

# Who wants to be a DPP?

*This article was written by Nick Cowdery QC, the New South Wales Director of Public Prosecutions (since 1994). It was produced for the NSW Bar News. I have obtained Mr Cowdery's permission to publish it in Balance because the issues it addresses are common to all Australian jurisdictions. It was written as a response to some recent political moves in NSW aimed at reducing the independence of the Director. They have been unsuccessful to date, but eternal vigilance is required. Almost all of the comments made as to the need for independence and accountability, apply equally in the Northern Territory.*

**Rex Wild QC**  
Director of Public Prosecutions  
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After 13 months in office as the DPP of NSW I interviewed myself for an article in the 1995 edition of Bar News entitled "Hot Seat – or Siberia?" I stated then: "I don't mind the heat, but the cold can be a worry". After more than seven years in office I can say that I have not been worried by the cold.

The job is not one for any person who relies upon praise and positive reinforcement; equally, it is not for any person with a belief in personal infallibility. All DPPs, like any competent professionals in any field of endeavour, recognise their limitations and the systems in place compensate for those and ensure that, whoever is the incumbent, the best possible job is done according to the appropriate objective standards.

In this State the DPP is appointed on terms similar in some respects to those of a Supreme Court judge. That includes salary, pension and tenure. (There may be a mandatory maximum retirement age; but whatever it is, I do not plan to be here when/if it arrives.) The Director of Public Prosecutions Act 1986 is the relevant legislation. As a statutory officer the DPP is not subject to the Public Sector Management Act 1988 and therefore not a "public servant" in the strict sense – although everything the DPP does must be in the general public interest.

The DPP is responsible to the Attorney General for the due exercise of his or her functions (section 4 of the DPP Act). The Attorney General, in turn, is answerable to Parliament. The Attorney General retains his common law powers. The present Attorney General has adopted a clear position on when and in what circumstances he may exercise his powers to override any decision of the DPP. That has not occurred in

the nearly 15 years of the existence of the office; nor has it occurred in the history of any other Australian DPP.


The DPP's decisions must be based upon the law, the evidence available in particular cases and the Prosecution Policy and Guidelines. There will often be an element of judgment required. Regard must be had at all times also to the efficient and effective conduct of the operations of the Office of the DPP – the resources available with which to prosecute are finite and must be carefully husbanded. Public funds must not be spent on empty gestures (for example, prosecutions or appeals that are judged as not likely to succeed). Many decisions are made under delegation by other members of the Office.

The independence of the office in prosecutorial decision making is crucial. Decisions must be made objectively, impartially and consistently. That means that decisions must not be swayed by extraneous influences such as the voices of sections of the media or of some politicians and such influences must be consciously evaluated and put to one side. That can be difficult, but any independent decision maker in society is destined to be in conflict with some politicians and some media commentators. That is as inevitable as crime itself.

Why is independence so important? In his Second Reading speech for the DPP Act then Labor Attorney General (now Justice) Terry Sheahan AO referred to independence from political influences in prosecutorial decision making. The powers of the DPP previously resided only in the Attorney General and, as Mr Sheahan said, "... because the power is exercised by a person who has a position of political significance, it is easy to assert that on some occasions it might be exercised improperly for political reasons". Such political reasons might result from pressures of varying kinds and origins, direct and indirect. The independence of the office of DPP requires and ensures that inappropriate pressures not be influential and, just as importantly, that there not be a perception that decisions might be made for improper reasons.

In relation to the terms of appointment of the DPP Mr Sheahan said: "To ensure that the community will be confident that the decisions of the director will be independent from political considerations, it is provided that the director will be appointed until the age of 65 years [since deleted], with similar pension entitlements as those enjoyed by judges of this State.

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# Busy year ahead

I trust you all had a good Christmas and New Year and that you are all enjoying the start of the new legal year.

