# Directors of Public Prosecutions: Independent and Accountable

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*'Independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.'*

IN the last five years Australia has witnessed several very public debates on the nature of the office of public prosecutor. There has been a protracted debate in Victoria culminating in the repeal of the Director of Public Prosecutions Act 1982 (Vic) and the enactment of the Public Prosecutions Act 1994 (Vic); the current debate in Queensland over the tenure of the Director of Public Prosecutions and the possibility of the removal of the Director from office without cause; and the well-publicised stoush between the Director of Public Prosecutions and the Premier in New South Wales over a perception of difference in attitudes as to sentencing laws.

The potential for ultimate dismemberment of the office of Director of Public Prosecutions ('DPP') by a government is so obvious that it barely needs stating. If a government or a parliament really wishes to destroy a prosecution service, each is capable of doing so. Parliament can abolish courts. Governments can withhold funding. Ministers can decline to re-appoint troublesome DPPs who are therefore not immune from destruction.

Nevertheless, the office of DPP is now well entrenched within Australian society. Overt attempts to fetter his or her powers will cause a major debate in the community where the attempt occurs.

Directors of Public Prosecutions are to be found throughout the common law world, including England and Wales, Northern Ireland, Eire,

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Fiji, Hong Kong and Jamaica. Other jurisdictions which have closely examined the concept, including Canada and New Zealand, have prosecution services which also pride themselves on their independence, albeit under a Deputy Attorney-General or Solicitor-General.

## PERSONAL QUALIFICATIONS

Speaking as one, I hope I cause no offence when I say that criminal lawyers are not generally noted for their academic insight or their interest in fine and subtle interpretations and elucidations of the common law. They are, generally, jobbing lawyers of the finest kind, more interested in facts and reality than theory. Therefore, rather than attempt an exegesis of the literature on the subject of prosecutorial independence, I thought I would venture a few personal observations. I will develop a theme that independence of the office is intertwined with accountability. Better systems of accountability will be rewarded with greater independence of decision.

Before warming to the theme, however, I should state my qualifications to make the observations which follow. I practise in Western Australia which, together with South Australia, Tasmania and the Northern Territory, allows practice as a fused or amalgamated profession. Indeed, most lawyers in my State practise as barristers and solicitors and the number who practise solely as barristers is comparatively small. The often silly and archaic rules which cause cost and confusion do not apply, and practitioners who are so minded slip seamlessly from one role to the other and back again. We watch with wry amusement the angst in other States at the prospect of fusing the professions of barrister and solicitor. More of that later.

After spending some of the 1970s and all of the 1980s in an eclectic government practice as counsel within the Crown Solicitor's Office, enjoying a wide variety of civil work and a not insubstantial constitutional and administrative law practice, together with significant prosecuting responsibilities, at the beginning of 1990 I succumbed and became the Chief Crown Prosecutor. At that point, the Chief Crown Prosecutor was a non-statutory office-holder within the Crown Solicitor's Office. Many prosecution decisions were made by the Chief Crown Prosecutor, but decisions in respect of nolles prosequi, ex officio indictments, Crown appeals and other matters were made by the Solicitor-General or, in some cases, the Attorney-General on advice.

I was appointed the State's first DPP effective from the beginning of 1992 and my five-year period of office expired on 1 December 1996. I can therefore lay claim to considerable experience within both a prosecution service which was ultimately answerable for its decisions to the government of the day and a prosecution service independent of the government of the day.

The birth of the Western Australian Office of the DPP was not without pain. There were some in influential positions who saw the office as a continuation of the role of Crown Prosecutor, with similar reporting responsibilities as before. This model was sometimes crudely described : 'A Chief Crown Prosecutor with a fridge' — drinks refrigerators then being a public service status symbol.

That was not my vision. I conceived from the beginning a prosecution service freed from the shackles of the past and from political and other influences, including that of the police.

The need for such an independent office has probably not been greater in Western Australia's history than in the last five years. The Director of Public Prosecutions Act 1991 (WA) was proclaimed on 4 February 1992. Two days later I instituted contempt proceedings against a serving Minister in the Lawrence government for extra-curial remarks arising out of a trial in which he had given evidence.[1]

In the last five years the Western Australian prosecution service has been called upon to prosecute two former Premiers (one Labor, one Liberal), a former Deputy Premier and a current Member of Parliament, together with numbers of police officers and assorted fallen tycoons.

