

A LIBERAL CROWN PROSECUTOR

SALLY DOWLING, SYDNEY CROWN PROSECUTOR

I was appointed as a Crown Prosecutor in 2002. Prior to that I had practised as a barrister at the private bar, working in commercial law and intellectual property. The change to working in criminal law has been the most satisfying decision of my professional life. I find the practice of criminal law intellectually stimulating, morally affirming and personally rewarding. Practising as a Crown Prosecutor combines the most exciting and enjoyable aspects of practice as a barrister – for example, cross-examination in jury trials and appellate advocacy – with the personal satisfaction that comes from making a direct contribution to the administration of the criminal law of the State.

One of the most surprising aspects of the shift to prosecuting was observing the entrenched identities that many criminal practitioners

adopt. I have heard colleagues at the Bar say “I could never prosecute, I am a defence lawyer”. On further enquiry, these lawyers will often say that they went into defence work because it gives them an opportunity to help the underprivileged in society and those most in need of assistance. That is an admirable and honourable motivation. But I am constantly surprised that some lawyers see prosecution work as incompatible with those altruistic impulses. It is not.

There is a perception among students and some practitioners that a desire for social justice and an interest in criminal law can only be combined in practice through working as a defence lawyer, either through Legal Aid or the Aboriginal Legal Service or as a barrister briefed by those organisations. Such a perception overlooks the critical role that prosecutors

play in the maintenance of a fair and impartial justice system. An ethical, fair and independent prosecutor is a very important safeguard for an accused person.

Practice as a prosecutor in NSW, either as a Crown Prosecutor or as a solicitor appearing for the prosecution, is governed by the NSW Barristers' Rules and the Director of Public Prosecutions' Guidelines. The role of a prosecutor is elegantly described in the Director of Public Prosecutions Guidelines as follows:

“A prosecutor is a “minister of justice”. The prosecutor’s principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The “public interest” is to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.”

The DPP Guidelines make it clear that, while prosecutors are obliged generally to act temperately and with restraint, there will be circumstances in some trials in which a prosecutor may firmly and vigorously urge the prosecution's view about a particular issue and to test – and if necessary attack – the evidence adduced by the defence or the legal submissions advanced on behalf of the accused.

This puts the prosecutor at the centre of what can, in some cases, be a complex interaction of obligations and values – she must negotiate her way through an adversarial trial in which all the relevant evidence must be adduced and any evidence for the accused is to be tested through cross-examination; and simultaneously maintain the utmost integrity and provide disinterested assistance in the determination by the jury of the true facts and the application by the court of the correct legal principles. Criminal trials, often conducted before a jury, invite tough cross-examination and rhetorical flourish on each side. Restraint and detachment are essential, yet an accusatorial and adversarial system of criminal justice is based on the assumption that firm advocacy on each side of the Bar table is the most effective mechanism to establish the truth.

Practising as a prosecutor sometimes requires making decisions that both complainants and accused persons dislike. Examples of such a situation are: a case in which the victim of domestic violence no longer wants to give evidence against his or her partner (who is perhaps the father of the complainant's

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children); a case where a child sexual assault victim is reluctant to accuse a parent; a trial in which a witness is frightened to testify as a result of threats from family or 'friends'. Sometimes these individuals refuse to co-operate with the prosecution. There is usually a strong public interest in prosecuting the offence, but sensitivity is needed to ensure that the correct balance is struck between the community's interest in prosecuting serious crimes and the interests of the individuals involved.

Another critical way in which fairness to an accused person is ensured is in the principled observation of the prosecutor's duty of disclosure. The Barristers' Rules (which also apply to solicitors who prosecute as an advocate) provide that a prosecutor must disclose to his or her opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused. The DPP Guidelines expands this obligation to impose a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which is relevant or possibly relevant to an issue in the case, including material that raises or possibly raises a new issue, the existence of which is not apparent from the evidence the prosecution proposes to use.

The obligation of disclosure, which commences with the service of the prosecution brief, continues up to and during trial. Failure to observe the duty of disclosure can have disastrous consequences, most obviously for the accused who may be denied a possible defence, but also for the community, if on appeal a miscarriage of justice

is found to have resulted from the prosecutor's failure to disclose.

On a day-to-day level, practising as a prosecutor involves integrity, dedication and compassion. The extent to which Crown Prosecutors are a part of the experience of criminal proceedings by victims of crime and their families is often overlooked. The NSW Charter of Victim's Rights states the obligations that prosecutors (among others) owe to victims of crime – principally the right to be treated with courtesy, compassion and respect for their rights and dignity. In addition to explaining the trial process to witnesses and victims before the trial and as it progresses, prosecutors are required to lead the evidence in chief in a sensitive and sensible way. We are also often called upon to explain the Director's decision not to proceed with charges, why an appeal has succeeded, or why a jury may have acquitted the accused. A good prosecutor needs to combine objectivity with empathy and understanding.

Many victims of crime are among the most vulnerable people in the community - children, those with drug and alcohol dependency, mentally ill and other socially disadvantaged people. Participating in just outcomes for underprivileged and vulnerable victims is a deeply satisfying task.

