Transferring and reinstituting proceedings

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1. Prosecution Policy considerations for reinstituting proceedings

Every decision to reinstitute proceedings should take into account the public interest factors contained in the *Prosecution Policy of the Commonwealth,* which gives specific guidance on re-instituting proceedings:

- after a 'no bill' has been entered (at para 6.25), and
- where a jury has failed to agree on a verdict (at para 6.26).

2. Transferring proceedings where defendants have moved interstate

- **Proceedings on indictment**

If a Commonwealth offence is to be dealt with on indictment as a trial, then the trial must take place in the state where the offence was committed (section 80 of the Constitution). Where section 80 applies, it is mandatory and cannot be waived by an accused – *Brown v R* (1986) 160 CLR 171.

More flexibility exists as to the location of a jury trial where the offence is begun in one state and completed in another or where the offence is not committed in any state – see sections 70 and 70A of the *Judiciary Act 1903*.

As a matter of law, greater flexibility also exists as to the location of sentencing an offender on indictment who pleads guilty provided that the requirements of the *Judiciary Act 1903* are complied with. In effect subsections 68(2), (5) and (7) of the *Judiciary Act 1903*, in combination, confer jurisdiction on State and Territory trial courts to hear a plea on indictment where the accused was

committed by a Magistrate in that State/Territory on that charge and at which committal the accused pleaded guilty – *Pinkstone* (2000) 117 A Crim R 111.

The CDPP may decide to indict an accused to be sentenced in respect of a Commonwealth offence committed in another jurisdiction where it is legally open to do so.

In deciding whether to do so, the circumstances of each matter should be considered. A decision should be taken to indict for sentence in a jurisdiction other than the one where the offence was committed, only where the balance of convenience strongly favours that decision.

In determining the most convenient location for sentencing some of the factors that are relevant are:

- **Where the accused is now located**
  This course should only be considered where the accused is located in the jurisdiction where the sentencing is proposed to take place

- **The expense associated with necessary interstate witnesses attending**
  In this context consideration could be given to seeking agreement to a statement of agreed facts that limits the number of interstate witnesses required.

- **Other public interest factors**
  These will depend on the circumstances of the individual matter. Generally speaking, offences where there is no civilian victim are more likely to be considered appropriate to be sentenced on indictment outside the jurisdiction where the offence was committed. Whether it is appropriate to do so in the particular case will depend on all the circumstances. But where there is a civilian victim and he/she continues to reside in the jurisdiction where the offence was committed this is likely to be a strong factor against agreeing to the offender being sentenced on indictment in another jurisdiction.

- **Summary proceedings**

If the matter can be dealt with summarily, the CDPP can choose where to commence proceedings. In deciding where to commence proceedings, factors to be considered include where the defendant is located, where the offence occurred and where the witnesses are located. For example, in circumstances where a person is likely to plead guilty (eg most social security offenders), the proceedings are generally commenced where the offender is located.

The CDPP may decide to commence proceedings in the location where the offence was committed rather than where the defendant is located if:

- it appears likely that the offender will plead not guilty (eg because he or she has done so on a previous occasion) and most witnesses are located where the offence was committed, or
- there is some other factor which would make instituting proceedings where the offender is located impractical or inconvenient.

Where the defendant has moved interstate since committing the offence, the decision as to where to prosecute a matter may require consideration of transferring the matter from one regional office

to another. In considering whether to transfer a matter from one regional office to a different regional office, the following procedure should be followed:

- if charges have not been laid, the matter should be transferred to a different regional office for charges to be laid in a different jurisdiction if the balance of convenience is against proceeding where the brief has been referred. Factors to consider include:
    - whether there is likely to be a plea of guilty;
    - the number of witnesses required and their location;
    - any other factor that would make it impractical or inconvenient to institute proceedings where the brief has been referred.

  The contemplated defendant should *not* be approached before charges are laid to ascertain how they intend to plead.

  If the matter is transferred to another Regional office, the matter does not need to be reassessed in that Regional office. Charges can be laid on the recommendation of the original regional office.