Nor are we alone. Since Mr John Phillips QC[2] became the first Australian DPP appointed in Victoria in 1982, Directors in all jurisdictions have been called upon to consider controversial and notorious matters for prosecution, sometimes within a hostile atmosphere. The Western Australian experience, along with all others, indicates why an independent prosecution service should now be regarded as part of the constitutional balance in 20th century democratic Australia.

## CONSTITUTIONAL ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Whether or not the position of the Attorney-General in Australia was ever equivalent to that described by Professor Edwards,[3] the role of the Attorneys-General in Australia in the closing days of the 20th century is quite different. Professor Edwards' classic texts on the subject shed little light on the reality of the constitutional position of either an Attorney-General or a DPP in Australia. Indeed, the changes in England brought about by the passage of the Prosecution of Offences Act 1985 (UK) have

1. *Pearce* (1991) 7 WAR 395.
2. Now Chief Justice of Victoria.
3. J Edwards *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964); J Edwards *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984).

also considerably altered the position for England and Wales. However, at least one comment made by Professor Edwards in 1984 remains true:

> Interpretations of the constitutional position which the Director of Public Prosecutions occupies in the administration of criminal law in England and Wales continues to be the subject ... of intense public debate. This debate generally surfaces in the wake of notable controversial cases that engender a high public profile.[4]

Attorneys-General have varied political responsibilities which transcend their former legal responsibilities. Often they are members of Cabinet. They may hold other unrelated ministerial offices. In Western Australia, for instance, the present Attorney-General, the Hon. Peter Foss QC, is also Minister for Justice, the Environment and the Arts. The legal responsibilities previously undertaken by the Attorney-General are now substantially undertaken by the Solicitor-General and by Law Departments. Indeed, unlike England, the Solicitor-General is an appointed, unelected official who in practical terms is a government's principal legal adviser. The statutes which cover their appointment are also designed to foster some independence of the Solicitor-General from the government of the day. They, however, differ from DPPs in that they advise governments how to act in a particular case. On the other hand, DPPs act.

As Attorneys-General become more active in the law-and-order debate, and in sponsoring legislation which has an impact on criminal justice, it is important that actual decisions regarding prosecutions be removed from the perception or reality of political expediency and placed in independent hands. Thus the separation of the prosecution service from those Law Departments has been a necessary concomitant of the changed responsibility and increased political activity of Attorneys-General.

This is no bad thing. My appointment followed the recognised procedure in Western Australia for the appointment of judges. The procedure for appointing DPPs in other jurisdictions is similar. DPPs are equated with judges in terms of salary and allowances and, generally, tenure.

DPPs have to exercise power and make decisions which, though not judicial or quasi judicial, nevertheless have a similar impact on the lives of citizens. A decision to prosecute or not to prosecute is at least as important to an accused person as any subsequent decision in judicial proceedings. DPPs ought now to be seen as part of the system of checks and balances within a constitutional democracy, even though their precise position is still evolving. Their position, and any threat to the independent exercise of their position, may cause a DPP to seek redress in the courts.[5]

The independent and crucial constitutional role of the DPP has been

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4. Edwards *The Attorney-General, Politics and the Public Interest* ibid, 37.
5. For an historic example: see *DPP (Fiji) v A-G (Fiji)* [1983] 2AC 672.

explained by high authority. In *Price v Ferris,*[6] Kirby P (as he then was) described the object of a DPP as follows:

> What is the object of having a Director of Public Prosecutions? Obviously, it is to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution directions. Its purpose is illustrated in the present case. The court was informed that, in the prosecution of a police officer, it is now normal practice in this State for the prosecution to be 'taken over' from a private prosecutor or informant and conducted by the DPP . The purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour. Analyses by law reform and other bodies have demonstrated conclusively how vital are the decisions made by prosecutors.[7] Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.[8]

In *R v Maxwell,*[9] Dawson and McHugh JJ said:

> The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the court. Indeed, the court would seldom have the knowledge of the strengths and weaknesses of the case on each side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, 'is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system'.[10]

The Commonwealth DPP was recently reviewed and, despite suggestions that the present operations be altered (with the consequent diminishment of the Director's authority), the review concluded in favour of the present arrangements, in part to preserve the independence of the office in its decision-making.

