

# Hot Seat - Or Siberia?

The learned editor of this journal (obviously desperate for contributions) asked me some time ago if I would do a "First 100 Days" sort of article about being the Director of Public Prosecutions of the First/Premier/Waratah State. It was already too late. It is even later now.

I was left entirely alone to ask myself hopefully relevant questions and provide almost appropriate answers. At least that way I get to exercise a significant degree of editorial control.

So here is not "a frank and revealing interview with the State's top prosecutor in which he provides rare insights into topical issues and the operation of the criminal justice system".

## Background

When my appointment was announced the *Sydney Morning Herald* did a Saturday Profile entitled "Man in the Hot Seat". It was positive and flattering and I was warmed. (It was a good thing I didn't ask the questions at that interview.)

I started in the position on 17 October 1994, 7 years after taking silk and 19 years to the day after hanging up my shingle in the old Frederick Jordan Chambers (after 4 1/2 years as a Public Defender in Papua New Guinea).

In the first 13 months I have found that the seat does occasionally warm up; but for a lot of the time I feel, as apparently did my predecessor Reg Blanch QC (now Chief Judge of the District Court) - or so he suggested at his 15-Bobber - that I have been exiled to a Siberia of the profession. I don't mind the heat, but the cold can be a worry.

## Why Did I Take The Job?

It seemed like a good idea at the time. No, it didn't. By any rational criterion it was an exceedingly bad idea - a sudden and dramatic drop in income, loss of freedom and personal independence, public accountability, acquisition of administrative responsibilities and loss of my superb harbour view from Level 43, MLC Centre (which I still sorely miss).

Fate, probably. A logical progression of a career in, principally, criminal law with a lot of prosecuting and an interest through local and international associations in the broader questions in the operation of criminal justice systems.

Time for a change. We only get one crack at life and we might as well get some variety, challenge and hopefully satisfaction from it. And if we can do some good along the way, so much the better.

So when the headhunters came around they found a reasonably easy prey.

## What Changes Did I Notice?

The air conditioning cooling tanks on the top of the Downing Centre are no substitute for Sydney Harbour (unless I redeploy my telescope to watch the breeding behaviour of legionella bacteria). But then, there is no time for window-gazing.

A principal difficulty is to remain a barrister while running an office of 500 staff (including about 240 solicitors and 70 Crown Prosecutors) in 11 offices throughout the State and coping with the challenges constantly thrown up by the government, the courts, the public and that ratbag on the radio (although that's not much of a challenge).

I have attempted to maintain practice by doing (so far) one trial and opposing a number of special leave applications in the High Court. I would like to do more, but the demands of the Office make it very difficult to run a second full-time job as Crown counsel.

The biggest mind change has been the realisation that even busy barristers do not work as hard or as long and under such constant pressure as people in positions like this. Barristers - even busy silk - have it easy by comparison because of the nature of private practice. They are briefed, do the work and return it with a bill. Clients of barristers seek and respond to advice and are represented for a finite time in court. The DPP by contrast is in fact a client, but one who directs his representatives and is responsible for their conduct and operations. He also has wider responsibilities to the community. For me, work does not come in easily digestible bites, no bills are sent (there is just a comparatively meagre automatic fortnightly reduction of the overdraft), jobs do not finish but stick around forever. The barrister's

choice to say no has been removed and it is a luxury you don't appreciate until you lose it (even if you don't often exercise it).

But I am not whingeing. Next question?

## What Do I Do On An Average Day?

Things are constantly happening to make days decidedly non-average, but that is probably a good feature of the job.

An average day is from 8am to 6.30pm with an extra couple of hours' work at home. Lunch is at the desk. Crazy.

