



## **THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

*A Short Address by the Director of Public Prosecutions, Mr Christopher Pryde,  
to Leadership Fiji on Wednesday 18 May 2016 at the Pacific Leadership  
Programme Conference Centre, Flagstaff, Suva.*

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Our Host, Ms Tamara Smith;

The Police Commissioner, Brigadier-General Qiliho;

Mr Dausiga, Fiji Corrections Service;

Young Leaders.

1. First, my thanks to Ms Tamara Smith, the Executive Officer of Leadership Fiji for inviting me to speak to you today on the office that I head, the Office of the Director of Public Prosecutions. My talk will centre on what the role is of the ODPP as a constitutional office and what that means in terms of rule of law and where we sit in terms of government and some of the challenges that we face in that role. I will also talk about how we approach a prosecution.
2. In 2013 a new Constitution was brought into effect and in 2014 Fiji had its first elections under the new Constitution.
3. The elections, however, though undoubtedly historically significant and momentous in the political evolution of Fiji meant very little to constitutional office holders such as the DPP. This is because, as constitutional office holders, our positions and our decisions are not dependent on the executive branch of government. We have three branches of government as I am sure you are aware; the legislative, the executive, and the judiciary. The DPP's Office is a quasi-judicial

office and in this regard we fall outside the three branches of government in terms of accountability for decision making.

4. This means that we do not depend on government for our appointments and we do not consult government on our decisions. In other words, whoever forms a government following an election is a matter of indifference to us and in no way influences the way we go about our decision making. As lawyers in the Office of the Director of Public Prosecutions we are governed in our decision making by three principal ethical considerations; (i) the Fijian Constitution; (ii) our duties as State lawyers to the court as officers of the court; and, (iii), our in-house policy documents.
5. First, the Constitution. The 2013 Fijian Constitution is different from its predecessors in one important way; it weakens the power of the executive branch of government by strengthening the various constitutional institutions of State that in turn act to keep the power of the executive in check. In other words the Constitution limits executive power in favour of institutions such as the ODPP.
6. For example, for the first time, the Fijian Constitution gives the DPP full control over the ODPP budget as well as full control over the appointment of State lawyers and administrative staff which were previously controlled in a somewhat ad hoc manner by the Ministry of Finance and the Public Service Commission respectively.
7. In the past, the executive branch of Government was able through these agencies, and at times did, fetter the independence of the DPP by restricting use of the ODPP budget, for example, by not allowing the DPP to vire funds from one area of the budget to another in order to engage and pay for overseas counsel.
8. Interference by the executive in decision making within the ODPP was also at times exercised through the Public Service Commission by the regulating of staff positions within the ODPP and the holding up or cancelling the appointment of State lawyers involved in sensitive prosecutions.

9. All these were fetters on prosecutorial independence but I hasten to add occurred before my time but not too far in the past to be forgotten. These were real challenges that affected the independence of the ODPP. The 2013 Fijian Constitution however eliminates these fetters by giving the DPP a parliamentary-approved budget and by giving the DPP full control to appoint State lawyers, either locally or from overseas, including administrative staff.
10. The ODPP in Fiji has finally reached the nirvana of administrative and financial independence from the Government of the day. This means that day to day decision making is freed from the weight of having to worry about whether a particular prosecution will please or annoy the government with the related potential adverse consequences. The sword of Damocles has been removed. We are finally free to concentrate on our core function which is to administer criminal prosecutions in Fiji forensically and dispassionately. This is what we do, we are the administrators of the criminal justice system; the gatekeepers in other words.
11. Section 117 of the Constitution sets out the general powers of the DPP that of being to initiate, take over, or discontinue prosecutions. It needs to be noted however that the Constitution does not create the ODPP; it merely states that the ODPP continues in existence. In fact the ODPP was created in 1970 at Fijian independence from Great Britain so the ODPP itself has a long history in Fiji.
12. Second, we are governed by our duty to the Court and with the attendant duties to our learned friends at the Bar with the overriding objective to deliver a fair trial, this most fundamental and absolute of all rights for the individual in criminal procedure. It is not our objective to secure a conviction at all costs. It is our aim to place before the court evidence that we say proves each of the elements of the offence. It is not about delivering justice to a person, it is about testing the credibility of the prosecution case.
13. The third ethical consideration that governs our decision making is the various policy documents published by the ODPP such as the Prosecution Code, the Prosecution Manual, the Code of Conduct, and

our HR Manual which we have uploaded onto our website for public consumption.

14. Nowhere in our deliberations do we consider the interests of government, government policy, or the national interest since those are political considerations. It is only in this way that we can give confidence to the public that a just and principled decision based on the evidence and the law is arrived at. From time to time, we will be approached by different well-meaning groups suggesting or requesting that we take a particular line on certain prosecutions, that we should be more “zealous” or that we should “denounce” certain crimes. We do not. We are, first and foremost, lawyers, not crusaders for a cause, no matter how deserving.
15. So how do we go about a criminal prosecution in Fiji? In Fiji it is the DPP that has the power to initiate, take over or terminate any criminal proceedings but before any decision is made we apply a two-step process; first, is there some evidence touching on each element of the offence so that there is a reasonable prospect of a conviction. If there is, then we ask whether it is in the public interest to prosecute. This is known as the two-step process.
16. As mentioned, the decision making process within the two-step process is completely independent of any direction from any person, even a Minister of Government, including the Attorney-General as chief legal advisor to Government. This means that, subject to the power being exercised in good faith and not for an improper purpose, the decision to institute, take over, or discontinue is for the Director of Public Prosecutions alone and is not reviewable.
17. How does the two-step process operate in practice?
18. First, is the evidence sufficient to sustain the charge; in other words, is there a reasonable prospect of a conviction? This involves an assessment of the reliability of the evidence and the likely defence case. The test is whether a court, properly directed in accordance with the law is more likely than not, to convict the accused of the charge alleged. Of course, once in court, we need to be able to prove the offence beyond reasonable doubt but for the decision to

prosecute the threshold is lower. By the way, this is how we compile our statistics since every high court matter must proceed with the signing of an Information, each time a decision is made a statistic is recorded.

