Introduction

At the outset, it is important to put the criminal law enforcement role of police in its appropriate perspective. Former New South Wales Police Commissioner Avery (1991) highlighted the fact that public policing bodies have a multi-faced role. Broadly speaking they are responsible for peace keeping, criminal law enforcement and a general community service function.

However, for the purposes of this forum, this paper will attempt to concentrate on those aspects of the criminal investigation process and their relevance and nexus to the prosecutory and judicial functions albeit which all play a contributory role in the administration of criminal justice. The criminal investigative process is by far one important area of police work which is seen by many police and the public at large as the central role of police organisations in terms of "crime fighting and solving crimes".

It has been expressly stated by the High Court of Australia that the judiciary is independent of any criminal investigation process undertaken by Police. The role of the judiciary is one of the exercising by the Courts of their jurisdiction to enforce, adjust or declare the rights and liabilities of persons, subject to the law, in accordance with the law and the actual circumstances of the case (R v Rogerson: 1992:503).
The completed investigation process may initiate the commencement of the course of justice where it is joined at later stages by the prosecution and ultimately the judiciary. The three processes eventually merge together forming the criminal justice model.

The Role of the Criminal Investigator in New South Wales

In New South Wales, specialised police officers in the area of criminal investigation undertake the vast majority of criminal investigative duties. For convenience purposes I shall refer to these police as "investigators."

Most criminal investigations are carried out by detectives and other plainclothes officers.

Today criminal investigation is largely carried by patrols, specialised Major Crime Squad detectives, certain centralised special agencies and task forces formed under our Major Investigation Plan. The management and co-ordination of such task force investigations is part of my responsibilities as the Commander State Major Incident Group.

Criminal investigation involves both a reactive process responding to individual crimes, and intelligence driven proactive work in so far as targeting suspected individuals or crime industries. These processes merge with the arrest and charging of persons and the prosecution phase with its fairly attentive responsibilities on arresting police and in particular the informant in the matter.

Hence, criminal investigation may be defined as, the systematic search and collection and analysis of information with the aim of identifying perpetrators of crime; the bringing of those before Courts to answer charges, the compilation of the brief of evidence. It involves crime and problem analysis, the interviewing of witnesses, victims and suspects, and intelligence and information gathering analysis processes, preparation of the brief of evidence and Court appearances. In order to carry these functions the investigator must possess an array of skills in the art of investigative techniques, and a practical knowledge of the applicable laws viz, under the Crimes Acts and its implications, the rules of evidence, Court practice and procedure.
The brief of evidence encompasses all relevant and material evidence which is sufficient the substantiate the offence charged at law, albeit of a prima facie level which generally involves contributions from victims, witnesses and investigators.

In giving effect to the enhancement of quality and professionalism of investigative work and thus contributing to the administration of criminal justice, the following investigative schemes and practices are in place in New South Wales:-

- Investigative practices and procedures - laid down in Commissioner's Instruction but subject to constant update.
- Brief handling procedures - a quality control process involving police prosecutor/Legal Services input, time frames and standards.
- Major Investigation Plan.
- Police Informant Management Plan.
- Major Crime Squads Referrals System.
- Computerised Case Management and Investigations Priorities.

The skills of investigators are developed and enhanced by a range of courses and programs, provided by the NSW Police Academy such as:-

- Investigators Course
- Detectives Education Program
- Senior Investigators Course
- Management of Major Investigations Program

Specialist skills courses in such areas as homicide, arson and child protection areas are available on continual education programs, whilst Chiefs of Detectives convene for an annual Conference.
What is an investigation

There is no legal definition of investigation per se. The Collins Australian dictionary defines investigation as a ‘careful examination’.

From a policing perspective criminal investigation can be said to be a response or series of responses which police make whether a crime has been or is about to be committed.

In today's rapidly changing climate, and community and government demands, the investigator must also possess insurmountable care, skill and consideration in all his/her decision making process in terms of management and conduct of investigations which must be nothing short of ethical and professional.

The investigator in his normal course of duties, unequivocally understands the serious consequences of deprivation of an individual's liberty and rights. Hence, in this regard, the investigator is mindful of two important competing requirements. There is the interest of the individual, who should be protected against unlawful arrest, and there is the interest of the public which requires that for the maintenance of order and safety there should be immediate interference with those who break the law. The legislature always intends that the former of these interests and the latter should each receive due attention (Bunning v Cross (1978) 141 CLR 54).

