



# Anglo Australasian Lawyers Society

19 May 2022, Australian Club Sydney

**The evolution of the role of the  
Office of the Director Public  
Prosecutions: the challenges of  
meeting expectations of public  
trust.**

Shane Drumgold SC

## Greetings

I would like to acknowledge the Gadigal People of the Eora Nation, the traditional custodians of the land we are meeting on today, and pay my respects to their past, present and emerging elders, and any other indigenous people here today.

Greetings distinguished guests and visitors

## The modern DPP

What makes a successful ODPP? I am not talking about the usual nebulous concepts of pursuing justice and fairness etc, rather how will a community with a successful ODPP differ from one without?

This is a question I recently grappled with, when asked by the Department of Justice and Community Safety, the ACT's version of the AG's department, to prepare a business plan, to support the relatively significant public funds given to my office to conduct its functions.

## What is our office?

It is trite to say that when we talk about the "Office" we are not talking about the cement, glass and fake marble, we are talking about the people. So, let's start by looking at what qualities an ODPP should look for in its people? In other words, what materials do we need to achieve what we need to achieve?

In our business plan, we settled on four important attributes:

- 1) Excellence - be committed to the pursuit of excellence.

We do not believe that natural talent is a thing. It is how people who are mediocre refer to those that are not - to explain why. We believe that the successful get where they are by hard work not talent, and that they constantly pursue improvement. We teach that you do not rise to your aspirations, you fall to your systems, so we assist our staff to develop systems of constant improvement to pursue excellence. We need people who see themselves as future leading silks and build their systems to get there.

- 2) Trust - be trusted by the judiciary, profession and the community.

We believe that trust is not something we pursue, it is our true selves revealed. Once staff have established trust we know, because the judiciary and other stakeholders accept what they say, simply because it comes from their mouth, and that is important when their whole job is speaking on behalf of the community. We caution that once staff have trust, they must protect it because it is a fragile creature. Lost trust will usually outlive the memory of why it was lost.

Trust is something different to skill. Because it extends beyond what a prosecutor does, to how they do it. Trust for a prosecutor requires not just technical compliance with the rule of

law and the rules of ethics, but the very personification of the spirit of those things at all times, regardless of how others in the community or profession conduct themselves.

3) Judgment - be committed to excellence and independence in judgment.

A successful prosecutor will work hard on exercising their judgment as well as their skill. For example, they won't cross examine someone to within an inch of their lives to make themselves look good to the gallery. They will not occupy the lectern for twice as long as they need to, mounting their sixth best argument just in case. They will pick their best arguments and deliver with conviction rather than clutter.

Independence and a sense of agency are essential when working as a prosecutor. A prosecutor will spend most of their working life, surrounded by people trying to undermine their confidence to convince them that their arguments have no merits. A prosecutor's sense of agency must come from the strength of the argument and their confidence in the rigour they applied in producing it, rather than external affirmation.

4) Appearance – a prosecutor will at all times demonstrate they are calm, professional, measured and worthy of community confidence.

A prosecutor will be the personification of the profession, as it should be, regardless of how it is. They will never be arrogant, they will always look calm, they will never use intemperate language, or be petulant, and rarely if ever raise their voice. They will appreciate that they are the face of a profession that someone has been dragged into, often experiencing the worst events in their life and be worthy of this. Terms such as 'Minister of Justice' and 'Model Litigant' must not just inform a prosecutor's decisions, they must visibly describe our appearance.

### Deliverables

So that outlines the materials I need to run my office effectively, now what should we deliver? Again, what will a community with a successful ODPP have that one without will not?

In our business plan, we settled on three main outcomes:

- 1) We will make the community safer;
- 2) We will make the community feel safer; and
- 3) We will do so in an efficient and cost-effective way, using best practice operations.

Efficiency and cost effectiveness is really a discussion between myself and treasury but operationally we build around constant process mapping to ensure we are lean and efficient, and able to rapidly identify and eliminate waste. But how are we achieving our goals of firstly making the community safer, and secondly making it feel safer?

### Community Safety

A couple of years ago I attended the book launch of *The Vanishing Criminal – Causes of Decline in Australia's Crime Rate* by former Director of the NSW Bureau of Crime Statistics and Research, Professor Don Weatherburn and his research colleague Sara Rahman. This book explores crime statistics over the past quarter of a century, with a particular focus on what it advances as a sharp fall in crime rates recorded over the past 20 years. The book uses relatively sophisticated mathematic modelling to test 16 hypotheses to explain the fall, ranging from Australia's aging population through to improvements in house and car security and medical interventions. Although it does not settle on one single cause, the book's modelling suggests that almost all crimes with the exception of sex offences have dropped between 60-70% over the past 20 years, explaining the flattening sex offence statistics as the result of increased reporting rather than increased offending.

