representation. I am very proud to have been part of that service early in my career. I owe a great debt to the Commission for the opportunities it gave me. The Legal Services Commission also very efficiently administers a system for funding private lawyers to represent defendants. However, the Commission has struggled for many years with inadequate funding. The effects are twofold. First there are fewer matters which can be funded. Secondly, because the level of fees which the Commission can afford to pay is so far below the market rates for legal practitioners in other fields, many good and experienced practitioners are lost to the criminal law. Many of those who continue to practice the criminal law do so out of their commitment to justice and not for the remuneration. In short the Commission's lawyers and private criminal law practitioners work very hard to ensure that accused persons are fairly tried and if convicted that they have all mitigating circumstances properly presented to the Court.

I mention also the important work of the ALRM, their lawyers deal with the most difficult of cases with even more limited resources. Reductions to their budget create a further burden on the Legal Services Commission which is likely to pick some of ALRM's clients. Overall, such budget cuts strain the court system as a whole.

The question of the payment of the legal expenses of those who are acquitted has attracted some recent attention. For the many defendants who receive legal aid this is obviously not an issue. I can understand the sense of grievance of those privately paying

defendants who are ultimately acquitted. Whether they should be reimbursed is a question of public policy. The criminal justice system as a whole, and the Legal Services Commission and ALRM, in particular, are underfunded. Governments operate with limited budgets and do the best they can to balance competing demands. It is a question of public policy whether limited government funds should be diverted from the operations of the courts and from legal aid budgets to pay the costs of privately paying acquitted defendants. I make only this observation on that question.

The criminal law provides many safeguards against wrongful conviction including a very high standard of proof. I suspect based on my experience that many acquittals result not from a positive satisfaction of innocence but from the failure to meet that high standard of proof. Are the costs to be paid whenever an accused is acquitted or only when an accused is innocent? If the latter, how are we to decide?

Whatever the community's answers to these questions it is clear that is that there can be only one rule for all. No particular individual or class of defendants is more entitled to his or her costs than another because of his or her position, vocation or membership of an association.

I turn to the Courts.

The Magistrates Court heard 65,857 criminal matters in 2013/2014, the District Court 2,923 and the Supreme Court (murders) 243. All courts dealt with most matters within a year (Supreme Court 89%, District Court 71%, Magistrates Court 66%).

Our courts work to a comparable standard to all the other courts around the country. The work of the courts and the justice system of South Australia is not substandard. Interstate comparisons are particularly difficult, and they must take into account the geographic distribution of the State's populations and the number and location of remote communities. They must also take into account policing practices, the complexity of the charges that are laid and a range of other factors which make it near impossible to compare one State to another. But if comparisons are to be made, the closest comparison to South Australia is Western Australia.

The time it takes to dispose of a matter is a function largely of the time it takes for prosecution and defence to prepare their cases and negotiate. Adjournments are given at the request of parties who want more time. Only a very small proportion of adjournments are given because there is no court available.

In the criminal area there remain backlogs and some long waits to trial particularly in the District Court which must be reduced. The Chief Judge of the District Court has established a criminal justice management forum. I attended the inaugural meeting. It discusses and exchanges views about topics and issues concerning the hearing of criminal matters. Members of the forum include judges from the District and Supreme Courts, representatives of the Attorney-General's Department, the DPP, the Legal Services Commission, the Law Society and the Bar Association. The forum is chaired by Judge Davison. Improvements will come through the hard work of rigorous analysis of the forum. I urge all practitioners to contribute constructively to its work through their representatives.

However, there remain intractable problems which are outside the capacity of the courts to manage. There are bottlenecks in the number of available criminal courts and judges to hear matters. By far, and in a way the most difficult, problem is in the matters not being reached on the day of trial. There are 577 criminal matters, or thereabouts, listed for hearing in the District Court annually. The average time for a trial is five days. More than half of the matters listed do not proceed to trial. Prosecution witnesses may leave the State or decline to attend because they cannot face a trial. Accused persons will decide to plead guilty if they can negotiate a plea to a lesser charge. Often that will happen at the last moment. Some accused bury their heads in the sand and plead only when they are assured they will have a

trial. They prefer to stay out on bail for as long as they can even though it means a longer sentence because they lose the reduction for an early plea of guilty. To accommodate these problems the District Court over lists trials.