19. Once we have satisfied ourselves there is sufficient evidence only then do we consider whether it is in the public interest to prosecute. As Lord Shawcross, the former Attorney-General of England said: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution." This applies equally in Fiji today. Just because we can doesn't mean we should.
20. The public interest factors in favour or against prosecution are summarised in Fiji's Prosecution Code which in turn is based on similar codes used throughout the common-law world, in particular, England, and they concern such factors as whether the offence is trivial, whether the offence is likely to result in a significant sentence, whether violence was involved, whether the accused was in a position of authority or trust; whether restitution has been offered, and so on. The list is a guide for factors to consider when making a decision as to whether it is in the public interest to prosecute.
21. The public interest must be considered specific to each individual case. For example, it is not appropriate to have a blanket public interest policy that applies to certain offences. Recently in Fiji we have had a number of charges brought into the courts for what is known as "Indecently annoying or insulting a person". This offence previously was known as "Indecently insulting the modesty of a woman" but was amended when Fiji's revamped Crimes Decree was enacted in 2010 to make the offence gender-neutral; a gallant and commendable amendment though no thought seems to have been given as to whether the offence should really remain on the statute books. It is not however the job of the prosecutor to question or usurp the legislator's decision to keep this offence on the statute books. Each case, not matter how trivial, must be looked at and given due consideration before a decision is made. Therefore it would be inappropriate to use public interest as a means to unilaterally

discontinue as a matter of policy offences such as these simply for the reason the ODPP does not think them worth pursuing.

22. The public interest factor acts as an important safeguard against potential arbitrary and illegal action by the security forces. For example, if a suspect has unexplained injuries, it is unlikely the prosecution will continue since it is not in the public interest that prosecutions based on confessions by suspects obtained under the threat of violence or actual bodily harm are continued. We have recent examples in Fiji where prosecutions have been terminated for precisely this reason. Of course, continuing a prosecution in these circumstances would also violate the principle of fair trial so as a matter of public interest, we do not rely on the confessions of suspects obtained in circumstances other than complete and informed voluntary will.
23. Interestingly, as an aside, the 2013 Constitution (section 13 (1) Rights of Arrested and Detained Persons) not only mandates that an arresting officer inform a suspect that he or she has a right to silence but that the suspect must be informed of the consequences of not remaining silent. In terms of rights of accused persons, the right to silence has been strengthened whereas, interestingly, this right has been considerably weakened in other jurisdictions such as England in recent years. (It may harm you defence if you fail to mention something that you later rely on in court).
24. In Fiji the courts at times convene voir dire hearings or “trials within trials.” These mini trials are used when a person claims that the confession they gave to the Police was extracted by the threat or real use of violence. In these mini trials, it is the State that needs to prove to the court beyond reasonable doubt that the confession was voluntary. If the State cannot do this, the confession is rendered inadmissible. If there is no other evidence then the State will have to either withdraw the prosecution or the court will acquit the accused. But the voir dire procedure to test whether a confession was freely given is only used once the matter has entered the criminal justice system. The DPP, as a gatekeeper to the criminal justice system, needs to pre-empt this procedure by satisfying itself that the

confession was given freely. As mentioned, in cases where there are unexplained injuries on a person, the State will discontinue the prosecution or direct the Police not to have persons charged. This is consistent with our duty to the court and the need to ensure that a trial is fair.

25. Equally, and conversely, it is in the public interest that crimes of violence are prosecuted. Here it is important to remember that a crime is not a private matter; a crime is a public matter and that is why the State intervenes. This is the philosophical and moral justification for the State to intervene. The State represents the interests of the victim as well as the interests of the accused in a general sense when the matter goes to court. For this reason, victims of crime are not entitled to control the court process as they might in a civil action by deciding, for example, on whether the matter should continue or not.
26. Once the decision has been made to prosecute, it is the DPP alone that decides whether it is in the public interest that the matter is continued or discontinued. The views and the interest of the victim are considered but they are not determinative. Often we receive representations from victims of sexual offences that say they have reconciled or forgiven the perpetrator of the crime; that they wish to leave the incident behind them and move on with their lives. This is completely understandable from the victim's perspective however as a matter of public policy in most situations the State will continue with the prosecution since it is in the public interest that people who commit these offences are prosecuted.
27. So that is a brief summary on what the ODPP does and what its role under the constitution is and how we approach the decision to prosecute. There are challenges to maintaining the rule of law in any country and Fiji is no exception. With the enactment of the 2013 Constitution however Fiji has for the first time the necessary foundations in place in terms of independence of decision making which is a vital pillar in creating a strong democracy governed by the rule of law.

I thank you for listening to me.

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