



NEW SOUTH WALES
BAR ASSOCIATION

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 amcconnachie@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