Royal Commission Roundtable Discussion 29 April 2016

on DPP Complaints and Oversight Mechanisms

Views on the matters discussed on the day, from

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I was invited but unable to attend the roundtable discussion on 29 April 2016 and I have been invited to express my views on the matters discussed on the day in whatever format I choose. I have read the Briefing document and annexures, Agenda, Participants List and the Transcript of the proceedings.

GENERAL INTRODUCTORY COMMENTS

Personal background of relevance: I have been involved in criminal justice in various capacities since 1968: as a Barrister since 1971 (Defending Officer in PNG 1971-75, Sydney Bar, Queen's Counsel since 1987), defender, prosecutor, DPP for NSW from 1994-2011 and part-time academic and consultant since then. I am a former President of the International Association of Prosecutors (IAP) and was inaugural Co-Chair of the Human Rights Institute of the International Bar Association.

Among other projects of possible relevance: in 2012-13 I wrote most of the first draft of "The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide", UNODC Criminal Justice Handbook Series
https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf ;
in 2013 I drafted the Prosecution Code of Hong Kong, China
http://www.doj.gov.hk/eng/public/pubsoppapcon.html ;
and in 2014-15 the Prosecution Guidelines for the new National Prosecution Office of Samoa.

Having read the transcript of the roundtable discussion, I am prompted to make this observation. DPPs are statutory officers (sometimes constitutional officers) of high standing and responsibility. They are highly qualified individuals and attend to their duties most diligently. In the absence of evidence of wrongdoing, they deserve to be trusted by government, by criminal justice agencies and the people with whom they deal and by the public. Trust in their capacity and willingness to discharge their duties properly should also be extended to them by commentators, policy makers and reformers.

In what follows I address the seven areas of discussion, in the order in which they were raised.

1 POLICIES AND CONSULTATION

Policies for decision-making fall into two broad categories: general prosecution policies or guidelines (such as the NSW DPP Prosecution Guidelines); and more specific policies or guidelines for addressing particular aspects of prosecution (in the NSW ODPP, to be found in manuals tailored towards specific types of crime or specific procedures). Both categories should include provisions for ongoing consultation with police (or other investigators) and victims (including secondary victims) at appropriate stages in the prosecution process.

2 PUBLICATION

The former category of high level documents should be publicly and freely available.

There may be, in a particular jurisdiction, some documents in the latter lower level category that should be publicly and freely available, but generally they should not be. They tend to be more technical guides to practice. The public interest could be served, for example, by making publicly available provisions in them that relate to the rights of victims.

3 PROVISION OF REASONS

As part of the continuing obligation to consult with victims in the course of a prosecution, prosecutors should provide victims, when requested (and so they need to be informed of the right to request), with reasons for prosecuting or not prosecuting particular charges and other decisions.

That said, there are qualifications that need to be made. Some victims choose not to be part of a consultation process and not to receive information about a prosecution. That choice must be respected.

The method of communication must be effective, so the personal characteristics of the victim need to be taken into account (language, any incapacity, extreme youth or age, psychological state, etc). It must be done in terms that are capable of being properly understood. If necessary, support should be provided during the process.

The initial communication should be oral and it should be followed by written confirmation.

The publication of reasons for decisions to persons other than victims will depend upon the case.

This is a controversial area. Reference was made in the roundtable discussion to the Irish DPP's decision to provide reasons for decisions to victims, etc . That process was introduced by the immediate past DPP, James Hamilton. The policy of his predecessor, Eamonn Barnes (the first Irish DPP), was not to publish reasons for any decision.

NSW Prosecution Guideline 12 was furnished by me in 2007 and in my view sets an appropriate middle course.

4 DECISION TO PROSECUTE

There was some discussion at the roundtable about an apparent change in approach in England and Wales from deciding to prosecute on the basis of the credibility of the principal witness to doing so on the basis of the strength of the whole case.

The latter has always been the practice in Australia (at least, in DPP Offices – police prosecutions may be different); and so it should be.

5 JUDICIAL REVIEW

The situation in England and Wales has developed where, although there is available an avenue of judicial review of prosecution decisions, the Court has imposed restrictions upon its availability and has used the situation to require internal CPS review mechanisms to be strengthened (eg the Victims' Right to Review). The Court seems to have no appetite to dominate or broaden the review of prosecution decisions and acts as a last resort.

The High Court of Australia has plainly ruled out judicial review of prosecution decisions other than in cases of abuse of the process of the court or where unfairness would arise that could not be overcome in the trial process; so to introduce it would require legislation (presumably in all jurisdictions to be so affected). Courts retain the right to stay proceedings for good cause in individual cases, temporarily or permanently.

In my view no need for judicial review in Australia has been demonstrated.

