Prosecution ethics and a commentary on the Guidelines of the New South Wales Director of Public Prosecutions

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Presenter - Christopher Maxwell QC, Acting Deputy Director of Public Prosecutions, New South Wales

Introduction

1. There are commonly accepted standards for prosecutors which apply, or should apply, to all systems of law throughout the world. It is instructive to look at these when speaking about the ethics of prosecuting. The discussion inevitably focuses upon the manner in which a prosecutor carries out his/her duties and the touchstone must be 'fairness' to all of the parties involved in the administration and execution of the criminal legal process. In everything a prosecutor does this word is paramount.

General standards

2. In 1990 the United Nations approved a set of general guidelines to apply to prosecutors conducting their work around the world in whatever jurisdiction.[1]
3. It covers qualifications, selection and training, status and conditions of service, freedom of expression and association, role in criminal proceedings, discretionary functions, alternatives to prosecution, relations with other government agencies or institutions and disciplinary proceedings and requires prosecutors to respect and assist in enforcing the guidelines.
4. Article 12 provides:

   "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."
5. Article 13(b) contains an injunction to

   "Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all

[1] UN Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors**,** published in 1999 by the International Association of Prosecutors.

relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect".

6. Article 14 provides:

   "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

7. Article 16 requires prosecutors not to use evidence that they know or believe was obtained unlawfully or improperly (except against those responsible for the impropriety).

8. In 2007 Ms Anna Katzmann, now a justice of the Federal Court of Australia spoke of the discretion which necessarily vests in prosecutors as follows:

   "…. the use of prosecutorial discretion should be exercised independently and free from political interference. Prosecutors are required to carry out their duties without fear, favour or prejudice – impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect."[2]

Standards that apply to prosecutors in NSW.

9. The **Criminal Procedure Act 1986 (NSW)** contains many provisions governing the way criminal proceedings must be conducted and substantially impacts on the way in which prosecutors carry out their functions. The **Evidence Act 1995 (NSW)**, operates to preserve the rights of those caught up in the process and impose obligations on prosecutors at every turn. Another piece of important legislation

[2] In a speech at the dinner for the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007.

impacting on prosecutors' duties is the **Crimes (Sentencing Procedure) Act 1989.**

10. The **Director of Public Prosecutions Act 1986 (NSW)** and the **Crown Prosecutors Act 1986 (NSW)** outlines in more specific ways the duties of prosecutors in NSW. The **DPP Act** does not in terms set standards for prosecutorial conduct, but section 13 enables the Director to furnish guidelines and that has been done since the very beginning of the Office's operations in 1987. The creation of this position and office with its complete independence from government is very much reflected in the Guidelines. It is useful to look at the reason for the creation of an independent prosecution office headed by a Director of Public Prosecutions because this is very much at the heart of what prosecutors do and how they should do it.

The rationale for a Director of Public Prosecutions

9. The office of the NSW Director of Public Prosecutions (DPP) was established by the Director of Public Prosecutions Act 1986 and commenced operation on 13th July 1987. The creation of this office worked a substantial change to the administration of criminal justice by transferring the day to day control of criminal prosecutions from the office of the Attorney General to the DPP. The central rationale for this change was to provide a prosecution service which would be free from political interference or any other inappropriate influence. An independent statutory appointment for a specific term, without the possibility of reappointment[3] was seen to be a preferable repository for the power to prosecute criminal offences, as opposed to a person elected by political process.

10. To separate the two positions was no more than an appropriate application of the separation of powers doctrine. In 1973 when the first separate

[3] See Section 4 Director of Public Prosecutions Act 1986 and Schedule 1 Provision relating to Senior Officers

prosecuting office was instituted in Australia [4] this link between government and prosecution was broken. There have been criticisms from some quarters about the office of the DPP, but never so far as I am aware has there been any criticism about moving away the day to day running of prosecutions from the office of the Attorney General.

