



Director's Instruction No. 12

The role of the DPP in the Magistrates Court

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AIM OF INSTRUCTION

To set out the role of the DPP in the Magistrates Court, particularly in regards to the conducting of prosecutions, and the relationship between the DPP and police and other informants.

When conducting prosecutions in the Magistrates Court and in particular in making prosecution decisions and exercising prosecutorial discretions, the Director acts independently. The Director is not acting on the instructions of, or on behalf of the informant.

It is not appropriate for prosecutors to use expressions which indicate they need to seek "instructions" from informants or from the AFP, or indicate that the DPP is appearing "on behalf of" the informant or the AFP.

To which matters does this instruction apply?

This instruction applies to all matters in the Magistrates Court.

THE ROLE OF THE DPP IN THE MAGISTRATES COURT

Criminal proceedings are instituted in the Magistrates Court by an informant, who is a party to the proceedings so instituted. However, in the ACT all criminal matters in the Magistrates Court are prosecuted by the DPP. There are no police prosecutors in the ACT, unlike the situation in every other Australian jurisdiction.

The DPP ("the Director") has three key functions in relation to criminal proceedings in the Magistrates Court:

- instituting prosecutions;
- conducting prosecutions;
- taking over the conduct of prosecutions.

These are three distinct concepts. Rarely will the Director “institute” a prosecution, and rarely does the Director take over the conduct of a prosecution. Mostly, the Director will be conducting proceedings that he or she has not instituted, but which have been instituted by a police officer informant, or some other public official informant. “Taking over the conduct” of prosecutions is different from “conducting” prosecutions.

Generally then, the Director is conducting prosecutions instituted by someone else, without having taken over the conduct of those proceedings.

When conducting prosecutions in the Magistrates Court and in particular in making prosecution decisions and exercising prosecution discretions, the Director acts independently. The Director is not acting on the instructions of, or on behalf of the informant.

The power to conduct a prosecution must include, implicitly at least, the power to discontinue the prosecution. It is the Director’s decision to discontinue, not that of the informant.

It is therefore **not appropriate** for prosecutors to use expressions which indicate they need to seek “instructions” from informants or from the AFP, or indicate that the DPP is appearing “on behalf of” the informant or the AFP.

In many instances prosecutors will need to consult with informants or the AFP, for example:

- to obtain the views of the informant on the question of bail,
- to obtain the views of the informant on representations;
- to ascertain the availability of witnesses or the progress of an investigation.

In some instances, this may necessitate the DPP seeking an adjournment to enable such consultations to take place. However, prosecutors should not use terminology to suggest that they will be seeking “instructions” from the informant in relation to any of those matters.

BACKGROUND

The scheme of the Magistrates Court Act 1930 and Crimes Act 1900

Criminal proceedings are generally started in the Magistrates Court by information laid by the informant (section 25 of the *Magistrates Court Act 1930*). A summons (section 37) or warrant (section 42) may be issued based on that information. Authorised persons

(basically police officers) can also commence criminal proceedings by court attendance notice (section 41B).

Section 53(1)(a) provides that in the hearing of criminal proceedings, the informant may “conduct his or her case personally or by a lawyer”.

The *Crimes Act 1900* also has relevant provisions, particularly in Part 17 which deals with indictable matters able to be dealt with summarily. Section 374 requires “the prosecutor” to elect whether to have the case disposed of summarily in certain circumstances.

The functions of the Director generally

The functions of the Director under section 6 of the *Director of Public Prosecutions Act 1990* (“the DPP Act”) include:

6 Functions

- (1) The director has the following functions:
 - (a) in relation to indictable offences:
 - (i) instituting prosecutions on indictment or summarily;
 - (ii) conducting prosecutions on indictment or summarily, whether instituted by the director or not;
 - (b) in relation to the commitment of persons for trial in respect of indictable offences:
 - (i) instituting proceedings;
 - (ii) conducting proceedings, whether instituted by the director or not;
 - (c) in relation to summary offences:
 - (i) instituting prosecutions;
 - (ii) conducting prosecutions, whether instituted by the director or not;

The provision of **functions** carries with it the **powers** to exercise the functions. The note to section 6(1) is apposite:

A provision of a law that gives an entity (including a person) a function also gives the entity the powers necessary and convenient to exercise the function (see Legislation Act, s 196 (1) and dict, pt 1, defs of entity and function).

