ACT Bar Association Conference

5 March 2022, Australian National University

Bounded discretions vs Arbitrary decisions

Applying the ACT Prosecution Policy

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Greetings

I would like to acknowledge the Ngunnawal and Nambri people, 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.

History of the Director of Public Prosecutions:

The office of the Director of Public Prosecutions has its origins in the United Kingdom in the 19th Century. The Australian DPPs were created to remove prosecutorial decisions from the political process. By the 1980s, there was a recognition that Attorneys General were unmistakably political creatures, and it was considered in everybody's interest, including that of politicians, that the Executive appoint a person independent of the political process to make what are often very difficult and contentious decisions.

Tasmania introduced a *Crown Advocate Act* 1973 (Tas) however the first Australian independent Office of the Director of Public Prosecutions was established in Victoria in 1982 (legislation later replaced) and other Australian jurisdictions soon followed suit. The Commonwealth in 1983, Queensland in 1984, New South Wales in 1986, both the ACT and Northern Territory in 1990, South Australia and Western Australia in 1991 and Victoria re-issued a new Act in 1994.

The population of the ACT were historically required to travel to NSW to attend court in either Queanbeyan, Goulburn or Cooma. This was until 1930 when the ACT Court of Petty Sessions was established, where visiting NSW Magistrates would travel to the ACT. The Supreme Court of the Federal Capital Territory was established on 1 January 1934 by the *Seat of Government Supreme Court Act* 1933 (Cth); with the first resident judge, Lionel Lukin appointed in 1934. Prosecution services were provided by the Commonwealth Deputy Crown Solicitor's Office.

In 1974 the ACT's first Chief Magistrate Charles Kilduff was appointed, however Police Prosecutors continued to appear in the ACT Court of Petty Sessions until the late 1970s. From the late 1970s, prosecutions in the ACT Court of Petty Session were taken over by the Commonwealth Deputy Crown Solicitor's Office and then from 1983 the newly formed Commonwealth DPP. On 1 February 1986, the Court of Petty Sessions changed name to the ACT Magistrates Court.

Self-government in the ACT commenced on 4 March 1989 and necessitated the shifting of prosecutorial functions from the Commonwealth to the Territory. The *Director of Public Prosecutions Act 1990* (ACT) had unanimous support in the new Legislative Assembly, with both sides emphasising the independence of the newly created role. The then Attorney General noted in introducing the Bill*: '*The Director of Public Prosecutions is an independent statutory office responsible for prosecuting criminal offences in the name of the Crown. The director's statutory independence ensures that prosecution decisions are perceived to be and are, in fact, made according to legal considerations and are free from political influence*.'* [Hansard 31 May 1990].

The ACT Office of the Director of Public Prosecutions commenced operation on 1 July 1991, with the appointment of the first Director Ken Crispin QC. I am the ACT's 5th Director of Public Prosecutions. I was appointed on 1 January 2019.

Distinct roles of Police and DPP

It is important to note that the tests for charging differ significantly from the tests for continuing a charge through to trial or hearing. In *Latoudis v Casey* (1990) *170 CLR 534*, *549* Dawson J cited (at 549) with approval the comments of Darley CJ in *Ex parte Jones* (1906) 6 SR (NSW) 313*:*

> It is said that police should make careful inquiry into the circumstances before instituting proceedings. I think it would be dangerous to the public welfare if we laid upon the police any such duty, and held that they were bound to make inquiries before commencing prosecution. In making such inquires they might easily be deceived. The proper course for police to pursue, is, if they see that a prima facie case exists, to bring it before the court which has jurisdiction to decide it. It is the duty of the magistrate to decide the case upon the evidence, and not the police to determine whether the accused is guilty or not. In some countries the police have this duty charged upon them of making inquiries, and exercising quasi-judicial functions, but that is not our system. Our system is that **if there is apparently good ground to suspect that an offence has been committed, it is the duty of the police to lay a complaint and bring the accused before a magistrate**.

Laying an information?

The test of "good ground to suspect" finds its way into ACT law in section 26 of the *Magistrates Court Act* 1930 (ACT), which states: 'An information may be laid before a magistrate in any case where a person has committed or **is suspected of having committed**, in the ACT, an indictable offence or an offence that may be dealt with summarily…'

How do police get the defendant before the court to answer an information?