Prosecutions in New South Wales

Successful criminal investigations lead to prosecutions. In New South Wales, the Director of Public Prosecutions (DPP) is the prosecuting authority relative to indictable matters finalised in the District or Supreme Courts. Generally, Police Prosecutors from the regional Legal Services
Branches prosecute summary matters or indictable matters dealt with summarily at Local Courts,

Guidelines issued by the Director of Public Prosecutions, NSW, indicate the following:-

A prosecutor is a "minister of justice". The prosecutor's 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 prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor does not have a "client" in the conventional sense. A prosecutor acts independently, yet in the public interest.

In carrying out that function, `it behoves him - Neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or overpliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."  (R.R. Kidston, QC, former Senior Crown Prosecutor of New South Wales (1958)).

The Director prosecutes. The police (and some other agencies) investigate. The Director has no investigative function.

The Director advises investigators in relation to the sufficiency of evidence to support nominated charges and the appropriateness of charges; but not in relation to operational issues, the conduct of investigations or the exercise of police or agency powers.
Under the DPP Disclosure Guidelines, and DPP Policy, protocols are in place where police investigators comply with evidentiary disclosure provisions of all material evidence directly or indirectly affecting the prosecution case as well as the receipt of legal advice by police.

It is recognised that in a common law system like New South Wales (NSW) the judiciary is independent of any criminal investigation. Criminal investigations resulting in prosecutions can be tested at the judicial level. The separation of function was discussed by the High Court of Australia in *R v Rogerson* (1992) 66 ALJR 500; per Mason CJ at 501:

> ...police investigations do not themselves form part of the course of justice.....  In no relevant sense do the police administer justice, not withstanding that they investigate crime, institute prosecutions (where appropriate) and assist in bringing prosecutions. As Lord Blackburn pointed out in *Coomber v Justices of Berks* (1883) 9 App Cas 61 at 67 `the administration of justice, both civil and criminal, and the preservation of order and prevention of crime by means of what is now called police' are separate functions and not one single function.

The only exception to this separation of function is the operation of the Coroner, who has an inquisitorial function and can direct police investigative activity in the course of an investigation.

Judicial contact can occur during a criminal investigation in relation to the issuing of process authorising the use of investigative procedures ie search warrants, electronic surveillance warrants, etc, as provided by legislation. Beyond that regulatory function the judiciary are not involved in `the investigation'.

Just as investigation and the judicial function are separate functions, the situation between investigation and prosecution is similar. Although separate functions, of necessity, synergy must exist for both functions to operate effectively.
In 1992 there was an attempt to give the Director of Public Prosecutions (DPP) the power to intervene in investigations. The Statute Law (Miscellaneous Provisions) Bill (No. 3) 1992 was the subject of parliamentary discussion. The Bill included a proposed amendment to the Director of Public Prosecutions Act 1986 (DPP Act).

The proposed amendment was to Section 20(2) of the DPP Act, after the words:

\[\text{The Director may advise and assist any Crown Prosecutor, any member of the Police Force or, if so directed by the Attorney General, any other person ....}\]

to omit;

\[\text{in respect of the conduct of criminal proceedings,}\]

and insert instead;

\[\text{in relation to the investigation of criminal activity, the conduct of criminal proceedings and any associated matters.}\]

Opposition to the proposed amendment was led by The Hon. B.H. Vaughan, who reminded the House (Hansard 19/11/92:9372) that Australia does not have the district attorney system, but `what we are about to do here is to give an officer of that body (DPP) the role of investigator as well as prosecutor; The Minister is attempting to give the role of investigator and prosecutor to one person.’ Criticism was made (at 9373) that the suggested amendment was `hidden' in the legislation and that even DPP personnel were unaware of the proposal. `There would have to be adequate consultation on this sort of change. I do not know what the Bar Council has said about it yet .... We have been ambushed: this is dangerous law and something has to be done about it. I put the principle that an investigator and prosecutor cannot be wrapped in the same person. That is absolutely opposed to common law principles.....(it) strikes at the criminal
justice system.' He later refers to the amendment (27/11/92 P.10306) as `the Hawaii Five-O amendment' and `the attempt to turn (the DPP) into a Los Angeles type district attorney's office.

