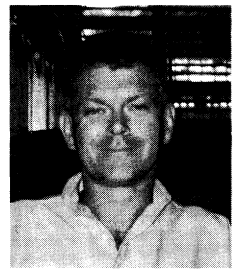
by Jon Tippett, President

EVERYONE'S AN EXPERT



Jon Tippett, James Muirhead Chambers.

Everybody knew him as Dinny. Dennis Barrett was an ex sergeant of the Victorian Police Force. He got a law degree and spent some time practising as a barrister at the Bar in Melbourne. He had a large jaw that portended stoicism and slightly bulging, lazy eyes which spoke of a kindly nature. He arrived in Alice Springs in the early 1980s to be a magistrate and made it his town.

The Sinatra song, "I Did It My Way", was written for Dinny. He considered Stare Decisis to be a concept that had the effect of cluttering up the every day dispensation of justice. Now and then the Supreme Court was called upon to tell Dinny that the idea was generally useful and that it did apply to Alice Springs.

A man of imposing size, in his later years he strode around the Alice Springs Court House resplendent in a gown of his own special creation. This signature of office had been styled in the tradition of American judicial robes. The gown fell to the height of his knees. As he often wore shorts and long socks it had the effect of making him look like Damien Monkhorst in a tutu. It is a testament to Dinny's personality that his dignity never suffered from the sporting of this strange apparel. While he encouraged his fellow beaks to adopt the gown as dress of the Alice Springs Court their enthusiasm remained ambivalent and it never caught on.

Dennis Barrett met his moment in history when, in front of a fixed television camera, he delivered his findings as Coroner in the Chamberlain inquest. His slow and at times stumbling delivery of his reasons smashed into the legal psyche of an entire continent and bounced off satellites to an intrigued audience around the globe. He became Dingo Barrett, a nickname that was intended to convey ridicule or the soft mindedness of the village idiot. Until, that is, the findings of the Chamberlain Royal Commission were made public.

Dinny was always wary of the expert witness peddling a self discovered point of view. He believed that the court hearing a case should do its own thinking. He was particularly cynical of the medical witness who appeared incapable of considering an alternative diagnosis as possibly open in a case. Many a loyal insurance medical expert was put to the sword by the Dingo.

Visions of Dennis Barrett casting aside medical opinion suggesting that the worker was quite capable of leaving the court room immediately to take part in the travelling rodeo (bull riding) returned to me as I read Lindy Chamberlain's call for DNA testing of Azaria's clothing. Her apparent wish, to prove that the dingo really did do it.

The importance of the Chamberlain Royal Commission is in how it exposed the dangers inherent in relying on expert evidence when even the experts believe their own opinions. Remember the foetal blood in the car? That was where, the story went, the baby's throat was cut. At one point in the evidence the theory was advanced that the substance identified as blood was in a spray pattern. It all amounted to the conclusion that there was villainy afoot.

The expert evidence together with a healthy dose of prejudice and a superbly conducted prosecution lead to a conviction that was ultimately found could not withstand scrutiny. The blood became a substance used in the production of automobiles.

Now we have at our disposal the universal solution to all crime. DNA. What a find for the experts this new weapon is. Defence counsel spend hours trying to work out what the hell the forensic biologist's report means and prosecuting counsel glaze over in relief that while they don't understand a word of it at least they have a witness who might. Then the whole thing is presented to the jury. A whole new generation of true believers. There they sit in the jury box eyes wide open and legless as the first figures come through. The chance of the DNA found at the scene not being that of the accused is 1 in 2.7 million. That is, of course, "where the inclusion of the polymarker loci as a single locus negates the concerns of some statisticians concerning the independence and low discrimination power of these loci". You can see it on their faces. "Well, bugger me. That's a lot better than the odds I can get at the TAB on a Saturday arvo", and "Boy, I liked the stuff about the locus. That puts my mind at rest. For one horrible crazy moment I thought I might have to understand it". "You got the word?" says the prosecutor. "Yeah, we got the word!" says the twelve. Hallelujah! Don't the Almighty work in the ways of the righteous!

Of course, some would say that there is a tinge of the sour grape in these words and some would be right. I have been on the pointy end of DNA evidence. There has been DNA evidence given in courts based on crook material which has lead to an inaccurate representation of the true position. A fair bit of case law is now available that deals with the admissibility and use to which such evidence may be put. The Court of Criminal Appeal in the decision of **Latcha v R** (1998) 127 NTR 1 addresses many of the practical problems that are faced by all parties in a case where DNA evidence is an important component of a prosecution. Unfortunately, it does not and cannot, solve the problem of access to independent forensic opinion, particularly by a funds starved defence.

