

Practising as a crown prosecutor

By Margaret Cunneen SC

If you are around my vintage, you may recall an early television ad offering training for 'the best, most interesting job in the world'. It featured a comely young woman with a beehive hairdo named Judy Suter. (I wish my memory was as good for things that happened a month ago.) She was spruiking an establishment which is probably a university now – The Receptionist Centre. I didn't graduate from The Receptionist Centre but I have clocked up 20 years in the best, most interesting job in the world. I am a crown prosecutor.

Criminal trials are fascinating, absorbing, stimulating and poignant. Few are devoid of humorous moments. Although the judge maintains order, makes decisions on the law and generally ensures that the parties, the Crown and the accused, each have a fair trial, it is the crown prosecutor who has control of the trial's course. The charge or charges which appear on the indictment are determined by the crown prosecutor, as are the witnesses to be called and the nature and extent of the evidence to be adduced from them.

The role of crown prosecutor in New South Wales derives from the *New South Wales Act 1823* and the *Australian Courts Act 1828* and the first crown prosecutor in this state was Frederick Garling, appointed on 7 January 1830. Now there are 84 throughout the state, who, as statutory office holders under the *Crown Prosecutors Act 1986*, prosecute in the majority of criminal trials conducted in the Supreme and District Courts and in appeals from them to the Court of Criminal Appeal and the High Court. About 29 per cent of crown prosecutors are women.

Practice as a crown prosecutor is regulated more stringently than that of other barristers. We are bound by the Director of Public Prosecutions Prosecution Guidelines which describe the prosecutor's role as follows:

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.

Although it is frequently misunderstood by victims of crime, the Guidelines prescribe that:

a prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest.

As practising barristers, crown prosecutors are also bound by the New South Wales Barristers' Rules and



there are additional rules for prosecutors which do not apply to those not so acting, including:

A barrister shall not press the prosecution's case for conviction beyond a full and firm presentation of that case.

The Barristers' Rules provide that a prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court...and must not argue any proposition of fact or law which he or she does not believe on reasonable grounds to carry weight.

Practice as a crown prosecutor is regulated more stringently than that of other barristers.

The DPP Guidelines say that crown prosecutors must act at all times with fairness and detachment, being neither suspicious nor gullible. 'Nevertheless', they continue, 'there will be occasions when prosecuting counsel will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and

to test, and if necessary to attack, that advanced on behalf of the accused. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an adversary process and prosecuting counsel will seek by all proper means provided by that process to secure the conviction of the accused of the crime charged’.

Although crown prosecutors do not represent a victim or complainant, the DPP Guidelines also oblige observation by them of the New South Wales Charter of Victims Rights, the first and foremost of which is: ‘A victim should be treated with courtesy, compassion and respect for the victim’s rights and dignity’.

Under the Charter, crown prosecutors are expected to consult a victim before any decision is made to modify or not proceed with charges, including any decision to accept a plea to a less serious charge. The views of a victim are not of course determinative but they must be taken into account.

‘Lawyers’ and ‘senior lawyers’ without the mettle to append their names to their opinions are said to have described prosecutors in the Office of the DPP as ‘zealots’, ‘without much experience in life’ working in a ‘sheltered workshop’.

All of these rules, some having the appearance, at least, of pointing in opposing directions, impose a heavy burden upon us. Because our principal and guiding function is to be independent of the police and complainant/victim on the one hand and the accused on the other, the courts look to crown prosecutors to provide all the applicable law and jury directions. Should the law be incorrectly applied, or the jury directions prove inadequate, the Court of Criminal Appeal will reserve its heaviest rebuke for the crown prosecutor. It is sometimes difficult to explain to investigating police and to people who allege that they are victims of crimes (or to bereaved relatives of people who were undoubtedly the victims of homicide), why one is obliged to remind the presiding judge of additional directions to the jury which appear to undermine one’s own case.

Every barrister well understands the stresses involved in making the numerous decisions, great and small, which

advocates make during the course of any legal hearing. Every barrister has a duty to the client and a duty to the court. For a crown prosecutor, the multiplicity of duties and the public forum in which we conduct our work, always under the glare of media scrutiny, combine to produce what is often a stressful and lonely environment characterised by high levels of conflict on several fronts.