Further debate took place on 27/11/92. The Attorney General, The Hon. J.P. Hannaford indicated (Hansard 27/11/92:10304) that the Government's proposed amendment `was aimed at clarifying the legal position in respect of legal matters being pursued at this time by the Director of Public Prosecutions.' The Attorney General indicated that the Government's view was that the DPP providing advice to the police is in accordance with the law and within his jurisdiction, but the clarification was as a result of comments made by Mr Justice Lee in the Blackburn Royal Commission, who made comment on the `role' the DPP may take under Section 20 in the investigative process. The proposed amendment was deleted from the Bill, which was then passed. Information from the Attorney General's Department Criminal Law Review Division indicates that the proposal was removed from the Attorney General's legislative program pending the DPP and Police settling their position.

Whether police and lawyers can effectively work together on investigations is open to conjecture. Corns (1991) discussed this issue in a study of the National Crime Authority (NCA). The NCA utilise a model of internal multi-disciplinary investigation teams. The investigators are police, led by a lawyer. Corns submits that aspects of the legal and police `sub-cultures' are structurally and ideologically inconsistent, creating the potential for significant intra-organisational conflict. For Corns, the format of the NCA investigative teams was based on the questionable premises that lawyers are the most appropriate persons to head the team and that police and lawyers can work together. Quoting (pp 239-240) a senior non-police member of the NCA staff:

*The leadership .... is vested in persons whose background is the legal profession and the judiciary. Unpalatable or not, it is a fact that the training and experience of these people is neither relevant to running an organisation nor relevant to conducting an investigation. Put simply, the world's finest chef may know nothing about fertilising*
wheat and the world's most eminent QC may know nothing about conducting surveillance.

Although Royal Commissions and other investigative bodies have a blend of lawyers and police in their structures, Corin's article is the only study of the interaction between the two groups.

The English Royal Commission on Criminal Justice (1993:69) considered it was not appropriate for the Crown Prosecution Service (CPS) to supervise police investigations:

We see as central to it (relationship with police) the unambiguous separation of the roles of investigator and prosecutor. It was the need for a separate prosecution authority which led to the establishment of the CPS in the first place. In our view, just as the police should concentrate on discovering the facts relevant to an alleged or reported criminal offence, including those which may tend to exonerate the suspect, so should the CPS concentrate on assessing both the strengths and weaknesses of the case ......

From the foregoing discussion it is submitted that it is appropriate that judges judge, prosecutors prosecute and investigators investigate.

The 'Police Prosecutor' - a conundrum?

Chappell and Wilson (1986:11) indicate that the assignment of the prosecution function to police is unique in the common law world, and particularly so in contrast to the United States and Canada. In both of those countries the police are kept aloof from the process of prosecution - an aloofness believed justified by the basic principles of justice which require independence and impartiality on the part of those exercising discretion concerning the prosecution of offenders. The authors contend that impartiality cannot be attained by combining in one agency the tasks of investigating and prosecuting crime. In the same vein,
the authors make reference to the Lusher Report recommendations that police no longer undertake the prosecution role, and the fact that governments have not acted upon that recommendation.

Sullman (1986), although in a different context, indicated that the traditional conception of the police was that, as criminal law enforcers dealing with crime and the Courts, they would behave as detached, preventive and reactive agents. They would do the job of apprehending offenders and accumulating evidence for presentation at Court. That having been done, the separation of powers and division of functions determined that the task of prosecution, adjudication and sentencing was for others to perform.

Mr Nick Manos (1990), the former Chief Magistrate for South Australia, discussed the suggestion of replacing Police prosecutors with lawyers from the Crown Law Department. He indicated that there are good arguments for and against the suggestion. Manos (1990:44) contends that the suggestion is acceptable if the State could ‘afford’ it, that is, employ experienced and competent lawyers.

...simply removing police prosecutors and replacing them with baby practitioners is not the answer ... police prosecutors are more capable and more stable than inexperienced practitioners ..... once the inexperienced practitioners start to gain experience they leave for greener pastures unless they are also incompetent in which case you are stuck with them. There is no doubt it would take many more legal practitioners than there are presently police prosecutors to do the same amount of work .... we are far better off with police officer prosecutors than any likely cosmetic alternative.

Chief Superintendent J. Murray (1990:98), the then Commander of the South Australian Police Prosecution Services, has also discussed the role of Police prosecutors and the suggestion of replacing them with lawyers.
Critics suggest that police by being involved in the interrogation of suspects, interviewing witnesses, and gathering and selecting evidence, should be `detached' from the conduct of the prosecution....(police) can be tempted to ignore evidence which may doubt the suspect's guilt.