It is also necessary to have regard to section 8, which relevantly provides:

8 Taking over the conduct of general proceedings¹

- (1) The director may take over the conduct of general proceedings instituted by another person (other than the Attorney-General) whether or not the person consents.
- ...
- (3) Where the director takes over the conduct of general proceedings instituted by another person, the director may—
 - (a) continue to conduct the proceedings in his or her official name; or
 - (b) cause the proceedings to be brought to an end.

¹ (Note there is a definition of “general proceedings” to mean a prosecution, proceedings or appeal referred to in section 6 (1) (a), (b), (c), (e), (f) or (g). “Proceedings” as used in section 6(1)(b) applies to committal proceedings. Also note that section 7 refers to prosecutions on indictment and provides that “the director may prosecute by indictment in his or her official name indictable offences”.)

- (4) Nothing in subsection (3) (a) prevents the director from continuing to conduct the general proceedings in the name of the person who instituted those proceedings.

Section 12 empowers the Director to give directions to, inter alia, persons who institute or conduct prosecutions.

Section 3 should also be mentioned. It provides:

3 Prosecutions etc begun by other people

A provision of this Act that gives the director a function in relation to a prosecution or proceeding (including a civil proceeding) instituted by someone else applies in relation to the prosecution or proceeding.

This section was originally a transitional provision (section 3(3)), which was remade by A2007-3².

While the original section 3(3) clearly had transitional work to do, it is difficult to understand what work the new section 3 does. Taken literally, it seems to provide that the functions (and consequent powers) of the Director apply to prosecutions or proceedings, notwithstanding that they were instituted by someone else. This appears to emphasise that it is the Director who conducts the proceedings, and not the Director on behalf of another.

That interpretation is consistent with the Explanatory Memorandum for the DPP Act which stated:

The Bill establishes the Office of the ACT DPP, describes the functions of the office, outlines the respective roles of the Attorney-General and the DPP in the prosecution process, confers necessary powers and discretions on the DPP and makes ancillary provisions for the administration of criminal justice in the Territory.

The DPP has the following principal powers and discretions:

- Prosecuting indictable and summary offences against laws of the Territory;
- Taking over and either continuing or ending summary prosecutions which someone else (other than the Attorney-General) has started;

....

The Explanatory Memorandum also noted:

² Section 3 was originally section 3(3) and read:

(3) A provision in this Act that confers on the Director a function or power in relation to a prosecution or proceedings (including civil proceedings) instituted by another person applies in relation to such a prosecution or proceedings whether instituted before or after the commencement of this Act.

What is now section 3 was substituted by A2007-3, with the only explanation being in a note: "existing section 3 (3) is remade in an updated form as new section 3."

... the DPP has general responsibility for conducting prosecutions, including supervising summary proceedings undertaken by other officers. To help the DPP discharge that function the Bill confers on the DPP a power to issue directions or guidelines to the police and other officers engaged in the investigation or prosecution of offences.

All this is consistent with the Director having general responsibility for conducting prosecutions. It is **inconsistent** with the Director prosecuting matters on behalf of the person who instituted the matter.

An interesting question arises as to how this sits with section 53(1)(a) of the *Magistrates Court Act 1930* which provides that in the hearing of criminal proceedings, the informant may “conduct his or her case personally or by a lawyer”. The better view seems to be that to the extent that section 53(1)(a) is inconsistent with the DPP Act and the powers and functions of the Director, the scheme of the DPP Act prevails.

The functions of the Director in the Magistrates Court

Of particular relevance in the Magistrates Court will be the function (and powers) of the Director to:

- conduct prosecutions for indictable offences summarily (cf section 6(1)(a));
- conduct committal proceedings (cf section 6(1)(b));
- conduct prosecutions for summary offences (cf section 6(1)(c)).

Generally the Director will be **conducting** prosecutions in the Magistrates Court. Rarely will the Director **institute** prosecutions in the Magistrates Court. Rarely will the Director **take over** the conduct of prosecutions in the Magistrate Court.

There are thus three concepts identified in the DPP Act:

- instituting prosecutions;
- conducting prosecutions; and
- taking over the conduct of prosecutions.