The Attorney-General has recently released a transforming criminal justice paper that makes a number of proposals for reform of the criminal procedure of the committal and trial of major indictable offences. The paper emphasises the need for earlier resolution of serious criminal matters. I welcome the government's commitment to improving this area of the criminal justice system. Early resolution allows victims defendants and witnesses to put distressing events behind them. It gives closure. Early trials result in more just verdicts because the recollections of witnesses will be fresher. The wider community too benefits from the early disposition of criminal matters because it engenders a greater sense of security.

The modification of existing procedures and the tightening of timetables can assist in the early resolution of matters. On the other hand, major changes in procedure should be supported by evidence before they are adopted.

There are two such proposals which in my view should be carefully investigated. The first is to empower the police to lay what is referred to as a statutory charge and which is in effect an internal police decision to charge without placing the matter before a court.

The second proposal I mention effects a significant shift in criminal procedure. It imposes a requirement on defendants to disclose more of their defence ahead of the trial or at least to indicate the aspects of the prosecution case which they do not dispute. There is no doubt that obligations of that kind will expedite proceedings which is a good thing and save much time and expense by avoiding expensive forensic investigations of matters about which there is no dispute. I can understand too the force of the arguments that obligations of this kind can be imposed without causing any unfairness. I express no concluded view on these questions. They are essentially matters of public policy. My point however is that they are important questions of public policy which should be fully explained to, and debated by, the community.

What is needed more than anything else is the proper resourcing of police and the Office Director of Public Prosecutions to collate and provide evidentiary material early and the provision of good quality legal representation to defendants soon after they are charged. Although it will be necessary to increase short term funding of the criminal justice agencies to change the prevailing culture to one of the early resolution in the long term the ongoing costs will be reduced. A failure to properly resource any change will cause the failure of that change.

The courts have always engaged in a process of continuous reform of civil process as well.

Since my time as Chief Justice, the District Court and Supreme Court have introduced a fast track stream which allows relatively short and simple trials to be expedited (3 days). If the parties and their lawyers can simplify the issues in dispute and reduce the estimated time to trial the court is able to offer a trial within weeks. About five matters have been listed for trial. Only one proceeded to a conclusion and a judgment will soon be delivered adjourned to a fixed date. There is a limited cost scale so that the successful party does not recover all of their costs. The limited cost scale is intended to encourage the parties to simplify and reduce the issues in dispute and to create a downward pressure on legal costs.

The rules have been amended to remove several early directions hearings. The parties are now expected to confer about their cases and attempt to either mediate or reduce the issue before the first appearance in court. That measure is designed to reduce the costly churn of solicitors attending court for hearings which do not progress the matter. It is critical

that lawyers actively take responsibility for resolving the civil disputes of their clients cost effectively.

The Supreme and District Court have also introduced rules which require a greater level of disclosure of evidence and consultation in building matters and medical negligence matters. We hope to review the effectiveness of those measures with the help of a leading university academic in the near future.

Everything I have said so far has been premised on old practices and technology. All of that is about to radically change. All of us here today are carrying that change in our pockets, purses or have it resting on the table in front of us. We call it a smart phone but telephonic communication is but a minor function. We all recognise the way it has transformed social interactions but we are yet to fully comprehend the way it will transform industry, commerce and government. We know that for youth it is a comprehensive entertainment package. It creates and facilitates virtual schoolyards, town squares, theatres, crowds, gatherings, protests, petitions and, overseas, even revolutions.

It is a real time newsroom whose reporters are every user with a smart phone, and there are close to 2 billion around the world. Using smart phones we access content which ranges from the works of ancient philosophers to modern comedians, from the constitutional debates of this and other countries to the sometimes informed, and sometimes bigoted, online commentary. We use smart phones to navigate ourselves around foreign lands, and to take selfies in front of iconic landmarks to share with our Facebook friends. All of this just 20 years after the first few threads of the worldwide web were spun.

When we reflect on trans-formations as massive as this it is obvious that it would be disastrous not to embrace this technology in all areas of government including the justice system. How might all of this look? Let me start with a vision of modern policing I once heard Commissioner Burns describe. Commissioner Burn's vision was that the tablet with an inbuilt camera would replace the police officers notebook. Let me step you through the cascading consequences I imagine that simple step could take us.

An assault on a city street; a police officer arrives and videos the victim, her injuries and her contemporaneous statement as she points out her assailant across the street. Other police officers video tape the statements of eyewitnesses as they stand in the street and point out where and how the assault was committed and give a description of the assailant. A police officer walks across the street and videotapes a conversation with the identified assailant who appears dishevelled and blood stained. The suspect is arrested and taken to the city watch-house. By the time of their arrival voice recognition software has created Word documents of the taped interviews. The arresting officer has also completed the fields on the electronic templates of a charge sheet and a police brief summarising the offending and evidence.