11. It was not just about independence from government but also important was the need to separate the decision to prosecute serious crime from the investigation process and the police. In his speech launching the Crown Prosecution Service in England on 1st October 1986, the then UK DPP, Sir Thomas Hetherington recognised this aspect and saw other advantages as well :

- " *To be, and to be seen to be, independent of the Police;*
- *To ensure that the general quality of decision making and case preparation is of a high level, and that decisions are not susceptible to improper influence;*
- *To provide flexibility to take account of local circumstances;*
- *To continue prosecutions while, and only while, they are in the public interest;*
- *To conduct cases vigorously and without delay;*
- *To undertake prosecution work effectively, efficiently and economically;*
- *To seek to improve the performance of the criminal justice system as a whole."*

12. Throughout this commentary on the NSW ODPP Guidelines (the Guidelines) I will refer to some of the bullet points above. One of the interesting and topical matters is to look at how efficiently and economically prosecutions are carried out. Any prosecuting office should be properly accountable for the work it does and the efficiency with which that work is done. What measures are in place for measurement of work and performance? How effectively do prosecution offices demonstrate

[4] In 1973 Tasmania became the first state to establish an independent prosecuting office, (Crown Advocate) pursuant to the Crown Advocate Act 1973

their performance? These are questions that must be addressed effectively by any public office.

13. Prior to speaking about those topics it is necessary to begin this commentary at the beginning, which is "the decision to prosecute." A prosecution will commence if it is in the **public interest** to do so. Just what is in the public interest and how it is determined is the subject of quite specific guidelines . It is the application of those guidelines which involves at times great care and experience and which sets out in some detail the standards for prosecuting in NSW.

The Guidelines

14. The former DPP for NSW, Nicholas Cowdery AM QC, who was instrumental in the creation of the Guidelines had this to say:

*"The **Prosecution Guidelines** (available at www.odpp.nsw.gov.au) do set standards for ODPP prosecutors…….. Adherence to guidelines of this kind, based upon the general duties of prosecutors and their enforcement in practice, is designed to ensure community support for the prosecution function. Without a sufficient level of community acceptance of the prosecutor's role and the criminal justice process itself, lack of confidence in the system would be likely to increase self-help and vigilantism and negate the efforts made by government in this way to improve social stability."*[5]

15. The importance of the guidelines being a public document is that it is available to everyone, particularly the stakeholders in the criminal justice process. The standards and criteria which govern decisions made by prosecutors are available to those who are intimately affected by those decisions and can be closely scrutinised. Transparency is achieved.

[5] Industrial Law Committee, Federal Litigation Section, Law Council of Australia Occupational Health and Safety Law Seminar, 12 November 2007

16. The existence of this document is also of importance because it encourages consistency in the decision making of the prosecutors. This paper will look at some of the more important guidelines.

The approach of the prosecutor.

17. There are two sides to this but they are not inconsistent. The first is summarised cogently in an oft quoted passage from the Supreme Court of Canada…….

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."[6]

18. The other side is explained in the guidelines in this way…..

"*Nevertheless, there will be occasions when the prosecutor 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 an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged."*[7]

[6] per Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270).
[7] Guideline 2 at p 6

The Decision to prosecute – Guideline 4

19. This has been described as a three stage process[8] and is clearly framed in that way. It is set out as follows:

(1) whether or not the admissible evidence available is capable of establishing each element of the offence;

(2) whether or not it can be said that there ***is no reasonable prospect of conviction*** *by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not*

(3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

20. Number one is the prima facie test and is about whether the available evidence taken at its highest could sustain a conviction. If not, then it falls at the first hurdle. Mostly, before any matter comes before the DPP for consideration it will have passed this test. One example of where this hurdle might apply is a request for advice from the police as to the sufficiency of evidence to file and serve a Court Attendance Notice (CAN) against a suspect.[9]

21. The second stage is certainly more interesting in that it can involve a great deal of thought and judgment on the part of the prosecutor considering it. It has been described in this way:

"it must be understood that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured before a hypothetical reasonable jury properly instructed (ie an impartial jury)

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8. The Role of the DPP in the 21st Century **Author:** Bugg, D. **Dates:** 17/04/2007; 06/07/2007 **Venues:** MOPED Conference; HOPAC 2007 Conference

[9] See Guideline 14 and Section 173 Criminal Procedure Act NSW 1986 as to a CAN.

or magistrate in the case of summary offences. This decision requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which, in the view of the prosecutor, could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds."[10]

22. It is framed somewhat differently in England, but essentially involves the same kind of approach :

"4.5 Prosecutors must be satisfied that there is sufficient evidence to provide ***a realistic prospect of conviction*** *against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.*

4.6 A realistic prospect of conviction is an objective test based solely upon the prosecutor's assessment of the evidence and any information that he or she has about the defence that might be put forward by the suspect. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."[11]

[10] Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951).