This is particularly the case in sexual assault matters, which comprise a significant part of prosecution practice. Sexual offences generally occur in private, where there are no corroborating witnesses. Often they occur within the family. All too often the case boils down to whether the jury accepts the complainant's word. An accusation of sexual assault is very difficult to defend, and often

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relies on a direct attack on the victim's credit as a witness through cross-examination. The effect of such proceedings on complainants has been the subject of much debate. Increases in sentences for sexual assault offences, and particularly the introduction of lengthy statutory standard non-parole periods, raises the stakes even further. This combination of factors makes for a very difficult environment at trial. In my view, sexual assault trials represent the raw edge of the criminal law. Balancing the rights of these particularly vulnerable victims with the overriding right of an accused to a fair trial requires prosecutors to act with the highest level of diligence and attention in these emotionally draining trials.

THERE IS OFTEN TENSION BETWEEN INVESTIGATING POLICE AND PROSECUTING LAWYERS

A good illustration of the competing responsibilities of a prosecutor in a trial is the obligation of prosecutors to assist the Court with directions to the jury. Whilst both prosecution and defence are obliged to assist the Court on matters of law (and there are difficulties for defendants who do not render this assistance at trial, then raise seek to raise these matters on appeal), in practice the prosecutor is expected to and must bring to the Court's attention all appropriate directions favourable to the accused. Sometimes prosecutors will be required to explain to complainants and their families why it is that

they are suggesting directions that support the defence case.

There is a common misconception that the prosecution team is one entity, with police, prosecution solicitors and Crown Prosecutors in cosy cahoots. This is not the case. There is often tension between investigating police and prosecuting lawyers, particularly about the admissibility of evidence and the negotiation of pleas. It regularly occurs that, once the Crown Prosecutor receives the brief, part of the Crown case is revealed to be inadmissible or so lacking in cogency that it cannot be used in Court. This may necessitate further investigations; or a review of the charges; or in some cases the withdrawal of the charges altogether, sometimes to the disappointment and disapproval of the police. Ultimately the withdrawal of a charge is a decision made by the Director of Public Prosecutions, acting in accordance with the Prosecution Guidelines and with the assistance of advice from the relevant Crown Prosecutor. The overriding consideration is always the interests of justice.

A colleague, who does not practice in criminal law, complained that the ABC TV show *Crownies* "doesn't know whether it is drama or comedy". Like that show, the practice of criminal law can have a weird (some might say dysfunctional) blend of tragedy and humour. Constant exposure to violence and injury does lead to a certain morbid style of humour, which serves as a coping mechanism and an outlet for the not inconsiderable stress associated with our work. There is also a strong sense of collegiality in Crown Prosecutors' chambers and (like the private bar) many prosecutors maintain an open door policy, which encourages the confidential discussion and

assessment of the challenges that come up during preparation or trial.

Practice as a Crown Prosecutor is fascinating. Every case opens a window onto another world of human experience. Every significant decision made as a prosecuting barrister requires the intuitive

or explicit assessment of the interests of justice through recognising both the rights of the accused to a fair trial and the interest of the community in the diligent prosecution of offenders. It is a great job – challenging, exciting and morally rewarding.

CROWNIES: THE FACTS

Crown Prosecutors are barristers appointed by the Attorney General to prosecute serious criminal proceedings on behalf of the State. There are currently 89 Crown Prosecutors in NSW. About 30% are women.

Crown Prosecutors are appointed under the Crown Prosecutors Act 1986. Typically, they are typically appointed from the private bar or from within the ranks of the Office of the Director of Public Prosecutions, which employs around 300 solicitors. Their functions are described in the Act as being to conduct, and appear as counsel in, proceedings on behalf of the Director of Public Prosecutions; to find a bill of indictment in respect of an indictable offence; to advise the Director in respect of any matter referred for advice by the Director; and to carry out such other functions of counsel as the Director approves.

The majority of criminal jury trials in this State are prosecuted by Crown Prosecutors. They are tried in the District Court and the Supreme Court of New South Wales. Crown Prosecutors also provide advice to the Director of Public

Prosecutions on the continuation or termination of criminal proceedings. Occasionally Crown Prosecutors appear at coronial inquests, inquiries into convictions under Part 7 of the Crimes (Appeal and Review) Act 2001 and in unusually complex committal proceedings.

From time to time, Crown Prosecutors are seconded as counsel to other organisations such as the ICAC, the Police Integrity Commission, the Legal Representation Office, the Public Defenders Office and the Criminal Law Review Division of the Attorney General's Department. Crown Prosecutors are often appointed as Judges of the Supreme Court and District Court.

Most Crown Prosecutors (and most barristers generally) choose to be members of the NSW Bar Association, but the Legal Profession Act 1984 requires all barristers to comply with the NSW Barristers' Rules. Rules 82-94 deal specifically with the duties of a prosecutor.

There are Crown Prosecutors located in chambers in Sydney, in Sydney West at Parramatta, and in regional locations in Newcastle, Wollongong, Lismore, Dubbo, Bathurst, Wagga Wagga and Gosford.