



# Determining the Appropriate Jurisdiction

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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 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 \(Cth\)](#) (the **Criminal Code**), the *Constitution*, the *Judiciary Act*, the offence and the factual circumstances involved, will primarily determine where offences can be prosecuted.

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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.

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*, 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.
5. From time to time, there may be occasions where the Office of the Director of Public Prosecutions (Cth) (CDPP) commences proceedings in one jurisdiction and later must consider whether it is appropriate to conduct those proceedings in a different jurisdiction. There is no formal mechanism to “transfer” prosecution proceedings between the various state and territory courts. A reference to transferring proceedings in this NLD should be read in that context.
6. However, prosecutors can give practical effect to a “transfer” by commencing proceedings in the new jurisdiction and later, at an appropriate time, discontinuing the proceedings in the jurisdiction where the prosecution had first been commenced.<sup>4</sup> This process regularly involves ongoing collaboration between prosecutors working across different CDPP office locations. This process is often referred to by a shorthand as “transferring” proceedings.

## B. SUMMARY MATTERS

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7. 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.
8. 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

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<sup>4</sup> This will often mean that, for a short period of time, the defendant may be subject to two prosecutions for the same offending across multiple jurisdictions. Prosecutors should be mindful of the need to ensure a defendant remains subject to appropriate bail conditions (if on bail) at all times during the transfer process. A defendant’s bail for an existing prosecution should generally not be revoked until the defendant is first subject to appropriate bail conditions in the jurisdiction to which the matter is being transferred.

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.

9. 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 Senior Executive Lawyer (SEL) level or higher (the [Decision Making Matrix \(DMM\)](#) 2.6).

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

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

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

13. 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.
14. Factors to consider include:
  - 14.1. whether a plea of guilty has been indicated;
  - 14.2. the number of witnesses required if the matter goes to hearing and their location; and
  - 14.3. any other factor that would make it impractical or inconvenient to prosecute the matter where it was charged.
15. Before deciding to transfer the matter to another jurisdiction and withdraw the current charges, prosecutors and Prosecution Team Leaders should consult with the relevant SEL in the receiving jurisdiction, particularly if the defendant has indicated a plea of not guilty.
16. If the matter is transferred to another jurisdiction, the proceedings on foot must be withdrawn.
17. 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.

18. 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.
19. 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”.
20. If the transfer was agreed to on the basis that the defendant would enter a plea of guilty in another jurisdiction and that plea is not entered as soon as is practicable (ie at the first appearance) in the new jurisdiction, it may be appropriate to discontinue the prosecution in the new jurisdiction and proceed in the original jurisdiction. Although not ideal, proceedings can always be recommenced in the new jurisdiction at a later date.

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

21. 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>5</sup>
22. Where a defendant has moved interstate and has been convicted in their absence, the CDPP would **not** seek to annul the conviction to transfer and reinstitute proceedings in another State or Territory. If the defendant seeks to annul their conviction, simply to have the matter transferred interstate for sentence proceedings, consideration should be given to the risk of the conviction being annulled and the matter being defended in the new jurisdiction.

#### **C. INDICTABLE MATTERS**

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23. 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.
24. Where a prosecution relates to more than one offence, the appropriate jurisdiction for each individual offence must be considered separately. It may be necessary for the prosecution of some offences to be commenced in one jurisdiction, and the prosecution of other offences to be commenced in another jurisdiction (or deferred to a later date where that is able to be achieved).

#### **Offences committed in a State**

25. The trial on indictment of a Commonwealth offence must be held in the State where the offence was committed.<sup>6</sup> This is a mandatory requirement which cannot be waived by a defendant or the prosecution.<sup>7</sup>

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<sup>5</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.

<sup>6</sup> [Constitution](#) s 80.

<sup>7</sup> See [Brown v The Queen \[1986\] 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] (Kiefel, Bell and Keane JJ), 262 [154] (Nettle and Gordon JJ).

