Justice and the discretion to prosecute

By the Hon John Nader QC

The writing of this opinion was occasioned by the experience of NSW Crown prosecutor, Margaret Cunneen SC. Ms Cunneen has received unjust, adverse criticism, aptly described by well regarded journalist, Bettina Arndt as a 'witch hunt'.[1]

Many of Ms Cunneen's critics argued that because a magistrate found that there was evidence to support each of a number of sexual assault charges against a defendant, and had committed him for trial, Ms Cunneen ought to have found a bill of indictment. Many of her critics said that she failed in her duty as a Crown prosecutor by not doing so. They did not understand that it is no part of our law that a bill of indictment should be found merely because a magistrate has committed a defendant for trial.

Ms Cunneen advised the director of public prosecutions (DPP) that a bill of indictment should not be found. Her advice was accepted. Nothing has shown that advice to have been wrong in any respect.

Ms Cunneen's duty as a Crown prosecutor (Crown) required her to decide whether the suspect should be sent for trial by jury.

In arriving at her decision, Ms Cunneen had to consider many circumstances beyond that which the magistrate was required to consider. Indeed, the fact of the magistrate's committal was irrelevant to the question whether the defendant should be put on trial. It is no disrespect to a magistrate to point out that a committal for trial by a magistrate is usually little more than a *sine qua non* to a case coming before a Crown for consideration of finding a bill of indictment.

The discretion to prosecute

A Crown acting according to sound and well defined principles that have evolved over many years, is very much a servant of justice.

The Prosecution Guidelines of the NSW DPP begin:

> A prosecutor is a 'minister of justice'. The prosecutor's principal role is 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.

A Crown is empowered by s 5(1)(b) of the *Crown Prosecutors Act 1986* to find a bill of indictment for an offence whether or not the person concerned has been committed for trial in respect of the offence. Where the person concerned has not been committed for trial the indictment is described as *ex officio*.

In general, Crowns appear in criminal jury trials in the District and Supreme courts.

The Crown's client is the entire community

In a criminal trial a Crown represents the community. The Crown's role is to assist the court to arrive at the truth and to do justice between the community and the accused. A Crown must present to the court all of the credible, relevant evidence.

No wins and no losses

The Crown's role excludes any notion of winning or losing cases. It is critically important that a Crown should never lose sight of the fact that, although there are strong adversarial elements in the criminal trial process, it is no part of the Crown's duty to *win* a case as it might be in civil proceedings.

Crowns have been seen to become seduced, as it were, by the heat of battle or by their personal belief that the accused is guilty, and to lose sight of their true role.

In *Boucher v The Queen* (1954) 110 CCC 263 at p 270 Rand J wrote:

> 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 dignity, the seriousness and the justness of judicial proceedings.

Servants of all yet of none[2]

A Crown knows that he or she is a servant of all the people. But no person or group of persons is a Crown's client. The entire community is a Crown's client in every trial, and stands, albeit unseen, as a party in the trial court. Consequently a Crown must remember that what fair minded members of the community demand is a just verdict whatever it may be. A Crown should never consider a verdict of conviction or acquittal as a win or a loss.

If a Crown has presented a case fairly, with appropriate vigour, skill and thoroughness, his or her duty in the service of justice has been done, whatever the verdict. In *Whitehorn v The Queen* [3], Justice Deane wrote:

> Prosecuting counsel in a criminal case represents the State. The accused, the court and the community are entitled to expect that … he will act with fairness and detachment

> and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.

Determining and settling charges

Crown prosecutors also determine and settle the appropriate charges. They advise the DPP on a wide range of issues, including the question whether or not there is sufficient evidence to justify proceeding with a particular prosecution or whether the proceedings should be terminated. See *Director of Public Prosecutions Act 1986*, ss 7(2) and *Crown Prosecutors Act 1986* ss 5(3): the former confers power on the DPP which is denied to Crowns by the latter.[4]

The public interest

In deciding whether to find a bill of indictment, the dominating criterion against which all factors have to be measured is the public interest. A Crown who has to decide whether to find a bill of indictment must consider what is demanded by the public interest as s/he perceives it.

Some questions are so fundamental to the public interest that they hardly need mentioning, but a reference to some of them is not out of place.

A Crown must be reasonably sure that the available evidence is likely to prove each of the essential elements of the alleged offence to the required standard. That is a fundamental public interest question, but there are other less obvious matters to be considered.

A former DPP, Mr Nicolas Cowdery QC stated in his guidelines that the factors to be considered by a Crown should include matters that he published in a check list.[5]

He did not, I am sure, intend that the check-list be taken to include all possible matters for consideration. He left it open to prosecutors to evaluate any other matter that might seem to be significant to the public interest. The circumstances of our lives are far too complex for all possible relevant matters to be included in a list. In fact, many of the items in the DPP's list are general enough to suggest more specific matters.

Such a check-list is useful if it is not too specific. The more specific such a list becomes, the more the Crown's discretion will be reduced.

I think it likely that Mr Cowdery was telling prosecutors that they should consider all the matters in the check-list, whatever other matters they may consider.

It would be impossible to make an *aide memoir* of every significant factor. New considerations arise from case to case, and from time to time, and prosecutors must be perceptive of them. Public attitudes change constantly.