I first need to disclose that my analysis of ACT statistics does not support a 60-70% drop in crime, quite the contrary. Indeed, at present we have something of a crisis in prosecuting sex offending, for example as reported in the Canberra Times on 29 March 2021 in the ACT the five year average of sex trials between 2010-2015, more than halved between 2015-2020.<sup>1</sup> The Canberra Times also noted a slight drop in the conviction rate averaged over these five-year periods from 59% to 55%.

As I noted in my comments to the Canberra Times, caution must be applied when randomly selecting single years. With this caveat, the ACT appears to be experiencing a general and significant reduction in the number of sex trials when averaged over a 5-year period which appears contrary to the findings of Weatherburn. It was noteworthy that according to the Canberra Times article, the drop in the number of sex trials appeared at odds with an increase in calls to the Canberra Rape Crisis Centre crisis line that had reportedly grew 300% from 2011-12 to 2019-20, an anomaly worthy of the Sexual Assault Prevention and Response Committee taskforce that produced the Listen: Take Action to Prevent, Believe and Heal report published in November 2021 that highlighted some rather shocking figures. Firstly, in 2020, 87% of victims who reported in the ACT were female<sup>2</sup>. Secondly, ABS studies reveal that only 13% of woman who had experienced sexual assault actually reported it to the police.<sup>3</sup> ABS data further shows that in 2020 'there was a 3.6% decrease in the number of sexual offences reported to ACT policing which resulted in charges being laid'<sup>4</sup>. This meant that only 2.8% of reported sex offences resulted in charges being laid, at least at the 30-day mark.<sup>5</sup> Thirdly, the report suggests a significant hole in the systems protection of our most vulnerable young people, with the Australian data noting that people aged 0-14 years of age were nearly twice as likely to be victims.<sup>6</sup> The ACT Government has accordingly

---

<sup>1</sup> <https://www.canberratimes.com.au/story/7183897/fears-over-drop-in-sexual-assault-trial-numbers/>

<sup>2</sup> Listen: Take Action to Prevent, Believe and Heal Report November 2021, pg 19.

<sup>3</sup> Listen: Take Action to Prevent, Believe and Heal Report November 2021, pg 19.

<sup>4</sup> Listen: Take Action to Prevent, Believe and Heal Report November 2021, pg 35.

<sup>5</sup> Ibid pg 36.

<sup>6</sup> Ibid pg 55.

developed a taskforce to reopen all sexual assault complaints made over the last 18 months to examine why.

ACT crime figures, however, will be different to nationwide figures because my office is the only ODPP in the country that prosecutes both summary and indictable matters making our figures much more elastic to micro-events such as law enforcement trends on particular crime groups. We also have a higher than average transient population.

Based on the number of actual matters coming into my office (as opposed to trials), we have actually experienced an increase. When matters coming into my office per year are averaged over a five-year period from 2010-2015, and compared to the average over the five years (2015-2020), we actually see a relatively large increase in most categories, for example:

- homicide and related offences have increased from 16 to 19.
- dangerous and negligent acts have more than doubled from 51 to 105.
- abduction and related offences have almost tripled from 23 to 68.
- robbery and related offences have increased from 95 to 116.
- drug offences have increased from 195 to 250.
- weapons offences have increased from 74 to 135.
- miscellaneous offences (regulatory) have more than doubled from 224 to 578.
- sexual offences have increased from 114 to 132.

Whilst our figures suggest a slight drop in burglary offences from 182 to 171, theft offences from 366 to 276 and property damage from 139 down to 138, there has been an increase in the five-year annual average of all other reported offence categories of around 75%.

In 2010 the ACT's population was 358,600. In 2020 it was 432,000. That is around a 20% increase in population, so even after a per-capita adjustment, the ACT criminal landscape is trending upwards.

Of interest, we have experienced a clear shift in the way crime is committed. Consistent with the rapid growth of the virtual marketplace, there has been a noted increase in the use of electronic commission as opposed to manual commission, and I query whether our drop in property offences has confused an undetected evolution to the electronic commission of crime with a drop in the crime rate.

ACT trends aside, it is clear from the Weatherburn analysis that Australia as a whole has experienced a nationwide downward trend in crime over the last 20 years, possibly a continuation on a trend dating to the mid-1980s. For example, some reports show that over the last 40 years our per capita homicide rate nation-wide has halved,<sup>7</sup> and the nett average rate across all other crimes has seen a nearly 40% drop, and this trajectory continues.<sup>8</sup>

I think the growth in crime in the ACT is consistent with a jurisdiction evolving from what was essentially a small town in central NSW, into a genuine city/state with grown up

---

<sup>7</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia, pgs. 10, 11.