[11] The Code for Crown Prosecutors from UK Crown Prosecution Service, Feb 2010

23. It can be seen immediately that this stage involves the exercise of judgment and experience of the proof of guilt and it is necessary for prosecutors, subject to their authority, to make calls about cases and have the confidence to back their judgment.

24. It may be that both stage one and two are satisfied but for some other reason the public interest would not be served by proceeding with the prosecution. These are set out in detail in this guideline and include such matters as the seriousness or triviality of the offence, special circumstances that would prevent a fair trial being conducted, the staleness of the offence, the availability of alternatives to prosecution, whether any resulting conviction would be regarded as unsafe and unsatisfactory, the youth, age or infirmity of the alleged offender, whether the alleged offender is willing to co-operate in the prosecution of others and the attitude of the victim to the continuation of the prosecution.

25. Any 'no bill application' made to the DPP by defence must carefully consider all of these matters and address them in the application. The consideration of such applications is a substantial part of the work done by the DPP and the two Deputy DPPs.

Charge negotiation

26. It has been recognised that quite significant benefits can flow the administration of criminal justice by utilising in a structured and careful way, a process of charge bargaining.[12] This involves the prosecution accepting pleas of guilty to a smaller number of offences or less serious offences than that for which an accused has been charged or been committed for trial, or at times for which he has been indicted. To conclude a prosecution in this way is not a step lightly taken and will only be done when careful consideration has been given, taking into account a number of factors. It has become a very important aspect of prosecution and

[12] Report by the Honourable Gordon Samuels AC CVO QC on his Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts 6th June 2002.

without the resolution of cases in this way the justice system in NSW would be under impossible pressures.

27. Guideline 20 deals with this aspect and encourages prosecutors to engage in this process by the application of principle and reason. Expediency will play a part and is often paramount where for instance an important witness becomes unfavourable or simply refuses to attend court. There are many things that can happen to substantially weaken the prospects of a successful prosecution and it is in such cases that plea bargaining will often occur.

28. Again the former DPP Nicholas Cowdery spoke of this process…..

"*It is vital also that investigators and victims of crime be consulted appropriately throughout the process – whenever a charge is to added, dropped or altered and at the various stages of the prosecution. Consultation means just that – a two-way exchange of relevant information, with each side seeking to understand the views expressed by the other. It does not mean that the prosecutor thereby seeks or acts upon the instructions or wishes of the person consulted, nor that the person must adopt the views of the prosecutor. Consultation gives an opportunity for other views to be expressed and taken into account when principled decisions are to be made. Often it may be necessary to agree to disagree about matters; but it is important that each side be heard and understood."* [13]

29. It is important that any resolution in this way should strive, within the limits of what is possible, to appropriately reflect the extent of the criminality. This process and its existence has been recognised and given legislative structure in NSW.

[13] Industrial Law Committee, Federal Litigation Section, Law Council of Australia Occupational Health and Safety Law Seminar, 12 November 2007 delivered by Nicholas Cowdery AO QC

30. The starting point is *Section 22 Crimes (Sentencing Procedure) Act 1999* which mandates that the sentencing court take into account that an offender has pleaded guilty and when it has been first indicated that he/she was prepared to so plead. The court will reflect this in a substantial discount deducted from the otherwise appropriate overall sentence which would have been imposed but for the plea of guilty.

31. The legal representatives of an accused person will be aware of the very significant reduction in sentence if an early plea is taken. Early in this context is taken to be at the first available opportunity after the offender is charged and prior to committal. The legislation recognises that to give such discount will encourage offenders to look, though their representatives to offer a plea well before the proceedings get under way. This is referred to as the utilitarian value.[14]

32. In a further initiative NSW commenced a system of criminal case conferencing from 2008 by the introduction of the *Criminal Case Conferencing Trial Act 2008.* The Local Court will order that such a conference take place prior to committal and that the prosecution brief be served on the accused prior to that conference occurring. The purpose is to see whether the accused person is prepared to plead guilty to any offences (*Section 6).* A certificate must be completed after such conference indicating the offence or offences which the accused was prepared to plead guilty to and the details of any agreed facts that he/she would plead to. This certificate would be available in a sealed envelope when at some future date the sentencing judge imposes sentence.

