

Prosecutors as Ministers of Justice

Speech delivered at the inaugural annual ACT DPP Dinner

Chief Justice Murrell*

2 August 2019

I acknowledge the traditional custodians of this land. Their sovereignty over this land has never been ceded. I extend my respects to their Elders past, present and emerging.

Thank you, Mr Director, for inviting me to speak at this inaugural annual prosecutors' dinner.

I have been asked to talk about the role of prosecutors as ministers of justice.

The title "ministers of justice" sounds glamorous (if you think that politicians are glamorous or aspire to be a minister with a capital M). Although prosecutors can be glamorous (and many of those present tonight *are* glamorous), they must also be completely apolitical and independent.

But before we talk about the modern, glamorous prosecutor, let's first travel back in time, to Victorian England.

A story from Victorian England

The date was 2 June 1865. In summertime, village cricket was the delight of everyone.¹ And so was a good drink on a fine summer's evening. The tavern in Lewes, Sussex, was busy. The townsfolk were joined at the tap-room by the publican's daughter – then aged fifteen. Everyone was settling in for a jolly night.

However, what happened next was far from jolly. The publican's daughter left the tavern at about half past nine. As she went out into the orchard, one of the townsfolk at the tap-room, Mr Puddick, suddenly appeared and grabbed her. On her account, she fainted and was oblivious to what occurred thereafter. But when she regained consciousness and made her way back home, it seemed that she had fallen victim to a heinous crime.

The next day, the young woman's parents confronted Mr Puddick and accused him of "ruining" their daughter. However, no medical examination was undertaken on the young woman until ten days later. When the doctor finally came, he found evidence of sexual assault. He also found evidence of resistance, which (as the able lawyers in this room will have already realised) was inconsistent with the account of complete lack of consciousness.

A trial ensued. It was one of the first trials to which the newly enacted *Denman's Act* applied.² The Act allowed the prosecutor to sum up the evidence during a closing address to the jury – a routine feature of trials today, but an innovative procedure at the time.

The prosecutor exercised this new right. In his closing address, he observed that counsel for defence had called no evidence, and told the jury that, if they were to acquit Mr Puddick, they would, in effect, be convicting the complainant of perjury.

* This is an extended version of the speech delivered at the inaugural annual ACT DPP Prosecutors' Dinner. I thank my associates, Ben Ye and Sienna Lake, for their research and editorial assistance.

¹ *Miller v Jackson* [1977] QB 966.

² *Criminal Procedure Act 1865* (UK).

I am confident that all ACT prosecutors would be appalled by such a submission. It is fundamental that the prosecution bears the onus of proving guilt beyond reasonable doubt, without reference to the consequences for the complainant or any other witness.

Back in 1865, Justice Crompton was also appalled. His Honour said:

Counsel for the prosecution ... are to regard themselves as *ministers of justice*, and not to struggle for a conviction ... not be betrayed by feelings of professional rivalry ... [nor] to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence.³

[Emphasis added.]

While *R v Puddick* was the first reference to the concept that a prosecutor is a minister of justice, the idea had been developing in England for some time.

Forty-seven years earlier in *R v Thursfield*,⁴ in his opening remarks the prosecutor both summarised the anticipated prosecution evidence and foreshadowed the evidence that may be favourable to the defence. This approach moved Baron Gurney of the Exchequer of Pleas, to say:

The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in furtherance of justice, and not to act as counsel for any particular person or party.⁵

The characterisation of prosecutors as ministers of justice has endured.

In 2004 the phrase “ministers of justice” was used by the High Court in the case of *Subramaniam v The Queen*.⁶ It has been adopted by intermediate courts of appeal across Australia.⁷ It has been accepted across the common law world,⁸ as well as by international criminal tribunals.⁹

But what does it mean for a prosecutor to be a minister of justice?

From private prosecutions to public prosecutions

The idea that prosecutors are ministers of justice is founded on the premise that the competent prosecution of criminal offences is a fundamental term of our social contract.¹⁰

In the mid-19th century, the conceptualisation of the prosecutor’s role as being a minister of justice developed parallel to the shift in England from private prosecutions to public prosecutions.

³ *R v Puddick* (1865) 176 ER 662 at 663.