<sup>8</sup> *Ibid*, pg. 12.

problems. It is quite clear however, that apart from the ACT, since the commencement of ODPPs in the early 1980s (my office being a relatively late comer in 1991) that crime has significantly reduced. I should point out that I am not claiming a solely causal connection, but there is certainly a correlation suggestive that citizens are safer with the current DPPs.

So, does the community feel safe?

### Historic Custody Trends

Firstly, you will note that the figures I cite, deliberately predate the beginning of COVID, which has distorted custody figures.

Sentiment surveys are all quite subjective so let us look at the trends in nation-wide custody. Looking from a historic longitudinal perspective, at the end of penal transportation in the mid-19<sup>th</sup> century, Australia's imprisonment rate per 100,000 population started to fall from around 700, to where it settled at the start of the 20<sup>th</sup> century at an equilibrium of just under 100, where it remained for around 80 years.<sup>9</sup>

Then in the 1980s we changed the way we spoke about criminal conduct in general, as our previous narrative of rehabilitation, and foundation statements such as Winston Churchill's quote *"the mood and temper of the public in the treatment of criminals is the test of civilisation of a country"* fell into the shadow of the increasing simplistic talk of getting tough on crime. A phenomenon leading Cambridge University criminologist Sir Anthony Bottoms coined Populist Punitiveness. In some jurisdictions this narrative has seen the introduction and growth of mandatory sentencing, but in all jurisdictions, it has generally raised the bar on the public's expectations of what constitutes an appropriate sentence.

Immanuel Kant once wrote: *"Enlightenment is man's emergence from his self-incurred immaturity...the inability to use one's own understanding without the guidance of another."* This raises a challenge when the community we serve, do not apply the intellectual rigour required to internally justify their view on the value of punitive measures and appropriate sentences, rather outsource it to shock jocks or fringe politicians, who replace logic with demagoguery, using often insidious racial language such as African Crime Gangs, or religiously based terrorism.

In 1985, Australia's imprisonment rate per 100,000 adults was 96.<sup>10</sup> From that point it has climbed by over 130% to its current rate of 220.<sup>11</sup> To set a historic context, the last time the per capita imprisonment rate was as high as today was about 50 years after the end of transportation at which time it was trending downward, rather than upward.<sup>12</sup>

---

<sup>9</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia pg. 5.

<sup>10</sup> Ibid, pg. 26.

<sup>11</sup> Ibid. In 2018, around 43,000 Australians were in prison, a rate of 221 for every 100,000 adults. See 4517.0 – Prisoners in Australia, 2018 (<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>).

<sup>12</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia. Dr Andrew Leigh MP. pg. 11.

The ripples from this are deep and wide. The results of the 5<sup>th</sup> National Prisoner Health Data Collection ('NPHDC') showed that almost 2 in 5 (38%) prisoners reported they had children in the community who were dependent on them for their basic needs.<sup>13</sup> Further, the 803 prison entrants in NPHDC's data collection had a total of 1,451 children.<sup>14</sup> This means almost two children per prison entrant (1.8) depended on them for their basic needs.<sup>15</sup>

As not all prisoners were asked to be involved in the data collection, the NPHDC sample may not be strictly representative of the total prison population, and sadly there has not been a more comprehensive study in this area. However by applying the ratio of two children per prisoner to the 43,000 prisoners held in Australian prisons as at 30 June 2018,<sup>16</sup> this would loosely suggest that there are over 80,000 children who have a parent in prison.<sup>17</sup> 80,000 little people suffering the impacts of their parent's job loss, deskilling, significant reductions in income, often loss of accommodation, education, and increasing barriers to themselves entering the job market, and more importantly, increased propensity to themselves being drawn into the criminal justice system.

As frequently occurs, the rise in imprisonment rates falls hardest on minorities and the socially disadvantaged. The Indigenous prison population in the early 1990s, at the end of the Royal Commission into Aboriginal Deaths in Custody,<sup>18</sup> was 1,124 per 100,000 adults.<sup>19</sup> In June 2018, it sat at 2,481 per 100,000 adults and has continued at an increasingly steep trajectory.<sup>20</sup>

Australia's imprisonment rate is also getting worse in an international context. Of our four main peers, being Canada, England/Wales, New Zealand and the US, Australia had the lowest imprisonment rate (per 100,000 adults) between 1973-1990.<sup>21</sup> However, by 2016, Australia's imprisonment rate had risen to second place, above Canada and England/Wales.<sup>22</sup> Today, the imprisonment rate in Australia remains second<sup>23</sup>. Although the rate is lower than in the US, the US has seen a decline in imprisonment, particularly for the disadvantaged whereas Australia has witnessed a marked increase.<sup>24</sup>

---

<sup>13</sup> *The health of Australia's prisoners 2018* by the Australian Institute of Health and Welfare, pg. 14.

<sup>14</sup> *Ibid.* The numbers in the NPHDC's report represented the sample in the data collection, and not the entire prison population.

