Speech at the ABA conference, 29 August 2025

A. INTRODUCTION

1. I thank the ABA for inviting me to come and speak at this conference. It is a pleasure to be with you all here today on Wear it Purple Day. As a proud ally of the LGBTQI+ community I am pleased to be able to show my solidarity and support for rainbow young people.

2. At the outset, I want to echo the Chief Justice's acknowledgement of the Gadigal people of the Eora Nation, the traditional owners of the lands and waters where we gather today. I pay my respect to Elders past and present and acknowledge that throughout the lands and waters of this country, Aboriginal and Torres Strait Islander peoples were the first law makers and decision makers. Aboriginal and Torres Strait Islander peoples continue to make decisions with respect to their communities, as they have done for longer than any other, being the oldest continuous living culture on the planet.

3. I would like to acknowledge the observations from Chief Justice Bell: the use of AI is alarming. Sadly, the use of AI is creating more work for prosecutors in my office.

4. I will be speaking today about how prosecutors navigate their roles and discharge their duty to consider the public interest, with some observations about how we do that in an era where public sentiment (and public scrutiny) is shaped by a proliferation of new media.

5. To start, I will look at the history of the Commonwealth prosecutorial functions, which, unlike the State Directors, and not surprisingly, has its roots at Federation.

6. I will then move to looking at the three-stage test that guides the prosecutorial discretion. That test is consistent across the federation, but also relevantly across the common law world.

7. I will be focusing on the third stage of that test, which requires a prosecutor to consider whether a particular prosecution is in the public interest. I will explore the guidance offered by the *Prosecution Policy*[1] on how this test is to be applied and what is to be considered, and the implications we can draw from the considerations it articulates.

8. This is often the most difficult aspect of applying the prosecutorial discretion: how do we ensure that what we take into account as the "public interest" actually reflects *the public interest*.

9. Whatever the public interest is, it is not wholly static, but nor does it change quickly.

10. Chief Justice Murrell described it in this way:[2]

> The public interest is not stagnant; it changes over time. The legislature may be slow to adopt evolving community attitudes, leaving the DPP to make what may be controversial decisions. Take the laws that criminalised consensual sexual intercourse between males; for many years no prosecutions were brought although the laws still stood.

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1 Available at: https://www.cdpp.gov.au/prosecution-policy

2 The Honourable Chief Justice Murrell, 'Prosecutors as Ministers of Justice' (Speech, Inaugural Annual ACT DPP Dinner, 2 August 2019), 8.

11. And that is where a lot of the difficulty lies: to what extent do we change our approach to prosecutorial decision-making on the basis of the changing world that we live in and the changing sentiments of the public?

12. Before I come to discuss that, let me start with the history.

B. FEDERAL CRIMINAL LAW: FROM FEDERATION TO 2025

Federal criminal law at federation

13. At federation the Commonwealth's criminal law function was relatively small. There was limited discussion of the topic at the convention debates, although it was part of the landscape. Criminal law is dealt with expressly in the Constitution, but only once: s 80 mandates a trial by jury and sets out where such a trial may be held.

Federal offences

14. The power of the Commonwealth to create criminal offences is contained in the incidental power in s 51(xxxix) and the enumerated powers in s 51.[3]

15. At federation, the first Act passed by the new Commonwealth Parliament was the *Consolidated Revenue Act 1901*(Cth).[4] It was not until the *Customs Act 1901* (Cth), Act No 6 of 1901, passed in the June, that the first federal criminal offences were enacted.[5] The first to appear in the Act was that against s 19:[6]

> Every wharf-owner shall provide to the satisfaction of the Collector suitable office accommodation on his wharf for the exclusive use of the officer employed at the wharf also such shed accommodation for the protection of goods as the Minister may in writing declare to be requisite.
>
> Penalty: Twenty pounds.

16. I am not aware how many charges against s 19 were ever laid, but the *Customs Act 1901* included a number of other offences, notably prohibiting certain imports, which continue to be prosecuted today.[7]

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3 See, for example, the discussion in *R v Tang* (2008) 237 CLR 1, 21 [34] (Gleeson CJ, Gummow, Kirby (on this point), Heydon, Crennan and Kiefel JJ agreeing).

4 The long, long title of that Act is: An Act to grant and apply out of the Consolidated Revenue Fund the sum of Four hundred and ninety-one thousand eight hundred and eighty-two pounds to the service of the period ending the thirtieth day of June One thousand nine hundred and one.

5 Including offences in relation to participating in a smuggling operation, with maximum penalty of 5 years' imprisonment: s 231, for collusive seizures, bribing officers, rescuing goods or assaulting/obstructing officers: s 232, and making a false statement on oath under the Act, punishable by 4 years' imprisonment: s 235. There are 54 sections prescribing a specific monetary penalty for various other offences, and a "catch-all" offence provision, stating that any person who is guilty of any contravention of the Act for which no other penalty is provided will be liable to a penalty of 10 pounds: s 238.

6 By s 5, a provision that contained a penalty was an offence. Section 5 provided: The penalties referred to at the foot of sections indicate that any contravention of the section whether by act or omission shall be an offence against this Act punishable upon conviction by a penalty not exceeding (except as hereinafter provided) the penalty mentioned.

7 *Customs Act 1901* (Cth) s 50, as enacted; *Customs Act 1901* (Cth) s 51 as at 29 August 2025.

Jurisdiction to hear federal offences

17. At federation, unlike the situation in the United States of America, the framers of the Constitution opted not to establish a separate federal court system.

18. Speaking at the 40th Anniversary of the Federal Court in 2017, then Justice Weinberg KC reflected on the state of the "autochthonous expedient" so described by the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[8] noting the decision was made principally because:[9]

> … investing state courts with federal jurisdiction was seen as cheaper, and easier to manage, than creating a dual system of courts. It was thought that it would have been burdensome to create a hierarchy of federal courts and tribunals, given the small population of this country.

19. Although we have since seen the establishment of the Federal Court of Australia with jurisdiction (albeit not exclusive) over all matters of federal civil law, we have not seen the same development in relation to federal criminal law. Other than the limited crime types within the Federal Court's criminal jurisdiction, prosecutions for federal offences continue to be carried out in State and Territory Courts exercising federal jurisdiction[10] as conferred by the *Judiciary Act 1903* (Cth).[11]

The prosecutorial function

20. At federation there was no Director of Public Prosecutions. The Attorney-General, as the First Law Officer of the Commonwealth, was responsible for the prosecution of federal offences.

21. In 1903, various matters in relation to offences against the laws of the Commonwealth were legislated in the *Judiciary Act 1903* (Cth). Notably that:

    21.1. indictable offences were to be prosecuted by indictment in the name of the Attorney-General: s 69(1); and that

    21.2. the Attorney-General had the power to discontinue the prosecution against any person under commitment on a charge for an indictable offence: s 71.

