

DPP: the last word...well, maybe



Photo: By Mark Tedeschi QC

In the 1995 edition of *Bar News* (there was only one a year in those days) a rather funereal photograph heralded an interview I conducted with myself that closely followed my appointment as director of public prosecutions for NSW in 1994. I had little idea then of how the next 16 years would pan out and no idea of where I would be in 2011.

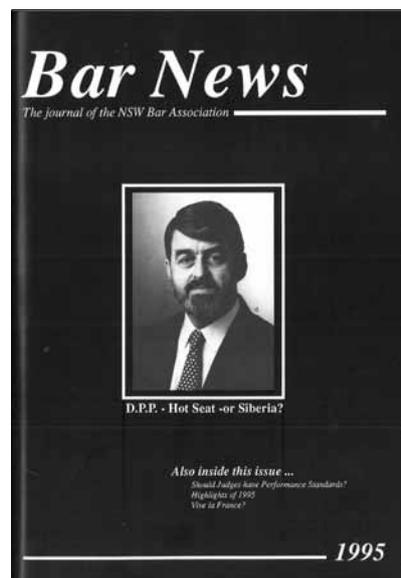
I have made a few other contributions to New South Wales Bar publications since then, notably to the hard copy *Bar Brief*, which preceded the electronic *In Brief*. A follow-up to the 1995 'Hot Seat – Or Siberia?' *Bar News* article appeared in *Bar Brief* No. 91 of February 2002: nearly half way through my term, as it turned out: 'Who wants to be a DPP?' (It

seemed that I probably did.)

With my retirement from office approaching, Bell SC decided it was time for another interview, but this time he would also contribute to

the questions (interviewing oneself is a lonely business). Appointment and retirement times seem to attract this sort of interest. On appointment, people are interested in what you might bring to the job and where you see it headed – full of optimistic expectation. On retirement people seem to be interested in just how little has been achieved and what remains to be done – 'wish lists' feature prominently in the requests.

So here we go again...but I also invite readers to look at my less personal piece in the April 2011 edition of the *Judicial Officers' Bulletin* where some observations are made about some of the advances in criminal justice over my time in office and a wish list



is provided of what remains to be done in that context.

Weren't you appointed for life? Why did you retire?

Good question. I was appointed for life, but a legislative anomaly in the Director of Public Prosecutions Act, from an oversight in 1991, required

former MLC) refused to do so and I was stuck with it.

Was it important to have life tenure?

In my view, yes – but admittedly not essential. A benefit of tenure for such positions is that there can never be any suggestion or

Act were being planned in 2007 the government initially proposed that subsequent directors be appointed for seven year terms, renewable (as crown prosecutors and public defenders are presently). Directors in other Australian jurisdictions (except Tasmania) are, in fact, appointed for various renewable terms. I argued strongly against that and in due course a compromise was reached that future appointments would be made for ten years, not renewable – and with a retirement age (it might be noted) of 72. A ten year term gives long enough for advances to be made; having it non-renewable removes any suggestion of the seeking of political patronage and gives the benefits noted above. But tenure is still better.

How has it been, to be DPP?

It was reported that in 1990 at the Press Gallery Christmas dinner Paul Keating described himself as the Placido Domingo of Australian politics, based on his assessment that Domingo's performances were 'sometimes great and sometimes not great, but always good'. I don't want to cop the flak in the present context that Keating did over that remark, but I want to raise Domingo for another purpose.

In an interview last year Domingo talked about keeping everything for the stage except happiness, which he enjoyed with his family. He talked about confining the big issues, especially suffering, to the stage. He said: 'I am a happy man,



Cartoon: Alan Moir

that I retire before I turned 65 (on 19 March 2011) or lose completely my statutory entitlement to a pension. I think I am a public-spirited person, but I didn't want to die in office if I could help it and there are other things to do. So I retired on 18 March and became a pensioner from 19 March.

Some time before, I had formally requested that the anomaly be corrected by legislative amendment, but the attorney general in the late government (and

appearance of currying political favour for reappointment after a fixed term. It also gives to the officeholder confidence that, provided one does not do anything improper or silly, one may stay in office and the job will continue to be done. Of course, this imposes on the officeholder a very strong obligation to behave responsibly and effectively at all times and not to abuse the privilege that has been given.

When amendments to the DPP

but I love to suffer on stage, it is the most beautiful thing of all!’ The interviewer thought this to be a paraphrase of Aristotle’s doctrine of tragic catharsis: that we are purged and exalted by watching someone else’s mental distress and physical torment. On the criminal law stage in New South Wales I have been resigned to be the designated sufferer. I think it is an important part of the role (but I accept that not everyone will share that view). It means that it helps to be able to compartmentalise one’s life and to have a thick skin.

perfect beings), the right decisions are made for the right reasons and that the consequences are just. So you need to know the principles to be applied and the proper limits of any discretion that may be available and you need to understand, if possible, why we humans do what we do to each other, sometimes in the most appalling fashion. It is also important to take the community along for the ride – after all, every action is done in their name and for their benefit.