The need throughout Australia for an independent DPP's office might be clear. The achievement of the need is less so. I propose to develop the argument that by ensuring accountability at all levels paradoxically the independence of a prosecution service is protected.

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6. (1994) 74 A Crim R 127, 130.
7. ALRC *Sentencing of Federal Offenders* (Canberra: AGPS, 1980) 61 et seq.
8. *Price v Ferris* supra n 6, 31 et seq. See X Connor 'The Victorian Director of Public Prosecutions' (1994) 68 ALJR 488.
9. (1996) 135 ALR 1.
10. Ibid, 9.

## INDEPENDENCE AND ACCOUNTABILITY

One of the least understood areas of law and government is the relationship between independence and accountability. It is necessary to examine that relationship before understanding why independence can only be assured if there is appropriate accountability. The high responsibility given to an unelected official to wield great power carries with it the duty to be accountable for its exercise.

A statutory office can be entirely independent in the sense of its decision-making and, nevertheless, be properly accountable for the quality and the consequences of that decision-making.

For many years, in different jurisdictions, both statutory office-holders and governments have deliberately confused the relationship to justify, on the one hand, unchecked and unaccountable behaviour and, on the other hand, lack of political responsibility for the consequences of certain unpopular acts or decisions. I illustrate the point with two examples.

### 1. Police services

The first example is the police service. No one would doubt that a proper and fundamental tenet of a democracy should be the absolute independence of police services in the making of operational decisions and in the conduct of their operations. The point is patent. There is no purpose in having an independent prosecution service if the charging process initiated by police is subject to extraneous interference.

However, under the laudable excuse that they should not interfere with police independence in decision-making and operations, politicians have abrogated their responsibility to require police services to be accountable, both financially and operationally. The present sorry state of affairs in a number of jurisdictions is sad proof of this fact.

I give an instance. There is a world of difference between a police minister standing apart and separate from decisions to charge suspected drug offenders and the same minister requiring of a police commissioner proper standards of conduct, supervision, financial accountability and risk management procedures within a drug squad. The former is appropriate, the latter is abrogation.

Belated and half-hearted attempts are occurring to regularise the position in some jurisdictions. However, there are vested interests in an independent body declining as much accountability as possible and in a minister declining as much political responsibility as possible.

It should be recognised that a Royal Commission into a police service provides only a report for consideration. It is not itself any solution to a problem. A problem identified by a Royal Commission requires subsequent

action by a government. Where a Royal Commission or other inquiry reveals corrupt, dishonest or neglectful behaviour within a police service, it may well be the case that proper systems of accountability beyond the police hierarchy, to government, parliament or the courts, have atrophied. A police service which resents a Royal Commission ought to have ensured proper accountability for its independent decisions much earlier.

### 2. The judiciary

The second example is the judiciary. No one would deny the proposition that the judiciary must be fearlessly and absolutely independent; that is to say, its decisions must be free from any taint of bias, prejudice or threat.

However, many have confused independence with lack of accountability. If a judge is lazy, inefficient, stupid or merely a procrastinator, why should there not be agreed methods of accountability and appropriate sanctions? We have surrendered the right to make judicial officers accountable for the efficiency and quality of the service they provide as judges in the confused belief that accountability and independence are mutually inconsistent, and that requiring a judge to be efficient is an intrusion on the judge's independence of decision.

I do not speak here about the independence of the actual decision-making process because, in part, it is accountable through being performed in public and through appeal procedures. However, many of the criticisms about courts today — delay, inaccessibility and the like — could be addressed by governments without in any way impinging upon judicial independence. Instead, that independence would be enhanced through proper accountability.