The arrested person is taken before the officer in charge of the watch-house and immediately makes a bail application. The officer scans the arrested person's smart phone and extracts telephone, email and Facebook contacts which are checked against a database which confirms the person's identity.

The officer can now confidently grant bail but requires a guarantor. Email contact with a parent or friend allows an app facilitated bank transfer for a cash guarantee. When the arrested person returns home after his release he finds text Facebook and email messages containing attachments which are the charge sheet, police brief and notification of a court hearing date. He also finds hyperlinks to a page on the legal services commission website allowing him to complete an online application for legal aid which is automatically approved by reference to his social security number.

There is a human tendency to bury your head in the sand when faced with big problems. Providing help at the press of a button can overcome that procrastination. The

Legal Services Commission website would also allow the charged person to access a list of accredited criminal law practitioners with hyperlinked online contact details.

The arrested person can then send the charge sheet, court hearing date and police brief to his selected solicitor. By the first hearing date, at which the solicitor can appear online, via audiovisual or text/chat link, or in person, the solicitor has obtained instructions by a combination of online and face-to-face communications and has negotiated with police prosecutions in a similar way. The matter can be set to trial or a guilty plea made. And, I confidently predict, that very many fewer matters will be set for trial. The potential for dispute and doubt when a witness is confined to distant recollections of chaotic and distressing events dissipates in the face of real time audiovisual records of the genuine and spontaneous reactions to those events.

Similar procedures, with some adaptation, will facilitate the investigation charging and prosecution of more serious offences. The statements of witnesses, and forensic investigations can be posted directly onto and managed on an online database; which also allows communications between investigators and between investigators and prosecutors so that the police investigation can be focused directly on the matters in contest.

The defendant having obtained very early legal representation allows his lawyer and the prosecutor to negotiate an early guilty plea or identify the real issues in dispute.

What I have described is not the brave new world of the distant future. It is possible with contemporary information technology. The savings to the justice system cannot be overstated. The improvement in timeliness will be dramatic and culture changing.

Information technology has the potential to effect as substantial improvements in civil proceedings as it does in criminal one. The form for initiating proceedings in any court in South Australia can be simplified and be undertaken on line using drop down boxes with the required information.

The initiating summons can be accompanied by the important supporting documents which are hyperlinked. A claim in debt will have electronically attached the invoice; a building dispute photographs of the faulty work; a personal injuries claim will have attached the relevant medical reports; a dispute over the meaning of a contract will have the contractual document itself.

Under present procedures that evidentiary material is referred to or described in clumsy legalise in the pleadings and months may go by after the initiation of the proceedings before the documents themselves are exchanged.

The electronically initiated proceeding will be served electronically when an electronic address is known. Electronic filing will be a 24/7 facility.

All parties will be expected to have negotiated and exchanged material before issuing proceedings.

The defence will also be filed electronically with the same facility for attachments.

The proceeding will contain an electronic identifier as to the type of matter. Notification of the filing of a matter will be given instantaneously to a senior judge coordinating the list for matters of that type who will then allocate it to a Judge who will then directly manage the matter. In some cases, the Judge may give a direction that the parties engage in further mediation or submit part of their dispute to expert determination.

The judge may direct the parties to make written submissions on a question of law which is apparent on the face of the initial pleadings or may direct the filing of written statements. That can be directed either by the coordinating judge or the judge managing the docket.

Return dates for the first appearance before the court will be generated electronically. Any special directions requested by the party will be expected to be sought online and, if not consented to by the other party, supported by written submissions. The managing judge will make decisions in chambers without court attendances other than in complex cases.

As matters proceed to trial, documents will be received electronically. There will be no need for files to be physically moved from the registry to a judge or from one judge to another. Parties will have around the clock access to all of the documents filed in their matters.

At trial complex searches of the documents can be quickly undertaken electronically saving much court time. The process of judgment writing will be much facilitated by the ease with which all of the information can be accessed.

The final matter I wish to raise has been a matter of shame for the criminal justice system and the wider community for all too long. I speak of the over representation of indigenous persons in custody.

In 2014 of the 900 prisoners held in remand in South Australia 26.1% were aboriginal. That percentage is consistent with the percentages from 2006 in South Australia and consistent with the Australia wide percentages. The sentenced prisoner rate in South Australia in 2014 was 366 of the 1770 prisoners or 20.6%. That percentage is consistent with the proportion since 2006 and marginally less than the Australia wide proportion. Of the total prison population of about 2650 22.4% were aboriginal again broadly consistent with the proportion from 2006 and a little less than the national average. Yet Aboriginal people comprise close to 3% of the South Australian population.