⁴ (1838) 173 ER 490.

⁵ *Ibid* at 490–1.

⁶ [2004] HCA 51; 79 ALJR 116 at [54].

⁷ *R v Hay and Lindsay* [1968] Qd R 459; *The Queen v Tran* [2000] FCA 1888; 180 ALR 62 at [128], cited with approval *Whittaker v Tasmania* [2006] TASSC 26 at [38] (Evans J, with Underwood CJ agreeing); *Kanaan v The Queen* [2006] NSWCCA 109 at [80]; *R v Lucas* [1973] VR 693 at 705 and the authorities there cited.

⁸ See, eg, Justice Steven Chong, ‘The Role And Duties of A prosecutor – The Lawyer Who Never “Loses” A Case’ (Speech delivered to Legal Service Officers and Assistant Public Prosecutors, Singapore, 10 November 2011).

⁹ *Prosecutor v Kordic & Cerkez (Decision on Motions to Extend Time for Filling Appellant’s Briefs)* (ICTY, Appeals Chamber, Case No IT-95-14/2, 11 May 2001) [14]; *Prosecutor v Blaškic (Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings)* (ICTY, Appeals Chamber, Case No IT-95-14-A, 26 September 2000) [32].

¹⁰ Anonymous, *The Secret Barrister: Stories of the Law and How It’s Broken* (MacMillan, 2018) 110.

Prior to the enactment of the *Metropolitan Police Act 1829* (UK) (which created the first modern police forces with some power to prosecute offences), nearly all offences were prosecuted privately by victims at their own expense.¹¹ To put the matter in context, the first office of public prosecutors (probably police officers who lacked any legal training) was created only 10 years after the right to trial by combat was formally abolished in England,¹² after the King's Bench upheld the right in *Ashford v Thornton*.¹³

I know that there are some keen prosecutors in this room, but I doubt they would be willing to put their life on the line; despite his strict fitness routine, I doubt that even the Director would be up for a sword fight today.

The flaws of private prosecutions were obvious. In 1845, a Royal Commission reported that:

The duty of prosecution is usually irksome, inconvenient and burthensome; the injured party would often rather forget the prosecution than incur expense of time, labour and money. When, therefore, the party injured is compelled by the magistrate to act as prosecutor, the duty is frequently performed unwillingly and carelessly.¹⁴

In England, the Treasury Solicitor's Department was granted statutory power to take on prosecutions of particular importance in 1856.¹⁵ Twenty-three years later, and 14 years after *Puddick*, the first Director of Public Prosecutions position was created.¹⁶

In Australia today, it is still possible to bring a private prosecution.¹⁷ However, in the ACT, the DPP is empowered to take over any private prosecution at any stage.¹⁸

Prosecutor's duties

Like all lawyers, prosecutors are officers of the Court,¹⁹ and their paramount duty is to the Court and the administration of justice.²⁰ All lawyers are ministers of justice.

But prosecutors are unique among lawyers in that they need not reconcile their duty to the Court and the administration of justice with a potentially conflicting duty to a client.

The principles applicable to ethical prosecutorial conduct align well with the principles that apply to ethical judicial conduct. The three basic principles against which conduct should be tested are:

- Impartiality
- Independence
- Integrity

These principles have three main objectives. In the case of prosecutors, the objectives are to uphold public confidence in the administration of justice; to enhance public respect for the

¹¹ The Crown and the Attorney-General did occasionally prosecute, but they are usually for matters such as treason.

¹² *Appeal of Murder, etc. Act 1819* (UK).

¹³ (1818) 106 ER 149.

¹⁴ Eighth Report of the Commissioners on Criminal Law, 1845.

¹⁵ *County and Borough Police Act 1856* (UK).

¹⁶ *Prosecution of Offences Act 1879* (UK).

¹⁷ See, eg, the unsuccessful attempt to prosecute Aung Sun Suu Kyi for a crime against humanity in *Taylor v A-G (Cth)*, High Court case M36/2018 (reasons reserved).

¹⁸ *Director of Public Prosecutions Act 1990* (ACT) s 8.

¹⁹ *Legal Profession Act 2006* (ACT) ss 28, 40, 76.

