



# Determining the Appropriate Jurisdiction

Last Update: May 2024<sup>1</sup>

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## **A. OVERVIEW**

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1. The *Constitution* provides that the judicial power of the Commonwealth shall be vested in the High Court of Australia and in such other courts as the Parliament creates and invests with federal jurisdiction.<sup>2</sup> Jurisdictional requirements are fundamental to the success of any criminal prosecution. A prosecution which is conducted without appropriate jurisdiction may be null and void.
2. Federal jurisdiction is the authority to exercise the judicial power of the Commonwealth. Except for specified offences prosecuted in the Federal Court of Australia, all prosecutions for Commonwealth offences are prosecuted in state or territory courts vested with federal jurisdiction. The criminal

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<sup>1</sup> References to the law, policies and guidelines are current as at the date of publication. Users should confirm the currency of all source material at the time of using this document.

<sup>2</sup> *Australian Constitution* s 71.

procedure of the relevant state or territory is picked up and applied by s 68 of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**).

3. The interplay between the *Criminal Code* and the *Constitution*, the *Judiciary Act*, the offence and the factual circumstances involved, will primarily determine where offences can be prosecuted.
4. Prosecutors should have regard to the following provisions when considering the appropriate jurisdiction:
  - 4.1. Section 80 of the *Constitution*, which provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury and every such trial shall be held in the State where the offence was committed.<sup>3</sup>
  - 4.2. Section 70 of the *Judiciary Act*, which provides that when an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be “dealt with tried and punished” in either State or part in the same manner as if the offence had been actually and wholly committed therein.
  - 4.3. Section 70A of the *Judiciary Act* which provides that the trial on indictment of an offence against a law of the Commonwealth not committed within any State and not being an offence to which s 70 applies may be held in any State or Territory. An offence that occurs overseas or partly overseas is also not committed within any State and can therefore be tried anywhere in Australia. In addition, offending that occurs wholly within a Territory can be tried anywhere in Australia.
  - 4.4. Part 2.7 of the *Criminal Code* (Cth) (the **Criminal Code**), which contains a number of provisions that provide geographical jurisdiction for Commonwealth criminal offences.
  - 4.5. The offence provision in the context of the relevant Act .

## **B. SUMMARY MATTERS**

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5. There is no constitutional requirement that summary proceedings for a Commonwealth offence be conducted in the State or Territory in which the offence was alleged to have been committed. If the matter can be dealt with summarily, the CDPP can commence the proceedings in any jurisdiction.
6. It is usually advisable to conduct the summary prosecution of a person in the State or Territory in which the offending is alleged to have occurred. That is because the evidence to support the prosecution will usually be available in that jurisdiction. The balance of convenience will often favour a local prosecution. While it might be more convenient for a defendant who is alleged to have committed an offence in another State or Territory to have their matter heard in the State or Territory in which they reside, it might prove to be inconvenient to witnesses or victims.
7. Where summary charges have been initiated and a defendant now resides in a different jurisdiction than the jurisdiction in which the offence was alleged to have been committed, care should be exercised before agreeing to transfer the matter to a different jurisdiction. Where the reason for a proposed transfer is the relocation of the defendant, the decision to transfer summary proceedings to another jurisdiction can be made by a Principal Federal Prosecutor. In all other circumstances, the decision to transfer summary proceedings to another jurisdiction must be made at the Branch Head level or higher (the Decision Making Matrix (**DMM**) 2.6).

### **Transfer before charges have been served**

8. If a prosecutor becomes aware that a defendant has moved out of the State in which charges have been laid, but the charges have not yet been served, consideration should be given to the most

appropriate jurisdiction in which to conduct the prosecution having regard to the balance of convenience.

9. Factors to consider include:
  - 9.1. whether it is likely the matter will proceed as a plea of guilty;
  - 9.2. the number of witnesses required if the matter goes to hearing and their location; and
  - 9.3. any other factor that would make it impractical or inconvenient to institute proceedings where the brief has been referred.
10. Prosecutors should **not** approach the defendant before charges are served to ascertain how the defendant intends to plead.