There is a constant stream of matters across the desk from all over the State requiring decisions on no bill applications, ex officio indictments, the choice of charges, bail reviews, appeals against inadequate sentences, applications for stated cases, appeals from orders for costs



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and so on. There are telephone and personal requests for instructions from prosecutors faced with unexpected (and sometimes expected) crises in court. There are representations from the public and politicians to be answered; speeches and papers to be written; Attorney General emergencies to deal with (notably public outcries over sentences and releases); matters of Office administration in and out of the office (which is a job by itself); liaison with other agencies in criminal justice; and so on.

The contribution of deputies, professional assistants and secretaries in my Chambers is essential just to keep the head above water and I am very grateful to them for their assistance.

### What Did I Inherit?

An Office that had been thoughtfully and carefully established; generally a lean, efficient and effective operation with an excellent record. But there were flaws, as there must be in any organisation of this type and size and especially in one that developed in the way this one did. There had been (to my perception) too much centralised decision-making. I looked at ways to delegate responsibilities, but that means preparing senior legal staff for that role, having good managers and installing adequate systems and checks. The process is ongoing. The administrative staff, particularly at senior levels, are excellent and take most of the routine administration off my shoulders. In all matters, however, the buck stops with the Director.

The goodwill and support from all staff was overwhelming and I have tried to reciprocate by consulting widely and freely. I publish a monthly "Director's Letter" to all staff (dubbed "Nick's Natter"). The feedback is generally positive, occasionally downright offensive, but the important fact is that it occurs.

### Does Administration Grind Me Down?

Occasionally, but it passes. I must repeat that being a barrister in private practice is pure luxury by comparison (provided you are in sufficient work). For 19 years I was lucky enough to enjoy and benefit from that luxury. The combination of freedom and satisfaction is unobtainable in any other occupation, so it seems to me. Of course, one imposes self-discipline and a regime of practice on oneself in order to operate efficiently; but it is self-imposed, and that's the difference.

By contrast, the DPP must meet the formal requirements of a government office with a large staff, rules, procedures and limitations. It is often frustrating and tedious, but the trick is to remain an individual, not become a cipher, and to make a personal impact where possible and (hopefully) beneficial. I cannot please everyone and I should not try to. I know already that I do not, probably because I tend to be more direct than is customary and I prefer to say what I mean.

Although I have had to get used to the organs of

government service, they have also had to get used to me. Sometimes it is quite funny; at other times, pathetic. They are learning too. This all suggests that a member of the NSW Bar can take on (almost) any job.

### What are the Office's Three Greatest Qualities?

Independence, independence and independence.

It is often - indeed, almost routinely - necessary to remind all and sundry that the Office is independent and answerable through me to the Attorney as the responsible minister. The theory is well accepted, but occasionally the practice needs reinforcement. I have enough material already for several episodes of a NSW version of "Yes, Minister".

It is no empty and theoretical assertion of independence, however. Victoria is an object lesson for us all (but it is the only one of the nine Australian D'sPP with unsatisfactory legislation, I am pleased to say).

As an indication of the problems that can arise was given in October. After some innocent (so I thought) comments of mine about an odious piece of legislation called the *Crimes Amendment (Mandatory Life Sentences) Bill 1995* were published, the Premier reportedly made some

public remarks to the effect that I was interfering in partisan politics. (I say reportedly, because apart from a chance meeting in a lift and a greeting at a Law Reform Commission seminar the Premier and I have not exchanged a word, oral or written.) The Minister for Police pressed the insult by inviting me, in Parliament, to become a politician. Eventually I gave evidence to the Legislative Council Standing Committee on Law and Justice (under summons) and wrote an article in the *Sydney Morning Herald* explaining my position - so much is public knowledge.

I am not a public servant, but an independent statutory officer, and one who might be expected to have - and to voice - opinions on laws affecting the criminal justice system. I do and I shall continue to do so.

The vice, however, is that in suggesting (inaccurately) that I have engaged in politics and that I might be silenced by the executive government, such commentators inferentially cast doubt on the independence of the office. If that doubt were to spread my operations could be jeopardised.