## ACCOUNTABILITY AND INDEPENDENCE IN A DPP

The accountability of a prosecuting service is one of the bastions of its independence. The common law provides significant entrenchment of a prosecutor's independence. In a series of cases it has been held that a prosecuting counsel's undoubted duty of fairness nonetheless does not give rise to a cause of action;[11] that an action for malicious prosecution cannot be sustained against prosecuting counsel while a conviction remains on record;[12] that a DPP is not ordinarily responsible for any malice there may be on the part of prosecuting counsel;[13] and that there is no duty of care

11. *Whitehorn* (1983) 152 CLR 657.
12. *Love v Robbins* (1989) 2 WAR 510.
13. *Riches v DPP* [1973] 1 WLR 1019.

owed to private individuals aggrieved by careless decisions of prosecution service lawyers.[14]

These important principles have been established to a large extent on the basis of public policy and the need for a prosecutor to be free to act in the public interest. Consequently, in order to consider the independence of a DPP and the accountability of decisions of a prosecution service, it is necessary to look beyond the traditional method of accountability (viz, a suit for damages, a declaration or prerogative relief).

The relationship between independence and accountability is in fact tolerably clear. As a DPP is independent from other participants in the criminal justice system, so also is the DPP linked in a relationship of mutual accountability and responsibility.

There are a number of participants or factors within the criminal justice system. They include: Attorney-General, parliament, courts, media, published prosecution policy, prosecution service, local profession, police and victims. I will discuss each of the relationships in turn.

## 1. The DPP and the Attorney-General

Under Part 4 of the Director of Public Prosecutions Act 1991 (WA), an Attorney-General is precluded from providing a DPP with instructions in any particular case, although an Attorney may give directions as to general policy. Similar provisions exist in all jurisdictions with local variations.

In some jurisdictions, the ultimate check on the DPP's power is that an Attorney-General has conjoint powers. Therefore an Attorney-General may, in an extreme case, exercise those powers. In such a case, an Attorney-General's decision takes precedence over that of a Director. Of course, there would be political accountability in such a case, and it takes little imagination to see why an Attorney-General would be extremely reluctant to act.

The relationship between a DPP and an Attorney-General, like any personal relationship, can have its moments. I have been fortunate in enjoying good relationships with the three Attorneys-General who have held office during my term. Legislation provides formal consultation provisions should a relationship break down.

I can say that on no occasion, even as Crown Prosecutor, was I ever subject to political influence. Indeed, each of the three Attorneys-General has recognised the considerable political advantage of remaining distant from the prosecution process.

However, maintaining a relationship, whether friendly and cordial, or formal and distant, is important to ensure that each acts within the limits of

14. *Elguzouli-Daf v Metropolitan Commissioner of Police* [1995] QB 335.

their statutory function. Where an Attorney-General can exercise power, a DPP is accountable for capricious or corrupt decisions. The Attorney-General's residual or conjoint power is not a threat to the independence of the DPP but a check on abuse. This is because, in the case of such a decision by a DPP, the Attorney-General could take over the matter and make appropriate decisions.

## 2. The DPP and parliament

The DPP is required to provide the Attorney-General with information to enable the proper conduct of the Attorney's public business, including the answering of questions in the House. Thus, there is a measure of accountability to Parliament by the DPP, albeit indirectly, in respect of decisions after they have been made. No one may influence a decision before it is made, but Parliament may seek an explanation afterwards.

This accountability to Parliament is a useful corrective to incipient notions of megalomania. Parliamentary questions, even the incomprehensible ones, are an opportunity for the legislature to require responsibility from a DPP, without intruding on the decision-making of that office.

## 3. The DPP and the courts

Courts are keen to uphold the independence of the DPP because a prosecutor's independence is not unlike judicial independence.

While courts have inherent powers to stay indictments and deal with abuses of process and other irregularities, they enhance the independence of the office of the DPP by confirming that the DPP and all prosecutors are not above the law. Courts are in a good position to assess those decisions within the criminal justice system which are inappropriate to be made by a court, and are appropriate to be made by a prosecutor, because of their own experience in independence of decision-making. In particular, courts are able to recognise that the public interest is multifaceted and that prosecutors are able to take into account aspects of the public interest which courts are unable to consider.