33. Perhaps the most important part of the legislation is the amount of the discount. If the offender offered to plead guilty prior to being committed for trial then the sentencing court **must** give a 25% discount. If after committal then it can be anything up to 12.5% *(Section 17)*

[14] See *Borkowski v R [2009] 102*

34. The most recent legislation which very much cements this duty on the prosecution to properly engage in plea negotiation is seen in the enactment of *Section 35A Crimes (Sentencing Procedure) Act.* This provision commenced on 14th March 2011 and provides as follows:

35A Consultation with victim and police in relation to charge negotiations

(*1) In this section:*

charge negotiations *means negotiations between the prosecution and an offender with respect to a plea of guilty in relation to an offence other than the offence or offences with which the offender has been charged or committed for trial.*

prosecution guidelines *means prosecution guidelines in relation to charge negotiations issued by the Director of Public Prosecutions.*

requisite consultation *means consultation with the victim and the police officer in charge of investigating an offence that complies with the applicable prosecution guidelines.*

victim *has the same meaning as it has in section 26.*

(2) A court must not take into account offences specified in a list of additional charges under section 32 in relation to an offence, or any statement of agreed facts, that was the subject of charge negotiations unless the prosecutor has filed a certificate with the court verifying that:

(a) the requisite consultation has taken place or, if consultation has not taken place, the reasons why it has not occurred, and

(b) any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines.

(3) The certificate must be signed by or on behalf of the Director of Public Prosecutions.

35. Significantly reference is made to the Guidelines in a piece of legislation and the essence of Guideline 20 is as follows:

"A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:

(a) the alternative charge adequately reflects the essential criminality

of the conduct and the plea provides adequate scope for sentencing; and/or

(b) the evidence available to support the prosecution case is weak in any material respect; and/or

(c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or

(d) it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges."

Disclosure by the prosecution

36. One of the most important factors ensuring a fair trial of an accused person is that he/she is aware of all of the evidence that will be relied upon by the prosecution and the way in which the case is sought to be made. In NSW requirements are in place for police to certify to the ODPP that they have disclosed to the prosecutor everything of relevance known to be in their possession. That certificate must accompany the brief. *Section 15A of the **DPP Act*** imposes upon police a continuing duty of disclosure to the prosecution and it is supported by NSW Police Force instructions.

37. The prosecution must disclose all material that it considers relevant – to the proof of the charge or to the defence of the accused – to the defence in a timely manner. Legislated procedural requirements support that obligation and Prosecution Guideline 18 mandates it. Possible exceptions based on public interest immunity and legal professional privilege considerations are provided for in the guideline and in case law.

38. One area in which an obligation to make further or supplementary disclosure may arise is where counsel or a solicitor confers with a witness and in the course of the conference the witness provides additional relevant material or material that is contrary to or inconsistent with that previously provided and disclosed to the defence. In such circumstances it is incumbent on the prosecution to have a supplementary statement taken

from the witness as to the additional or inconsistent material and to serve it upon the defence in a timely fashion. Prosecution Guideline 18 addresses this situation.

39. Prosecutors must take these obligations seriously and err, if necessary, on the side of disclosure to the defence. To do otherwise risks putting the proceedings in jeopardy at first instance or on appeal and raising the prospect (in some cases) of a malicious prosecution action.

40. There is also a strict requirement for disclosure of the crown case in NSW provided is to be found at *Section 137 Criminal Procedure Act 1986 (NSW)*

137 Notice of prosecution case to be given to accused person

(*1) The prosecutor is to give to the accused person notice of the prosecution case that includes the following:*

(a) a copy of the indictment,

(b) a statement of facts,

(c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,

(d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,

(e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,

(f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,

(g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,

(h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,

(i) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,

(j) a list identifying:

(i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and

(ii) the place at which the prosecutor believes the information, document or other thing is situated,

(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness.

41. The items of particular significance include the summary of facts and information of which the prosecutor is aware that would reasonably be regarded as being of relevance but is not in possession of the prosecutor.

42. There is also a requirement for a more limited form of defence disclosure at *Section 138.* This covers such aspects as whether Defence will rely on alibi or substantial impairment and also whether the accused will consent to dispensing with the application of certain requirements of the Evidence Act 1995 NSW relating to statements of witnesses that prosecution intends to call and to the summary of the facts served by the prosecutor.