²⁰ *Legal Profession (Barristers) Rules 2014* (ACT) r 1; *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 3.

criminal justice system; and to protect the reputation of individual prosecutors and of the prosecution system as a whole.

Later, I will revisit the important issue of reputation.

Duty to conduct the case impartially, with fairness and with detachment

A prosecutor's fundamental duty is to 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".²¹ It flows that a prosecutor has no interest in securing a conviction at all costs.²²

The fundamental duty to act with fairness and detachment embraces the three basic principles of impartiality, independence and integrity. Most of the other duties of a prosecutor – the duty of disclosure, the duty to call all relevant evidence, the duty to address the jury dispassionately – are just aspects of this fundamental duty.

But advocates like to win their cases

Just as I am telling you now, you have probably told your children or been told as children:

It's not whether you win or lose, it's how you play the game.

But in your heart do you believe it? Do you really expect your children to believe it?

How do you really feel when the jury returns a verdict of "not guilty"? I doubt that you rush back to the office with the good news. It is difficult to be really detached from your case, whether or not you are a prosecutor. As a prosecutor you probably feel emotionally aligned with the complainants and you want to win for their sake. Or the instructing police are highly invested in the case and you want to win for their sake. More fundamentally, most good advocates are Type A personalities. We like to win; we are probably addicted to winning.

You may be comforted to know that your prosecutorial duty and your desire to win are not necessarily incompatible. As a former NSW Senior Public Defender once said:

There is nothing more dangerous than a reasonable Crown.

What prosecutors should and should not do

There is a wealth of case law demonstrating what prosecutors should not do.

- They must not suppress material that tends to undermine the complainant's credit (such as CCTV film that shows her kissing the accused on the night in question, when she says that they had no contact).²³
- They must not sit on witness statements and exculpatory evidence received after the trial, especially where such conduct may delay an appeal.²⁴
- They should not publicly criticise an appeal court that has ordered a retrial, saying that the decision turned on a very minor matter that was "most unlikely to have made any difference to the verdict of the jury" – in effect, suggesting that the appellant was guilty.²⁵

²¹ *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J.

²² *R v Puddick* (1865) 176 ER 662.

²³ This is a personal experience told to me by an ex prosecutor in the ACT.

²⁴ See, eg, *Prosecutor v Kordic & Cerkez (Decision on Motions to Extend Time for Filing Appellant's Briefs)* (ICTY, Appeals Chamber, Case No IT-95-14/2, 11 May 2001) [14], discussed below.

²⁵ *MG v The Queen* (2007) 69 NSWLR 20 at [28]–[29], [46]–[47].

- They must not inject their personal opinion into submissions, e.g. by telling the jury that one of the prosecution witnesses is an “idiot” (coincidentally, a witness whose evidence supported the defence case theory) or that (as proven by many movies that they have seen) after being raped women will invariably bathe because they feel “dirty”.²⁶
- They should not ridicule the defence case, telling the jury that it is “bizarre” or reminiscent of a plot worse than *Desperate Housewives*, nor should they describe the evidence given by the accused as “pathetic”.²⁷
- They should not make media comments commending the excellent police investigation and the fortitude of the victim in the trial that they have just prosecuted.²⁸
- They must not publicly advocate for “innocent” victims, suggesting that the criminal justice system unduly favours accused persons who, after all, are “merely *presumed* innocent”. Nor should they suggest that “every time a guilty person is acquitted the law, in a sense, has failed to community”.²⁹
- They should avoid intimate relationships with defence counsel against whom they are appearing (unless this is disclosed to the accused and the accused doesn’t mind, even after he has been convicted).³⁰

These matters may be obvious to you. However, the reality is that most of these things have happened in Australia, relatively recently. And most of them were not the product of inexperience.

Yet every day around Australia hundreds of prosecutors do the right thing.