I should also say that for the whole time I have had the support of an

Did you miss court-room advocacy?

Yes, dreadfully at first. For years jury trials had been my principal field of work and I think they are the last bastion of advocacy, which I did enjoy. (Appellate advocacy is a different beast and not as attractive to me.) When I lobbed behind the director’s desk I very quickly realised that I could not continue to prosecute trials. In fact, in 1995 I did prosecute a matter in the Supreme Court (one trial more than my predecessor had done) and for two weeks I was prosecuting by day and directing by night. I had to accept that this was a recipe for a short and unhappy life and thereafter the only appearances I made were in the High Court (and, I say with all due modesty, almost invariably successfully). The difference was that I could prepare in my own time and the hearings were comparatively short.

Should the DPP appear in high profile cases?

Subject to the limitations I have mentioned, I think it is desirable that the director should appear in the highest profile or most significant cases. That said, however, it should be noted that a very large number of cases prosecuted by the office are high profile and/or very significant and they are more than adequately dealt with by crown prosecutors. For the reasons I have discussed, it would simply not be possible for the DPP to continue to appear in even a modest number of such cases – the time required for

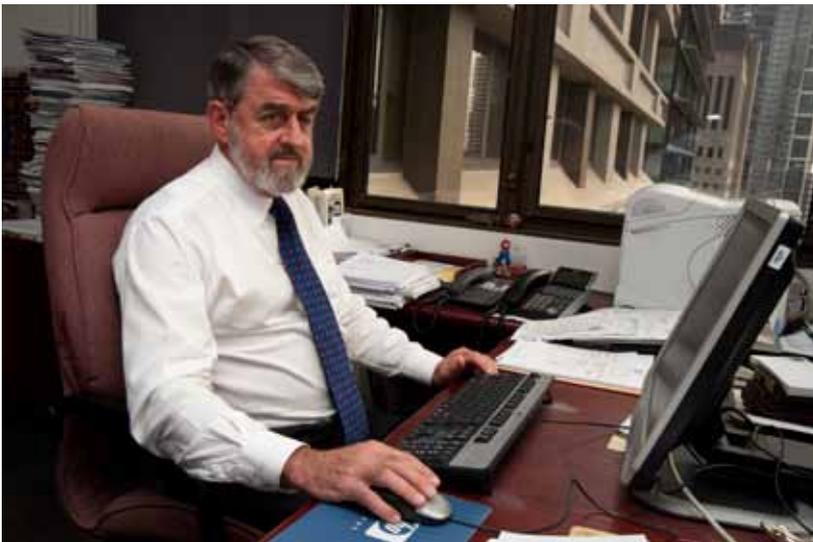


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I think being the DPP is the best job in criminal justice. It is true that you go to work every day knowing that just about every decision you take will make someone unhappy and that notion does not appeal to everyone; but I have had no problem with it. The important thing is to ensure that, as far as humanly possible (and we are not

office that has included the most capable and professional criminal lawyers in the state and it has been a very great pleasure to see the willingness with which they have applied themselves to the task and have advocated and embraced improvements along the way.

directing, for making prosecutorial and managerial decisions behind the desk, for attending the myriad meetings, simply would not allow that.

Some high profile High Court appeals, however, should bring the director into court and I appeared in some of those – notably appeals against acquittals for murder entered by the Court of Criminal Appeal.

Do you have any views on the way in which criminal cases are dealt with?

There is a continuing push to have more (and more serious) cases dealt with in the Local Court and to expand its jurisdiction accordingly. That bench has become so much more professional than it was when

I believe that courts faced with the imperative to become, in the word of the bean-counters, more 'efficient' (that is, faced with budget cuts), will dispense with juries too often and that rot has begun.

I started practice (in 1971) and I think that push is a good thing. Even senior counsel and crown prosecutors are now among the appointees to the bench of the Local Court.

Nevertheless, in my view there remains a firm place for trial by jury of the most serious crimes and I strongly support the maintenance of that institution. The late government weakened the right to trial by jury by removing the requirement that the Crown

consent to trial by judge alone and placing the decision in the hands of the judge and I opposed that move (including in evidence to a Legislative Council committee). I believe that courts faced with the imperative to become, in the word of the bean-counters, more 'efficient' (that is, faced with budget cuts), will dispense with juries too often and that rot has begun.

Juries add legitimacy and community involvement and acceptance to the process of criminal justice. They bring into the process the general values, standards and judgments of ordinary citizens which they apply, with proper guidance, in making their decisions. I think there is great value in that and I am sorry to see the dilution of that contribution.

It is interesting to note that some countries that previously abolished juries (e.g., Japan) or had limited forms of them (e.g., France) are now reintroducing forms of juries or expanding their involvement. That should tell us something; although it has been fashionable in government and some media to ignore international developments.

