"Criminal Advocacy from a Consumer Perspective".
Paper delivered at the CLANT Conference in Bali in 2017.

Justice Judith Kelly

1. In the first of a number of disclosures I have to make this morning, I have to tell you that I am not Chief Justice Michael Grant. He's taller – more "Chief Justicey" – has slightly better hair and at least one more Y chromosome. Sorry about that.

2. The second disclosure I have to make is that this is not a scholarly paper. It is more a series of personal reflections – which seems a bit trivial after Wayne Martin's excellent paper on the very real problems of Aboriginal disadvantage we all deal with on a daily basis.

3. The topic I have chosen is "Criminal Advocacy from a Consumer Perspective". To offer a little bit of an explanation of that choice of topic – and a final disclosure – I have never practised as a criminal advocate. When I was at the bar I practised pretty much exclusively in civil matters – mostly of a commercial nature – I did

not do crime except for a few *Fisheries Management Act* cases which don't count.

4. My first real criminal trial was on the bench. It was a kiddy sex case. In fact I had 4 in a row, in my first 4 weeks on the job, 3 of which ended up as hung juries. (Ian Read was kind enough to tell me he'd had 1 hung jury in 25 years. At that point I'd had 3 in 3 weeks. I thought it was very kind of him to boost my confidence like that.) The result was that, in addition to the usual pitfalls of a neophyte on the bench: standing there wondering why everyone is still standing until you work out they're waiting for you to sit down; walking off the bench on the wrong side, and wondering whether it would be OK to stay there until everyone has gone – I wound up with depression. (It got better.)

5. My point is that unlike other many other judges who are able to hand out sage advice from their time at the criminal bar, I can only speak as a consumer of the criminal advocacy I have experienced

and appreciated – or had inflicted on me as the case may be - during my time on the bench.

6. I have been told (in confidence so don't tell anyone else) that the working title of the Chief Justice's planned paper was "Things that piss me off" (I'm sure he would have thought of a catchier title for the conference programme) and I thought about stealing it, but I really have experienced some particularly fine criminal advocacy during my time as a judge of the SC of the NT – some vintage, some fresh. In fact one of the first things I noticed when I was appointed was the generally high standard of advocacy among the members of the criminal bar. Those of us practicing in the civil area spent most of our efforts trying to keep our clients out of court with a favourable settlement and as a result tended to have far less actual trial experience than those at the criminal bar.

7. So, the mode I am adopting for this paper is that of "critic" – as in theatre critic, literary critic or restaurant critic – offering a hopefully informed critique of various aspects of the criminal

advocacy I have experienced as a consumer and I hope that, in my role as critic, I can speak for those other consumers of the advocacy being reviewed – jurors.

8. I would like to start with a review of one of the very early criminal trials I presided over which was an exemplar of its kind and would receive a 5 star rating (or if you're doing a David Stratton 4 ½ stars). Before I start with the review - I don't want you to think that we get together on the 6th floor after court and talk about you and rate your performance. We do – I just don't want you to think that.

9. The 5 star case was an attempted rape case. I don't remember whether the jury found the accused guilty or not guilty: it doesn't matter (well it probably did matter to the accused - and the complainant for that matter) but the point is that the advocacy on both sides was first rate.

10. I won't embarrass the advocates in question by mentioning their names. They were both fairly young and I'm not sure how much experience they had had at that time. And I promise not to mention by name any advocate who gets below a 3 star rating.

11. This trial started, as it does after the modest introductory remarks of the trial judge, with the Crown opening. The prosecutor immediately engaged the audience (that is me and the jury) by telling a story. She opened with a simple statement along the lines of: "X was having a really bad day" – and went on to say what had happened on the Crown case. The jury and I were engaged from the word go. It was a very interesting story told simply from beginning to end. "The accused went here and did this. So and so saw him walk down X street. So and so saw him outside the shop at 10.00 o'clock. He was wearing the same dirty red football jumper he had worn for the last month. He went to A's house and into A's bedroom." She gave a very visual description of the bedroom and what happened in it – where the light sources were etc. She told what the complainant (A)

experienced. "A couldn't see the accused very well but she saw this and felt that and heard the other. When he was on top of her, she grabbed his necklace. It was a cross or whatever it was (I forget)." On it went. By the end of the opening we knew very well what the Crown said occurred and what we expected to hear from the various witnesses without the tedious "You will hear from M who will tell you XYZ." What is more, we could picture it happening.

