Speech delivered by Chief Justice Higgins
at the **AFP Homicide Course**
Monday 27 October 2008
Australian Federal Police College

Good Evening Ladies and Gentlemen, Chief Police Officer, Assistant Commissioner, and members of the AFP.

Thank you for inviting me to join you here tonight. I have been asked to share with you some of my thoughts on the issues that I see facing homicide investigations and their prosecutions.

I personally have worked in the criminal justice system for many years. First as a legal practitioner, then as a judge of the Supreme Court and now as Chief Justice of the ACT, so my perspective of homicide investigations and their eventual prosecution comes from a background of legal principle.

It is important to acknowledge the time and effort that the Australian Federal Police in this Territory, and police officers in other states, put into their investigations. Matters that do finally reach the courts, at times represent hundreds of hours of work for the informant and the investigating officers involved in the case. This is particularly true with respect to homicide investigations.

Your role in putting together the final movements of a person, and presenting evidence as to how their death came about represents society's desire to live in a lawful community, one in which the rules and laws laid down by that society are respected and adhered to. Yours is a particularly important role, as you are charged with investigating homicide, which is, the crime considered to be the most serious by the law and society in general.

Noting this, I understand the frustrations of investigating officers when a matter comes before a court, and a seemingly insignificant archaic rule of evidence is applied to the detriment of the prosecuting case. Personally, I take no pleasure in seeing a

prosecution case fall over. However, the court is no different to society at large, in that, court processes are also governed by rules of the law.

The protection of the Rights of the Accused

These rules require that the highest regard be given to the protection of defendants' rights, and most fundamentally a defendant's right to a fair trial. During court proceedings the defendant is recognised as the most vulnerable party. Theirs is the freedom and reputation at stake, so it is important that they be afforded the full protection of the law.

The rationale behind these protections was expressed by Sir William Blackstone in the 1760's. This maxim, since known as Blackstone's formulation, states that it is 'better that ten guilty persons escape than that one innocent suffer'.[1] This notion has underwritten human thought on crime and punishment even well before Blackstone's Commentaries. In fact there are many who see the principle expounded in God's words to Abraham in the book of Genesis[2]. At its core, this sentiment expresses the importance of the protection of the innocent. There is great fear that a person who is innocent should be wrongly convicted and punished. To safeguard against this, the law is developed towards ensuring that an accused is given a fair trial.

The focus on the protection of the rights of those brought to answer the accusations of the Crown is reflected in the law itself. Examples of this are seen in the standard of proof required in the criminal law, which is beyond a reasonable doubt. This emphasis is also seen in the requirements that witnesses recount an event in their own words before the court. In the discretion that allows seemingly relevant evidence to be weighed in terms of its prejudicial and its probative value, and the requirement that in circumstances where competing inferences are reasonably open, then that inference, which is least adverse to the accused must be preferred even if it be unlikely.

The laws which govern our criminal justice system go back to a time when state oppression was rampant. The development of the courts and the legal system can thus

[1] William Blackstone (1760) *Blackstone's Commentaries* Vol 4 at page 358
[2] Alexander Volokh (1997) '*n* Guilty Men' 146 *University of Pennsylvania Law Review* 173 http://www.law.ucla.edu/volokh/guilty.htm (See also Genesis 18:23-32)

be seen as the citizens' attempt to protect themselves from the excesses of the state, and oppressive criminal justice practices which took the form of trial by ordeal, and capital, and corporal punishment.

These laws have been laid down by parliaments and courts of the past and in keeping with the legal tradition create binding precedents on judicial officers.

Justice Dawson once observed, and I quote:

> 'The adversary system is the means adopted, and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputes. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case of either side. When a party's case is deficient, the ordinary consequence is that it does not succeed.'[3]

I offer these words by way of an explanation, as investigating officers and informants to the crown I understand that to a certain extent once your brief is taken to court your involvement with the mater changes significantly. It becomes the responsibility of the prosecution to negotiate the legal course, and to determine the most appropriate way in which to present the evidence that you have gathered.

To improve investigations

This brings me to the crux of my presentation tonight, which is what can you do to better ensure that the evidence you have gathered most effectively communicates your investigations?

Firstly, and most importantly you must be both thorough and diligent. While I'm sure that the training undertaken in this course will better develop your investigative techniques than I could, I would emphasis that any notes or reports you create may eventually be scrutinised by the court. In addition, any shortcoming in your investigation will potentially create vulnerability in your evidence which will undoubtedly be fully explored and exposed by the defence lawyer at trial, to the

[3] Per Dawson J at 682 *Whitehorn v The Queen* (1983) 152 CLR 657 as cited in Margaret Cunneen (2005) 'Living within the Law' *Sir Ninian Stephen Lecture,* 24 September2005, University of Newcastle.

detriment of your case. With that in mind you should always ensure your investigations align with the principles of AFP best practice.

It is also important to consider the elements of possible charges that may arise from an investigation, with a view to gathering such evidence as will support the charge or charges full.