Sexual assault cases

The following remarks relate especially to sexual assault cases because of the sensitivities of the large number of young victims and the special need to keep the identities of concerned persons concealed. However, all indictable offences are governed by the the same overriding public interest principle. Because of our ever-changing social values, crimes become more or less serious with the passing of time. Examples are not necessary to support that.

Sexual assault cases form a special category as well because of the necessity to protect sexual assault victims from additional suffering that may be caused by the forensic process itself. This is in the minds of Crowns when considering whether an alleged perpetrator of sexual assault should be sent for trial. It is manifestly a public interest question.

Victims whose evidence is not strongly corroborated, are often advised by police and Crowns that a conviction is not at all certain, and that an acquittal is possible by reason of lack of sufficient corroboration. If the Crown decides that a conviction is not a real probability, a bill of indictment should not be found: a decision commonly called a *no bill*.

Victim distress

I put this forward as an important public interest issue. It is disturbing to be in court, perhaps as a judge, to witness the great distress reaction of a woman or girl, who at the end of a trial, hears the foreperson of a jury announce that the man on trial for sexually assaulting her is not guilty. This grief is aggravated when, as sometimes happens, the acquitted man sneers or laughs at her in the court.

A verdict of not guilty is commonly regarded as exonerating an accused person, but it can be devastating to a victim who, notwithstanding the acquittal, well knows that she was sexually assaulted by the accused. It is pointless to explain to her that the jury may have believed her but they were left with a reasonable doubt. I have never seen a satisfactory resolution of this tension.

Therefore, the decision to prosecute such cases to trial must be considered painstakingly. The suffering caused by the crime itself can be aggravated by the stress experienced in the lead up

to the trial, sometimes for many months, culminating in the disappointment of a verdict of acquittal.

The community has an interest in protecting the victim of sexual assault from further distress. It is a matter that must be considered and taken into account by Crowns in bill finding considerations.

For a similar reason, the lapse of time between complaint, investigation, and trial should be made as brief as it is possible for the prosecutor to make it.

Justice and fairness for accused persons

Justice Deane's remarks, quoted above, are a reminder that accused persons, as members of the community, are also owed a duty of justice by the Crown. The forensic vigour to which I have referred does not permit a Crown knowingly to do or fail to do anything that might result in injustice to an accused person. The accused is a member of the community whose legitimate interests the Crown must respect.

Fairness is a quality which we all understand, but it implies much that cannot be specified, even if I were capable of doing so. But, for an example, it implies that if any relevant fact, or probable source of relevant fact, that may assist an accused, comes to the attention of a Crown prosecutor, the accused must be informed of it without delay. Delayed disclosure may minimise the value of the information to the accused: *a fortiori*, it may well result in injustice to delay the disclosure till the time of trial.

It follows from what I have already said, that the Crown prosecutor must be guided in the bill-finding process by the answer to the question, 'is prosecution required in the public interest?'

The public interest does not include events that members of the public might regard as interesting: such as the grisly details of a recently committed murder or a sexual assault.

Sir Hartley Shawcross's comments support the public interest test and were said to apply equally in NSW by Mr Cowdery QC in his guidelines.

Prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'.[6]

Legal practitioners know that juries in criminal trials frequently reach unanimous verdicts for different reasons: unanimity of reasons for a verdict is not required. The 'merciful verdict' of manslaughter in a trial for murder is an obvious example. I have little doubt that two prosecutors considering the same matter might reach the same conclusion about finding a bill, influenced by different reasons but applying the public interest test as each one sees it.

It is critical that we remember that judgment is not a science; it is an art in which judges [I use the word in its generic sense] may become more skilled with experience in exercising their discretion.

As a consequence, a Crown should have considerable experience of criminal law practice before being required to consider the finding of bills of indictment.

Due to the ever increasing complexity of legal topics the executive government and heads of jurisdiction, when appointing judges who may be required, perhaps, in some executive inquiry, to evaluate the exercise of a Crown's discretion, should appoint judges or legal practitioners who themselves have had wide and relevant experience in the practice of criminal law.

Endnotes

1. Bettina Arndt, 'Selective zealotry of the morals brigade', *The Australian* 18 July 2014, p12.
2. The motto of the coat of arms of the NSW Bar Association – included in the coat of arms by the College of Arms.
3. Per Deane J in *Whitehorn v The Queen* (1983) CLR at 663–664
4. Section 5:
   (1) The functions of a Crown prosecutor are
   (a) to conduct, and appear as counsel in, proceedings on behalf of the Director,
   (b) to find a bill of indictment in respect of an indictable offence, whether or not the person concerned has been committed for trial in respect of the offence,
   (c) to advise the Attorney General or Director in respect of any matter referred for advice by either of them, and
   (d) to carry out such other functions of counsel as the Attorney General or Director approves.
   (2)…
   (3) A Crown Prosecutor does not have the function of determining that no bill of indictment be found or directing That no further proceedings be taken against a person.
5. ODPP, Prosecution Guidelines, http://www.odpp.nsw.gov.au/prosecution-guidelines, No.4. Note the words 'which may include the following' in the introduction to the numbered list.
6. Per Sir Hartley Shawcross QC, UK attorney-general and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951.