12. The next highlight in the trial was the cross-examination of the Crown witnesses by the co-star of the trial, defence counsel. She asked short single point (mostly but not all) leading questions and she asked absolutely nothing that was not necessary. The cross examination was well structured and she gained the concessions she needed. You could see the penny drop with the jury. (And shortly thereafter with me.) You could tell from the questions she asked what the defence case was. The complainant did not see the accused. She just felt his necklace. She knew that the accused had a necklace like that (she had seen it before and could describe

it well) and she just assumed it was him. It's a common enough necklace – reasonable doubt. And she let us think we were clever enough to work it out for ourselves.

13. All in all it was a pleasure to listen to and very effective advocacy on both sides. 5 stars.

14. By way of contrast – there is the 2 star opening. (I confess this is a composite.) To set the scene - consider the jurors. They have just been chosen to sit on a jury when (from their perspective) they have better (certainly more profitable) things to do with their time. They may be annoyed. Some of them may be anxious. They have just heard introductory remarks from the judge who has told them:

- all about the burden of proof in some considerable detail
- about their role and the judge's role and
- something about what evidence is and how to assess it
- and has cautioned them to pay careful attention.

15. Then the prosecutor stands up to open the case for them. The judge has told the jury that the prosecutor will tell them what the case is about. They perk up a bit. This could be interesting (the judge's remarks having been unusually dull). Then the prosecutor proceeds to tell them:

- all about the burden of proof in some considerable detail,
- about their role and the judge's role,
- something about what evidence is and how to assess it and
- cautions them to pay careful attention.

16. He then makes some largely incomprehensible remarks about one or two of the legal issues in the case out of context and tells them, "This is the law. The judge will tell you this. Of course if I say something about the law that is different from what her Honour says, it is her Honour you must listen to." [No kidding!]

17. The prosecutor then embarks on a lengthy and repetitive recitation of what he "anticipates" various witnesses will say about various aspects of the case in no particular order. The annoyed jurors are

now even more annoyed. [On the plus side, the ones who were anxious are probably not so anxious any more – they are annoyed too.] And they have no real idea what the case is about or what the Crown says happened.

18. Consider that opening from the judge's perspective: she has just given the jury the information she is obliged to give them at the beginning of the trial and the prosecutor has told them the same things all over again as if she hadn't spoken. She's thinking, "Are you deaf or am I invisible? How rude!"

DEFENCE "OPENINGS'

19. Sometimes defence counsel chooses to do a brief response to the Crown opening (which we generally call an opening). [This is different from the genuine Defence Opening at the beginning of the defence case – something which rarely if ever happens in the Territory. The Chief Justice has fairly recently written to the Law Society and the Bar Association about the acceptable content of

these faux mini-openings and I believe that has been circulated to the profession. I am not going to talk about those issues, but about the experience of such openings from a listener's perspective.]

20. Some defence counsel choose this time to remind the jury about the burden of proof. [Annoyance among the jurors by this point is just about universal and reaching extreme levels.] Also, (from this consumer's point of view at least) heavy emphasis on the burden of proof and the presumption of innocence at this point in the trial, before the jury know what the defence case is, sends me the message, "Look my client might be guilty – probably is guilty in fact - but remember, the prosecutor has to prove it."

21. Some of the "mini defence openings" can be tantalising. I sat through one in which counsel simply told the jury, "As you listen to the Crown case, remember, things are not always what they seem." That had its virtues. It piqued the interest – impliedly promising further revelations during the course of the trial - and it put the listener in a desirably sceptical frame of mind when

listening to the Crown witnesses. However, it also had its pitfalls. As I recall the defence failed to deliver the promised payoff: things, as it turned out, were exactly what they seemed. Still – in an appropriate case, I think it could be pretty effective.