An outstanding example is the case of Lawyer X. Victoria Police had used practising barrister Nicola Gobbo as an informant against her own clients, while she was representing them. This caused a miscarriage of justice that tainted possibly hundreds of convictions. Last Friday, the first tainted conviction was quashed, that of Faruk Orman.³¹

The Lawyer X scandal came to light when the Victorian Director for Public Prosecutions decided to disclose to several convicted persons the fact that Victoria Police had used their counsel, Ms Gobbo, as an informer against them. When the decision to disclose was challenged by Victoria Police and Ms Gobbo in court, the Commonwealth Director for Public Prosecutions intervened in the proceedings to support disclosure. Justice Ginnane noted in the primary judgment:

if disclosure of the informer’s identity might provide substantial assistance to a person to challenge a conviction, then no obligation of confidence protects it from disclosure and such a disclosure is not a misuse of the information.³²

If the DPPs had not honoured the duty of disclosure, “fundamental and appalling breaches” of Lawyer X’s obligation to her clients and the court and the “reprehensible conduct” of

²⁶ *R v Livermore* (2006) 67 NSWLR 659 at [18], [33]–[36].

²⁷ *Ibid* at [38]; *R v Liristis* [2004] NSWCCA 287; 146 A Crim R 547 at [90]–[108].

²⁸ *R v TS* [2004] NSWCCA 38; 144 A Crim R 124 at [3], [114]; *MG v The Queen* (2007) 69 NSWLR 20 at [7].

²⁹ *MG v The Queen* (2007) 69 NSWLR 20 at [21], [33], [45]–[46].

³⁰ *R v Szabo* [2001] 2 Qd R 214.

³¹ Danny Morgan and Sarah Farnsworth, ‘Faruk Orman walks free after murder conviction quashed over Lawyer X scandal’ in *ABC News* (online), 26 July 2019 <<https://www.abc.net.au/news/2019-07-26/faruk-orman-walks-free-over-lawyer-x-scandal/11348676>>.

³² *EF v CD* [2017] VSC 361 at [13] (Ginnane J).

Victoria Police³³ may never have been revealed. We would not have known that “the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system”.³⁴

The Directors acted as exemplary ministers of justice.

Some specific duties

Duty of disclosure

At common law, the prosecution must disclose all relevant evidence to the accused. A failure to do so may lead to the quashing of a guilty verdict.³⁵ This duty extends to disclosing significant evidence concerning the credibility of prosecution witnesses, and any other material that may undermine the prosecution case or assist the defence case.³⁶

The duty is continuous and it can extend beyond the end of the trial. It applies to all accused, regardless of the gravity of the accusation. A famous example is the prosecution of Mario Cerkez, a member of the Croatian military accused of crimes against humanity and grave breaches of the *Geneva Convention* during the Croat–Bosniak War. He had been convicted by the Trial Chamber of the International Criminal Tribunal of the former Yugoslavia (ICTY), and sentenced to 15 years’ imprisonment. His appeal was delayed, because the prosecutor had failed to disclose witness statements and exculpatory evidence that were received after the trial.

The ICTY criticised the prosecution for its failure to disclose – a duty that the Tribunal said was part of the prosecutor’s duty as a minister of justice.³⁷ On appeal, Cerkez’s sentence was reduced to 6 years. But by the time that the appeal judgment was delivered, he had already served more than seven years in prison.³⁸ The delay caused by the lack of disclosure materially contributed to the excessive imprisonment.

Duty to call all credible and relevant evidence

The courts cannot review a decision to prosecute (or not to prosecute).³⁹

Similarly, it is a prosecutor who decides what witnesses should be called.⁴⁰ As the High Court recognised in *R v Apostilides*,⁴¹ it is only in exceptional circumstances that a trial judge should call a witness on their own initiative. In my experience, this has never occurred.

The exercise of a discretion to not call a witness is only appealable if, when viewed against the conduct of the trial as a whole, it gives rise to a miscarriage of justice.⁴²

As there is little a trial court can do to scrutinise a prosecutor’s decision, it becomes imperative that the prosecutor call:

³³ *AB v CD; EF v CD* [2018] HCA 58; 93 ALJR 59 at [10].

³⁴ *Ibid.*

³⁵ *Mallard v The Queen* (2005) 224 CLR 125 at [17], citing *Grey v The Queen* [2001] HCA 65; 75 ALJR 1708.

³⁶ See, eg, *Cannon v Tache* (2002) 5 VR 317.