NTWL has a busy year planned with many social events in the pipeline. Our next function is the QUIZ NIGHT, which will be held on 12 APRIL 2002 at a venue to be announced. The cost will be \$10 per person in tables of eight. There are some very interesting prizes and an extremely interesting door prize. All will be revealed later. Start getting your tables together now. It will be a great fun night.

Congratulations to Megan Lennie, one of our Committee members, who has had an article published in the Australian Property Law Bulletin, entitled 'Changes to the Northern Territory Stamp Duty Act'.

## Membership

Memberships are now due. I have noted the increasing number of women lawyers admitted to practice in the Northern Territory and I invite you all to join NTWL. If you wish to find out more about our organisation please contact me on 8981 3133.

I would like to thank Justice Sally Thomas for taking on the role of Patron of the NTWL. Justice Thomas is a respected member of our legal community and we are very fortunate to have her as our Patron.

## Alice Springs

Justice Thomas has kindly agreed to have Patron's Drinks at the Supreme Court in Alice Springs in June. I would appreciate it if someone in Alice Springs would take on the role of assisting us in



Sandra Robinson, NTWL

the preparation of this function. Please contact me if you can assist.

## To all our members

If you have any ideas on functions, articles or issues that you think we should take an interest in, please contact me. REMEMBER start getting those tables for our great quiz night. All will be revealed in the next issue of Balance.

(DPP) from previous page

*It is intended also that the director will be paid the same salary and allowances as a Supreme Court judge. The high status of the director's position, and the security of tenure provided, will ensure that the director is freed from any suggestion or appearance that he or she is open to political pressure. There will be no reason to fear that the director may make decisions to curry favour with the Government of the day, in order to secure reappointment or advancement".*

The statement of the Leader of the Opposition on 25 January 2002 should be considered against that background. It proposed, in summary, the establishment of a parliamentary oversight committee with powers to require the DPP to explain and justify his/her decisions, to veto the appointment of a person as DPP [a power already possessed by the Parliamentary Committee on the Office of the Ombudsman – section 4A of the DPP Act], comment on the DPP's budget management [there is already an Executive Board with external membership] and report to Parliament on the DPP's performance [the DPP reports annually to Parliament].

The Opposition would also establish a fixed term of appointment for seven years, to "ensure and enhance the independence and integrity of the DPP"!

(The Leader of the Opposition, reportedly, has "left open the possibility of extending the fixed-term principle to the state judiciary" – SMH Editorial, 29 January 2002.)

As the media release by the Australian Bar Association on 25 January 2002 pointed out, the proposal to establish a parliamentary committee of oversight was not new.

The Opposition has trotted it out in October 1995, September 1997, August 2000 and April 2001 and in statements on other occasions.

It is said that if it is good enough for the ICAC, the Ombudsman and the State Crime Commission to be superintended in such a way, then the DPP should also be subject to such oversight.

But these bodies have investigatory and compulsive powers that can impinge upon the rights of any citizen and it may be argued that the exercise of such powers should be accountable to Parliament in this way.

The DPP has no such powers and operates, in effect, simply as a legal firm. The DPP does not investigate and has no coercive powers at all.

It has been suggested that there is a precedent for such a committee in England and Wales. That is not so.

There is a Home Affairs Select Committee attended from time to time by the DPP; but it is clearly established, in theory and in practice (confirmed by my English counterpart), that the DPP is in no sense accountable to the Select Committee (or to the Public Accounts Committee) and any attempt by a member to explore a prosecutorial decision would be (and has been) firmly curtailed.

The Premier has said on radio that the government is reviewing the term of the appointment of the DPP. That was news to me. It is true that only in NSW and Tasmania, among the nine Australian DPPs, does the DPP have tenure. However, the words of Terry Sheahan in 1986 hold true today. If a limited term is introduced it creates the risk of decision making calculated to promote personal advancement in the future.

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After all, if not to the bench or another position in the gift of the government, where is a DPP likely to go at the end of a fixed term and before retirement? (A few have, in fact, returned to the Bar.)