22. In my experience, a frank, straightforward acknowledgement of matters which are not in dispute – pointing the listener to the real issues in the case – is generally well received. It inclines the listener to trust you. They feel you are being straight with them. "Ladies and gentlemen, this case is about self-defence. There is no dispute that Mr X hit Mr Y with a tyre iron. You will hear from the witnesses how that came about. The issue for you to decide at the end of the trial is – are you satisfied beyond reasonable doubt that he was <u>not</u> acting in self-defence. That is the question the defence asks you to focus on as you listen to the evidence."

23. Of course the nature of the case does not always permit such an approach. In such cases many experienced defence counsel choose to forgo the opening statement. From a consumer's point of view

- if there is no purpose to be served by making an opening statement except to repeat the judge and annoy the jury – I would say don't.

EVIDENCE: XN, XXN & RXN

24. I won't give a how to do it lecture or repeat the advice given in Riley J's Little Red Book of Advocacy or in the various advocacy courses now available [I highly recommend both] about XN and XXN and of course the key features are thorough preparation and a well- planned, well organised structure. I want to focus on the perspective of the listener. What puts listeners in a receptive frame of mind and what is likely to induce consumer resistance (ie piss them off)?

25. <u>Try not to be boring (or confusing or annoying).</u> The jury needs to know what happened. What happened is a story. Ideally it should be an interesting story told from beginning to end as far as possible without stops, starts or intrusions.

26. But sometimes we get this. "Now witness, I just want to take you back to what you said about the couch. Where exactly on the couch was the accused sitting?" What? We've moved on from the couch. We're in the kitchen and the accused has picked up the knife. It was just getting interesting. I want to know what happened next! What's with the couch???? Does it matter where the accused was sitting on the couch? Almost certainly not – and if it does, why didn't counsel ask the witness this when she was talking about the couch?

27. Brevity is good. No-one likes having their time wasted – especially when they have been compelled to perform a public duty for pitifully inadequate remuneration. [Jurors don't like it much either.] This can be tricky. Of course it is helpful to paint a picture – as vivid a picture as possible – and this will require eliciting detail – especially visual detail. But unnecessary detail is frustrating, annoying, distracting and counter-productive. There is an almost universal practice of asking witnesses how long everything took

and how far away everything was which I have never been able to understand the rationale for.

28. For example, the witness has just described in emotionally charged detail what the accused did to her. The jury is engrossed. Then counsel asks, "And how long did he do that for?" The witness has no idea. If it happened to counsel – counsel would have no idea. Nor would I and nor would the jury. What's more, we don't care. Nothing turns on it. The witness looks puzzled then picks a number out of thin air – usually 5 minutes for some reason – the only possible effect of which is to cast doubt on the reliability of the witness. What? 5 Minutes? There's no way that could have taken 5 minutes.

29. Another example: The complainant has described an attack on him with a knife. There was an argument. Things were said. The accused pulled out a knife, ran up to the complainant and stabbed him in the chest. We are all involved, vicariously frightened. Then counsel asks, "And how far away from you was he when you

first noticed the knife?" What? Who knows? More to the point, who cares?

30. It can be surprising how much time is taken by such matters frustrating the listener, interrupting the story and breaking the audience's attention. When I am using the transcript to summarise the substance of what a witness has said on a particular topic, I have not infrequently reduced 5 pages of transcript down to 2 paragraphs.

AFTER THE EVIDENCE, THE CLOSING ADDRESSES

31. When well done – these can be the highlight of a trial for the listener – particularly for the jury. The jury has heard all of the evidence, they know the story by now and you can generally see them leaning forward, eager to hear what each counsel has to say to them about the case and how they should decide it.

32. Obviously you will follow the advice given in the advocacy courses and Riley J's Little Red Book: stick to your case theory, have a strong introductory sentence, a logical structure and (as Riley J advises) a strong finish emphasising your main point and confidently requesting a verdict.