³⁷ *Prosecutor v Kordic & Cerkez (Decision on Motions to Extend Time for Filing Appellant’s Briefs)* (ICTY, Appeals Chamber, Case No IT-95-14/2, 11 May 2001) [14].

³⁸ *Prosecutor v Kordic & Cerkez (Judgment)* (ICTY, Appeals Chamber, Case No IT-95-14/2, 17 December 2004) 299.

³⁹ *Maxwell v The Queen* (1996) 184 CLR 501, 534.

⁴⁰ *MG v The Queen* (2007) 69 NSWLR 20 at [79], citing *Whitehorn v The Queen* (1983) 152 CLR 657.

⁴¹ (1984) 154 CLR 563 at 575.

⁴² *Ibid.*

[a]ll available witnesses ... whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based.⁴³

This includes witnesses whose evidence may be unfavourable to the Crown case.⁴⁴

A prosecutor must refrain from cherry-picking that part of a witnesses' evidence that is favourable to the Crown's case, and glossing over that part that is less helpful to the prosecution case.⁴⁵

However, the duty is restricted to calling material witnesses – witnesses who are able to give credible evidence about matters that are directly in issue in the trial.⁴⁶ Irrelevant evidence is inadmissible at trial.⁴⁷ More importantly, while from a prosecution perspective a lengthy, unfocused trial peppered with irrelevant, repetitious or unreliable evidence may be just be another day at the office, but for the accused, the victim and, the public, any unnecessary delay or wastage means additional costs and further trauma.

Human frailty, discretion and the public interest

Perhaps the 'ministry of justice' should not be left to frail mortals, whose judgement is inevitably affected by unconscious bias, caffeine addiction, and late nights attending to sick children.

Is there a place for non-human prosecution in our legal system? It would certainly bring greater objectivity to the prosecution process.

This is not a dystopian dream but a reality in China. Currently, three Chinese provinces deploy legal 'case management' robots to review cases, check facts, offer sentencing opinions, generate arrest warrants, and approve indictments in simple cases, almost halving the time spent by prosecutors reviewing evidence in one municipality.⁴⁸

I think that your jobs are safe for now. I'm not sure that Australians will want to emulate a criminal justice process that boasts a 99 per cent conviction rate.⁴⁹ In any event, I doubt that Australian robots are up to determining the public interest on a case-by-case basis, while exercising appropriate compassion and having regard to contemporary community standards.

In our system, it may not be in the public interest to prosecute all criminal acts, whether for economic, compassionate or social justice reasons. Prosecutors must exercise a very human discretion when deciding whether it is in the public interest to prosecute, what charge should be laid and whether to accept a plea to a lesser charge.

As Sir Keir Starmer QC MP, former DPP of the UK, remarked:

⁴³ *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 per Dawson J.

⁴⁴ *Mahmood v Western Australia* (2008) 232 CLR 397 at [39] per Hayne J.

⁴⁵ *Jack v Smail* (1905) 2 CLR 684 at 695.

⁴⁶ *Dyers v The Queen* (2002) 210 CLR 285 at [11] per Gaudron and Hayne JJ.

⁴⁷ *Evidence Act 2011* (ACT) ss 55, 56.

⁴⁸ Bai Yaxin, 'Could "robot" prosecutors become common in Chinese legal cases?' in *China Plus* (online), 3 August 2017 <<http://chinaplus.cri.cn/news/china/9/20170803/13319.html>>; Neil Connor, 'Legal robots deployed in China to help decide thousands of cases' in *The Telegraph* (online), 4 August 2017 <<https://www.telegraph.co.uk/news/2017/08/04/legal-robots-deployed-china-help-decide-thousands-cases/>>.

⁴⁹ Terrence McCoy, 'China scored 99.9 percent conviction rate last year' in *The Washington Post* (online), 11 March 2014 <https://www.washingtonpost.com/news/morning-mix/wp/2014/03/11/china-scored-99-9-percent-conviction-rate-last-year/?noredirect=on&utm_term=.239c7fe8185d>.