There are four options:

1) The laying of an information is accompanied by a summons for the defendant to appear.

2) Police can issue a court attendance notice to answer the information.

3) Pursuant to section 42 of the *Magistrates Court Act* 1930 (ACT), the AFP may apply for a warrant of arrest, however pursuant to section 42(3) the Magistrate may issue a summons instead *'*if the magistrate considers it appropriate*.'*

4) Pursuant to section 212 of the *Crimes Act* 1900 *(ACT)*, the police may arrest without a warrant. In order to lawfully exercise this power, police are required to reasonably suspect that proceeding via summons would not achieve a purpose in subsection 212(1)(b), namely, ensuring the appearance in respect of the offence, preventing the continuation of the offence, preventing concealment or loss of evidence, preventing

harassment or interference with a person who may be required to give evidence, preventing the fabrication of evidence, or preserving the safety or welfare of the person. Police then have power to charge the defendant and either deny or grant bail by the "authorised officer" being the watchhouse Sergeant.

Broad power of the DPP:

My functions and powers are both provided for, and limited to section 6 of the *Director of Public Prosecutions Act 1990* (ACT), and include:

- In relation to indictable offences - Instituting and/or conducting prosecutions (s6(1)(a));
- In relation to summary offences – instituting and/or conducting prosecution on behalf of someone – in most cases, the AFP (s6(1)(c));
- Doing anything incidental or conducive of the performance of another function (s6(1)(r)).

In *Dix v Attorney-General* [1] the court reminded us that the DPP is not simply a lawyer for the police.

When a single judicial officer acquits an accused, there are significant checks and balances, including a written decision and several levels of appeal of those decisions. It is important to remember that prima facie, a decision to discontinue a prosecution has none of those checks and balances. This has been subject to much academic and judicial comment.

As has been said in UK courts, the primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service. [2]

It has been said that where law ends, discretion begins and the exercise of discretion may mean beneficence or tyranny, justice or injustice, reasonable or arbitrariness. [3]

Further, as outlined in *R v Maxwell* [4] the discretions that are afforded a Director of Public Prosecution are insusceptible of judicial review.

It has been commented that prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. Given the extent of this power and the considerable discretionary powers vested in the Director, they must be exercised in strict accordance with transparent published prosecution policies and guidelines. This is

[1] [2002] AJ No 784.

[2] *R v DPP, ex parte Manning* [2001] QB 330, 343-44 (Lord Bingham CJ).

[3] K Davis, Police Discretion (West Publishing, 1975) 12.

[4] (1996) 184 CLR 501.

particularly so because the decision-making process is rarely, if ever subjected to external scrutiny. [5]

As pointed out by Kirby P, a decision to commence, not to commence or to terminate a prosecution is made independently of the courts, yet they can have the greatest consequences for the application of the criminal law. [6] We walk a fine line between allowing the DPP sufficient independence, whilst ensuring that there is at least some oversight of the Director's duties, given the Office is an unelected one, unanswerable to any constituents. [7]

It has been warned that the Director's discretion can dangerously be synonymous with unchecked power, and it is accepted that public accountability of the branches of government play a role in the criminal law process, [8] so such discretion needs to be exercised with extreme caution, in a transparent, principled and of high-quality way, so it promotes public confidence in the power rather than detracts from it.

The process of prosecutions in Australia at both State and Federal level has historically been one of the most secretive, and poorly documented aspects of the administration of criminal justice. [9] This is changing somewhat with things such as the broad adoption of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Assault, as I will get to shortly, further assisted in the ACT by the recently amended *Victims of Crime Act* 1994 (ACT), and with the commencement of the Victims Charter on 1 January 2021.

This is all in line with the United Nations Guidelines on the role of Prosecutors, requiring Prosecutors vested with discretionary functions to provide guidelines for the exercise of such powers so as to ensure consistency and fairness in the exercise of the discretion. [10]

However, courts have also cautioned that the discretion must not be exercised in blind adherence to policy [11] and requires individualised judgment. [12]

The prosecution policy:

Section 12 of the *Director of Public Prosecution Act* 1990 (ACT) provides for me to give direction or furnish guidelines, which I have done in the form of the 'ACT Prosecution

[5] Dr Denise Lievore, Victim Credibility in Adult Sexual Assault Cases [2004] (288) AIC Trends and Issues in Crime and Criminal Justice 1

[6] *Price v Ferris* (1994) 34 NSWLR 704, 708 (Kirby P).