It seems that these are three **distinct** concepts. It is clear that the Director will mostly be conducting proceedings that he or she has not instituted. As well, taking over the conduct of prosecutions is different from “conducting” prosecutions. This is clear from section 8(4), which comprehends that the Director may conduct general proceedings in the name of the person who instituted them, notwithstanding that the Director has taken them over.

A wide interpretation – emphasising the independence with which the DPP acts - should be given to what is involved in “conducting” prosecutions.

In ***Raymond v Attorney-General*** (1982) 2 All ER 487 the Court of Appeal was considering a provision that enabled the DPP to “undertake ... the conduct of [proceedings instituted or carried on by another person]”. The Court stated at 491:

Section 4 of the 1979 Act has already been cited. It may be observed that while any person may institute or “carry on” any criminal proceedings the director may undertake, at any stage, the “conduct” of those proceedings. The word “conduct” appears to us to be wider than the phrase “carry on” and suggests to our minds that when the director intervenes in a prosecution which has been privately instituted he may do so not exclusively for the purpose of pursuing it by carrying it on, but also with the object of aborting it, that is to say he may “conduct” the proceedings in whatever manner may appear expedient in the public interest. The director will thus intervene in a private prosecution where the issues in the public interest are so grave that the expertise and the resources of the director’s office should be brought to bear in order to ensure that the proceedings are properly conducted from the point of view of the prosecution.

The interpretation that taking over the conduct of prosecutions is different from “conducting” prosecutions is consistent with remarks of Kelly J in ***The Queen v Dainer and Others; Ex parte Pullen*** (1988) 89 FLR 208. That case concerned the interpretation of the equivalent provisions of the Commonwealth *Director of Public Prosecutions Act 1983*. It should be noted that the expression in the Commonwealth Act was “to carry on proceedings” rather than (as in the DPP Act) “conducting” proceedings. At 213, Kelly J held that:

The Act makes a clear distinction between the Director's taking over a prosecution and his carrying on a prosecution and is careful, by s 14(2), to limit the occasions when the Director is deemed to be a prosecutor, informant or complainant to those when he has taken over a prosecution or proceeding. In my opinion the expression "take over" or its derivatives as used in the Act is intended to relate to those occasions when, under s 9(5) [the equivalent of section 8 in the ACT Act], he takes over a proceeding referred to in that subsection with a view to declining to carry it on further.

The expression "to carry on", where used in the Act, in relation to proceedings or prosecutions is intended, I think, to relate to the general conduct of such proceedings except their being "taken over" by the Director so that he may decline to carry them on further. This approach seems to me to accord with that of the Court of Appeal in ***Raymond v Attorney-General*** (1982) 2 WLR 465; 2 All ER 487, where, however, the expression construed was “the conduct of any criminal proceedings”. The Court held that that expression was wide enough to include not only the "carrying on" of proceedings but also their discontinuance.

The power to conduct includes the power to discontinue

In ***Miller v Director of Public Prosecutions (Cth)*** [2005] FCA 482, Weinberg J (himself a former Commonwealth DPP) was considering a challenge to a decision by the Commonwealth DPP to discontinue a matter he had taken over. At 22, His Honour noted:

The power to institute or carry on a prosecution must include, implicitly at least, the power to decline to institute or carry on a prosecution. Indeed, that is precisely what the Director does in every case where he determines that charges that are proposed, or have been laid, should not be brought or continued. It makes no difference whether that decision is based upon a conclusion that the evidence is insufficient to enable it to be said that there are

reasonable prospects of conviction, or upon a conclusion that it is not in the public interest that a prosecution be brought or continued.

Although Weinberg J was considering the Commonwealth Act which uses the expression “carry on” rather than “conduct”, the case is authority for the proposition that the power to conduct **includes** if not expressly then implicitly the power to **discontinue**. The important thing to note is that it is the Director’s decision to discontinue, not that of the informant. It is not a case of the Director acting on the instructions of the informant or “on behalf of” the informant, this latter formulation suggesting agency.

The Director is independent

In a similar vein are cases which emphasise the independence of the Director’s task of making prosecution decisions and exercising prosecution discretions.