22. From federation, the prosecutorial powers and functions of the Commonwealth were exercised by the Attorney-General, and his (or her) offices and later the Crown Solicitors Offices.[12]

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8 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

9 The Hon. Justice Mark Weinberg KC, 'Federal indictable offences: has the 'autochthonous expedient' run its course?' (Speech, 40th anniversary of the Federal Court of Australia Conference, 9 September 2017), 1.

10 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J); *Gould v Brown* (1998) 193 CLR 346, 379; *Solomons v District Court* (NSW) (2002) 211 CLR 119, 144 [53].

11 See s 68 (both as enacted in 1903 and as amended).

12 Commonwealth, *Parliamentary Debates*, Senate, 10 November 1983, 2496 (Gareth Evans, Attorney-General). See, also, Michael Rozenes KC, 'Prosecutorial Discretion in Australia Today' (Speech, Australian Institute of Criminology Conference, 18 April 1996), 7.

Development of federal criminal law

23. Despite the first offences being created in the *Customs Act 1901*, there was no dedicated *Crimes Act* until 1914.[13] That offences were found in different Acts and the early court arrangements of the federation led to some issues, to say the least.

24. In the second reading speech for the *Crimes Act 1914*, the then Attorney-General, Mr William (Billy) Hughes, observed:[14]

> … as it has been held that the Commonwealth cannot have recourse to the common law, it follows that in every case where an offence committed against the Commonwealth is not dealt with under any State Statute the proceedings by the Commonwealth in respect to that offence stop short at committal. The Commonwealth may deal with the matter up to the point when the offender is committed for trial, but beyond that it has no status at all. Obviously, that is a most undesirable state of affairs, and it affected the Commonwealth very materially in several important prosecutions quite recently, notably Customs frauds and frauds against the Maternity Allowance Act.

25. And so in 1914, the *Crimes Act 1914* was enacted, making offences "against the Commonwealth offences against the law of the Commonwealth and therefore justiciable in Commonwealth Courts."[15]

26. It was not until 1979 that the Australian Federal Police was established. Prior to that there had been attempts at creating such a force. In 1917 there was the "Commonwealth Police Force" which lasted only two years. In 1927 the "Commonwealth Police (Federal Capital Territory)" was formed, after Parliament moved to Canberra. In 1960 a third Commonwealth Police was created, but it was not until after the Hilton Hotel Bombing in 1978 that the AFP was finally formed.[16]

27. In 1982, as a result of the recommendation "and revelations" in the Costigan Royal Commission on the activities of the Federated Shop Painters and Dockers Union, parliament established the position of the Special Prosecutor in the *Special Prosecutors Act 1982* (Cth).

28. The Special Prosecutor, Mr Robert Redlich AM KC, was appointed for a fixed term, but extended his term to overlap with the creation of the Director of Public Prosecutions.[17]

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13 The *Customs Act 1901* (Cth) contained a number of provisions relating to procedure. See, for example: Part XIV "Customs Prosecutions", which included provisions relating to the prosecutor and court in which proceedings could be brought (prosecutions against the Act may be instituted "in the name of the Minister", and in the High Court: s 245); limitations (a 5 year period: s 250); and that "In every Customs prosecution except for an indictable offence or for an offence directly punishable by imprisonment the defendant shall be compellable to give evidence": s 254(3)). The Act also provided for inchoate offences (aiding and abetting, s 236 and attempt: s 237), and what must be the first minimum penalty. Section 243 provided: The minimum pecuniary penalty for any offence against this Act shall be one-twentieth of the maximum which is prescribed in pounds.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1914, 264-265 (William Hughes, Attorney-General).

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1914, 264-265 (William Hughes, Attorney-General). Quite which "Commonwealth Courts" were contemplated is not clear. Other than the High Court, there were no such other Courts.

16 See: The Beginnings of the AFP. https://www.afp.gov.au/about-us/history/unique-stories/beginnings-afp

17 1983-1984 Annual Report of the *Office of the Special Prosecutor*, [1.1].

29. The next major development in federal criminal law was the creation of the statutory Director of Public Prosecutions role and the Office of the Director of Public Prosecutions, in the *Director of Public Prosecutions Act 1983* (Cth).

30. Finally, although this is not the end of the story, the Commonwealth enacted the *Criminal Code Act 1995* (Cth), codifying federal offences in the *Criminal Code* (Cth).

The *Director of Public Prosecutions Act 1983* (Cth)

31. The Commonwealth was the second Australian jurisdiction to establish an independent statutory Director of Public Prosecutions (**DPP**), following just behind Victoria.[18] Most of the other Directors were formalised within the decade.

32. Appointing an independent Director and vesting prosecuting authority in that role occurred against the backdrop of the perceived imperative for a specialist federal prosecuting agency to be established – an agency capable of prosecuting the most complex federal criminal matters.[19]

33. In reading the Bill a second time, the then Attorney-General, Mr Gareth Evans, said:[20]

> The Bill establishes an Office of the Director of Public Prosecutions with the main functions of conducting Commonwealth prosecutions and exercising discretions in relation to prosecutions.

34. Assigning the function of bringing prosecutions to an independent Director ensures the independence of the prosecutorial process from those who make the laws. It seeks to avoid the irreconcilable conflict between the ideals of independence and impartiality in prosecutorial decision-making from political imperatives, including the principle of ministerial accountability which applied to the Attorney-General.[21]

35. The then Attorney-General went on to say:[22]

> … the Director appointed under the Act will provide leadership, guidance and direction to, and will set high professional standards for, all persons engaged in the prosecution work of the Commonwealth.

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18 *Director of Public Prosecutions Act 1982* (Vic). That Act replaced the Criminal Law Branch of the Crown Solicitor's Office with the Victorian DPP. For the context that led to the creation of the *Public Prosecutions Act 1984* (Vic), which included removing from the Victorian Director the power to control the Office of Public Prosecutions, see Jude McCulloch, Greg Connellan and Alastair Isles, 'Putting the politics back into Prosecution' (1994) 19(2) *Alternative Law Journal* 78.

19 Christopher Craigie SC, 'Prosecutorial independence, accountability and integrity' (Speech, 2009 Meeting of Australian and Pacific Chief prosecutors, 21 October 2009), 3.

20 Commonwealth, *Parliamentary Debates*, Senate, 10 November 1983, 2496 (Gareth Evans, Attorney-General). Notwithstanding the creation of the Director of Public Prosecutions, the Attorney-General retains the power to prosecute on indictment: s 10(1) of the *Director of Public Prosecutions Act 1983* (Cth). The Attorney-General's power to discontinue proceedings is found in s 71 of the *Judiciary Act 1903* (Cth). The most recent exercise of that power was in relation to the prosecution of Mr Bernard Collaery. On 7 July 2022, acting pursuant to s 71(1) of the *Judiciary Act 1903*, the then Attorney-General declined to proceed further with the prosecution.

21 Michael Rozenes KC, 'Prosecutorial Discretion in Australia Today' (Speech, Australian Institute of Criminology Conference, 18 April 1996), 7.