[7] Public Accountability of Public Prosecutions, Yang K – Murdoch University Law Review (2013) 20(1).

[8] Public Accountability of Public Prosecutions, Yang K – Murdoch University Law Review (2013) 20(1).

[9] Australian Law Reform Commission, Sentencing of Federal Offenders, Report No 15 (1980).

[10] Office of the United Nations High Commissioner for Human Rights, Guidelines on the Role of Prosecutors (1990).

[11] *R v Moore; Ex parte Australian Telephone and Phonogram Officers Association* (1982) 148 CLR 600, 403.

[12] *Cumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480,493.

Policy'. Pursuant to section 12(4) I am required to give a copy of each direction or guideline to the Attorney-General, which thereafter bind my decision making. The principal considerations in whether or not to continue a prosecution are outlined at section 2 of the published ACT Prosecutions Policy.

At 2.1, the policy states: 'The decision to prosecute should not be made lightly or automatically but only after due consideration.'

Broadly there are two considerations as outlined at 2.4: 'The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?'

Reasonable prospect of conviction

To provide the transparency in our considerations, 2.7 outlines a non-exhaustive list of factors for consideration:

> 2.7 The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:
>
> (a) Are the witnesses available and competent to give evidence?
>
> (b) Do they appear to be honest and reliable?
>
> (c) Do any appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?
>
> (d) Do any have a motive for being less than candid?
>
> (e) Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
>
> (f) What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?
>
> (g) If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
>
> (i) Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?
>
> (j) Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?

(k) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?

(l) Where several accused are to be tried together, is there sufficient evidence to prove the case against each of them?

The application of these tests requires reliance on experience in the prosecution of such matters. For example, 2.7(e) requires consideration of potential attacks on the credibility of witnesses, which itself requires a detailed and nuanced understanding of Part 3.7 of the *Evidence Act* 2011 (ACT). Further considerations such as those set out in2.7(i) traverse complex questions of admissibility of evidence spanning the entire *Evidence Act* and knowledge of weighty jurisprudence interpreting the various provisions. Moreover 2.7 (j) requires a complex analysis of the evidence and of both statute law and jurisprudence surrounding Part 3.4 of the *Evidence Act*. Likewise with 2.7(k) consideration must be given to Part 3.9 of the *Evidence Act* and so on.

As outlined at 2.4.2 of the Office of the Director of Public Prosecutions Business Plan 2021-2025, we monitor conviction rates. If the percentage of not guilty is too high or too low, it may suggest the application of the reasonable prospects test in 2.7 of the Prosecution Policy is either too optimistic or too pessimistic, and we work on a ballpark of 30%.

In *Miazaga v Kvello Estate* [1986] 1 SCR 802 the Canadian Supreme Court cautioned at [66] that:

> ... the Crown prosecutor who harbours personal doubt about the guilt of the accused cannot substitute his or her own views for those of the judge or jury in making the threshold decision to go forward with a prosecution. The Martin Report explains as follows, at pp 71-72:
>
> > Crown counsel need not and ought not to be substituting his or her own views for those of the trial judge or jury, who are the community's decision makers. It cannot be forgotten that much of the public's confidence in the administration of justice is attributable to the trial court process that ensures that justice is not only done, but is seen to be done...

<u>This is an important cautionary reminder.</u>

<u>Public interest</u>

In relation to this discretion methodology, in the UK Sir Hartley Shawcross QC's statement as Attorney-General to the House of Commons, in January 1951, pointed out that, '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 prosecutions.'