#### **Transfer after charges have been served**

11. If a defendant moves interstate after charges have been served, the matter should only be transferred where the balance of convenience is strongly against proceeding where charges have been laid.
12. Factors to consider include:
  - 12.1. whether a plea of guilty has been indicated;
  - 12.2. the number of witnesses required if the matter goes to hearing and their location; and
  - 12.3. any other factor that would make it impractical or inconvenient to prosecute the matter where it was charged.
13. Before deciding to transfer the matter to another jurisdiction and withdraw the current charges, case officers and Prosecution Team Leaders should consult with the relevant Branch Head in the receiving jurisdiction, particularly if the defendant has indicated a plea of not guilty.
14. If the matter is transferred to another jurisdiction, the proceedings on foot must be withdrawn.
15. However, it may be appropriate for the original proceedings to remain on foot until the new proceedings have been initiated, served and there has been an appearance at the first mention.
16. It is essential the prosecutors in each jurisdiction liaise to ensure that the original proceedings are discontinued so that a warrant is not issued in the original jurisdiction for charges that are being, or may have been, dealt with in another jurisdiction.
17. It is **not** appropriate for the original proceedings to remain on foot until the finalisation of the new proceedings. Two separate court proceedings in relation to the same alleged conduct should not be in place for any longer than is absolutely necessary to give effect to the “transfer”.

#### **Ex-parte convictions following a failure to appear**

18. In each State and Territory, if a defendant fails to appear after being served and certain circumstances are met, a Court may deal with a summary offence in the absence of the defendant, including by entering a conviction and imposing a penalty.<sup>4</sup> This can occur where a defendant has moved interstate.
19. Where a defendant has been convicted but not yet sentenced, the CDPD would **not** proactively seek to annul the conviction to transfer and reinstitute proceedings in another State or Territory.

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<sup>4</sup> See *Magistrates Court Act 1930 (ACT)* s 110; *Criminal Procedure Act 1986 (NSW)* s 196; *Local Court (Criminal Procedure) Act 1928 (NT)* s 62; *Justices Act 1886 (Qld)* s 142; *Criminal Procedure Act 1921 (SA)* ss 62, 62A and 62B; *Justices Rules 2003 (Tas)* r 34; *Criminal Procedure Act 2009 (Vic)* ss 25 and 80; *Criminal Procedure Act 2004 (WA)* ss 51 and 55.

If requested to consider or respond to an annulment application and transfer, prosecutors should have regard to relevant statutory provisions in their jurisdiction and the balance of convenience before determining the appropriate response.

### C. INDICTABLE MATTERS

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20. Indictable matters should generally be prosecuted in the jurisdiction in which the offence is alleged to have occurred. It is less common to transfer indictable matters.

#### Offences committed in a State

21. The trial on indictment of a Commonwealth offence must be held in the State where the offence was committed.<sup>5</sup> This is a mandatory requirement which cannot be waived by a defendant or the prosecution.<sup>6</sup>
22. Where a Commonwealth indictable offence is committed wholly in one State, any trial on indictment of that matter must be prosecuted in that state.
23. In all other cases, including where an offence is alleged to have begun in one State or part of the Commonwealth and completed in another State, or not committed in any State and not being an offence to which s 70 of the *Judiciary Act* applies,<sup>7</sup> the prosecutor should consider the most appropriate jurisdiction in which to prosecute. That requires careful analysis of the elements of the offence as charged and the evidence.<sup>8</sup>
24. Where proceedings can reasonably be instituted in two or more jurisdictions, s 70A of the *Judiciary Act* effectively “gives the prosecuting authorities a discretion as to the place where a trial on indictment will be held”.<sup>9</sup>
25. In determining the most appropriate jurisdiction in which to commence proceedings, decision makers should consider the balance of convenience. The factors that might identify where the balance of convenience lies will vary in the circumstances of the case, but may include:
- 25.1. where the defendant is now located, including the need for any extradition procedures;
  - 25.2. where the bulk of the criminality is alleged to have occurred;
  - 25.3. where the arrest occurred;
  - 25.4. whether the matter may proceed as a trial or a plea of guilty;
  - 25.5. the location of any victims;
  - 25.6. the location of the preponderance of witnesses in the matter;
  - 25.7. any expense associated with necessary interstate witnesses attending;
  - 25.8. other costs associated with the litigation, such as setting up litigation infrastructure in a remote area; and
  - 25.9. current delays in any particular jurisdiction.

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<sup>5</sup> Constitution s 80.