22 Commonwealth, *Parliamentary Debates*, Senate, 10 November 1983, 2496 (Gareth Evans, Attorney-General).

36. That guidance continues to be an important aspect of the role,[23] and the guidance contained in the *Prosecution Policy* is the main focus of my talk.

37. Mr Ian Temby AO KC was appointed as the first Director. In his first Annual Report, after just over 3 months in the role and at a time when only the Canberra and Melbourne offices had been set up, he described the Office as a new initiative representing "a fresh approach to the prosecution functions of the Commonwealth". He explained the two main reasons for establishing both the role and a separate Office to support the exercise of those functions, were:[24]

    37.1. to ensure that key decisions in relation to enforcement of the criminal law of the Commonwealth are made on an objective and professional basis, without the fact or appearance of political involvement; and

    37.2. to improve the standards of performance in relation to Commonwealth criminal law enforcement, where work demands had increased greatly over the preceding decade, and that work had become more difficult and complex.

The CDPP today

38. I now have some visuals for you.

39. These documents, helpfully called "placemats" contain a snapshot of the key statistics explaining who we are and what we do. This document is publicly available and is updated annually.[25]

40. As the Director of Public Prosecutions for the Commonwealth, my role, in its simplest terms, is to carry out the functions of the first law officer of the Commonwealth in so far as they relate to the prosecution of federal offences.[26] In addition, I am also responsible for the Office of the Director for Public Prosecutions (the entity known as the CDPP), that is both in the general sense and within the meaning of the finance law of the Commonwealth.[27]

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23 As the then Director Christopher Craigie SC observed Establishing clear lines of responsibility and the development of consistency in decision making is critically important in ensuring independence and adherence and accountability to one's remit in the law enforcement process. This highlights the importance of policies and guidelines to assist prosecutors exercising their responsibilities, 'Prosecutorial independence, accountability and integrity' (Speech, 2009 Meeting of Australian and Pacific Chief prosecutors, 21 October 2009), 3.

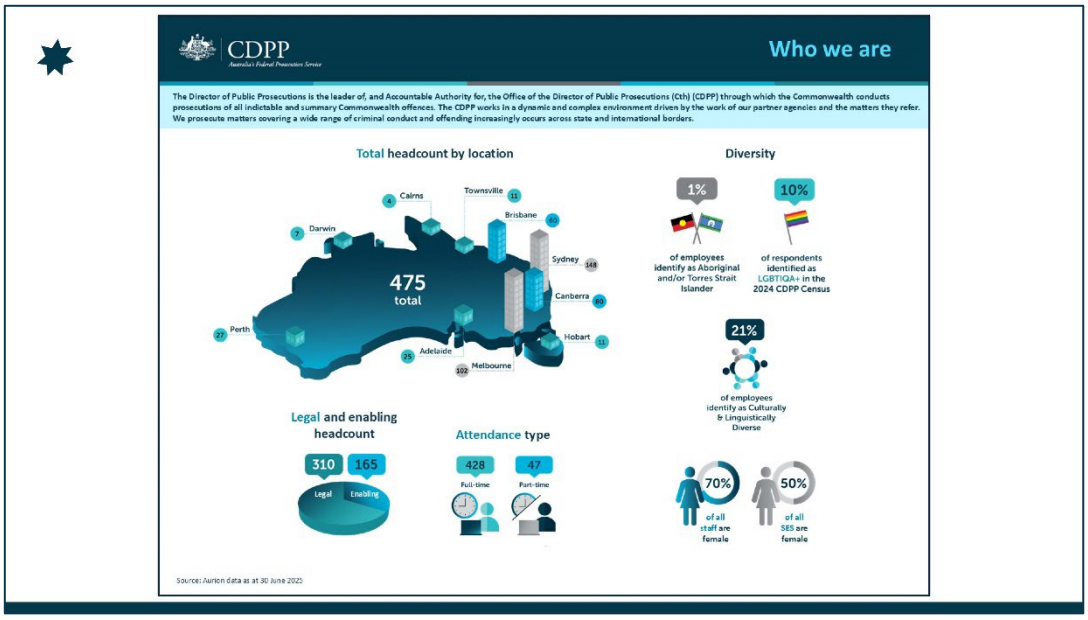
24 Office of the Director of Public Prosecutions (Cth), *Annual Report 5 March to 30 June 1984* (Report, 1984) 1.

25 Available at: https://www.cdpp.gov.au/about-us

26 See, in particular, ss 6, 9 and 11 of the *Director of Public Prosecutions Act 1983* (Cth) (the **DPP Act**).

27 See s 5(4)-(5)of the DPP Act.

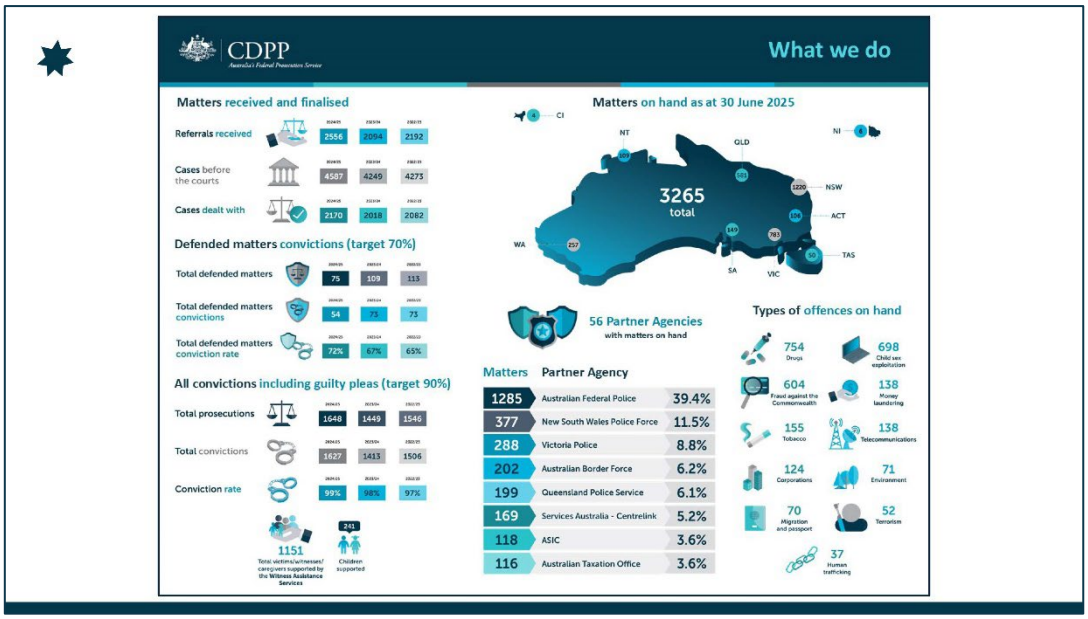
Who we are



41. The CDPP now has 10 offices nationally (in all the capital cities, and Cairns and Townsville).

42. The CDPP employs over 300 legal staff, and over 160 non-legal, corporate and support staff. Many of the powers reposited in me as the Director are delegated to the experienced senior prosecutors who work at the CDPP, although I remain accountable for each of the decisions they make.