The total incarceration rate for the adult Aboriginal and Torres Strait Islander population of South Australia in 2014 was 2501 of every 100,000 or 2.5%. That proportion was lower than Western Australia and the Northern Territory but significantly higher than New South Wales Victoria and Queensland.

The rates for Aboriginal youths are worse.

A SACOSS costs report released earlier this year examined the overrepresentation of Aboriginal youth in the Justice system. It found that aboriginal youth are approximately 4% of the population but comprise 46% of youth in detention. An aboriginal youth is 12.5 times more likely to be involved with the justice system and 19.7 times more likely to be in detention than non-aboriginal youth.

The Royal commission into aboriginal deaths in custody reported as long ago as 1991 that:

> "the consequence [of Australia's history since colonisation] is the partial destruction of Aboriginal culture and a large part of the Aboriginal population and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non—Aboriginal people"

The Australian Human Rights Commission surveyed the response to its many recommendations in 1996 and found that few of the recommendations of the Royal Commission into deaths in custody had been put into effect.

It is a major failure of policy in this area that there has not been a review of the implementation of the Royal Commission's recommendations or the proposal of alternative or new recommendations in a systematic way since 1996.

The failure to bring the aboriginal incarceration rate to anywhere near proportionate levels represents a continuing institutional degradation of Australia's indigenous peoples. Cuts in funding to Aboriginal legal aid organisations may exacerbate the problem.

It is an ethical and a social justice failing which must be remedied. Sound economics also demands its correction. The estimated annual cost of detaining indigenous youth is 13.3 million which would be reduced by 12 million if Aboriginal youth were not over represented. If the adult prison population was proportionate there would be only 80 indigenous prisoners, and a much smaller prison population of 2137 and not 2650. When you double that proportion to 6% of the prison population you arrive at 2216 persons imprisoned instead of 2650.

Success in reducing indigenous incarceration would so dramatically reduce prison overcrowding that there would be no need for a new gaol.

The SACOSS report like the Royal Commission found that the causes of over representation are many complex and interconnected factors. Ill health alcohol and drug dependence mental illness homelessness poorer education and family dysfunction are causes which generally precede contact with the justice system and over which justice agencies have no control. Other government agencies must speak to how these issues will be addressed. But what can the criminal justice system do?

The Royal Commission recommended (89) that the operation of bail legislation be closely monitored to ensure that the entitlement to bail as set out in the legislation is being recognised in practice. The granting of bail is essentially a risk assessment which weighs the risk that the defendant will abscond or commit further offences against the principle that persons not yet convicted should be denied their liberty. That principle applies irrespective of class or race. However in practice if a particular community group suffers a high rate of homelessness, unemployment and, poor family and community authority and supervision bail is more likely to be refused. I have, and many judicial officers, face this problem day in day out.

The Port Adelaide Nunga court pioneered by Magistrate Chris Vass involves indigenous elders in the sentencing hearing. The involvement of the community elders both furnishes the court with useful information and adds an additional level of authority to the sentence of the court. Another important benefit is that the participation of the elders reinforces their authority in their indigenous community. I believe that the role of the indigenous community and its elders in particular in the criminal justice system can be expanded.

The Royal Commission recommended (114) that wherever possible departments and agencies responsible for non-custodial sentencing programs should employ aboriginal people to take particular responsibility for the implementation of such programs and should employ and train aboriginal people to assist to educate and inform the community as to the range and implementation of non-custodial sentencing options. The Commission also recommended that in devising work programs on community service orders in Aboriginal communities there should be close consultation with the community to ensure that work is directed which is seen to have value to the community.

The Commission also recommended that home detention be provided both as a sentencing option available to courts as well as a means of early release of prisoners. It recommended that corrective services authorities ensure that Aboriginal offenders are not denied opportunities for probation and parole by virtue of the lack of adequate numbers of trained support staff or of infrastructure to ensure monitoring of such orders. (109 – 119)

It is time to revisit these recommendations. It is time to investigate the establishment of bail hostels, and community corrections programs managed by indigenous communities. These programs will be enhanced by engaging indigenous community authority structures.

They should also adopt best practice community correction approaches. Once established, the programmes should be reviewed and their continuing operation must be evidence based.

It will be difficult. There will be failures but doing nothing is not an option.