

RESPONSE BY DEFENCE COUNSEL TO CROWN OPENING

It is usual in this jurisdiction for the trial judge to allow counsel for the defence an opportunity to make a brief response to the prosecution opening at the start of the trial. Whether to do so is a matter within the discretion of the trial judge. A response of that nature is to be distinguished from the opening address to which the accused person is entitled under s 363 of the *Criminal Code* (NT).

On a number of recent occasions counsel for the defence has included inappropriate material in a response of that nature. On one recent occasion that resulted in the discharge of the jury.

Any response by the defence to the prosecution opening is subject to the following principles and restrictions.

1. The purpose of the response is to define for the jury's benefit the key issues in the trial and to state the accused's defence to the prosecution's allegation.
2. The response may outline briefly the evidence the defence proposes to rely on, but should not be used as an opportunity to outline the defence case in the nature of an opening address.

The response is also not an opportunity to make argument or submission; to provide an advance instalment of the defence's final address; or to make pre-emptive assertions concerning weaknesses in the prosecution case.

In order to avoid any prejudice to the conduct of the trial, care must be taken that the response does not urge on the members of the jury the way they should assess the evidence of a witness to be called in the prosecution case; does not contain any attack on the credibility of a complainant or other prosecution witness; does not describe any material which is or may be inadmissible or unavailable; does not anticipate the directions or warnings to be given by the trial judge; and does not use inappropriately emotive language.

In some cases the trial judge may, before the defence opens and in the absence of the jury, explore whether defence counsel is aware of the limited scope of the response and whether the proposed response complies with the principles and limitations detailed above.

Dated: 22 March 2017

Michael Grant
Chief Justice