The crimes we prosecute



43. Since 1984, the ambit of federal criminal law has continued to grow, with more crimes legislated and more briefs referred each year. The current landscape is markedly different from: (a) what it was at federation, (b) what it was at the time of the enactment of the *Crimes Act* in 1914, and even compared to 1984 when the Office was established.

44. As Justice Weinberg AO KC observed in 2017:[28]

> In recent years, the reach of federal criminal law in this country has expanded enormously. The framers of our Constitution could never have imagined anything like the array of indictable federal offences that exist today. Nor could they have imagined the many diverse areas into which federal criminal law now extends.

45. Justice Weinberg went on to describe the expansion as "frenetic". There is no indication of that trend abating.

46. The Office currently receives around 2,500 matters each year.

47. The three largest crime types by the numbers are drug matters (around 750), matters relating to child abuse material or other sexual offending involving children (around 700 matters) and matters relating to fraud against the Commonwealth (around 600). Those three crime types make up more than 80% our cases by the raw numbers.

48. But not all cases are equal. The resources required to prosecute a relatively small fraud against the Commonwealth pale into comparison with the resources required to prosecute a terrorism offence, or allegations of war crimes or complex corporate offending which may have lasted months and in relation to which there are literally thousands of documents.

49. The Office also prosecutes a substantial number of cases relating to telecommunications offending, corporate crime, environmental and migration crime, terrorism, and human trafficking.

50. The matters range from prosecuting the alleged theft of saltwater crocodile eggs from Kakadu National Park, following a joint investigation by Parks Australia, the Australian Federal Police and the Northern Territory Parks and Wildlife Commission; to the self-described "largest tax fraud in Australia's history" (said by the lawyer, who was himself a conspirator, to his fellow conspirators); to allegations of the war crime of murder; to the alarming (and still growing) number of matters involving child abuse material and the use of carriage services in sexual offending.

51. We have active prosecutions in every State and Territory, and matters from Christmas Island and Norfolk Island. New South Wales is (by far) our most active jurisdiction with around 1,220 matters. This accounts for about half of the Office's current workload. Victoria and Queensland are next in line.

<u>Referring agencies: our partners</u>

52. The Office receives briefs from up to 60 different partner agencies each year.

53. In 2024 to 2025 around 80% of the matters referred came from just seven of those agencies: the Australian Federal Police (32.7%), the Australian Fisheries Management Authority (12.8%), NSW Police (9.6%), Victoria Police (9.2%), other state and territory police (10.7%), the Australian Border Force (4.9%) and Services Australia (Centrelink) (3.9%).

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[28] The Hon. Justice Mark Weinberg KC, 'Federal indictable offences: has the 'autochthonous expedient' run its course?' (Speech, 40th anniversary of the Federal Court of Australia Conference, 9 September 2017), 12.

54. As Justice Weinberg noted, "The Australia of today is not the Australia of Federation."[29] The same holds for federal criminal law.

55. With that context in mind about who we are and what we do, I turn to the how: how do we decide which cases to prosecute?

C. THE PROSECUTORIAL DISCRETION

56. It is the exercise of prosecutorial decision-making in which the prosecutor's role as a minister of justice[30] is at its most acute in our day-to-day work.

57. In carrying out our day-to-day functions as prosecutors, I and my staff must always be conscious that we are performing functions traditionally held by the first law officer. We need to act with integrity and impartiality.

58. Prosecutors' paramount duties are twofold: to the Court **and** the administration of justice.[31] Our decision-making and prosecutorial functions need to be undertaken in light of both of those broad duties.

59. This is done principally through the application of the *Prosecution Policy of the Commonwealth*.

Prosecution Policies of the Commonwealth

60. In December 1982, the Attorney-General published guidelines about the exercise of the prosecutorial discretion.

61. This was a significant step. The guidelines, containing the "Prosecution Policy of the Commonwealth", were one of the first publicly available documents in the common law world that set out the factors prosecutors consider when making decisions.[32]

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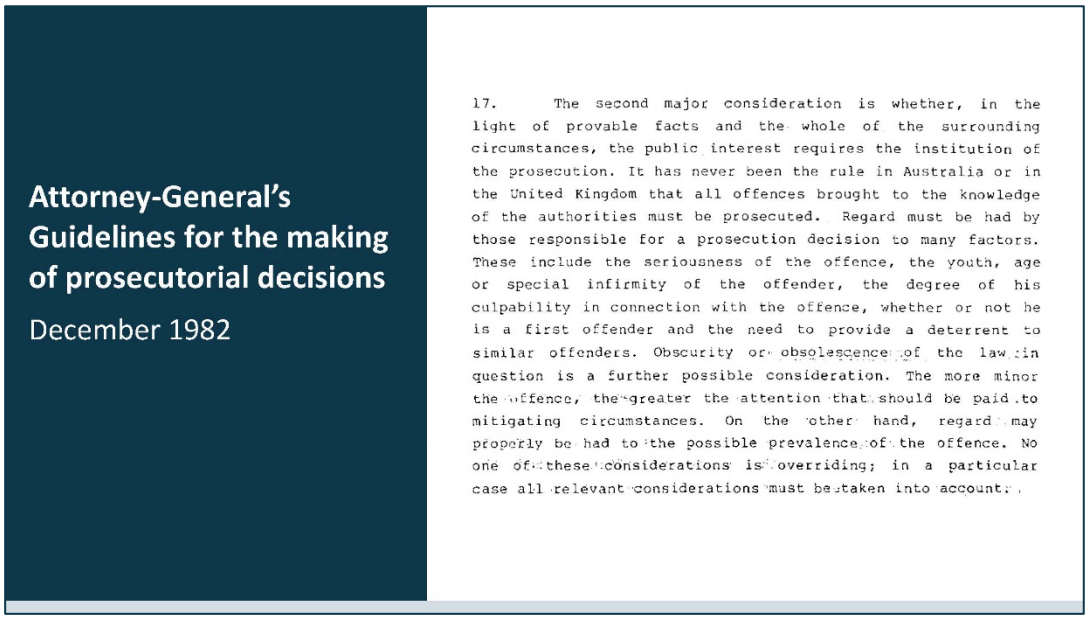
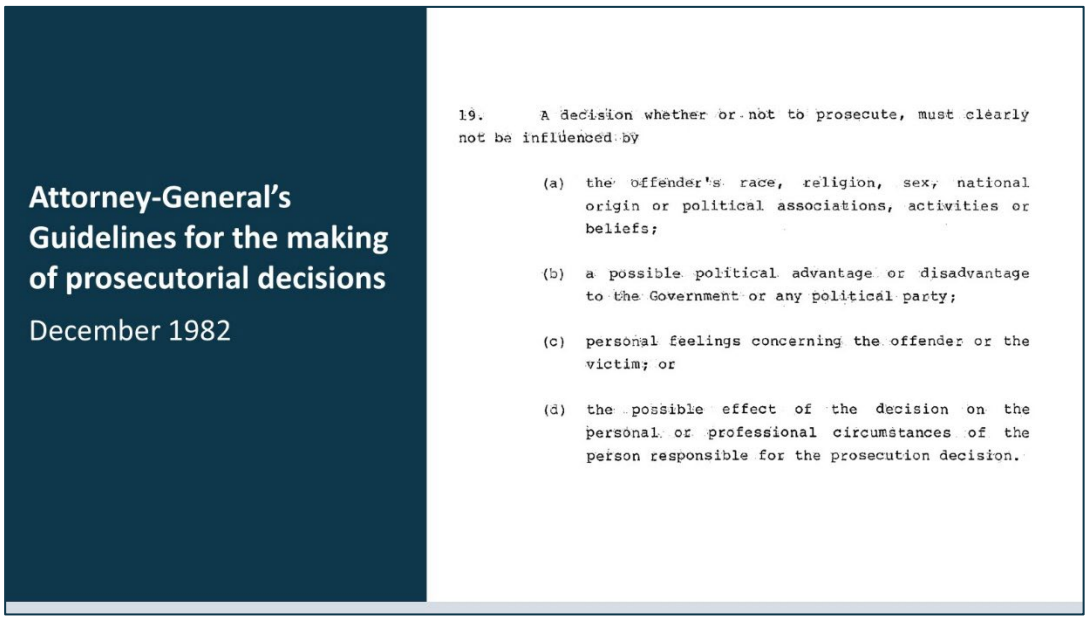
29 The Hon. Justice Mark Weinberg KC, 'Federal indictable offences: has the 'autochthonous expedient' run its course?' (Speech, 40th anniversary of the Federal Court of Australia Conference, 9 September 2017), 34.

