Speech to mark the 25th Anniversary of the establishment of the ACT Office of Director of Public Prosecutions

Jon White SC, Director of Public Prosecutions

The office of the Director of Public Prosecutions had its origins in the United Kingdom in the19th Century. The first Australian DPP was established in Victoria in 1982 and other Australian jurisdictions soon followed suit. The newly formed Commonwealth DPP took over responsibility for prosecutions in the Territory.

The Australian DPP's were created to remove prosecutorial decisions from the political process. There was a recognition that Attorneys General were now unmistakably political creatures. It was in everybody's interest - including that of politicians - that a person independent of the political process should make what are often very difficult and contentious decisions.

Self government necessitated the shifting of prosecutorial functions from the Commonwealth to the Territory. The *Director of Public Prosecutions Act 1990* had unanimous support in parliament, with both sides emphasising the independence of the newly created role.

As the then Attorney General Bernard Collaery noted in introducing the Bill:

> *The Director of Public Prosecutions is an independent statutory office responsible for prosecuting criminal offences in the name of the Crown. The director's statutory independence ensures that prosecution decisions are perceived to be and are, in fact, made according to legal considerations and are free from political influence. [Hansard 31 May 1990].*

Responding on behalf of the opposition, Terry Connolly as he then was noted in particular the relationship of the DPP to the Attorney General:

> *The Attorney maintains responsible politically to this parliament for the system of criminal justice. He can give directions to the director under clause 20 of the Bill, but those directions must be made public by being published in the Gazette and tabled here. Directions are not disallowable, but nor should they be. If they were, that would in effect make the DPP politically accountable to this house. The correct channel is for the Attorney to be responsible to this house of the administration of justice and the Director to retain his independence, subject of course to direction. [Hansard 7 June 1990].*

The ACT DPP commenced operating on 1 July 1991. The first Director Ken Crispin QC. Ken Crispin was an inspired choice, as he was of a particularly independent cast of mind. In his first annual report he recalled that "prior to my appointment I had discussions with successive Attorneys- General each of whom stressed that I would enjoy complete independence in the exercise of my statutory powers and responsibilities. The present Attorney-General has continued to affirm that independence and there has been no occasion upon which any suggestion of political interference has arisen" [Annual Report of DPP 1991-1992]

I must say that I too in my role have never suffered political interference or the suggestion of it.

One feature of the ACT DPP was unique amongst Australian DPPs - the office has from its inception been responsible for the prosecution of summary as well as indictable matters, police prosecutors having been abolished in the ACT in the 1970's. This has meant that at all levels in the Territory, prosecutorial decisions are made which are independent of police as well as politicians. Other jurisdictions are now starting to emulate this model.

There have only been 4 DPP's since the establishment of the office. Ken Crispin (who was of course later appointed to the Supreme Court) was succeeded by Terry Buddin SC who was later appointed to the NSW Supreme Court. He was succeeded by Richard Refshuage SC who was appointed to the ACT Supreme Court. I was appointed in September 2008.

The independence of the DPP is ensured by the statutory framework of the *DPP Act*. Not only is the DPP immune from direction on specific matters [section 20 (3)], the DPP is responsible for all staff of the office and has in relation to those staff powers of a head of service. [Section 30 (3)].

So important are prosecutorial discretions, that the independence of the DPP is now a cornerstone of our system of government. In his review of the ACT Public Service in 2011, Dr Hawke, noting that the DPP was an office whose role at arm's length from the government "was part of the foundation of the ACT system of government and accountability frameworks" recommended that the DPP should receive appropriation funding in its own right. Such a reform would do much to ensure the appropriate balance relating to the independence of the DPP. It is certainly less than ideal that the DPP does not have a seat at the table when budgetary appropriations are discussed.

There is no doubt that the DPP exercises discretions of considerable importance to the criminal justice system. Indeed prosecutors have strikingly been called ministers of justice. And as the High Court has repeatedly emphasised, prosecutorial discretions are essentially unreviewable [*Maxwell's case*].

All this means is that the job of a prosecutor is a lonely one. Many public officials make decisions that are unwelcome or unpopular in one quarter or another – the prosecutor has the unique distinction, often, of making decisions that are unpopular in every quarter. Prosecutors are the most scrutinised of public officials. Everything we do is scrutinised by the Courts before whom we appear, by our colleagues in a quintessentially adversarial profession, by police and other investigators whose matters we prosecute, by victims, witnesses and other interested parties, by the Assembly and its members, and by the media.

As I have often remarked, prosecution is not a game for those who crave popularity.