In launching the UK Crown Prosecution Service on the 1 October 1986, then Director of Public Prosecutions for England and Wales Sir Thomas Hetherington (1977-1987) summarised its main objectives to include to continue prosecutions **while, and only while, they are in the public interest.**

To give these considerations transparency and consistency, 2.9 of the Prosecution Policy acknowledges the Director is invested with significant discretion, and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued. As noted in the Prosecution Policy many factors may be relevant to the public interest, and the weight which should be accorded to them will depend upon the circumstances of each case. Without purporting to be exhaustive however, under the existing Prosecution Policy, those factors may include the following:

> (a) the seriousness or, conversely, the triviality of the alleged offence;
>
> (b) whether it is of a "technical" nature only;
>
> (c) any mitigating or aggravating circumstances;
>
> (d) the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim;
>
> (e) the antecedents and background of the accused;
>
> (f) the staleness of the alleged offence;
>
> (g) the degree of culpability of the accused in relation to the offence;
>
> (h) the effect on public order and morale;
>
> (i) the obsolescence or obscurity of the law;
>
> (j) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
>
> (k) the availability and efficacy of any alternatives to prosecution;
>
> (l) the prevalence of the alleged offence and need for deterrence, both personal and general;
>
> (m) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
>
> (n) whether the alleged offence is of considerable public concern; …

It has been said that the cases envisaged are often ones where the harmfulness of the conduct was relatively low, or where the offender's culpability was low and given the proportionality it is considered not in the public interest to institute full prosecution against these individuals,[13] however these are not exhaustive considerations.

Victim's rights of review

As I noted earlier the Royal Commission into Institutional Responses to Child Sexual Abuse has made important recommendations. Recommendations 40-43 of the Royal Commission

[13] Avon Hirsch and A Ashworth, Principled Sentencing (Hart 2nd ed, 1998) Ch 4.

into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, Parts III to VI, 2017) has recommended the implementation of DPP complaints and oversight mechanisms:

> 40. Each Australian Director of Public Prosecutions should:
>
> a. have comprehensive written policies for decision-making and consultation with victims and police
>
> b. publish all policies online and ensure that they are publicly available
>
> c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.
>
> 41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.
>
> 42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.
>
> 43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports

Pursuant to these recommendations, in 2019 I launched our 'Victim Review Policy' supported by:

1) Victims' Right of Review Director's Guideline (published on ACT DPP website);
2) The ACT DPP Prosecution Policy;
3) Director's Instruction No. 1: Discontinuing prosecutions and significantly amending Statements of Facts in the Supreme Court;
4) Director's Instruction No. 2: Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court and Children's Court;
5) Director's Instruction No.7: Charge negotiations in the Supreme Court;
6) Director's Instruction No. 13: Guidelines for contact with complainants in sexual offence matters;
7) Director's Instruction No.14.1: Review of a decisions to discontinue a prosecution; and
8) Director's Instruction No 14.2: Reviewable decisions to discontinue – contact with complainants, review processes and auditing.

In summary, all homicide, sexual offences and serious violence offences are subject to an automatic review. Less serious violence offences and any other offence against an identifiable victim named in the information are subject to review on request of the victim. There are now processes where a victim may request written reasons for a decision to discontinue a prosecution.

Within the office, the original decision is recorded on a RORD (Record of Reviewable Decision) which also documents any review of the decision. Compliance with the policy is subject to an annual audit by an audit committee, and the results are published in the Annual Report.

Representations to discontinue or significantly amend a case

Representations from defence are much more likely to be successful if they are conscious that I am legally obliged to also consider the complainant's rights, and they address our documented considerations, including:

1) Are the representations based on a) there being no reasonable prospect of conviction, b) it not being in the public interest, or c) a mixture of both;
2) Do the representations clearly address the criteria in 2.7 or 2.9 of the Prosecution Policy;
3) Provide supporting evidence for the submissions;
4) Be courteous and professional – whilst unprofessional representations are still closely considered, discourteous tones often obscure the more valid substance of a representation.

What are not relevant considerations:

1) Issues of costs or offers to not apply for costs do not feature in the published considerations. We start with the assumption that costs generally follow the event in any event:*Latoudis v Casey* (1990) 170 CLR 534
2) Emotional pleas do not assist the application of the published considerations.
3) Threats of media publicity or complaints to government etc do not feature in the published considerations and appear ignorant of the independence of the office.
4) Personal attacks do not assist the representations.
5) External commentary from other cases, or extra-judicial comment on views on a case do not feature in the published considerations.

The most successful representations are those that present logical argument, addressing the published test.

Shane Drumgold SC