30 A label adopted by the High Court in *Subramaniam v The Queen* [2004] HCA 51; (2004) 79 ALJR 116, [54] (the Court), referring to *R v Puddick* (1865) 4 F & F 497, 499 [176 ER 662, 663].

31 The Honourable Chief Justice Murrell, 'Prosecutors as Ministers of Justice' (Speech, Inaugural Annual ACT DPP Dinner, 2 August 2019), 3.

32 It was published in response to one of the recommendations from the UK Royal Commission on Criminal Procedure (1981). See, also, Andrew Ashworth, 'Prosecution, Police and Public – A Guide to Good Gatekeeping' (1984) 23(2) Howard Journal of Criminal Justice 65, 68.





62. In presenting the guidelines to Parliament, the Acting Attorney-General Mr Neil Brown QC (on behalf of the then Attorney-General Peter Durack QC) said:[33]

> While the guidelines do not in Senator Durack's view represent any substantial departure from those that have been followed in the past, they are now drawn together for the first time in one document and thus provide a clear statement of the prosecution policy of the Commonwealth. This will assist officials who need to make decisions in the prosecution process; it will also make the public aware of what the guidelines are.

63. The next iteration of the policy was published in 1986. A second edition was published in 1990. The current version was settled in March 2006. Several annexures were subsequently added, most recently in 2021.

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33 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 1982, 3271 (Neil Brown QC, Acting Attorney-General).

64. I am currently undertaking a review of the policy, to streamline the various additions, and also to consider whether any changes need to be made in light of other developments.

The three-stage test

65. There are three stages to the test for exercising the prosecutorial discretion.

66. This is a relatively standard multi-staged test. It mirrors those used by the various State and Territory prosecution offices, and indeed in common law jurisdictions around the world, although there are some minor differences.

67. The first stage of the test can be a low hurdle. Is there a *prima facie* case? Assuming the facts can be established, do those facts amount to an offence known to law? Can each element of the offence be proven? For example, there may be a limitation period, or other fundamental issue with the allegations. Briefs referred to the office for advice at times do not meet this threshold test.

68. The second stage of the test is more comprehensive and requires an objective assessment of the brief. Prosecutors are required to determine whether the evidence bears out a reasonable prospect of conviction of a particular offence or offences.

69. This test will not be satisfied if it is "clearly more likely than not that an acquittal will result". Determining whether the evidence meets the test requires a qualitative assessment of the evidence, including among other things its admissibility and availability, its likely impact on the judge or jury (acting properly), whether the person (or persons) giving the evidence is (or are) credible or reliable, and whether there is any obvious line of defence that would discredit that evidence or otherwise call into question the likelihood of a conviction.[34]

70. Once a prosecutor is satisfied that there is a reasonable prospect of conviction having regard to all the evidence, they move to the third stage of the test. That is, the prosecutor must look at the provable facts and **the whole of the surrounding circumstances** to determine whether a prosecution is in the public interest.

D. HOW IS THE PUBLIC INTEREST CONSIDERED?

71. How do we ensure that what we take into account as the "public interest" actually reflects the public interest? This requires consideration of the anterior question: who's interest is the public interest?

    71.1. Is it the interests of the individual who may be charged? That person is a member of the public.

    71.2. Is it the interests of a particular or discrete section of the public? Answering the question consistent with the views of a particular section may give a different answer depending on which group is favoured.

    71.3. In a federation is it the interest of the Commonwealth or the States and Territories?

72. I would answer each of those questions in the negative.

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[34] For further discussion of the first two stages of the test, see Michael Rozenes KC, 'Prosecutorial Discretion in Australia Today' (Speech, Australian Institute of Criminology Conference, 18 April 1996), 3-4.

73. It is clear that the concept of the public interest in the prosecutorial discretion is a broad one. It is inextricably bound up with questions about the nature and purpose of criminal law, and how society, as a whole, wants to deal with law breakers.[35]

74. In *Rogers v The Queen*, Mason CJ acknowledged the "legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime".[36]

75. What is in the public interest is also evident in what is legally classified as a crime. Governments are our elected officials. The expression of Government policy through the criminalisation of certain conduct necessarily reflects the public interest. As prosecutors our task is not to disregard the decisions of Parliament in enacting a particular offence.

76. However, for practical purposes this does little to assist the prosecutor's assessment, since every prosecution is for an enacted offence and therefore to that extent falls within the scope of the public interest. The prosecutorial discretion exists because it is accepted that despite the legitimate public interest in the prosecution of offences and the conviction of the guilty, not every alleged offence should be prosecuted.

77. Since 1982 the various facets of the public interest in this context have been articulated in prosecution policies.[37]

78. In order to get a sense of how the public interest is considered, it is instructive to consider how those factors have developed over time.

Public Interest factors in the 1982 Guidelines

79. Let me start with the 1982 Guidelines.

80. That Policy stated at [17] that:

> The second major consideration is whether, in the light of provable facets and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution. It has never been the rule in Australia or in the United Kingdom that all offences brought to the knowledge of the authorities must be prosecuted. Regard must be had by those responsible for a prosecution decision to many facts. These include the seriousness of the offence, the youth, age or special infirmity of the offender, the degree of his culpability in connection with the offence, whether or not he is a first offender and the need to provide a deterrent to similar offenders. Obscurity or obsolescence of the law in question is a further possible consideration. The more minor the offence, the greater the attention that should be paid to mitigating circumstances. On the other hand, regard may properly be had to the possible prevalence of the offence. No one of these considerations is overriding; in a particular case all relevant considerations must be taken into account.

