

3 December 2009

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Mr Martin Hinton QC  
Solicitor-General  
Office of the Attorney-General  
DX 336  
ADELAIDE SA

Dear Martin

### **Criminal Justice Ministerial Task Force – Case Conferencing Program**

I refer to your letters of 23 November 2009 and 30 November 2009 in which you invited the Society to provide any comments on the operation of the case conferencing pilot that has been underway in the Adelaide Magistrates Court for over six months.

The Society's Criminal Law Committee has discussed this matter and accordingly, I provide the following comments.

The Criminal Law Committee contains a number of practitioners, both from the prosecution and defence. A number of Committee members who have appeared regularly in case conferences in the Adelaide Magistrates Court. Committee members have sought out views from other practitioners as well for the purposes of this report.

The pilot Case Conferencing Program was initiated for a number of purposes including to encourage negotiations at an early stage; to enable the Court to have a direct input and involvement in case conferencing (and incidentally in the same way as the management of most other types of litigation is now conducted by the courts); to reduce delays in respect of major indictable matters; to seek to resolve matters before committal; to reduce the number and length of trials in the District Court; to encourage negotiations between prosecution and defence; to better inform accused persons about committal and related procedures; to assist in resolution including the involvement of complainants; to increase potential sentencing discounts for guilty pleas; and to agree or attempt to agree evidence, issues, extent of prosecution disclosure, defence disclosure and other pre-trial matters.

The Committee believes that the Case Conference Program is proceeding well and that the potential for the purposes outlined above can develop and be enhanced.

The Committee considers the pilot should continue and it would be most worthwhile to expand the pilot to allow for more case conferences to be held.

The Committee makes the following observations about case conferencing generally:-

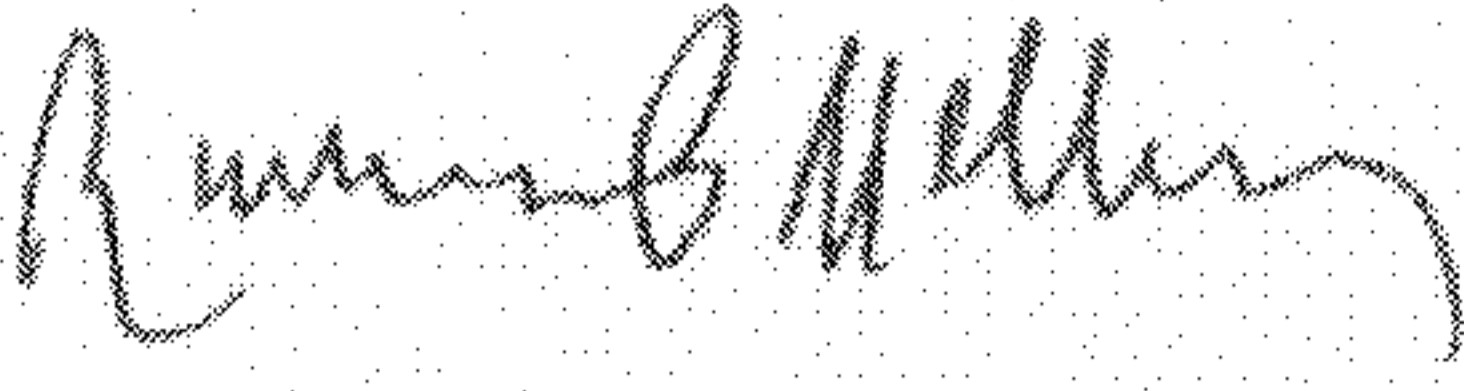
1. One of the flaws in the current Case Conferencing Program is that the Magistrate hearing the case conferences is often also listed in the Committal Court on the same day. This means there is very little time for a detailed or dedicated case conference. It would be more useful if a separate Magistrate is assigned to case conferences. From time to time a case conference will require back-and-forth negotiation which cannot happen where there is time pressure.
2. Case conferencing is not a substitute nor an alternative to open and realistic negotiations. Those practitioners who engage in proactive negotiations continue to do so. However, case conferencing is having a useful effect with practitioners who may be more reluctant to engage in negotiations at an early stage. This applies to both prosecution and defence.
3. Defence counsel rarely refer matters to case conferences. Therefore defence practitioners need to be encouraged to refer matters. This is likely to increase with the extension of the pilot and as practitioners become more informed and aware of case conferencing, its utility and its efficacy.
4. Case conferences are currently voluntary. That is, if one party asks for a matter to be referred to a case conference, the other party may decline. A useful reform may be considering making the referral to a case conference a decision for the sitting Magistrate. As one of the aims of case conferencing is to require parties to be well informed and properly instructed earlier, an ability to refuse a referral (without any discussion or decision-making by the Magistrate) would seem to be at odds with the spirit of the pilot program. If one party believes the matter is destined for trial or that there is no room to negotiate, this position may well change with a more detailed discussion – plus the Magistrate's input – at a case conference.
5. Some defence counsel have indicated that case conferences have been very helpful where difficult or recalcitrant clients have refused to listen to sensible advice. In these cases, hearing the negotiations or potential consequences from both the Crown and the Magistrate, which then tally with the defence counsel's own advice to the client, has resulted in the client understanding that the negotiations are sensible and there are significant benefits in accepting the proposals.
6. Some defence counsel are occasionally and apparently insufficiently prepared to conduct the case conference whether by virtue of a lack of sufficient instructions from the accused or adequate consideration of the brief, the issues, the prosecution evidential material and related matters. This may reflect time constraints, workload demands, the sheer complexity and volume of many major indictable matters in modern times and other exigencies but should not be excused on that basis. Effective discussions may be reduced because of that lack of preparation.
7. Further education, information and professional development sessions for counsel at the Bar and defence and prosecution practitioners should be conducted. That will encourage the openness of discussions generally, understanding of case conferencing and its development, availability of legal aid funding and methodologies for the conduct of case conferencing. This could also seek to reduce the potential for unnecessarily adversarial approaches by either side to case conferencing. The realistic, practical and pragmatic approach to case conferencing is to be encouraged. An analogy is with pre-trial conferencing in the Magistrates Court which has been functioning for many years and so the approach to case conferencing already has a strong foundation for practitioners on both sides to engage. Case conferencing is certainly more complex and more intense. However, the involvement or understanding of an accused person with Court processes and the consequences of a guilty plea or a trial are important to engage at the threshold stage of a case conference. In other