With murder, for example (you will probably all be very familiar with this), under section 12 of the *Crimes Act* 1900 (ACT) it is a requirement that the Crown prove beyond a reasonable doubt that the accused committed a deliberate, willed act, which caused the death of another person. It is further necessary for the Crown to show that the accused did that act with an intention to kill the deceased or with reckless indifference to human life.

These elements have been considered by a number of cases in the past, both here in the ACT and in many other jurisdictions.

Elements of Murder

Deliberate Act

The first element that of a willed and deliberate, act was considered in *R v King*[4]. This matter was conducted by special hearing, as the accused was found unfit to plead, and unlikely to become fit to plead within 12 months. The accused, Mr King, was charged with murdering his wife Pamela Ann King.

The defence submitted that Mr King's actions were the result of automatism, that is, that they were involuntary to the extent that Mr King's will did not govern the movement of his limbs at the time of the incident.

This argument was rejected by Justice Gray who found that the conduct, as alleged, was proven, and, had the accused been fit to plead, would have constituted murder.

[4] [2004] ACTSC 82

Automatism has, however, in other cases been successfully argued to rebut the contention that an act was done deliberately.

Intention

The second element, intention, is probably of more significance to you as future homicide investigators.

Intent is notoriously difficult to prove, as it in essence requires one to show what was occurring in the mind of the accused person. This was a critical point in another of the ACT's most recently publicised murder trials, *R v Porritt* [5]

In that case the accused was charge with murdering his mother, Nanette Mary Porritt.

It was admitted that the actions of the accused had resulted in the death of his mother, but the principal argument was about intent. Counsel for the accused submitted that 'the accused neither intended, nor foresaw, that his acts would cause the severe injuries that resulted.'[6]

In light of the evidence that was presented to the court I agreed in essence with those submissions, I was 'not satisfied beyond a reasonable doubt that the accused inflicted any of the injuries suffered by his mother intending to kill her or with reckless indifference to the probability of death being caused.'[7]

The accused was, however, found guilty of unlawful homicide by reason of criminal negligence.

Self Defence

Establishing that a death is unlawful also requires consideration of the available legal 'excuses' for homicide, the most common being self defence.

[5] [2008] ACTSC33 (22 April 2008).
[6] *R v Glen Malcom Porritt* [2008] ACTSC33, Per Higgins CJ At 151
[7] *R v Glen Malcom Porritt* [2008] ACTSC33, Per Higgins CJ At 152

Self defence may be raised if 'on the proven facts, there is a reasonable possibility that the accused acted in self defence'.[8] For an argument of self defence to be accepted, the court must conclude that the accused personally believed his conduct was necessary to defend himself; and that the conduct was a reasonable response in the circumstances, as the accused perceived them to be. Here the onus is again on the Crown, who must negative, that is exclude, as a reasonable possibility, the inference that the accused acted in self defence.

A recent example of self defence in the context of the ACT jurisdiction is *R v Rao*[9] In that case Justice Gray concluded that 'the prosecution has not established beyond reasonable doubt that the act of the accused which caused the death of the deceased was not done in self defence' His Honour went on to say that the 'The prosecution have not satisfied me beyond reasonable doubt that the accused did not believe, on reasonable grounds, that it was necessary in self defence to do what he did, and that there were not reasonable grounds for such a belief to be held'[10].

Another case in which self defence was raised was *R v Hirst.*[11] In that case the jury returned a verdict of not guilty. As there was no issue that accused caused the death of the deceased by a deliberate act, this verdict indicated that the jury did not accept beyond a reasonable doubt, that the accused had not acted in self defence.

Conclusion

In some matters, a deficiency in a brief of evidence, which, ultimately leads to an acquittal will not represent a failure of the investigating officer, or any misdirection of the prosecutor. Some cases that come before the court simply fail to meet the requisite standard of proof. The result of this is that those defendants are acquitted, that is the presumption of innocence stands un-displaced.

In that situation the system has worked, just as it has when a conviction is secured.

[8] Per Gray J at 94, *R v Maurizio Gianpier Rao* [2008] ACTSC 17 (13 March 2008)
[9] [2008] ACTSC 17 (13 March 2008).
[10] Per Gray J at 116, *R v Maurizio Gianpier Rao* [2008] ACTSC 17 (13 March 2008)
[11] *R v Ian Edward Hirst* [2008] ACTSC

In the end, it all comes down to the evidence. Your job is to find and present the evidence that you have uncovered. The prosecution and defence lawyers will then test that evidence, and the judge will rule on it according to the law. Each role is important and each facilitates the process by which society responds to alleged infractions of the law. I should emphasise that it is as important to find and present evidence that exculpates or casts doubt on the guilt of a person as much as the contrary. The recent case of Andrew Mallard illustrates that.

I thank you in advance for your commitment and efforts and I look forward to perhaps seeing the fruits of your labours in court.

Thank you.