Sentencing (Guideline 28)

43. While the prosecution has an active role to play in the sentencing process, it must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude. Requirements are set out in NSW Barristers Rule 71 and Solicitors' Rule 71A.

44. In summary the prosecutor must:

- inform the court of any relevant legislation, authority or decisions (including comparable sentences) bearing on the appropriate sentence;
- correct any error made by the opponent;
- assist the court to avoid appealable error; and may
- make submissions on the nature of the penalty that is appropriate (eg custodial, fine, diversionary).

45. It is important to appreciate that any discussions between prosecution and defence as to an acceptable sentencing outcome (ie one against which the prosecution would not appeal) do not bind the sentencer. It is the judge's or magistrate's task to find and apply the law and the authorities make it clear that whatever "agreement" may have been reached between the parties, that cannot fetter the bench's discretion. A helpful discussion of the principles appears at para 27 and following in the judgment of the High Court in *GAS and SJK v The Queen* [2004] HCA 22.

46. Co-operation by convicted persons with the authorities should be appropriately acknowledged and taken into account. There are legislated discounts for pleas of guilty entered at various stages of the proceedings and authoritative guidance is given in several CCA decisions (including guideline sentencing judgments).[15]

47. One important matter to bear in mind in sentencing proceedings in Uniform Evidence Act jurisdictions is that generally the laws of evidence will not be enforced; but unless copies of all documents to be tendered by the defence on sentence are provided to the prosecution at least two clear working days before the hearing, the prosecution may make an application for a direction under section 4(2) and (3) of the **Evidence Act 1995** that the law of evidence applies to the proceedings. If that application is successful, hearsay evidence will be inadmissible pursuant to the general provisions of the Act. If the application is not successful, the prosecution may seek an adjournment of the hearing. If an adjournment is not given,

[15] Section 23 Crimes (Sentencing Procedure) Act 1999. See also *R v Bourchas (2002) 133a Crim R 413*

then the prosecution may indicate that it has not been possible to test the material and therefore the prosecution submits that less weight should be given to it.

48. Where copies of defence documents have been provided in time, the prosecution must advise the defence at least 24 hours ahead of the hearing if the authors of any of the documents are required for cross-examination.

49. Victim impact statements are able to be provided pursuant to Division 2 of Part 3 of the **Crimes (Sentencing Procedure) Act 1999** and the requirements of the **Charter of Rights for Victims of Crime** in section 6 of the **Victims Rights Act 1996**. If the offence is being dealt with in the Industrial Commission it must involve death or actual physical bodily harm. If it is being dealt with in the Local Court there are some other qualifications (cf section 27).

Independence, accountability and transparency

50. That the DPP and prosecutors be independent and free from inappropriate influence has been referred to above in this paper. This does not mean however that the prosecution is immune from accountability. That a prosecuting authority be responsible and accountable for its decisions is of paramount importance.

51. The prosecution remains accountable throughout, however to the appropriate authority. In the case of the NSW ODPP, to the Attorney General and through him to the Parliament and the people of the State. Sometimes it may choose to demonstrate that accountability more directly to the community. A regulatory agency will also have its line of reporting ultimately to a Minister and to Parliament and the people.

52. To do that effectively a measure of transparency is required but consideration must always be given to the requirements of privacy

legislation, legal professional privilege, public interest immunity and the legitimate sensitivities of individuals who may be involved.

53. Guideline 12 deals with the question of providing reasons for decisions and Guideline 32 governs DPP police relating to media contact. Releasing material to the media requires substantial care and awareness of legal provisions which preclude certain information being revealed. The DPP employs an expert media liaison officer who deals with all media inquiries. Information sought of an uncontroversial nature may be provided but any other matters must get the approval of the Director.

Conclusion

54. A careful and detailed set of guidelines is essential to the proper exercise of judgment and discretion by prosecutors in any system. The Guidelines of the NSW DPP provide an excellent and detailed coverage of the standards expected of the prosecutors who work for this office. It is also of importance that it is freely available to all of the participants in the criminal justice process.

55. The control of prosecutions is an exercise of considerable power and as such it is properly governed by well entrenched rules which guarantee that such power is exercised with fairness and always in the interest of the community that is served by the ODPP.

Acknowledgment

56. This paper has relied considerably on material from papers given by Mr Nicholas Cowdery AM QC the former NSW DPP, who occupied that position from 1994 to 2011. I have done so with his aquiescence.