33. But what else can enhance the experience for the listener and keep the jury receptive to your arguments? It is hard to pin it down. It is different for different people and a lot can depend on personal characteristics. Being a good looking, ex-New Zealander with a bucket load of charm and a natural easy-going manner is obviously not going to hurt your case but not everyone can pull that off. Some other people just have trustworthy faces – or a natural air of authority. If you are a normal person without these super-human attributes, this is what works on me – and I suspect on most juries:

- Counsel who are businesslike and serious about what they are doing and who talk logically about the facts and the issues inspire trust and confidence.

- Counsel who make themselves the focus of the address, who use rhetorical tricks and flourishes, who talk in generalities, use inappropriately informal language or try to be funny invite suspicion and scepticism.

- Counsel who sound confident inspire confidence. [It can be hard when you are shaking in your boots but some people practice in front of a mirror. And of course the more thorough your preparation the more confident you will actually be.]

- Listeners can only take in and retain so much. A logically structured address that focuses on the best point (or couple of points) is more effective from the listener's point of view than one which exhaustively makes every available point no matter how trivial or unconvincing. Too many points can cause the listener to lose interest and concentration. And confidently urging a bad argument can cause the listener to become sceptical of your good arguments.

- On a related point – overselling something sets up consumer resistance. It might be a very nice garnet and the jury might be willing to buy it as such, but if you try to sell it as a ruby, you will lose the trust of the listener and they may well not buy it at all. [Obviously the same goes for mushrooms and truffles – insert the metaphor of your choice at this point.]

- One word that sets up automatic consumer resistance in me is "clearly". It is usually a signal that what follows is anything but obvious.

FINALLY SOME REMARKS OF A GENERAL NATURE

34. Professionalism and courtesy are attractive characteristics and inspire confidence.

35. It is fortunately rare in the Territory at least, but counsel sniping at each other, making unnecessary complaints and being un-

cooperative with each other over matters in which their client's interests are not advanced by lack of cooperation is unattractive and sets up consumer resistance to the favourable reception of other, important messages counsel may want to get across.

36. One of my personal non-favourites is the general whinge. Counsel will get to his or her feet and set forth a stream of complaints about the conduct of opposing counsel – often it must be said in fairness justified complaints – while 12 jurors fiddle their thumbs in the jury room. "I was only given notice of this at the last minute. I have had to deal with this on the run. I served this report on the defence 6 weeks ago and etc etc etc." I will then ask, "What do you want me to do about it? Do you have an application? What remedy are you seeking?" The answers are (in order), "Nothing, no and none." So why tell me about it? In particular why tell me about it while the jurors are having their 12th cup of tea for the morning and just want to get on with it? It's like little kids on a long car trip, "Mum, she's being mean. Mum, he put his feet on my side of the seat."

37. It sometimes (though thankfully rarely) happens in front of the jury too. One of the least effective, most "consumer-resistance-setting-up" opening statements by defence counsel I have ever cringed before was one in which defence counsel took the opportunity to launch a personal attack on the prosecutor accusing him (quite wrongly) of all sorts of improprieties right down to (allegedly) trying to prejudice the jury against the defendant by calling him "the accused" instead of "Mr Smith". It backfired. At the request of the prosecutor I corrected the more egregious mis-statements to the jury – after giving defence counsel the opportunity to do so himself, which he declined.

38. Incidentally, one aspect of unnecessary non-cooperation which I have noticed getting right up the nose of a jury is the unnecessary objection – especially on technical matter such as leading, in areas of the evidence that are non-contentious.

39. The next point is a "judge only" one. (I realise that to criminal advocates, the impression you make on a jury is far more important than the impression you make on a judge, so feel free to ignore this one – AT YOUR PERIL.) Please note - a question from the bench is usually a request for information NOT an invitation to repeat all of your submissions. If the question can be answered "yes" or "no" it should be. If it requires further explanation, well and good. In any event, the question should be addressed – not avoided.

40. Another non-favourite of mine is non-compliance with (in order of importance) standards of ethics and etiquette. Starting with ethics –Professional Conduct Rule 17.5 states:

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>
> A practitioner must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue.