81. The policy went on to confirm what is <u>not</u> to be taken into account, at [19]:

> A decision whether or not to prosecute, must clearly not be influenced by:
>
> (a) the offender's race, religion, sex, national origin or political associations, activities or beliefs;
>
> (b) a possible political advantage or disadvantage to the Government or any political party;

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35 Dr Jacqueline Tombs, 'Prosecution – In the Public Interest?' (Speech, Australian Institute of Criminology Proceedings on Prosecutorial Discretion, 7-9 November 1984), p 2.

36 *Rogers v The Queen* (1994) 181 CLR 251, 256 (Mason CJ), citing *Walton v Gardiner* (1993) 177 CLR 378, 396.

37 See *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 443 [55] (Hayne J).

(c) personal feelings concerning the offender or the victim; or

(d) the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision.

82. This final paragraph is important. It is an admonition not just to the prosecutors themselves but to the wider community. Prosecutors can and do make unpopular decisions, but we are simply performing the task that Parliament has entrusted to us. It is important to also remember this statement in context: up until this point, prosecutorial decisions in commonwealth matters were made generally by public servants in the Attorney-General's department, or the Attorney himself (up until that point, himself).

83. Australia has however, matured in this regard. Although the decisions we make are still the subject of debate, they have tended not to have impacted Directors' careers (who, at the senior levels tend to come from the private Bar and may return there). However, the first Director, Mr Temby KC, unfortunately, was the subject of some significant comment when he confirmed the prosecution of then Justice Lionel Murphy. And there is a view that that decision impacted his career.

84. On the establishment of the CDPP in 1984, Mr Temby KC noted:[38]

> The office has continued to operate under the guidelines which formed the Prosecution Policy of the Commonwealth as presented to the Parliament … in December 1982. That Prosecution Policy will be revised as certain imperfections, generally slight, have become apparent. When revised, this document will be made public.

Public Interest **factors in the 1986 Prosecution Policy**

85. Mr Temby KC ultimately reviewed the guidelines and published what became known as the "First edition" of the Prosecution Policy of the Commonwealth. The current policy, as we will see largely reflects his early work, and we all have much to thank him for in that regard.

86. In the foreword to that document, the then Attorney-General Mr Lionel Frost-Bowen, observed that the previous guidelines were in place when the Attorney-General was frequently required to be directly involved in prosecution decisions.

87. The 1986 Policy reflected the establishment of the role and Office of the Director of Public Prosecutions for the Commonwealth.

88. It was arranged into three substantive sections, dealing with the institution of a Commonwealth Prosecution, "control" of Commonwealth Prosecutions and other decisions in the prosecution process.

89. The public interest aspect of the test was expressed at [2.15] as follows:

> The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account …

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[38] Office of the Director of Public Prosecutions (Cth), *Annual Report 5 March to 30 June 1984* (Report, 1984) 10.

90. The Policy then went on to list 20 individual factors (enumerated as [2.16](a) – (t)), and concluded by observing:

> The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

91. The Policy dealt expressly with the prosecution of juveniles (at [2.17]) and repeated what was paragraph 19 in the 1982 Policy.

92. It was an expansion and refinement of the information in the guidelines.

***Public Interest* factors in the 1990 Prosecution Policy**

93. The "Second Edition" of the policy was presented to Parliament by the then Attorney-General Michael Duffy.

94. The changes reflected the four years of operation of the First Edition. It followed a similar format, but slightly modified the three-stage test.

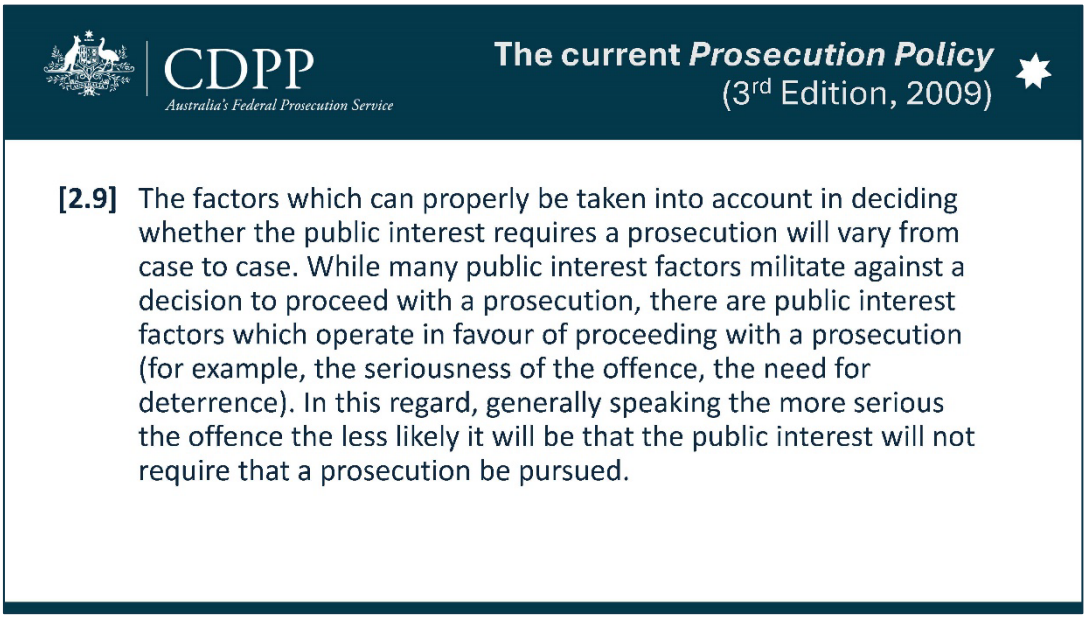
95. In relation to the public interest test, [2.16] of the 1986 Policy (with its 20 factors) was reproduced in full.

96. Again, the four prohibited considerations were repeated, and special consideration was given to the decision to prosecute juveniles.

***Public Interest* factors in the current Prosecution Policy**

97. The second edition had a long life.

98. It was not until March 2009 that the "Third Edition" was published. It has been the subject of some updates, including the addition of a number of annexures, most recently in February 2021, but this third edition remains the current prosecution policy of the Commonwealth.[39]



99. I say currently because the policy is again under review. The Policy was last updated in 2009 (with the most recent amendments in 2021). It is simply time for a review.

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39 As noted above, the policy is currently under review.

100. In addition, a recent review by Independent National Security Legislation Monitor (the **INSLM**) into secrecy offences recommended consideration be given to including an additional public interest factor that would expressly require a prosecutor to consider the "public interest in a free and open press" when prosecuting journalists or media organisations.[40]

101. In reviewing the policy, reports and recommendations such as these are taken into account.

The factors to be considered

102. The guidance in the current policy commences with an acknowledgement that the factors will vary from case to case and may pull in different directions.