This 25th anniversary is not just a time of proud reflection, it is a time look ahead to the challenges that face the Territory and the DPP as our population pushes upwards towards 400,000.

It is now clear that the types of serious crime that used to be a rare in the Territory, are now a regular occurrence. Canberra, regrettable as some may find it, has grown up. This is

shown by statistics such as a doubling of our Supreme Court workload, the number of homicide prosecutions we now deal with, and a fundamental shift in the types of crime which now regularly include complex fraud matters, commercial drugs seizures, drug manufacture, and complex sexual offending involving multiple victims, or child victims.

These changes reflect the natural growth of our city, and have recently been recognised through an expanded Assembly, more beds at our prison, the appointment of a fifth judge and indeed the construction of a new court complex. The pressure created by this population growth presents the greatest challenge faced by the DPP. Our core structure was not designed to accommodate such a volume of serious crime. We do not have the resources to create a structure which supports the changing nature of our work and would allow us to recruit senior crown prosecutors to prosecute complex matters.

This is a challenge for not just us but the next assembly, and I look forward to working through the issues with the next attorney general.

The role of the prosecutor is endlessly fascinating. We see the worst of human nature but also the best. While it is not a job for those who crave popularity, it is immensely satisfying to serve the community so directly.

Rather than dwell on past cases, I thought I would identify some key trends in criminal justice.

Undoubtedly, one of the fundamental changes in criminal law since the establishment of the office relates to the role of victims. Victims were once bystanders in a criminal process which concentrated exclusively on the accused. Now victims are finding their voice, and prosecutors have a vital role to play in that. The Royal Commission into Institutional Responses to Child Sexual Abuse has shone a light on the way victims have interacted with the criminal justice system including with prosecutors. It is clear that more must be done to involve victims – to explain the various stages of the court process, to seek their views on prosecutorial decisions, and to ensure that their victim impact statements are put before sentencing courts. My office with its witness assistance service and with close cooperation with the Victims of Crime Commissioner is taking up this challenge.

Family violence has been an ingrained part of Australian life, suppressed behind closed doors. Now, the terrible secret is out. The ACT and my office in particular have been in the vanguard of innovative response to family violence. We press ahead with prosecutions even when victims express reluctance – a reluctance often borne of coercion. Most recently with reform allowing interviews of complainants to be tendered as the evidence in chief of the complainant we are on the cusp of very significant advances in this area.

Sexual offending has always been complex. This is particularly so as it relates to children. The criminal law's understanding of children's evidence has evolved greatly. Children were once thought to be inherently unreliable. In the recent case of *GW,* an appeal I took to the High Court from a decision of our own Court of Appeal, the High Court accepted that unsworn evidence of children was to be treated in no different a fashion to sworn evidence of adults. This is a significant development and one of which my office can be proud. My office has also pioneered the use of expert evidence in sexual offence cases, for example to

explain a lack of complaint, or the “freeze response” of a victim of sexual assault. Again my office is at the cutting edge of the presentation of such evidence.

We have also tackled institutional abuse – the ADFA Skype case, which penetrated a military culture of silence, was particularly significant. And of course we have prosecuted officials from other powerful institutions such as churches.

The challenge of taking on such powerful institutions should not be underestimated. The establishment will always seek the deflect scrutiny, and mask its failings. But that is precisely why a strong and independent Director of Public Prosecutions is so vital.

The next frontier is the electronic delivery of prosecution services, for example dealing with briefs of evidence and delivering documents to Court in electronic form. Again we are at the vanguard. Already complex murder briefs are received, analysed, served and presented to the Court in electronic form. The challenge is to move to electronic briefs in all matters.

I would like to finish by reflecting on the people who make up the office.

Personally, the most fulfilling aspect of my job has been working with the very dedicated of professionals who make up the DPP.

In his first annual report, Ken Crispin noted that he had in his time appointed a “Fijian Indian, an Irishman and an Italian”. The Fijian Indian referred to was none other than Dean Sahu Kahn, the longest serving prosecutor in my office. I suspect the Irishman was Alyn Doig who is now at the local bar after sterling service with the office. Of the Italian all trace has been lost.

Another stalwart of the office is Catherine Zaal, who has been with us from the very start. Catherine and Dean and so many others over 25 years have done great service.

As ministers of justice, we never lose sight of the fact that it is the community that we serve. The community wants more than a fair and efficient prosecution service, it wants a DPP in which it can have confidence, a DPP which it knows has a strong commitment to the public interest and the protection of the community.

I am sure we will continue to serve the community proudly in our next 25 years.

Jon White SC

30 June 2016