41. Almost everyone complies with this rule but the few persistent exceptions make it worth emphasising.

42. You submit that your client has good prospects of success, or that a suggested sentencing disposition would be inappropriate. You do not say to the court, "I think that would be inappropriate given the seriousness of the offending," or, "I believe my client has reached a turning point and has good prospects of rehabilitation."

43. This is not a charming formality like referring to your opponent as "my learned friend". If you use the inappropriate terminology you are in breach of the conduct rules. More importantly, you are not maintaining the appropriate boundaries. If you do not keep firmly in mind when you are making submissions on behalf of your client and when you are informing the court of your opinion, you run a real risk of breaching your duty to both your client and the court.

44. Consider your duty to the court. Do you really believe that your client has reached a turning point or has good prospects of rehabilitation? Are you being completely frank and honest? Is the court to treat such quasi-submissions as your honestly held opinion or belief? Are you, in effect, personally vouching for the client – as a referee or character witness? Surely not.

45. Consider your duty to the client. If you do not truly believe that he has reached a turning point, or you have doubts about his prospects of rehabilitation, will you refrain from making this submission in the interests of your duty of candour to the court? Again, surely not. Your client is entitled to have you advance and protect his interests to the best of your skill and diligence, uninfluenced by your personal view of him or his activities. In the context of making submissions on your client's behalf, your personal opinions and beliefs are irrelevant.

46. No conflict arises if you remember what it is you are doing and express it appropriately: "I submit that the court can conclude that

that my client is at a turning point and has good prospects of rehabilitation for these reasons ….."

47. By contrast, if you are asked for a matter within your own knowledge, to take a trivial example, how long you will need to prepare submissions, your honest opinion / belief or estimate is expected and will be accepted and relied upon. In such circumstances, "I think…." or "I believe…" are entirely appropriate and "I submit …" would be entirely inappropriate.

48. Less serious – but from a consumer's point of view still productive of annoyance – are breaches of etiquette. These customs are not taught in law school (or they weren't 30 or 40 years ago) – but they are important. They constitute the culture of our profession. Dot points.

- When you are not dressed as the Court is – change. If you are wigged (or robed) when the judge is not – take it off. If you are not wigged (or robed) when the judge is – don't apologise unless

it is your fault. It is insincere. DO seek leave to appear undressed. It will be given as a matter of course but it shows you know the correct protocol.

- Do not introduce yourself as Mr or Ms. Just give your last name: "Kelly for the defendant YH" The court will then accord you the appropriate courtesy title – Mr, Ms, Dr, Prof. Women tend to infringe this one more than men for some reason. [You might want to pay attention to the way you say it. As (I think) Riley J has pointed out: "If the Court pleases, my name is Smith and I appear for the defendant," is inapt. Your name will probably be Smith whether the Court pleases or not. "My name is Smith, if it please the Court I appear for the defendant," works.]

- Wig perched on the back of the head and hair poking out – no! It's a wig not a hat! Jabot worn loose like a scarf or leaving patches of bare skin showing – ditto!

- Your opponent is your "learned friend" not your "friend". The term "learned" means that the person has been admitted as a practitioner with a right to appear before that court. "My friend" originated as a term used for an opponent not so admitted. Calling your learned friend your friend is an insult, no matter how friendly you may be.

49. Having had that little whinge myself, I need to emphasise the positive. I sit on a busy Court in mainly criminal cases – not so busy as some district, local and magistrates courts who do more work with less assistance, but busy enough. I have been on the Court for 7 ¾ short years. During that time I have been a consumer of criminal advocacy by numerous people across a range of matters. There have been some clangers, some teeth gritting moments (in which I am screaming silently, "Just get on with it!") but mostly I have experienced admirably competent, intelligent and skilful advocacy from prosecutors and defence lawyers doing their considerable best to advance the interests of their clients and do their duty to the Court during a time of shrinking budgets and

legal aid cuts when they are increasing having to do justice on the smell of an oily rag. It has been an absolute pleasure. I thank you.