I do not propose to dwell on this relationship because it is well recognised in a series of cases.[15] The position is succinctly explained by Gaudron and Gummow JJ:

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi , to proceed

15. *Barton* (1980) 147 CLR 75; *Jago v District Court (NSW)* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 509; *Harry* (1985) 39 SASR 203; *Ex parte Christianos v DPP* (1992) 9 WAR 345; *Lorkin* (1995) 82 ACrimR 196.

> ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[16]

Nevertheless, the independent exercise of some prosecutorial functions may be called into question by courts in the appeal process or by ancillary measures, such as the stay of an indictment or the refusal to accept a nolle prosequi.

## 4. The DPP and the media

A working relationship between the media and a prosecution service is vital for the interests of justice and to maintain the independence of the prosecution service.

The public must generally be informed about the work of any government agency, including a prosecution service. It is especially important for a prosecution service to have its work publicised. If sentences are to have any effect of general deterrence then, self-evidently, a sentence will not generally deter unless it is well known.

Prosecutions perform other useful functions besides deterrence. A prosecution can be the means of restoring peace within the community. Allegations of serious misconduct will not be left to fester in secret but will be broadcast. The result — conviction or acquittal — is generally marked by the community as the close of the event, and respected as such. For this reason, courts insist on open justice, and prosecution services must be responsive to the needs of the media when they seek to report matters or to explain decisions.

Lawyers are by nature distrustful of journalists. However, the old days of 'tell them nothing' are well and truly gone. Any such lingering attitude is a great threat to independence. The 'Barwickian' approach to the media, as described by Sir Garfield Barwick in his autobiography,[17] is a relic of other days and gentler ways. Few Attorneys-General or DPPs could get away with telling journalists that if the Attorney-General had anything to announce he would send for them — but otherwise keep away.

Trust is necessary before the community is prepared to allow a statutory office-holder a measure of independent judgment. The community cannot trust an office-holder if they do not know anything of the process, reasoning or factors which may influence the office-holder's decisions. For example, courts and judges are trusted by the community with a high degree

16. *Maxwell* supra n 9, 26 (footnotes omitted).
17. G Barwick *A Radical Tory* (Sydney: Federation Press, 1995).

of independence because, among other reasons, the decisions of a judge or other judicial officer are available for immediate public scrutiny. Judges hand down detailed reasons to justify their judgments. Even when the community disagrees with a judgment (sometimes vehemently in the case of sentencing), the community does not doubt the independence of the judicial officer.

Oddly, from time to time the community calls for the independent decision-making of judges to be restricted, especially in the area of sentences. Although such calls gain support, particularly around election times, it is not surprising that few of those proposals are, in the event, enacted. When they are enacted, history shows that within a few years the measures are often quietly repealed and replaced by less restrictive fetters on judicial discretion and independence.

In constrast with the openness of the judiciary, the public is suspicious and disinclined to trust those processes of government which are confidential. Statutorily secret bodies, such as the National Crime Authority, are subjected to criticism, in part, because their processes are secret. Communities are less likely to allow them independent action when their accountability has the appearance of being limited.

From my observation, all Australian DPPs are open with the media in respect of the performance of their offices. All give reasons for decisions which have been made, except in those few special circumstances where great prejudice to a person would occur if publication took place.

The result of an open relationship with the media, from my direct experience in Western Australia and my observations elsewhere, is that independence is enhanced because the office enjoys a high degree of public support. If there were to be any inspired attack on the functions of the office, those attacking it would know that the attack would have to be fought in public, and that an attempt to constrain the office's independence in its decision-making would have political and other ramifications.

I have personally witnessed the outpouring of support against an unjustifiable attack in Western Australia. The morning after, the switchboard went into virtual meltdown due to calls of support.

## 5. The DPP and a published prosecution policy

A written Prosecution Policy is an important keystone of independence. But, unlike most other Australian jurisdictions, there was no Prosecution Policy in Western Australia until November 1992.

Policy, like Masonic ritual, tribal initiation or priesthood, was a thing to be acquired by inculcation upon reaching the highest echelons of the Crown Solicitor's Office. Because a decision could not be justified in accordance with a fixed and published set of criteria, questions of

independence sometimes arose when a decision was made either to terminate a prosecution or to ex officio indict.