The time has come in the Northern Territory for there to be established a forensic labo-

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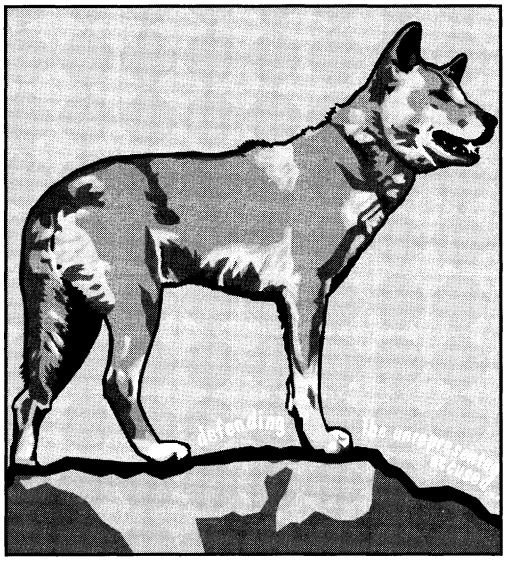
ratory that operates entirely independently of the police force. The methodology of the scientists whose opinions become important evidence before a jury must be entirely open to examination and equally available to all parties. An important component of any investigation is the manner in which it is carried out. Flaws in the collection of evidence are often not available to either the prosecution or the defence. Justice is only served if such information can be freely given without concern for the fact that the police investigation may be affected if that occurs. Statistical figures that form part of the analysis of DNA evidence, it is recognised, may be wrongly constructed, particularly by persons who may have an interest in the outcome of the case. Bias, we know, can be both conscious and unconscious. An environment that has the effect of removing the likelihood of bias in the presentation of scientific results will lead to greater confidence in the opinions emanating from it and assist in the administration of justice. The latter result is achieved by a reduction in the number of arguments that presently arise regarding the quality of the DNA evidence and the conclusions that can be fairly drawn from it.

Scientific evidence has, in the past, shown a great capacity to bring about severe injustice. The Birmingham 6 is but one stunning example. Chamberlain does not, and unfortunately will not, stand alone. It is impossible to account for experts with a hidden agenda or who suffer personality flaws that lead them to advocate a position that is subsequently found to be dangerously wrong. Courts have, in the main, taken great care to analyse expert evidence so that it is not put to a use that it cannot serve. However, a court can only analyse what it is told. The expert is General to the theory and years later the theory is sometimes exposed as complete hogwash, or worse, only available if vital information is not included in its construction. At the time of its delivery the theory can appear as real as the trial judge's displeasure at having to deal with yet another defence objection.

The removal of the immediate potential for theories to be developed to assist one side or the other would be a significant step, particularly in the sensitive investigative stage of an offence. An independent forensic laboratory makes the possibility of conveniently analysed results that may later have to be supported in a disingenuous way if they are to benefit the party advancing them, less likely.



There is also the factor that carefully carried out tests that are free of bias can show that an accused person may be, or is, innocent of the offence alleged against him or her. The advantage to the prosecution is the likelihood of a party pleading guilty rather than electing to challenge the results in a 26L application in cases where the scientific evidence is available in a non partisan manner.

Inevitably, there will be cries of cost and table thumping to the effect that the system is working perfectly as it stands and calls for change are just humbug. We heard that sort of rhetoric when the call went out for all records of interview to be taped. Not as many verbals now though.

No doubt that good ole boy 'Mike the Highway Hunk Reed' will cry that it is all about the villains being set free to loot and pillage while the rest of us huddle in our lounge rooms watching Allie McBeal on television. On second thoughts I think I'd rather be out at the risk of being looted and pillaged. Dad tried to teach me patience but he abdicated his parental responsibility by not preparing me for the Mike Reeds of this world. Beam me up Scotty!

The problem of not having an independent forensic laboratory in the Northern Territory is compounded by the manner in which the DNA data bank is being developed. In 1998 the Minister for Police Mike Reed introduced amendments to the Police Administration Act that provide for the harvesting of DNA material. Mr Reed dealt with "Intimate Procedures" in s 145 that provides for the intervention of a court if consent is not given by the subject. S 145A allows for the conduct of "Non-Intimate Procedures" to obtain DNA samples. The latter section does not provide for the intercession of a court in the case of a refusal to provide the sample and specifically allows a member of the Police Force to exercise reasonable force to gather the material. The subject of the procedure under S 145A need only be in lawful custody charged with any offence punishable by imprisonment. There is no requirement that the Police have reasonable grounds that the provision of the sample may provide evidence relating to the offence for which that person is charged. As far as I can make out no guidelines have been implemented that determine the use to which the sample once taken is put. No public watchdog has been appointed to ensure that the authorities apply principals of bioethics to ensure that the material is properly maintained and only used for purposes confined to the development of a carefully supervised data bank. Who has access to the information and in what circumstances appears to have been left to the scientists. Is that safe? History says no.

Individual liberty has been cast aside by politicians caught in the headlights of a new holy grail in law enforcement. Assault and battery is now legal so that a DNA sample can be

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