- if charges have been laid, matters should only be transferred where the balance of convenience is strongly against proceeding where charges have been laid. Factors to consider include:
    - whether a plea of guilty has been indicated;
    - the number of witnesses required if the matter goes to hearing and their location;
    - any other factor that would make it impractical or inconvenient to prosecute the matter where it was charged.

  It is appropriate to consult with the other Regional Office, particularly if a plea of not guilty has been indicated, before deciding to withdraw the current charges and transfer the matter to that other Regional Office.

  If the matter is transferred to another Regional office, proceedings should be re-instituted in the State or Territory to which the matter has been referred. The original proceedings should then be withdrawn.

  If the matter is transferred to another Regional office, the matter does not need to be reassessed in that Regional office. Charges can be laid on the recommendation of the original regional office.

- if a matter has been transferred from where the brief was referred to where the defendant is located and the defendant pleads not guilty, the matter should be reviewed and consideration given to whether it is appropriate for the hearing to continue where the defendant is located or whether the matter should be re-instituted where the brief was originally referred. Proceedings should not be discontinued simply because the defendant has pleaded not guilty. Consideration should be given to the possibility of

obtaining formal admissions from the defence to reduce the number of witnesses required.

- **Guideline on ex parte convictions in NSW**

In the NSW Local Court, a summary offence may be dealt with in the absence of the defendant if the magistrate is satisfied that the defendant had reasonable notice of the date, time and place of the hearing.

Once a defendant is convicted ex parte in NSW, the CDPP should not normally transfer the brief to another CDPP office in another State or Territory for the defendant to be prosecuted for the same offence in the other jurisdiction. This rule applies even where the defendant has not been sentenced in NSW and is known to be in another State or Territory. This is because the defendant has already been convicted of the offence.

Under s4 of the *Crimes (Appeal and Review) Act 2001* (NSW) the defendant or the prosecutor may apply to the Local Court for the annulment of an ex parte conviction. Subsection 4(2) provides that an application must be made with 2 years of the conviction.

The CDPP should not normally use this provision to seek to annul a conviction solely to allow it to prosecute the defendant in the State or Territory to which he or she has moved. However, the annulment provision may be used for other appropriate purposes, primarily where a question or doubt exists as to the defendant's guilt or liability for a penalty.

Subsection 5(1) and paragraph 5(2)(b) of the Crimes (Appeal and Review) Act provide that if the Minister is satisfied that a question or doubt exists as to the defendant's liability for a penalty, the Minister may refer the application to the original Local Court. Subsection 6(1A) provides that an application by the Minster may be made at any time after the relevant conviction is made.

3 Re-institution of proceedings after 'no bill' entered

The entering of a 'no bill' to proceedings by indictment:

- is not a bar to proceedings being reinstituted in respect of the same matter (though that is rare); and
- re-institution of proceedings may be relatively uncontentious where it is later discovered that a 'no bill' was obtained by fraud.

4 Re-institution after dismissal for want of prosecution

Where a magistrate dismisses an information or complaint for want of prosecution – for example where the CDPP was unable to secure the attendance of its witnesses – proceedings can be re-instituted provided they are not:

- barred through the expiration of applicable time limits, and
- the dismissal did not amount to a hearing on the merits.

Whether the CDPP would re-institute proceedings in these circumstances depends on whether the community interest in the prosecution of the matter outweighs the defendant's interest in having the dismissal of the proceedings being treated as the end of the matter. To re-institute the proceedings represents a type of double jeopardy.

Some factors to be weighed are:

- the reasonableness of the magistrate's decision to dismiss the proceedings;
- the seriousness of the alleged offence.

5 Stay applications

The accused may argue in an application that the re-instituted proceedings be stayed as an abuse of process that his or her conduct did not amount to fraud. However, even if the court found that the 'no bill' was not obtained by fraud, it would not follow that the court would have the power to stay the proceedings.

The real question in such an application is whether the re-institution of the proceedings is an abuse of process. If the Director is of the view that the 'no bill' was obtained by fraud, and there is no evidence that he has exercised his prosecutorial discretion unlawfully, a court should not stay proceedings on the basis that it takes a different view.