26. Where a Commonwealth indictable offence is committed wholly in one State, any trial on indictment of that matter must be prosecuted in that State.
27. 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>8</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>9</sup>
28. Where proceedings can reasonably be instituted in two or more jurisdictions, s 70A of the *Judiciary Act* effectively “gives the prosecuting authority a discretion as to the place where a trial on indictment will be held”.<sup>10</sup>
29. 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:
  - 29.1. where the defendant is now located, including the need for any extradition procedures;
  - 29.2. where the co-accused are located, including the need for any extradition procedures for co-accused if the matters are to proceed jointly;
  - 29.3. where the bulk of the criminality is alleged to have occurred;
  - 29.4. where the arrest occurred;
  - 29.5. whether the matter may proceed as a trial or a plea of guilty;
  - 29.6. the location of any victims;
  - 29.7. the location of the preponderance of witnesses in the matter;
  - 29.8. any expense associated with necessary interstate witnesses attending;
  - 29.9. other costs associated with the litigation, such as setting up litigation infrastructure in a remote area; and
  - 29.10. current delays in any particular jurisdiction.
30. In making this determination, decision makers must **not** take into account:
  - 30.1. any real or perceived forensic advantages of the procedure, the laws of evidence or the disclosure regime of a particular jurisdiction; or
  - 30.2. the sentencing practices of a particular jurisdiction.
31. 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 a State in which the offence was not committed. For this to occur, certain requirements must be met under the *Judiciary Act*. Sections 68(2), (5) and (7) of the *Judiciary Act* combine to confer jurisdiction on state and territory

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<sup>8</sup> Offences committed in several States.

<sup>9</sup> See *R v Huston* [2011] QCA 349; (2011) 219 A Crim R 153, 165-166 [42]-[46], 169-170 [59]-[64] (Muir and Chesterman JJA, Wilson AJA).

<sup>10</sup> *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455, 475 (Brennan J).

courts to sentence a person for a Commonwealth offence prosecuted on indictment, regardless of where the offence was committed, provided that the defendant is first committed to that court by a magistrate in the same jurisdiction as the sentencing court.<sup>11</sup> This requirement applies even if committal proceedings have already taken place in another jurisdiction.

32. In practical terms, compliance with the *Judiciary Act* provisions is achieved by the laying of “fresh charges” in the jurisdiction in which the sentence proceeding is intended to take place. The matter will need to progress through the committal process before being committed to the higher court. Courts are likely to be receptive to joint requests by the parties for that process to be expedited where the matter has been transferred from interstate by agreement.<sup>12</sup>
33. Importantly, the *Judiciary Act* does not allow the prosecution to file an ex officio indictment in the new State if the offence was not committed in that State. This is because ss 65(2), (5) and (7) only operate to confer jurisdiction on State courts to impose sentence for offences committed outside of that State if a magistrate commits the defendant to a higher court.

### Offences committed in a Territory

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

### Transferring indictable matters

35. 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.
36. When considering transferring a matter to a jurisdiction in which the offence is not alleged to have occurred, prosecutors should follow the guidance set out at [31]-[33] above.
37. When transferring the matter to a jurisdiction in which the offence is alleged to have occurred, it may be possible to give effect to the interstate transfer by filing an ex officio indictment (with the consent of the defendant) in the new jurisdiction.<sup>13</sup> This is because a prosecution of that offence in that jurisdiction is permitted and consistent with s 80 of the *Constitution*, on the basis that the offending took place within that jurisdiction.
38. In determining the most convenient location for sentencing, some of the relevant factors are as follows:
  - 38.1. Where the defendant is now located.
  - 38.2. 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.

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

<sup>12</sup> This process may require the investigative agency to prepare a version of the brief of evidence capable of complying with legislative requirements in the jurisdiction to which the matter is being transferred.

<sup>13</sup> For example, if the commission of an offence involved conduct having been completed across both Queensland and New South Wales, such that the prosecution could have been commenced initially in either jurisdiction, it would be open to give effect to a transfer between those jurisdictions only by presenting an ex officio indictment in the other jurisdiction.

- 38.3. 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>14</sup> 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.
  - (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.
39. Any decision to transfer indictable proceedings interstate must be made at the SEL level or higher (DMM 3.16).
40. Where a decision is made to transfer proceedings, a single CaseHQ file should be maintained for the prosecutions.

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<sup>14</sup> Refer to the [Victims of Crime Policy](#) for the definition of “victim”.