Prosecutorial discretion is a good thing. It takes the edges off blunt criminal laws; it prevents injustice; it provides for compliance with international obligations; and it allows compassion to play its rightful part in the criminal justice response to wrongdoing. The blunt instruments that criminal law statutes necessarily have to be can be honed into compassionate and appropriate casework decisions by the exercise of the public interest discretion.⁵⁰

The public interest is not stagnant; it changes over time. The legislature may be slow to adopt evolving community attitudes, leaving the DPP to make what may be controversial decisions. Take the laws that criminalised consensual sexual intercourse between males; for many years no prosecutions were brought although the laws still stood.

A contemporary issue where the criminal law collides with the need for compassion and the attitudes of many – but not all – is voluntary assisted dying or euthanasia. In the United Kingdom, the issue arose in the *Purdy* case.⁵¹ Ms Purdy suffered from multiple sclerosis. She asked the DPP for an assurance that her husband would not be prosecuted if he assisted her to travel to Switzerland to end her life. Failing that, she sought the DPP's policy on whether the DPP would prosecute her husband under the *Suicide Act*,⁵² so that she could work out whether her husband was likely to be prosecuted. The House of Lords ruled in Ms Purdy's favour, finding that, on human rights grounds, the DPP had to state their policy in relation to prosecuting in cases of euthanasia.

Recently, your Director decided not to prosecute a euthanasia homicide.⁵³ In his statement of reasons, he referred to UK policy and an Australian paper on 'Prosecutorial guidelines for voluntary euthanasia and assisted suicide', and stated:

I do not formally adopt either of these as policies, their existence informs my discretion to resolve the issues in this case with judgment, sensitivity and common-sense, consistent with the demands of fairness. The considerations in these policies also reflect the application of some of the discrete public interest factors set out in the ACT DPP's Prosecution Policy ... *I have deliberately avoided the adoption of an offence-specific policy in relation to the public interest test.*

[Emphasis added.]

In doing so, the Director made the point that, in a system that emphasises individualised justice, it may be unhelpful to constrain public interest discretion by reference to classes of offences and better to exercise discretion by considering the individual act in question.

Independent and effective prosecutors are essential to a working democracy

There is a strong connexion between independent prosecutors, the rule of law and an effective democracy. A weak or compromised prosecution service endangers the rule of law.⁵⁴

⁵⁰ Keir Starmer, *Legal Action Group Annual Lecture 2013*, quoted in Kim Evans, 'Keir Starmer on "prosecutorial discretion"' in *The Justice Gap* (online), 6 December 2013, <<https://www.thejusticegap.com/keir-starmer-prosecutorial-discretion/>>.

⁵¹ *R (Purdy) v DPP* [2009] UKHL 45; [2010] AC 345.

⁵² *Suicide Act 1961* (UK).

⁵³ Decision of Neville Shane Drumgold, Director of Public Prosecutions ACT in *Police v O* (CC2019/3260) (28 June 2019), <https://www.dpp.act.gov.au/_data/assets/pdf_file/0007/1382353/Police-v-O-DPP-Statement-of-Reasons.pdf>.

⁵⁴ Africa Criminal Justice Reform, 'The independence and structure of the prosecuting authority' (Factsheet 12), February 2019, <<https://acjr.org.za/resource-centre/fact-sheet-12-history-and-structure-of-the-nga.pdf>>, 1.

The South African experience is a contemporary example.

In 1994, apartheid ended and South Africa became a democracy.

Up to 1998, the responsibility for prosecutions had rested both with the independent Attorneys-General of the four provinces and the Justice Minister, who had the power to reverse decisions of an Attorney-General and take over prosecutions. In effect, prosecutions were controlled by the executive.⁵⁵

In 1998, the National Prosecution Authority (NPA) was established. The National Director of Public Prosecutions (NDPP) operates within the NPA.

In 2015, President Zuma informed the then NDPP Mxolisi Nxasana that there would be an inquiry into his fitness for office. Mr Nxasana maintained that he was fit for office and said that he did not wish to resign. However, after an inquiry was set up, Mr Nxasana decided to accept a settlement offer of 17.3 million Rand (around 1.7 million AUD) to vacate the office. President Zuma appointed a new NDPP.