What are your views on legal aid?

I think it needs to be understood that in the adversarial system of

criminal trial the prosecution puts up a case and the defence may attack that case and mount a case of its own. The verdict depends upon not finding the truth of the matter, but upon deciding whether or not, in the face of that attack and any opposing case, the prosecution's case has been proved beyond reasonable doubt.

In Europe, where there are predominantly inquisitorial systems, they talk about 'equality of arms' on both sides of the contest and I think that, even more so in the adversarial system, for it to work at its best there must be such equality of arms. The criminal justice system is exactly that – a system. It is comprised of component parts, rather like cogs in a machine: investigators, prosecutors, defence representatives, courts and corrections. The machine works at its best when each cog is operating at its best (and, incidentally, not trying to do the work of another cog). If one cog is not working well, the whole machine risks malfunctioning.

In NSW about 80–85 per cent of indictable matters have legally aided defence representation. That is a very high proportion and it shows the necessity of having a properly funded Legal Aid Commission providing such representation. Unrepresented litigants are a heavy and costly burden on the administration of justice.

I have constantly been amazed at the illogicality of increasing funding to police at one end

of the process and prisons at the other, while cutting funds to all the processes in between (prosecution, defence, courts). Criminal justice is a core function of government. Governments, whatever other priorities exist, have an obligation to see that it is properly resourced and functioning effectively, otherwise there is the risk of people taking things into their own hands. Proper resourcing includes providing professional representation on both sides of the record in the system that government has created and maintains.



Photo: By Mark Tedeschi QC

Should criminal law barristers do both prosecution and defence work?

Emphatically, yes. I commenced practice as a defender in Papua New Guinea and came back to the Sydney Bar five years later. I then appeared on both sides of the record in criminal cases, with a progressive concentration on prosecuting as the years went by. Experience on both sides enables

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one to better understand how a matter should proceed and the circumstances in which one's opponent is working and that can be very helpful in achieving the right outcome.

Would you do it all again?

Yes. Somebody should and I was privileged to be able to do it for 16 years. Perhaps rather perversely, I enjoyed a great deal of it (but there are some things that I will definitely not miss). Daily decision making and direction in the prosecution of serious criminal cases was enormously stimulating and satisfying.

Do you have any regrets?

Yes, of course. We all make mistakes. I think that any mistakes I made in professional legal actions were identified and corrected before any harm was done (and I don't think there were many). I did deliver a

pretty crook speech once on an important occasion early in my time in office [that invites readers to select any one – or more!] and I did once admittedly go over the top in relations with the media at a particularly fraught time. I also regret that I was perhaps too tolerant of the regime that followed the creation by then Treasurer Michael Costa of the position of executive director – I thought that it could be made to work for the benefit of the ODPP and its officers, but now I am not so sure.

But I think that, given the provocations and pressures I faced on a daily basis for over 16 years, my record is not too bad.

Do you have any advice for your successor?

This is a job that, I think, can be carried out in one of three ways, each of them legitimate. One way is for the director to go to work each

day, roll the arm over, do what the job basically requires to be done, and go home in the evening to other pursuits. Another way is to do that, but also to agitate for change and improvement in the criminal justice system behind the scenes, using the avenues of political and bureaucratic power to seek to quietly achieve gains without publicity. (I believe my predecessor may have followed that course - and very effectively.)

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A third way is to do the latter, but to do it with the knowledge and engagement of the community whom the director serves. I fell into that way at an early stage, when in 1995 I encountered my first 'law and order auction' election and Bob Carr (the second of five premiers I served under, with four attorneys general) was promoting mandatory sentencing and other draconian (and ill-considered) changes to criminal justice. That brought me out, if you like. It seemed to me that the community had a legitimate interest in knowing

what was being done in criminal justice in their name, what changes were being agitated and why, what arguments might be made and who was doing what. There is also value in obtaining the community's informed views about all that. I headed down that road which inevitably draws media interest and political angst.

So my advice is to have a clear expectation of the way in which the job will be approached and be prepared to wear the consequences.

Is there life after the DPP?

I think so (although seeing the number of retired ODPP officers who return as prosecutors, even for acting periods, I sometimes wonder). On 1 April (a great date on which to start any new enterprise!) I became an adjunct professor at the University of Sydney and I have visiting professorial fellow appointments with the universities of NSW and of Wollongong. I have consultancy and project work with prosecutors and prosecution agencies in developing countries through an international agency and that will involve some travel. I am involved in programs of the International Association of Prosecutors. Some arrangements may be made for



'Daily weight'. Photo: by Mark Tedeschi QC.

limited involvement in the media and another book is possible. There are speaking and other engagements ahead. The family and whatever it is that one is supposed to do in 'retirement' will no doubt take care of any time left over. I shall maintain my practising certificate for now and I could even be an occasional barrister. I plan to keep busy and to stay engaged with criminal justice in various ways with choice and flexibility that I have not had for the last 43 years of my working life.