A fixed set of guidelines enables a degree of objectivity to be brought into the decision-making process, and independence is confirmed if the decision-maker is able to justify a decision in accordance with previously published material.

A discretion exercised by a prosecutor is, after all, not arbitrary but to be exercised according to law. As it was put by Lord Halsbury :

> 'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion — according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man, competent in the discharge of his office, ought to confine himself.[18]

## 6. The DPP and the prosecution service

I spoke earlier of the advantages of practising in an amalgamated profession. Those jurisdictions which are fortunate enough to do so have been able to develop a service of Crown Prosecutors.

In the last five years in Western Australia we have worked very carefully developing the skills and professionalism of Crown Prosecutors at all levels. As a consultative exercise within our office we developed a document entitled *Roles and Responsibilities of Crown Prosecutors* which sets out, in exhaustive detail, the role of a Crown Prosecutor at each stage in the process of a prosecution matter. The role envisages that a crown prosecutor will prepare papers, settle indictments, advise on evidence, contact victims, and appear on pleas days, status conferences, bail applications and trials. In short, a lawyer will act as both solicitor and barrister as needed, without regard for the distinction.

For the past two years we have recruited only at base grade entry level. There is a waiting list of applicants. Prosecution work is sufficiently varied to enable lawyers to develop at their own pace. There are no glass ceilings preventing a branch of the office from proceeding beyond a certain level.

Of course, as part of the natural order of things legal, there are those in the office whose work is almost exclusively barristerial in nature, and others whose work is almost exclusively solicitorial. However, there is a great range of work between the two extremes. Team leaders who are responsible for the supervision of the legal and paralegal teams, which form the basic practice structure of the office, also have significant court responsibilities,

18. *Sharp v Wakefield* [1891] AC 173, 179.

particularly on pleas days when they often appear as counsel.

The *Roles and Responsibilities of Crown Prosecutors,* and the position of Crown Prosecutor, were developed in part to enhance efficiency, and in part to ensure independence of thought. Naturally, it is not possible for a DPP of any jurisdiction to make all decisions due to the volume of work. Therefore independence requires independence not only for the DPP but for all decision-makers, which in practical terms is every Crown Prosecutor. Hence the need to create a structure which fosters and protects independence while conforming to the requirements of accountability.

There are advantages in the employment of Crown Prosecutors to carry out the functions of the office. They are not under pressure to win at all costs because they have a set career structure and set salary. Their training can be regular and suited to the particular vocation. They can be inculcated into a culture of openness. They develop skills in decision-making using the Prosecution Policy.

Of course, it would be idle to suggest that all Crown Prosecutors were always models of fairness in the character of a minister of justice, not striving for a verdict at all cost. Nevertheless, that is a goal to which we aspire, and in my experience it is easier to achieve when there is an accountability for performance within an office structure.

## 7. Need for dissent within an office

At the same time, there is a need to develop in an office a culture of independence of thought and the ability to build a system which allows rigorous dissent in the case of decision-making. We have sought to achieve this culture, in part, through continuous ethical policy training over the last three years.

Law is an uncertain and inexact science and reasonable lawyers may often hold differences of view on such things as whether there is a reasonable prospect of conviction; whether the public interest requires a continuation or termination of a prosecution; or whether a sentence is so low as to justify a Crown appeal.

If the High Court can occasionally split four-three (or in the case of *Uebergang v Australian Wheat Board*[19] all ways) so can Crown Prosecutors. Of course, unlike the High Court, at the end of the day we can still be, occasionally, wrong.

To enhance the independence of decision-making, every prosecution service in Australia has systems to ensure that significant decisions are not made by one person alone. There is consultation and review. For example, under the guidelines we have developed, if I as DPP disagree with a

19. (1980) 145 CLR 266.

recommendation which has passed through the hands of a Crown Prosecutor and a senior Crown Prosecutor for ultimate decision, the reasons for disagreement must be explained and noted. This accountability significantly enhances independence of thought by junior officers, as well as providing a check on the power of the DPP.