<sup>6</sup> See *Brown v R* [1986] HCA 11; (1986) 160 CLR 171, 195 (Brennan J), 204 (Deane J), 214 (Dawson J), in which the Court concluded that an accused person could not waive the requirement of a trial by jury pursuant to s 80 of the *Constitution*. See also, *Alqudsi v The Queen* [2016] HCA 24; (2016) 258 CLR 203, 249 [113], 261 [154] (Kiefel, Bell and Keane JJ).

<sup>7</sup> Offences committed in several States.

<sup>8</sup> See *The Queen v Huston* [2011] QCA 349; (2011) 219 A Crim R 153, 154 [42]-[46], 158 [59]-[64] (Kennedy, Ipp and Owen JJ).

<sup>9</sup> *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455, 475 (Brennan J).

26. In making this determination, decision makers must **not** take into account:
- 26.1. any real or perceived forensic advantages of the procedure, the laws of evidence or the disclosure regime of a particular jurisdiction; or
  - 26.2. the sentencing practices of a particular jurisdiction.
27. It is possible for a defendant who committed an indictable Commonwealth offence in one State and who pleads guilty to that offence to be sentenced in another State, provided that the requirements of the *Judiciary Act* are met. That is because ss 68(2), (5), (7) of the *Judiciary Act* combine to confer jurisdiction on state and territory courts to hear a plea on indictment where the defendant was committed by a Magistrate in that jurisdiction on that charge, regardless of the locality of the offence.<sup>10</sup>
28. That can be achieved either through laying the charge in the jurisdiction in which the sentence will be imposed, or (if charges have already been laid in the State in which the offence was committed) by filing an ex officio indictment in the alternative jurisdiction to facilitate the matter proceeding as a plea in that jurisdiction.

### Offences committed in a Territory

29. The effect of the *Judiciary Act* provisions is that Commonwealth offences committed in a Territory can be prosecuted anywhere.

### Transferring indictable matters

30. In deciding whether to transfer an indictable matter between jurisdictions, decision makers should consider the circumstances of each matter. Matters should only be transferred where the balance of convenience strongly favours a transfer.<sup>11</sup>
31. In determining the most convenient location for sentencing, some of the relevant factors are:
- 31.1. Where the defendant is now located.
  - 31.2. Any expense associated with necessary interstate witnesses attending. In this context decision makers should consider seeking agreement to a statement of agreed facts that limits the number of interstate witnesses required.
  - 31.3. Other public interest factors. These will depend on the circumstances of the individual matter:
    - (a) Generally speaking, matters for which there are no victims<sup>12</sup> are more likely to be considered appropriate to be sentenced on indictment outside the jurisdiction

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<sup>10</sup> *Pinkstone v R* [2000] WASCA 367; (2000) 117 A Crim R 111, 113 [11] (Kennedy, Ipp and Owen JJ).

<sup>11</sup> Where a plea has been negotiated at the committal phase, and where the defendant consents, it might be appropriate and efficient to proceed by way of an ex officio indictment in the new jurisdiction.

<sup>12</sup> The [Victims of Crime Policy](#) defines “victim” to include “an identified individual who has suffered harm as a direct result of an offence or offences committed, or apparently committed, against Commonwealth law or prosecuted by Commonwealth authorities. ‘Harm’ includes physical or mental injury, pregnancy, emotional suffering or economic loss.”

where the offence was committed. Whether it is appropriate to do so in the particular case will depend on all the circumstances.

- (b) Where there is a victim who continues to reside in the jurisdiction where the offence was committed, this is likely to be a strong factor against agreeing to the defendant being sentenced on indictment in another jurisdiction.
- (c) Decision makers should also consider the interests of justice in sentencing occurring in the jurisdiction where the alleged offending occurred.

32. Any decision to transfer indictable proceedings interstate must be made at the Branch Head level or higher (DMM 3.16).

#### D. RELATED RESOURCES

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33. Prosecutors should also consider the following resource:

33.1. [NLD: External Territories Prosecutions](#)

#### E. DOCUMENT RELEASE INFORMATION

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##### Approval for release

<b>Position</b>	Raelene Sharp KC
<b>Date</b>	22 May 2024
<b>Published on CDPP website</b>	Yes

##### Version control

Version	Date	Author	Description	Next review
1.1	May 2024	Legal Capability and Performance	First release. New National Legal Direction as part of Guidelines and Directions Manual Conversion, including Chapter 8: "Transferring and reinstating proceedings".	May 2027