I think any such doubts have now been dispelled.

### What Does the Office Do?

It prosecutes.

The function is simply stated, yet many do not clearly understand. The Office has no investigative role - that is done by police and other agencies. We conduct prosecutions and ancillary court proceedings (appeals, bail hearings, applications for prerogative relief, and so on) and give legal advice in connection with those criminal proceedings (for example, advice to police on the sufficiency of evidence, appropriate charges, grounds for an appeal).

### **I Mentioned Challenges Posed by Government: What Contacts are there with Government?**

I consult regularly with the Attorney on matters of relevance to the Office. The Criminal Law Review Division, presently headed by a Crown Prosecutor, occasionally refers proposed legislation for comment and we make suggestions to it. I am trying to encourage greater consultation, especially where legislation may have practical consequences for the operation of the Office.

One of the matters the government must get used to is that so-called "public outrage" over particular sentences is usually ill-informed and short-lived. All I can do, however, is to provide the facts and put matters in a proper legal context.

The tests I apply in deciding whether or not to prosecute or to appeal are clearly defined and have been published elsewhere. There may well be a degree of public disquiet about what is perceived to be a general decline in the level of sentencing for serious offences, but if so that is a matter for the courts to address. Crown appeals against sentences, in my view, should continue to be exceptional.

### **What Should be the Guiding Practice of a Prosecutor?**

Transparency. Full disclosure must be made of relevant information. Prosecutions are conducted in the public interest by prosecutors who represent the community and the accused and the public have the right to know what is happening and why.

There is one qualification to that: occasionally it may not be appropriate to publish in detail, even to interested parties, the reasons for a decision to proceed or not to do so. For example, it may not be in the public interest for details personal to an individual to be published where they may have influenced the making of a decision and where they are of no other general importance.

In the spirit of openness I have published to the profession at large some notes for guidance on the making of decisions to "no bill", on procedures for pleas of guilty, on elections for judge alone trials and on the tests applied when considering appeals against sentences.

### **What About Victims of Crime?**

They must be kept informed of matters and their views should be sought and considered, but they should not alone

determine what action is to be taken. The process of consultation is far advanced and our in-house Witness Assistance Service provides valuable support for victims and prosecutors.

I consult regularly with victims and victims' groups which is a difficult but necessary activity.

### **What Contacts Exist with the Bar Association?**

The Director, the Deputies and all Crown Prosecutors are members. I want to strengthen our ties with the Association. Many Crown Prosecutors come from the private Bar, some return to it. We are keeping those links by being involved in Bar CLE programs, briefing out some prosecutions to the private Bar (as circumstances and funds permit) and occasionally lunching in the Bar dining room and attending Bar social functions. The Crown Prosecutors are in a unique position, being and having the qualities of barristers but at the same time being subject to my direction. That sometimes produces tensions that need to be resolved and our membership of the Association assists.

### **Am I Keeping Up my International Connections and Human Rights Interests?**

Most certainly. So far as criminal justice is concerned it is important to keep abreast of practices and developments in jurisdictions with similar systems and to learn from features of other systems (for example inquisitorial systems) that may be of benefit to us. I keep up my links through the International Bar Association and the Heads of Prosecuting Agencies Conference (amongst

other organisations intern-ationally) and with our own Conference of Australian Directors of Public Prosecutions (fondly known as "CADS").

We have staff exchange programs in place and developing. So far this year several lawyers have spent time in Hong Kong; I have made arrangements with Scotland and Canada and I am now making arrangements with the UK and Ireland.

In the human rights field I continue to play a part on various national and international committees, most recently having undertaken a study for the IBA of the Japanese system of pre-trial detention called "daiyo kangoku" or substitute prison. The photograph that accompanies this article was taken in the office of the Kyoto Bar Association in Japan in February.



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It shows the President of the IBA, Prof J Ross Harper CBE and Japanese lawyers. But the real interest is that the painting behind us is of a naked woman. What is it about Bar Associations and art?