A complicating factor in Australia is that (I think in all jurisdictions) the Attorney General (and sometimes the Solicitor General) has concurrent powers with the DPP. They are extremely rarely exercised, but would resulting decisions also be reviewable if the DPP's were?

DPP decisions are accountable in many ways:

* The DPP is made accountable, through the appropriate Minister, to the Parliament. That Minister may request information at any time and consultation occurs in practice.
- The Minister is able to inquire and entitled to be informed about any matter of concern in the conduct of the prosecutor's official functions.
- The DPP is required to report on a regular basis (typically by way of an Annual Report to Parliament). That reporting will include regular reporting on the expenditure of public funds which must be appropriately overseen by the relevant Treasury officials and reporting on the conduct of prosecutions.
- Prosecution Policy and/or Guidelines are promulgated. They inform the community and all agencies coming into contact with the prosecution of the standards that will be met and the guideposts that will be followed in the course of the prosecution function. That enables action to be assessed against those standards and guideposts to ensure that it is accountable in that way. It also facilitates disciplinary action internally, if that is indicated.

- Reasons for decisions are given to those with a legitimate interest in having them. (Of course, there are limitations on that – see point 3 above.)
- In the course of the prosecution process, prosecutors are required to consult with police, victims and some witnesses about important decisions to be taken (eg changing charges, discontinuing matters, appealing or not appealing) before the decisions are made. The purpose is to ensure that the others are informed about what is happening and why and also have the opportunity to make their views known and taken into consideration (even if they may not ultimately prevail).
- Internal accountability mechanisms are in place in DPP Offices. Decisions to discontinue prosecutions and allied decisions cannot be made by one person alone – there are checks and balances in place and internal review mechanisms for other than minor routine practice decisions.
- Representations may be made at any time by anyone to a DPP Office and are treated seriously (if genuinely made).
- Most of the prosecutor's core function – the prosecution of matters in court – takes place under public observation in open courts where the public, the media, police, etc may come and watch and listen. Defence representatives are also keen observers of the conduct of prosecutors.
- The media report on prosecution proceedings and conduct – another effective means of ensuring accountability.
- Court decisions are usually subject to appeal procedures in which the conduct of the prosecutor may be further examined if necessary.

The question arises of what decisions may be made judicially reviewable. In the course of any single prosecution a host of decisions, many discretionary, are made by prosecutors. What criteria would apply to identify reviewable decisions? And on what grounds? It has been suggested during the roundtable that any review should be focused upon the quality of the process of prosecution, not necessarily upon the outcome. But it is likely to be the outcome that would stir any push for review.

A real issue of the separation of powers arises here. A DPP is regarded as a part of the executive branch of government, albeit with some quasi-judicial functions and characteristics. If the judiciary is to be supplanted in that position (and putting to one side the practical difficulties that would arise), that is a clear breach of the separation that we regard as essential to the proper functioning of government.

A lesson should be learned from the experience of the *Administrative Decisions (Judicial Review) Act* 1977 (Cw). As counsel prosecuting Commonwealth criminal matters in the 1970s and 1980s I found my cases frequently interrupted by review applications by the defence under the Act of any decision that could be characterised as "administrative" – decisions to commit for trial; decisions on severance and joinder; listings; admissibility of some evidence; and so on. They fragmented the criminal process, caused unwarranted cost and inconvenience and achieved nothing of benefit other than to the lawyers involved. For that reason section 9A was inserted into the Act.

6 INTERNAL MERITS REVIEW

For the most part (certainly in NSW) adequate methods of internal merits review already exist and should be in place. It is noted that some Directors identified improvements to be made to their systems.

These are assisted by a formal system of delegation of powers and the stipulation of processes to be followed (usually in practice manuals).

7 INSPECTORS AND PROCESS REVIEW

It is interesting to note that the England and Wales CPS Inspectorate developed from an internal initiative to an independent agency reflected in those existing for police, prisons and parole – which Australian jurisdictions have only in part and not uniformly. But the situation of the CPS is quite different from that of any Australian DPP or combination of them. The CPS has 13 areas with (even after a 30% budget cut over the last 5 years) over 6,000 permanent staff dealing with up to 800,000 cases a year. The scale and dispersal of the workload presents a much stronger argument for an independent inspectorate than exists in Australia (with nine separate DPP Offices of wide-ranging size). Even so, the CPS Inspectorate does not (and should not, in my view) review individual cases.

In my view there is not a case for one (or any number up to nine) independent DPP inspectorates in Australia. It is unnecessary, unaffordable and impractical. There is a case, however, for each DPP Office to have a formalised program of internal review of process and many (including NSW) already do. Results should be published in the Annual Report.

FOOTNOTE: It was pleasing to note that nobody at the roundtable discussion even raised the idea of a parliamentary oversight committee over the DPP with power to review prosecution decisions, such as was proposed a number of times by the NSW Opposition (now the party in government) during my tenure as DPP.