words, the potential for case conferencing to be still more successful is yet to be fully realized.

8. Case conferences tend to focus on resolution whether by way of withdrawal, guilty plea to charge as laid or to a lesser alternative. It is rare for a case conference to focus on agreement of issues, evidence and disclosure. The potential for that to be further developed needs to be encouraged and enhanced.
9. A development of check lists might be of some assistance for both parties and the presiding judicial officer for the purposes of a case conference.
10. An observation was made by a practitioner that a useful aspect of case conferencing would be for sentencing indication to be made by the prosecution and by the presiding judicial officer but that may be limited by virtue of the fact that it is a magistrate that is presiding. Sentencing indication is a most worthwhile approach to resolution and needs to be more fully considered. This should be part of case conferencing.
11. Adequate preparation by a presiding magistrate also needs to be encouraged for the purposes of the successful outcome of a case conference.
12. Prosecution disclosure needs to be considered whether or not it is complete. That is, if it is incomplete, whether further disclosure is required or likely to occur, the timing of that, the issues raised and the effect of that in the context of the strengths or weaknesses of a prosecution case. Openness about the extent of disclosure and what still remains to be done whether by way of investigation or disclosure of materials also needs to be part of a case conferencing process.
13. Defence disclosure should also be actively considered. It is certainly done in the context of the more informal plea negotiation practices between practitioners. Options for defence disclosure should be considered at the case conferencing stage.
14. Opportunities for the parties to confer through their counsel in the case conference (off the record) or by taking a short break should also be encouraged.
15. The use of DPP letters giving notice about a case conference and the consequences of non-participation or non-resolution needs to be more fully considered. In some respects it might be said that such standard form correspondence has a more than merely obvious statement of the position. It might be seen to be that such correspondence is indicating that a person's non-participation in case conferencing will be to their prejudice and care must be taken about both such correspondence, its use, the transcripts of case conferencing and its use. This requires a better understanding of what is to occur in the context of sentencing following case conferencing.
16. We do not have examples of what has occurred at sentencing in the District Court as a consequence of case conferencing and more needs to be understood about that in due course.

I trust these comments are of assistance to you.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Richard Mellows".

Richard Mellows  
**PRESIDENT**