The Opposition proposal of this year comes in the wake of my having declined to institute a Crown appeal against sentence by the Supreme Court in a manslaughter (not murder) of a young girl.

The most controversial decisions made by the DPP seem to be decisions not to appeal against allegedly inadequate sentences; but let us keep them in perspective.

These are cases in which a court has heard all the facts of a matter and delivered remarks on sentence that are available to be (but are seldom) read by anyone expressing a view. I do not impose sentences and I do not have the power to change them.

The only course open to me is to institute an appeal to a higher court and the law and guidelines governing the commencement of such expensive action are clear. It is not an easy row for the Crown to hoe.

It would be an easy course to ignore those rules and to institute appeals just to end the public hysteria and personal criticism and to please the political agitators of the day; but life as DPP was not meant to be easy, whether I make the decision or it is made by one of the Deputy Directors pursuant to delegation. It is not personal and commentators should not make it so, although some do.

There was a particularly torrid example of this last month following the manslaughter sentence when an apprentice shock-jock on one radio station, apparently filling in during the silly season, decided to make me his project for the week.

The less said about that rubbish, the better; but I really don't enjoy much the consequential death threats (fielded by my secretary, it should be noted, who doesn't enjoy them much, either), the calls to resign, to buy a razor, the criticism of my lopsided face.

I don't like being used as a tool with which to attack the government of the day.

During last month's fracas a sample of members of the public, spurred on by some of the (to borrow Chief Justice Spigelman's phrase) "electronic lynch mob of talkback radio", claimed amongst other things:

- I should be sacked and Michael Costa appointed in my place
- I am not popular with the people [but being popular is nowhere in my duty statement – and popular with which "people"?)]
- I am setting myself up as a director of public policy [no, merely commenting, where appropriate, on aspects of the administration of criminal justice]
- I am usurping the role of the courts by deciding what evidence will be used in court [we rely upon all

available relevant and admissible evidence and are subject to court rulings]

- I have sympathy with the wrongdoers, not the victims, and make excuses for crime [but we attempt to respect and protect the rights of all involved in the criminal justice process, work extensively with victims and prosecute, not excuse, crime]
- I should be sacked because I don't listen to the people [I do – but "listening to the people" is only one aspect of the process of gauging the general public interest: which is a different concept from what happens to be of interest to the public]
- I am accountable to no-one [not so]
- I am arrogant and flying in the face of public opinion [but decisions cannot be made in accordance with the demands of those who shout loudest and longest and perhaps a certain measure of detachment is needed to survive the onslaught].

There has been no suggestion in all of this that I am not discharging my office competently. If that were to be suggested, then I am sure that the proposition could be explored in the defamation jurisdiction.

The provision of reasons for decisions is a vexed question, in this and other jurisdictions. In one sense it would be the easier course to give full explanations to anyone who asked (although the resource implications would be immense). But there are privacy considerations involved.

### *presumption of innocence*

Respect must be paid to the presumption of innocence. There are often sensitive personal considerations behind the final decision not to proceed with a prosecution, for example.

The workings of the appeal process cannot be explained shortly to non-lawyers. There is no statutory obligation to provide detailed reasons to the public and judgment must be exercised in each case.

The better course, it seems to me, is to keep trying to put factual, general information before the public about the way in which the criminal justice process works, so that people are better able to make their own assessments of situations and are less vulnerable to the unhelpful hysteria whipped up in the heat of the moment.

This means writing, talking to groups and to journalists, going on radio and on TV. There is always the risk of selective reporting, misrepresentation and personal attack, but that is a price that must be paid.

The Opposition has never, in seven years, approached me or (to my knowledge) my senior officers for information about the Office or my functions. One wonders how they can be so sure that change is required and that their proposals are for the best.

I am grateful to the NSW Bar Association and its officers for their support on matters of principle and for the opportunity to place these matters on the public record. I am proud to be a member.