103. The policy then goes on to list 24 matters which "may arise" for consideration in determining whether a prosecution is in the public interest. They are not exhaustive. Nor are they prescriptive. But they do guide the exercise of the discretion.

104. These 24 matters reflect the original 20 from the First Edition, with four additional factors.

105. The additional four factors are:

105.1. The attitude of the victim of the alleged offence to a prosecution (see (o));

105.2. The adequacy of civil penalty provisions (see (x));

105.3. The adequacy, as an alternative to prosecution, of any disciplinary proceedings (see (w)); and

105.4. The need to give effect to regulatory or punitive imperatives (see (v)).

106. The inclusion of consideration of victims expressly represents a change. Historically, there was a resistance to including victims in consideration of the prosecutorial discretion. With the introduction of Victims' Charters in some jurisdictions, and changing attitudes, the views of victims

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40 Independent National Security Legislation Monitor, *Secrecy Offences – Review of Part 5.6 of the* Criminal Code Act 1995 (Report, 2024) 237-238. The CDPP's submission to the INSLM was that the current policy provides sufficient flexibility for those issues to be taken into account.

are increasingly taken into account in considering the public interest, far more so than they were in the past.

107. Two other notable changes are worth mentioning because they reveal how the public interest changes over time, if only subtly. They are:

107.1. The offender: the current policy at (d) refers to both antecedents and background. The First edition referred only to the alleged offender's "antecedents";[41] and

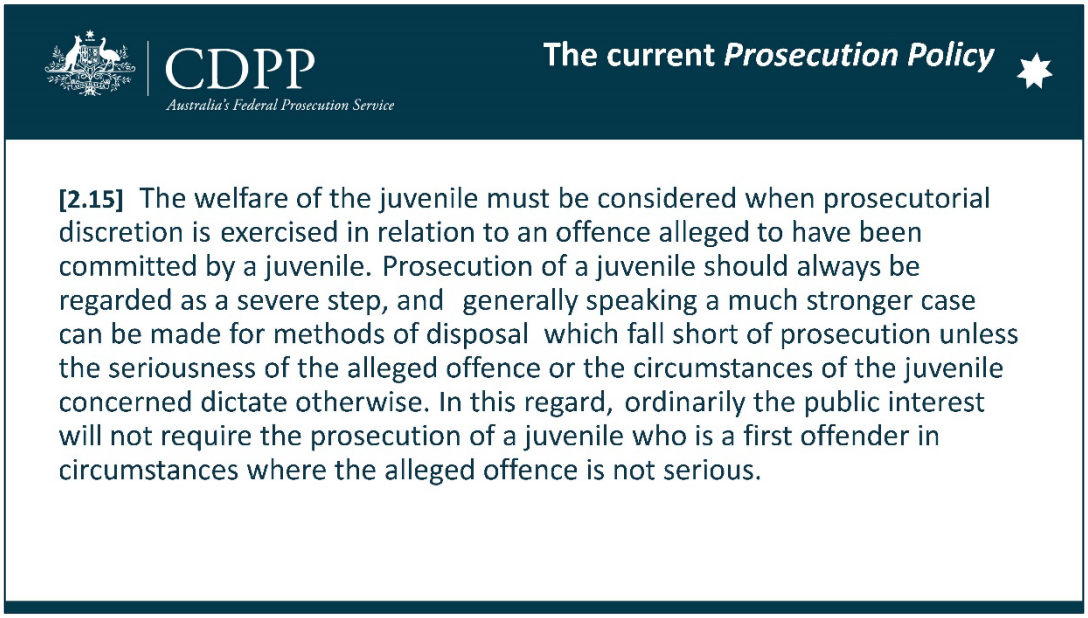
107.2. The effect on community harmony at (g), previously read "the effect on public order and morale".

108. Changes in language may seem minor, but these changes do reflect the changing public interest.

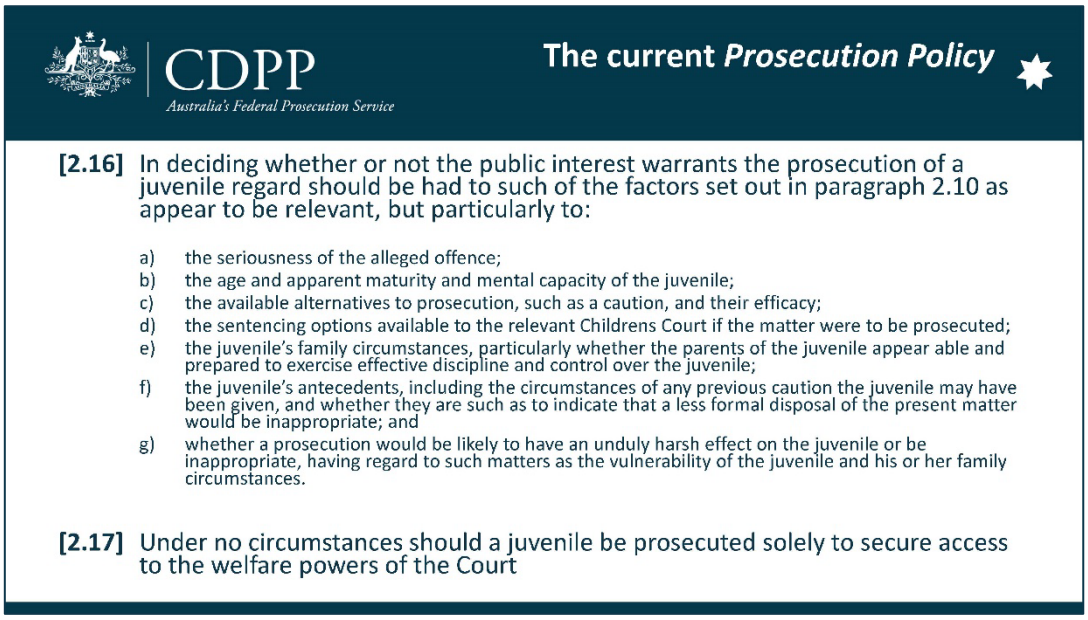
109. However, the fact that the majority of factors have not changed is a reflection of the consistent nature of much of the public interest.

<u>The prosecution of juveniles</u>

110. The current Policy retains significant guidance on the prosecution of juveniles. This content was updated and expanded to include express reference to the welfare of the juvenile. It must be considered.



41 In this context *antecedents* is used to refer to a person's criminal history, *cf* the use of "antecedents" as a descriptor of ancestry. Such considerations are expressly precluded, see [2.13] which prohibits consideration of "race" or "national origin".



111. The First Edition was silent on that factor, although that is not to say it would never have been taken into account. This change reflects changing societal attitudes.[42]

112. The seven factors listed in [2.16] are effectively the same as the seven factors listed in the First Edition.

Assessing each of the factors

113. It remains up to the individual prosecutor to decide what factors they should consider as part of the "whole of the surrounding circumstances", having proper regard to the circumstances of each particular case. They then must use their judgement to decide whether, having that regard to the circumstances, the interests of the public are served by commencing or continuing the prosecution.