Murray argues that Police prosecutors are separate from investigation and become an `officer of the Court', being frank and fair with defence. He indicates that for an independent body to take over the role would necessarily mean an increase in staff, at a suggested ratio increase at 4:1. Murray predicts that all Police departments will ultimately lose their prosecutorial role.

Police Prosecutors in New South Wales are attached to the regional Legal Services Branches. Their guidelines are analogous to those of the DPP. They do not participate in investigations but are available to give police prompt advice during investigations. The DPP also provide written advice in response to written requests for advice. Police Prosecutors perform the function of presenting the evidence of the prosecution in summary matters and generally assisting in the administration of charge matters before Local Courts.

The Independent Commission Against Corruption (ICAC) (1994) has also examined the role of Police Prosecutors. ICAC (1994:51) discussed suggestions relative to all prosecutions being conducted by qualified lawyers and indicated that one of the justifications of a change was the need for the prosecution to process to be independent of the investigatory agency. It was indicated that:

....there is certainly room for the perception that police prosecutors will tend to do the bidding of their police colleagues, rather than seeking to ensure that a just result is achieved. I speak in terms of perceptions because I have no evidence of that tendency manifesting itself in practice....It would be wrong to assume that a police prosecutor is more likely to behave in a corrupt manner than a qualified lawyer.

The ICAC recommended that a pilot be conducted with a view to having all
prosecutions in a particular police region conducted by DPP lawyers. The pilot has not yet taken place.

Bloch and Weidman (1975:14) indicate that there are many reasons for police and prosecutors to co-ordinate their efforts, their respective efforts impacting on each other. For example, the number of arrests made by police determines the prosecutor’s caseload. ‘There is also a shared responsibility to prepare and present cases (p.14).’ The authors indicate the importance of liaison as a means of improving case preparation (for police) and practices of the individual prosecutors. Policy which may impact on the other department should be discussed prior to implementation, existing policies which cause problems can also be discussed in a cooperative relationship. The authors opine that the prosecutor/police relationship works the best ‘if there is an atmosphere of mutual trust, respect and professional involvement (p.14).’ It is conceded that this may be more easily achieved in smaller centres.

Bloch and Weidman indicate that liaison between police and prosecutors also assists in:

- assessing effectiveness of police units
- identifying supervisors who motivate staff to prepare for and perform well in Courts
- anti corruption measure from prosecutorial success re ‘sensitive’ crimes (gambling/morals)
- identifying suitable supervisors for advancement or effective supervisory practices for universal implementation.

**Police/DPP Liaison**

The New South Wales Police Service has a senior officer (Superintendent) designated as the ‘DPP Co-ordinator’. That officer acts as the primary liaison point between the Police Service and the DPP. Police concerns in relation to DPP performance or decisions are directed to the DPP Co-ordinator who then seeks a response through the DPP counterpart, the Solicitor for Public Prosecutions.
The Senior Police Liaison Officer, (Sergeant), performs as a direct daily link between the DPP staff and operational police. The officer has duties relative to (inter alia) monitoring receipt of briefs of evidence; assisting in preparation of cases and the resolution of particular problems on behalf of the DPP; informing police of `no bill' decisions; contributing to Crime Support Group meetings and police education; and making recommendations relative to security measures for listed criminal hearings.

Crime Support Groups comprise regional representatives of the Police Service and the DPP. These groups are the subject of Commissioner's Instruction 92.37. They convene regularly to address problems affecting either or both organisations. Personnel attending include solicitors from the DPP, District Intelligence or Operation Inspectors, Regional Legal Service Commanders. Invitations to attend such meeting can be extended to members of the Local Court administration, Criminal Listings Directorate, detectives, prosecutors and others involved in investigation and prosecution. The meetings take place on a bi-monthly or on a needs basis.

A recent successful innovation in New South Wales has been the establishment of the Police - DPP Prosecution Liaison Standing Committee. I co-chair that Committee with the Solicitor for Public Prosecutions, Mr Steve O'Connor. Membership comprises senior officers of both organisations and is policy directed. Meetings are also bi-monthly.

It is currently possible for some cases in New South Wales to receive `special attention by the prosecution agency' where gravity of the matter requires that effort. Liaison with the DPP to ensure, for example, the commitment of a dedicated Crown, can be obtained in high profile or complex matters. A ready example of this is the allocation of a Crown Prosecutor in each of two high profile multiple murder cases at a very early stage. Both matters are currently before the Courts and I therefore make no further comment herein.