## 8. The DPP and the local profession

About 15 per cent of the DPP's work in Western Australia is briefed to the legal profession, chiefly to the Bar Association of Western Australia, of which body I am a member. The figure varies from State to State according to local practice and economics. In some States the volume briefed has been high, in others almost non-existent.

In Western Australia, the allocation process, both internal and external, has recently been reduced to writing to ensure accountability and independence. In this State, allocation of work to the Bar is made by the DPP's Allocations Committee, which sits monthly and allocates all of the trial and appeal work for the months ahead. Work is allocated to Crown Prosecutors as well as to the legal profession at the one meeting. The opportunities for nepotism and influence are greatly diminished because decisions are reached by the committee.

Further, we brief widely in the profession, as creation in a barrister of dependence on Crown work can itself inhibit independence of action by that person. The ability to brief the Bar provides a prosecution service with a useful flexibility, but is entirely neutral as to independence.

Crown Prosecutors are subject to the same duties of fairness as counsel briefed from the Bar. If authority is needed for so basic a proposition, it can be found in *R v Lucas*.[20] In my experience, both Crown Prosecutors and briefed barristers display independence in the exercise of the discretion as prosecuting counsel and generally act appropriately. Barristers who follow the 'servant of all and servant of none' doctrine are neither more nor less independent than those who work within a prosecution service, although it must be conceded that, in order to ensure independence of thought within an office structure, care must be taken in developing the appropriate structure, culture and mechanisms.

From my observations of other prosecution services, I would expect that any DPP would be of much the same view in respect of their own office — namely, that the use of internal Crown Prosecutors does not detract from independence of decision-making.

As an illustration from my own experience, most discontinuance submissions for nolles prosequi or 'no bills' come from Crown Prosecutors

20. [1973] VR 693, Newton J and Norris AJ 705.

either at their initial consideration of the case following committal, or after interviewing some of the witnesses, either for that purpose or in preparation for trial. Defence lawyers are often slow to make discontinuance submissions even in obvious cases. The reasons for this reluctance are probably best left unexplored.

## 9. The DPP and the police

There will always be a tension between the need to ruthlessly evaluate police work in the form of charges and briefs, and the personal relationships which inevitably develop between prosecutors and particular officers, chiefly in the Criminal Investigation Bureau. The potential problem is pronounced in small jurisdictions.

Few major circuit towns outside Perth in Western Australia have more than two or three detectives attached. The same is true in the other less populated States. Consequently, it is inevitable that during the period of their posting, the local detectives will become well known to defence and prosecuting counsel.

The problem of familiarity is brought into sharp relief when it is necessary to prosecute a police officer. When a prosecution service is sufficiently large, independence of decision-making can be achieved by ensuring that decisions are made by people unacquainted with the officer or officers concerned. In smaller jurisdictions, the only recourse may be to brief a lawyer unacquainted with the accused or witnesses.

Notwithstanding the close relationship which inevitably grows between some Crown Prosecutors and some police officers, I have not detected any lack of resolve in the independence of their decision-making in respect of briefs which involve police. However, this is another area where it is not sufficient simply to rely on the professionalism of any lawyer, but to ensure that systems and procedures are in place to minimise the possibility of a restraint on independence. In short, attention must be paid in a prosecution service to the implementation of risk management strategies.

A prosecution service is necessarily accountable to police for the quality of its service and the quality of its independent decision-making because, in the great majority of cases in Australia, police initiate charges. The carriage of a prosecution, however, is not on behalf of the police but on behalf of the Crown.

Often a Crown Prosecutor will consult with police about a possible course of action and will almost always have to explain the decision thereafter, if the decision is other than that recommended.

However, despite initial resistance in most jurisdictions, police have now generally accepted an independent prosecution service and its right to make ultimate decisions on indictments.

## 10. The DPP and victims

Alleged victims of crime have, in the past, been neglected in the criminal justice system. Their needs and rights are very important and all prosecution services have procedures to ensure that victims are kept informed, and in some cases consulted, as to progress of a prosecution. There are specific statutes in several jurisdictions which protect the rights of victims.[21]

Alleged victims of crime can sometimes seek to pressure a prosecution service into a course of action. This is generally done individually, but occasionally will be an organised attempt. A group may lobby for the prosecution of a certain class of persons, such as priests or former priests, regardless of the strength or weakness of the evidence in a particular case.