Civil rights organisations brought proceedings challenging the constitutional validity of the removal and replacement. The Constitutional Court ruled that the removal of the NDPP was an unconstitutional abuse of power. The removal and the appointment of a new NDPP were declared invalid, as were provisions in the *NPA Act*,⁵⁶ which permitted the President to extend a NDPP's term of office past retirement age and indefinitely suspend a NDPP without pay. The provisions were described as 'tool[s] that [are] susceptible to abuse',⁵⁷ and that would expose the office holder to 'the temptation to "behave" herself in anticipation of renewal'.⁵⁸ In its judgment, the Court emphasised the NPA's 'pivotal role in the administration of criminal justice', which could not be performed by 'a malleable, corrupt or dysfunctional prosecuting authority'.⁵⁹

Recently, Shamila Batohi was appointed as NDPP. She has a strong vision for the Authority and has stated:

An effective, accountable National Prosecuting Authority needs at least two things: structural independence and competent personnel with expertise and integrity.⁶⁰

South Africa is ranked 73 of 180 countries globally for corruption.⁶¹ This places South Africa above India but behind Vanuatu and Malaysia, on par with Morocco and Tunisia.⁶²

Can one woman be a game changer? Let's watch that space.

Final comments

But back to more parochial matters.

⁵⁵ Ibid at 2.

⁵⁶ *National Prosecuting Authority Act 1998* (South Africa) ss 12(4), 12(6); *Corruption Watch v President of South Africa* [2018] ZACC 23 (Constitutional Court) at [36]–[48].

⁵⁷ *Corruption Watch v President of South Africa* [2018] ZACC 23 (Constitutional Court) at [45].

⁵⁸ Ibid at [43], quoting *Helen Suzman Foundation v President of South Africa*; [2014] ZACC 32; [2015] 2 SA 1 (Constitutional Court) at [81].

⁵⁹ Ibid at [19].

⁶⁰ Cathleen Powell, 'Court fixes some of the flaws in South Africa's prosecuting authority' in *The Conversation* (online), 16 August 2018, <<https://theconversation.com/court-fixes-some-of-the-flaws-in-south-africas-prosecuting-authority-101697>>.

⁶¹ Transparency International, *South Africa*, <<https://www.transparency.org/country/ZAF>>.

⁶² Transparency International, *Corruption Perceptions Index 2018*, <<https://www.transparency.org/cpi2018>>.

Allow me to make a few practical suggestions about how you, individually, might choose to exercise your duty:

- Interrogate the police to make sure that they are not (whether consciously or inadvertently) withholding (or strategically delaying the delivery of) material that may be relevant to the defence.
- Line up the available evidence against the elements of the offence and ask not only whether it tends to prove an element but also whether it tends to disprove an element.
- Just because you can take an objection that doesn't mean that you should take an objection; sometimes it better to let the trial flow, especially where the objectionable question was asked because of the inexperience of defence counsel.

At an organisational level, I know that practical steps are being taken to reinforce the fairness and detachment with which you perform your role:

- Prosecutor duties are reflected in professional guidelines such as the ACT Barristers Rules.⁶³ The Barristers Rules are one means of ensuring that prosecutors conduct themselves with integrity. Consequently, I am pleased that many of you are being supported to join the ACT Bar Association.
- The exchange of lawyers between the DPP and Legal Aid gives you as prosecutors an understanding of what fairness to the accused means in a practical sense.

Finally, I want to return to a topic that I mentioned earlier – reputation. I said that one of the key objectives of promoting ethical conduct by prosecutors is to protect the reputation of individual prosecutors.

A good reputation is critical to the success of any lawyer. But it may mean something different for a prosecutor and defence counsel. A defence counsel may be highly regarded although they are aggressive, difficult and keep their cards close to their chest. However, a prosecutor must always act transparently and fairly, even in the face of extreme provocation by defence counsel.

It is trite to say that:

It takes many good deeds to build a good reputation, and only one to lose it.⁶⁴

Learned, able and glamorous as you are, you may prefer a quotation from Shakespeare's most admired lawyer, Portia, in *The Merchant of Venice*:

How far that little candle throws his beams! So shines a good deed in a naughty world.⁶⁵

⁶³ *Legal Profession (Barristers) Rules 2014* (ACT) rr 62-72.

⁶⁴ Benjamin Franklin, provenance unknown.

⁶⁵ William Shakespeare, *The Merchant of Venice*, Act V, Scene I.