Relative to police attendance at Court, from a general perspective, it is usually the case that the `informant' police officer, or some other police officer associated with the case, is present.
during the hearing of the matter. This is especially the case in relation to detectives, who tend to follow their cases through to finality. These officers and their commanders display more dedication to the task and fully appreciate the sometime laborious nature of a contested hearing. Anecdotal evidence from some prosecutors indicates that uniform police can be less committed, especially in trial matters, and exhibit an apparent enduring desire to depart the Courtroom as soon as their own evidence is finished. The informant officer, who should possess the most knowledge of the matter, is a vital source of information to a prosecutor and should always be on hand to assist the prosecutor.

Commissioner's Instruction 92.01 is pertinent, it reminds police that they are responsible for proceedings which are initiated in the execution of their duty. The Instruction directs police to attend Court for pleas of not guilty, unless excused. It is perhaps true that current demands on police human resources, electronic and flexible rostering, along with ignorance of the time a Court matter can take, have conspired to discourage police officers staying in Courts and learning more about evidence and the laws they are expected to enforce.

**The Need to Integrate the Investigation and Prosecution phases.**

Clearly the timely completion of the prosecution process is, in large, dependant upon there having been an efficient and focussed investigation. This would seem to have more application to more serious and complex fraud, drug and generally major crime cases where it does make sense to have early input from the prosecutor who will be ultimately responsible for the conduct of the prosecution. For example, involvement from the DPP at an early stage of a corporate or complex investigation so that prosecution issues are able to be addressed at an earlier point in time than would occur under traditional practice where the investigator submits a completed brief which is then considered and assessed by the prosecutor.

For these very reasons it can be argued that for efficiency grounds the investigation and the prosecution functions should be integrated. The denied outcome is collation and presentation of the best available evidence.
The question however, whether evidentiary requirements is reasonable and necessary is based on value judgement made by the prosecution who are responsible and accountable for the conduct of the prosecution. Whether the additional work really needed is a matter of fine judgement: the only test is to refuse it to do it and see if the prosecution succeeds or otherwise.

The Need for Co-operation and Conflict Resolution

Police develop a proprietary interest in their cases, especially ones in which they have invested special efforts as for example dangerous arrests, long stakeouts, or simply the nature of the particular case. They believe this entitles them as much lawyers to have some influence on the disposition of the case. but they are in actual fact the least influential of all actors in the judicial system. There is no coherent and consultative system in place where police are duly informed of case outcomes in terms of alternative prosecutions or where cases are no billed. The reasons stem from several factors. Aside personal interest, police are expected by victims and the general public to know this information. They serve as boundary spanners between the community and the Court system. This is more evident in the smaller country police stations (but would equally apply to metropolitan areas) where the police officer is endeavouring to ascertain the outcome of a case that is the town's serious crime. To the prosecutors office and the judges whose jurisdiction also includes a major city such a case may be just another break and enter. However, the towns people will view this more seriously and will hold the officer in charge of the case responsible for knowing the outcome and being able to explain it.

There is a need for police, prosecutors and judges to co-operate for the purposes of resolving specific issues within the justice system and perhaps just simply to open lines of communication. In seeking better co-operating with Courts and prosecutors, the policing role would be more informative in this context; one which would be seen to be timely and equitably serve the community needs and expectations of victims and the community at large in so far as case management, progress and disposition concerned.
Conclusion

The independence of the investigator, prosecutor and the Court is of paramount importance for the purposes of giving effect to the administration of criminal justice. Each duty must not merely be seen but fundamentally it must be objectively separate in the interests of the community.

However, having said that, each duty cannot effectively function without some form of cooperative and collective response in so far as practices and procedures are concerned to ensure that justice is served appropriately.

It is suggested that the investigator and the prosecutor should play a more active and communicative role up until the sentencing phase. By allowing the investigator to become part of the criminal justice process and to receive feedback on the progress and outcome of the case will provide the basis for any remedial and subsequent enhancement of brief preparation and evaluating and improving the qualitative nature of brief handling and investigative practices.

Lastly, but not of least importance, is that it would serve as a useful corruption preventative tool in the promotion of added responsibility and accountability of ethical investigatory, evidentiary and Courtroom standards.

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