Every barrister is familiar with hostility from the bench and from opposing parties. Practice at the bar is a poor choice for lawyers who are not resilient in its face. However there is an extreme and quite malicious form of hostility which some reserve for lawyers who practise as prosecutors. If it is accurate (and it would be no particular surprise to me if it is not), a recent piece in a Sydney newspaper on the topic of the selection of a new director of public prosecutions contains some typical manifestations. ‘Lawyers’ and ‘senior lawyers’ without the mettle to append their names to their opinions are said to have described prosecutors in the Office of the DPP as ‘zealots’, ‘without much experience in life’ working in a ‘sheltered workshop’.

Considering that the ranks of crown prosecutors have been enhanced, in recent years, by some of the finest and most able former defence barristers I have had the privilege to oppose in trials, and observing that the Office of the Director of Public Prosecutions has attracted many brilliant young solicitors with outstanding academic credentials, it is staggering that these comments could be made. Irrational and disrespectful comments such as these, although unsourced and unsupported, risk damaging public confidence in our role. Perhaps that is precisely the point of them.

Although all of these factors combine to produce an extraordinarily adversarial ‘workplace’, we have always enjoyed the unfailing support and confidence of Senior Crown Prosecutor Mark Tedeschi QC and that of our recently retired director of public prosecutions, Nick Cowdery QC. Our leaders expect us to be able to justify a particular approach or tactical decision by reference to the evidence and the DPP Guidelines. If we can do that, we may be confident of their backing through even the most trenchant and sustained criticism.

Criminal law is a fascinating area in which to practise. It is always exciting to take delivery of a new brief and the more so, in a slightly different way, when, due to

increasing budgetary constraints, the brief is delivered a very short interval before the start of the trial. Criminal trials provide a fascinating insight into human behaviour and into the real lives of members of our society. For so many of the players in a criminal trial, the events which are put under the forensic microscope are among the worst things, or have brought about the worst consequences, in their lives. Each of the players is a member of the community the crown prosecutor represents. Yet the crown prosecutor's role is to remain independent of any sectional or individual interest that is not consistent with the general public interest.

...it is not 'zealotry' to present a strong case if the evidence is itself strong.

Crown prosecutors take very seriously their role as independent ministers of justice striving to achieve what best serves the general public interest. Crown prosecutors are always aware that, whatever the result, there will be dissatisfaction, to some degree, in some quarters. Victims of crime and/or their traumatised relatives would often not be happy with any result short of putting the offender up against a wall for the immediate attention of a firing squad. Investigating police, who have often invested months or years of effort and emotion in a brief, also have an obvious interest in conviction and salutary penalty. This is why crown prosecutors, independent of any political interest and free from the direction of any police or investigatory office, are an essential and intrinsic part of an advanced criminal justice system.

Crown prosecutors have, as their direct defence counterparts, the public defenders. We enjoy extremely cordial and supportive relationships with the public defenders who, although fewer in number than the crowns, are all of course highly experienced criminal lawyers operating under similar pressures. They, like the crowns, are motivated by, and derive great personal satisfaction from, a sense of direct service to the community.

I have sought the views of many of my colleagues and, whether they are older or younger, with many years at the bar or just a few, they agree that service as a crown prosecutor is stimulating, absorbing and replete with human interest. Keeping abreast of developments in the criminal law and evidence is challenging and exacting. The years tend to fly by because it is not the kind of job in which one has it all mastered in a year or two. Our independence leaves room for humanity, compassion and kindness. On the other hand, it is not 'zealotry' to present a strong case if the evidence is itself strong.

Jury trials involve a very special type of advocacy and the presence of a jury commandeers a court efficiently toward a just result determined by a cross-section of the community which the crown prosecutor represents. For the lawyers and for the judge, a criminal trial is an unforgettable journey during which excellent professional relationships are often forged. Every trial teaches new lessons and hones new skills. Decisions made by ordinary citizens, the consequences of them upon themselves and the ripple effects upon many others serve as broadening and unforgettable life experiences.

Practice as a crown prosecutor is not an ordinary job. It is made extraordinary by a commitment to justice through independence, transparency and service in the best interests of the community. It has been a most fulfilling and fascinating 20 years.