<sup>15</sup> *The health of Australia's prisoners 2018* by the Australian Institute of Health and Welfare, pg. 14.

<sup>16</sup> 4517.0 – Prisoners in Australia, 2018 (<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>)

<sup>17</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia Dr Andrew Leigh MP pg. 19.

<sup>18</sup> The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987–1991).

<sup>19</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia Dr Andrew Leigh MP pg. 19.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, pg. 26.

<sup>22</sup> *Ibid.*, pgs. 6, 27.

<sup>23</sup> *UK Prison Population Statistics*, Briefing Paper, Number CBP-04334, 23 July 2019, by Georgina Sturge, (House of Commons, Library), pg. 4.

<sup>24</sup> Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6546>.

In 2000, the African-American imprisonment rate per 100,000 adults was 3,628, whereas the Australian Indigenous imprisonment rate was 1,438.<sup>25</sup> However, by 2017, US initiatives saw the African-American imprisonment rate drop by 1,300 per 100,000 adults to 2,304, whilst the Australian Indigenous imprisonment rate increased by almost 1,000 per 100,000 adults to 2,433.<sup>26</sup> It is now official - the Australian Indigenous people are currently the most imprisoned race on earth, and the non-indigenous rate is in the US slip stream.

I am not just talking about remote Australia. In the ACT, in 2007, our percentage of Indigenous prisoners was 8.4% against a national average of 24.4%.<sup>27</sup> Fast forward 10 years and whilst the national average has had a marginal increase to 27.4%, the ACT's average had more than doubled to 21.2%.<sup>28</sup> Likewise, with prisoners with a known prior term of imprisonment - for the same period the Australian average has remained the same at 56.5%, however the ACT's figure has grown from 57.4%<sup>29</sup> to 75.1%.<sup>30</sup> This means that not only are prisons not doing a good job at rehabilitation and integration, they are actually increasing a persons chances of a subsequent term of imprisonment.

I expect that high sentences are driven by the communities increasing expectation of higher sentences, that as outlined, is clearly not driven by increased crime, rather an irrational fear of crime, and a false belief that imprisonment can achieve things statistics suggest it is not. This has been documented for over two decades. Back in May 2002, the then Federal Minister for Justice and Customs referred the *Inquiry into Crime in the Community: Victims, Offenders and Fear of Crime* to the House of Representatives Standing Committee on Legal and Constitutional Affairs. Its report tabled in August 2004 found back then that there was "a significant mismatch between the levels of fear of crime and actual levels of crime". This has gotten worse over the past 20 years and substantially impacts the sense of safety and corresponding quality of life of people, and as outlined, I believe our job is not just to keep the community safe, but to make it feel safe.

So how are we performing against the second criteria, making society feel safe. The answer is not very well.

Where to from here?

I am of the view that ODPPs, Governments and indeed the entire legal profession have a role to play in messaging. Rather than talking tough, we should be explaining to the community that they are safer than they have been at any time in history. Explaining that one of the main threats to our safety is the overuse of the rather blunt tool of imprisonment

---

<sup>25</sup> *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia Dr Andrew Leigh MP pg. 28.

<sup>26</sup> Ibid.

<sup>27</sup> 4517.0 - Prisoners in Australia, 2007, Table 3 Prisoners, selected characteristics by states and territories <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02007?OpenDocument>.

<sup>28</sup> 4517.0 - Prisoners in Australia, 2017, Table 14 Prisoners, selected characteristics by states and territories <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02017?OpenDocument>.

<sup>29</sup> 4517.0 - Prisoners in Australia, 2007, Table 3 Prisoners, selected characteristics by states and territories (as n. 23 above).

<sup>30</sup> 4517.0 - Prisoners in Australia, 2017, Table 14 Prisoners, selected characteristics by states and territories (as n. 24 above).



as a method of behavioural reform, that worsening recidivism figures appears to suggest is harming rather than helping.

There is something of an enlightenment movement, however. We have seen many former major stakeholders such as former High Court judges Sir William Deane, Mary Gaudron, and Michael Kirby, many former politicians, former State and Territory judges, former AFP Commissioners and Director of Public Prosecution become patrons of organisations such as the Justice Reform Initiative, aimed at increasing both the activity and accuracy of messaging on the interplay between crime rates and imprisonment figures.

The Office of the Director of Public Prosecutions need to be clear in its goals and responsive to the changes in the landscape to meet them. I am of the view that offices such as mine need to evolve beyond occupying half of the bar table in an adversarial criminal system, to playing a role in improving the quality of life of the community, by promoting a sense of safety commensurate with actual safety. To achieve this, it is my view that we need to become more visible in the landscape and have clear and accurate messaging. Messaging that reduces fear levels and promotes a general sense of safety.

Thank you for providing a platform for my messaging.

Shane Drumgold SC  
19 May 2022