The IBA has just launched a Human Rights Institute which will be a well resourced and significant force for the promotion and protection of human rights for lawyers and in legal systems internationally. I am the first Co-Chairman of the Institute (with a Norwegian lawyer).

I think I have overcome a first impression in the minds of some that prosecuting and human rights do not go together. In my view they are necessary bedmates.

### What Changes Would I Like to See?

The Office should take over the conduct of all summary prosecutions in the State. It is indefensible that police should still be conducting them. I am pressing that issue as hard as I can.

There should be modifications to committal proceedings. The CLRD is examining some proposals. (In the UK committal proceedings were abolished in September.)

Ways should be found - and imposed, if necessary - to bring forward as far as possible the point at which a person charged with a crime is required to commit himself or herself to a course of action: in the first place, to plead guilty or not guilty; and if not guilty, to define the issues that will be contested at the hearing and have as many of them as possible - especially issues of law in which the jury is not concerned - litigated in advance of the trial proper. Limited defence disclosure should be required. The defence should make an opening statement after the Crown opening.

I should have the power, presently held exclusively by the Attorney, to grant immunities. Why should a politician be the one to do that?

There should also be some qualification of the so-called right to silence (in reality a collection of privileges); for example enabling the court and prosecutor to comment appropriately on a defendant's previous failure to make answer to an allegation. The recent UK legislation is a useful model.

Such developments would have consequences for the Office, particularly in the early preparation and disclosure of briefs. They are also likely to attract the "usual" opposition of the private profession but deserve careful consideration.

I would also like to see exchanges between the Crown Prosecutors and Public Defenders. I have long held the view that an advocate does a much better job if he or she knows what it is like to be at the other end of the Bar table.

As to matters of form: the Office had a logo that looked remarkably like the central part of the British Royal coat of arms (as represented in the Supreme Court). The Crown had an undue prominence: but no more - the logo was changed from 1 July 1995 to reflect the law and the State. Republican? Maybe.

More generally, I would like to see: wigs for counsel done away with and all advocates in superior courts (barristers and solicitors) wearing simple robes with some mark of

distinction for senior counsel; majority verdicts (11/1); victim impact statements; Crown appeals from directed verdicts of acquittal on a point of law; and so the wish list goes on ...

### How Long Will I Be Director?

It is an indefinite appointment, or a life sentence. I shall stay for as long as I enjoy it and can make a useful contribution and unless something better comes along. I can only be removed if I become mad, bad or broke, so that gives some scope.

### And Siberia?

The Dalai Lama's motto is: "Be happy and useful". It's a fine ambition and I urge it upon everyone.

A degree of isolation is probably necessary. The cliché "it's lonely at the top" holds true to an extent. It is not a popularity quest and I am not a politician. I constantly have to make decisions of all kinds that will inevitably displease some people, including some of my staff. Not losing sight of the boundaries and keeping the right balance are probably the keys to an eventual escape from exile. We'll see.

It is an indication of the degree of that isolation that I had to ask myself these questions.  NR Cowdery QC

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## Not So Appealing

*(State Rail Authority of NSW v Bauer & Ors, High Court of Australia Special Leave Application 18 April 1995)*

Deane J: Mr Bennett, how many hearings have there been so far in this matter?

Mr Bennett: Four, your Honour.

Deane J: Four?

Mr Bennett: Yes.

Deane J: What success has your client enjoyed to date?

Mr Bennett: None, your Honour.

Deane J: So you are 10:nil against you.

Mason CJ: Even if you were to succeed in the High Court, you would still be behind the score board, would you not?

Deane J: Except if we sat seven, you would be up to 7:10.

Mason CJ: You would be getting closer.

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Mason CJ: Thank you, Mr Bennett. The Court need not trouble you, Mr Menzies.

*(Special leave application refused).*