



00/576-6

7 December 2017

Mr L Babb SC
Director of Public Prosecutions
Directors Chambers
DX 11525
Sydney Downtown

Dear Mr Babb

Independence of Crown Prosecutors

Yesterday the New South Wales Bar Association was made aware of an email sent from the Senior Crown Prosecutor to Crown Prosecutors regarding the role of Crown Prosecutors as contradictors.

The Bar Association has serious concerns regarding the content of the email, which unfortunately displays a fundamental misunderstanding of the independent role of Crown Prosecutors. We are troubled by the points made by the Senior Crown Prosecutor in this communication, which appears to view the role of Crown Prosecutors as mere agents, rather than independent counsel exercising discretion in individual cases. A Crown Prosecutor has a duty to exercise independent judgment over and above the role to simply act as a contradictor to the defence.

As you would be aware, Rules 42 and 43 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 set out the duty of counsel to exercise independent forensic judgment and for example make it clear that that independent judgment may properly be exercised in circumstances where it is contrary to the wishes of the client or instructing solicitor.

The Courts have also made clear the independent role of Crown Prosecutors. In *Vasta v Clare* [2002] QSC 259 the then Chief Justice of Queensland, the Hon Paul de Jersey AC QC stated that:

“... it is undoubtedly nevertheless correct to say that the role of Crown Prosecutor is attended – should be attended – by a large measure of independent discretion. That independence, of political and executive interference, and of the investigative agency, among other things, is critical to the integrity of the criminal justice system”.

Further in *Giannarelli v Wraith* (1988) 165 CLR 543 The former Chief Justice of Australia, Sir Anthony Mason AC KBE QC observed that:

“The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case.”

These considerations regarding the independence of counsel apply equally to Crown Prosecutors as well as the private Bar. The Association is of the view that the directions contained in the Senior Crown Prosecutor's email are antithetical to this duty of independence. Further, such an approach will have the effect of undermining the Early Guilty Pleas Reforms which were announced by the New South Wales Attorney-General.

The Senior Crown Prosecutor's apparent direction to Crown Prosecutors to the effect that concessions made to the defence in the course of a trial should only be made in extreme cases and with the approval of the Senior Crown Prosecutor, a Deputy Senior Crown Prosecutor or the Director's Chambers is not only in conflict with that independence, but also raises practical difficulties. How, for example, is a Crown Prosecutor to obtain that approval in any event during the course of a trial when a decision needs to be made regarding a potential concession?

Further, although I am sure it was not intended, the tone of the Senior Crown Prosecutor's email is regrettable.

The content of the Senior Crown Prosecutor's email is attached. It has been typed into a separate document to protect the identity of the individual who brought the communication to the Association's attention. In that regard, I would ask you to confirm that no investigation or adverse action be undertaken regarding the source of this information.

I seek a meeting with you as a matter of urgency regarding the Association's concerns. I will refrain from making any public comment or raising the matter with the Attorney General until you have had an opportunity to respond to this request.

Please feel free to contact the Association's Deputy Executive Director Alastair McConnachie on 9229 1756 or at amconnachie@nswbar.asn.au to arrange a suitable date and time for the meeting.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President

Re- the Crown Prosecutor as contradictor

Dear all,

For some time now the Director's Chambers have become aware of a number of instances in which Crown Prosecutors have conceded points that should never have been conceded. It appears that some Crown Prosecutors are not aware of the role of a Crown Prosecutor to act as a contradictor to the version put forward by an accused or an offender, or by Counsel on behalf of an accused or offender. I have been asked by the Director to stress the importance of not making concessions to the defence except in extreme cases where its appropriateness has been confirmed by the Senior Crown Prosecutor, a Deputy Senior Crown Prosecutor or the Director's Chambers.

The instances of inappropriate concessions that have arisen most commonly are the following:

1. Crown Prosecutors allowing a defence version of the facts to go to a sentencing judge without any challenge. This sometimes takes the form of the Crown Prosecutor agreeing to agree facts which are to the advantage of the offender where those facts are contrary to evidence in the Crown case. The Crown has an obligation to present the facts that are demonstrated by the evidence, and it is a dereliction of duty to agree to a version which runs counter to the evidence in the prosecution case. It is a particularly egregious dereliction of duty if permission has been given by the Director's Chambers to take a plea on the basis of certain agreed facts, and then those agreed facts are changed at the request of the defence.
2. Crown Prosecutors failing to cross-examine an offender on sentence. A Crown Prosecutor has an obligation to test the evidence given by an accused/offender, both in a trial and on sentence. Where the defence tender an affidavit from an offender on sentence, the Crown should require the offender for cross examination. Even if there is no material to contradict the offender's evidence, it should be fully tested in cross examination as a matter of course.
3. There has recently been an increase in agreements by Crown Prosecutors to facts on sentence that are purely within the offender's knowledge. Whilst on occasion a submission can be made that the Crown is not in a position to disprove such a matter, the positive adoption of such "facts" in an agreed facts document should be avoided.
4. Crown Prosecutors failing to object on sentence to the admissibility of facts that an accused has told a psychologist or psychiatrist, and allowing those facts to be presented as the basis for the judge to sentence the offender. Unless an offender gives evidence to verify the accuracy of those facts, they are not admissible as evidence of the truth through a psychologist or psychiatrist. A Crown Prosecutor who is faced with a report which contains such facts should object to them being admitted as evidence of the truth. Without verification from the offender, the medical report is of little if any value.

5. Crown Prosecutors failing to press evidence which has been objected to by the defence on the basis of the judicial discretion. The judicial discretion is just that - a discretion to be exercised by the judge, and not pre-empted by a Crown Prosecutor. For example, where the defence allege an illegality or impropriety on the part of the police, a Crown Prosecutor should always argue for the admissibility of the evidence because of the probative value outweighing the seriousness of the illegality or impropriety. It is not the role of a Crown Prosecutor to pre-empt a judge's decision on the admissibility of evidence. Where there is any viable case for admissibility, a Crown Prosecutor should press for that admissibility and allow the judge to make a ruling.
6. Crown Prosecutors making concessions on sentence that non-custodial sentences are appropriate or highlighting the mitigating factors whilst barely mentioning the exacerbating features. This conduct effectively prevents an appeal against sentence in the event that the Director's Chambers considers that a custodial sentence was appropriate.

The whole system of criminal justice - in trials, sentences and appeals - depends upon the Crown Prosecutor acting as a contradictor to the defence. It is not the role of a Crown Prosecutor to make concessions to the defence case. In those instances where a Crown Prosecutor wishes to make a concession, it should first be checked with the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor to ensure that it is appropriate.

Mark Tedeschi AM QC
Senior Crown Prosecutor