In *Price v Ferris* (1994) 34 NSWLR 704, the NSW CCA was considering a prosecution taken over by the NSW DPP pursuant to section 9 of the NSW DPP Act. The NSW Act was different from the ACT Act, as it “deemed” the DPP “to be the prosecutor” once he had taken the prosecution over. It was held (by Kirby P and Meagher JA, Priestley JA dissenting) that where the Director takes over a matter pursuant to the *Director of Public Prosecutions Act 1986*, s 9, he does so to the exclusion of the former prosecutor and must conduct the matter in his own name. The original informant asked the Magistrate in the matter to state a case. The Court held that once the DPP had taken the matter over, the original informant was no longer a party to the action, and could not request the magistrate to state a case.

Because of the difference in the legislation the decision is not directly applicable to the ACT DPP. However, some general observations of Kirby P at 707-8 are worth noting:

What is the object of having a Director of Public Prosecutions? Obviously, it is to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions. Its purpose is illustrated in the present case. The Court was informed that, in the prosecution of a police officer, it is now normal practice in this State for the prosecution to be taken over from a private prosecutor or informant and conducted by the DPP. The purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour. Analyses by law reform and other bodies have demonstrated conclusively how vital are the decisions made by prosecutors: see, eg, Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15) (1980) Canberra, AGPS at 61f. Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence: cf discussion X Connor, “Victorian Director of Public Prosecutions,” (1994) 68 ALJ 488. The power to take over proceedings must be understood against the background of these realities.

The notion that once the DPP had taken over proceedings, the private prosecutor could somehow retain powers and privileges of his or her own (including to appeal) is, in my respectful view, completely incompatible with the scheme of the Act and the language in which it is expressed:

1. The very words take over indicate the interposition of the DPP in the place of the original private prosecutor: see *Regent's Canal and Docks Co v Gibbons* [1925] 1 KB 81 at 84;
2. The powers then given to the DPP after taking over the matter are extremely wide. They include, in s 9(1)(c) of the Act, the express power to institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the offence. That would include not only an appeal to the District Court but also an appeal to the Supreme Court by way of stated case;
3. The provision in s 9(4)(a) of the Act that the DPP is deemed to be the prosecutor does not contradict this view. On the contrary, it is language consistent with the DPP's stepping into the shoes of the original prosecutor, after which time the DPP is "deemed to be the prosecutor", that is, to the exclusion of the prosecutor who initially launched the proceedings;
4. This view of the scheme of the Act is further confirmed by the power of the DPP to decline to proceed further in the prosecution under s 9(4)(b) of the Act. It would be odd indeed if, notwithstanding the power to terminate the prosecution and to institute and conduct appeals to any court in respect of the offence, the private prosecutor thereafter had any standing to do anything whatever. The whole purpose and scheme of the Act is to convert the private prosecutor's rights and privileges to those which are enjoyed by the DPP who is thereafter deemed to be "the prosecutor", that is, the only prosecutor;
5. Nor do I consider that s 10(1) of the Act is inconsistent with this scheme. To the contrary, it enhances the powers of the DPP and assures the DPP of those powers even if the procedural requirements of notice to the private prosecutor are not given. The obligation ordinarily assumed by s 10(1)(b)(i), to give notice in writing to the Registrar or proper officer of the Court concerned, is further evidence of the intention of parliament that the DPP should take over and control the prosecution to the exclusion of the private litigant; and
6. Nor is this a purely theoretical concern. The appearance of total impartiality in prosecutorial decisions is far from theoretical. It is designed to achieve the very practical object of faith in the manifest integrity of the process. This is not so much to exclude people like Inspector Price from having a part after the DPP has taken over his proceedings. It is to uphold the office of the DPP and to assert, after the "take over", that the decisions are manifestly the DPP's and the DPP's alone.

To similar effect is *Tatana v Director of Public Prosecutions (Cth)* [2011] VSC 316, where it was held that where a person commences a private prosecution which is subsequently taken over by the Commonwealth Director of Public Prosecutions pursuant to the *Director of Public Prosecutions Act 1983* (Cth), s 9(5), the person ceases to be a party to the action upon the Director taking over the prosecution. Accordingly, that person has no standing to bring an appeal under the *Criminal Procedure Act 2009* (Vic), s 272.

Making due allowance for the differences in the NSW and Commonwealth legislation, the key factor in these decisions is the exercise of the independent and unfettered discretion of the Director.