In some cases a group incensed by what it regards as a lenient sentence may bombard the prosecution service with requests and petitions to appeal. As my friend Mr Bernard Bongiorno QC once remarked, one gets a little suspicious of a spontaneous outpouring of opinion on a particular sentence and request for appeal when each of the 400 letters contains the same spelling mistake. A DPP must take account of these matters but is alone entrusted with the ultimate independent decision.

It is worthwhile remembering that in Australia all are Directors of *Public* Prosecutions. The word 'public' is so important that the Queensland Parliament legislated in 1994 to give the Director of Prosecutions a second P.

A service exists for public prosecution not private vengeance. A victim, or in some cases victims group, is, however, generally entitled to have the decision explained. While from my experience it is fair to say that few victims accept the reasons for discontinuing a prosecution when I explain them, almost all recognise that the DPP is the person entrusted by the community with the power to act.

## FINANCIAL RESOURCES ARE NOT A THREAT TO INDEPENDENCE

An obvious and subtle way to control a prosecutor's office is through the allocation of resources. It is possible to measure the cost of a prosecution service reasonably accurately for budget purposes. Because that cost will always be a direct draw on consolidated revenue, with no (legal) possibility of recoupment of moneys, it is natural that economic rationalists from time to time will look critically at the value for money being achieved by a prosecution service.

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21. Eg Victims of Crimes Act 1994 (WA); Victims of Crimes Act 1994 (ACT); Crimes (Victims Assistance) Act 1992 (NT); Victims of Offences Act 1987 (NZ).

It is impossible to provide an economic justification for a social service which is economically irrational. If a community wishes to be governed by the rule of law and to accept the principle that all men, women and children have equality of rights and responsibilities under law, then it follows that the justice system will be a cost of living in a civilised community.

A threat to a prosecution service's funding in the guise of economic rationalism is not a direct threat to the independence of that service. It is rather an inroad into the justice system, poisoning that system, perhaps to the extent that the prosecution service is unable to function effectively. The same logic applies equally to other aspects of the system, including the courts and the police.

Nobody suggests that the police should conduct an audit of the victim's life before making a decision whether or not to expend significant amounts of public money in the apprehension of the offender. Rather, the police seek to apprehend every murderer, regardless of the worth of the victim, because, in the values of our community, life is still regarded as sacred and the taking of it offensive to the peace of the community.

Any discussion with a DPP about money will rapidly establish that their office is short of resources. However, almost any discussion with any CEO of any government department anywhere in Australia will yield the same response.

Funding, or the lack of funding, is not an influence on the independence of the office. A prosecution service can function fully, effectively and independently to the limit of its funding and then it simply stops functioning.

By way of analogy, I do not regard stays of proceedings on a *Dietrich*[22] application as a matter of concern. The prosecution service will prosecute such matters if government provides financial resources for the defence. It will prosecute something else in the meantime. No threat to the independence of a prosecution service is thereby occasioned. It is simply ineffective in that particular case. So, if there is insufficient money to fund all prosecutions, notwithstanding prudential management, a service will simply be ineffective to the extent of the underfunding. That is, of course, a significant problem which ought not to occur, but it is not a problem of independence.

## CONCLUSION

As I said at the outset, I have avoided an analysis of the written work on the subject of prosecutorial independence in order to share with you such experience as I have gained as a practitioner in dealing and grappling

22. (1992) 177 CLR 292.

with the notion of independence as a prosecutor.

At the core of that independence I believe that there must be accountability and the two factors, far from being inconsistent, are in fact complementary to the extent that independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.

In the end, every legal practitioner who has, through choice, chance or circumstance, chosen to practise in whole or part in the criminal jurisdiction is entrusted with a significant responsibility on behalf of the community. The system depends upon prosecutions being conducted by counsel of ability, independence, moderation, firmness and restraint. On the other side, to respond to all the resources of the state marshalled against a citizen accused of crime, the system requires defence counsel of integrity, ability, courage of purpose, judgment and independence. The system is in equipoise, and if the balance is out on either side then injustice will most surely follow.