114. This is a test that has been kept deliberately broad, acknowledging that every offence and every alleged offender will have unique features and that the prosecutor must have the freedom and ability to consider any factor relevant to a particular case.

115. It is not a prosecutor's task to shape what is criminalised or influence what crimes are investigated. Nor is it our role to define the public interest.

116. Even though on one view decisions whether or not to prosecute might be said to have a normative factor, we as prosecutors do not inform the public interest, rather we seek to act *in* the public interest.

What is not in the public interest

117. It is clear from that tour of prosecution policies that the factors by which the public interest might be considered have changed over time.

118. However, what has been a constant are the factors that are not to be considered.

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42 See, for example: *Speaking for Ourselves: Children and the Legal Process* [1996] ALRCIP 18, part 8.

119. These same factors are also consistent across the federation. Every DPP in Australia has a list of considerations in their *Prosecution Policy* (or equivalent) that sets out, in effect, the same four considerations that **cannot** form part of the decision as to whether or not to prosecute, namely:

119.1. specified attributes of the alleged offender;

119.2. personal feelings of the decision maker;

119.3. political considerations, and

119.4. effects of the decision on the decision-maker

120. Those prohibitions do not deal with what is in the public interest as reflected in public discourse.

121. On one view the public interest could be discerned from public discourse. Interestingly, two Australian jurisdictions have included additional criteria that specifically exclude consideration of community response. In the Northern Territory, a prosecution "must not be influenced by **any possible media or community reaction to the decision**". And in Tasmania, a decision "cannot be clearly influenced by **strong opinion for or against a particular prosecution**".

122. Public discourse, including both traditional media and social media, may help understand or shape the views of the public on a particular issue or case. They also reveal what the public is interested *in.* But this must be carefully distinguished from the *public interest* as it applies in prosecutorial decision-making.

Determining the public interest in challenging cases

123. The theory is all well and good, but in practice how do these words assist prosecutors exercise the prosecutorial discretion appropriately?

124. In many cases, the issues will not be difficult to determine.

125. However, there are cases where determining the public interest presents significant challenges. And in the modern era those difficult decisions can be the subject of intense public scrutiny and comment.

126. In a speech to the Australian Association of Crown Prosecutors last year, the Honourable Justice Beech-Jones spoke of the tough decisions that are made in private and which are necessary to maintain the fairness of a prosecution. "No prosecutorial decision fits this description so much as the decision on whether or not to pursue a prosecution … No tabloid newspaper will celebrate you for those decisions and you won't get silk for making them. Prosecutors often have to choose secret honour over public adulation or professional recognition."[43]

127. And in fact those decisions, no matter how properly decided by reference to policy, will not always be popular.

128. Some of the most challenging cases are those involving children who are accused of serious and significant terrorism related offences. These children often present with a myriad of complex factors which can include significant mental health issues.

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[43] The Honourable Justice Robert Beech-Jones, 'The Prosecutor's Duty and the Prosecutor's Conscience' (Speech, Australian Association of Crown Prosecutors Conference 2024, 8 August 2024), 4.

129. The CDPP is not an investigative agency: we do not choose which persons to investigate, rather, we review and respond to briefs provided by our partners.

130. The AFP takes a cautious approach to the investigation and referral of juveniles for criminal offending, referring matters that in their view clearly have reasonable prospects of conviction and warrant a criminal justice response. It can therefore be a difficult exercise to determine whether to proceed to prosecution in a particular case.

131. Another challenge is the availability of appropriate mechanisms to respond to challenging behaviours. The criminal justice system is well-developed, and now includes many sentencing and other options for juveniles accused of serious crimes. However, in order to access those programs or other options, in many cases a proceeding must first be commenced.

132. That is in tension with the prohibition on prosecuting a juvenile "solely to secure access to the welfare powers of the Court." Sentencing dispositions might not always be "welfare powers", but the tension is clear.

Review of prosecutorial decisions

133. The role of a prosecutor is a heavy one: the decisions we make can be life changing, regardless the outcome of any criminal proceeding that may follow the exercise of the discretion.

134. Given their impact, it seems incongruous then that there is no direct review of the decisions that we make.

135. It is true that there is no independent right of review of prosecutorial decisions; Courts have consistently ruled that their role is to determine disputes not which disputes come before them.[44]

136. However, it is not the case that the decision whether or not to prosecute is immune from scrutiny.

137. Every decision *to* proceed is the subject of litigation and in that context is the subject of consideration.

138. The decision to prosecute is subject to judicial consideration in the context of applications for stays, conviction appeals and, in New South Wales, in applications for costs following an acquittal, discharge, direction that no further proceedings be taken, or successful appeal against conviction.[45] Under the New South Wales legislation, before a certificate for costs can be issued, there has to be a finding that, "if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings".[46]

139. Action can also be brought for abuse of process, or for malicious prosecution.[47]

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44 *Maxwell v The Queen* (1996) 184 CLR 501, 534*; Likiardopoulos v The Queen* (2012) 247 CLR 265, 280 [37]; *Taylor v Attorney-General* (Cth) (2019) 268 CLR 224, *Harkness v Banks (No 2)* [2024] VSC 709.

45 *Costs in Criminal Cases Act 1967* (NSW), s 2(1).

46 *Costs in Criminal Cases Act 1967* (NSW), s 3(1).

47 See, for example: *A v New South Wales* (2007) 230 CLR 500.

140. When it comes to the making of a decision **not** to prosecute, the CDPP has specific guidelines which allow for complainant victims of certain crimes, or the family of a victim who died as a result of the alleged offending, to be able to seek my personal review of a decision not to prosecute.[48]

141. The exercise of the discretion that is not the subject of any litigation is the decision *not* to prosecute. However, all the work of the Office is subject to questioning at Senate Estimates.

142. There is, therefore, public debate about the decisions prosecutors make, including when they decide not to prosecute.

143. The fact of that debate is not unhealthy. However, it can have unintended consequences on the perception of the independence of prosecutorial decisions.

144. If a decision is made at a point in time after significant public debate, it is difficult to establish that the decision was not influenced by that public debate, that it was made acting independently and with the integrity required.

E. CONCLUSION

145. There is a strong connection between independent prosecutors, the rule of law and an effective democracy.[49] The role of the independent prosecutor is not merely as legal technician, but also as moral accountant. Moral and social judgments interact with legal judgments at several stages in the criminal process, including at the initial stage of whether to prosecute or not.[50]

146. The prosecutor is in a unique position. Although we work with our partner and referring agencies, the client (in the purest form) is the Director of Public Prosecutions. Being ministers of justice our express purpose is to see the proper administration of justice, that those accused of crimes are brought before the courts in a fair process, furthering the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

147. With that in mind, the duties to the client and the court should generally not be in tension. We do not seek to win at all costs, but to ensure a jury can reach the right outcome following a fair process, which is pursued almost at all costs.

148. If we are going to take the extraordinary step of charging people with a criminal offence, although it becomes normalised in many ways, it remains an extraordinary step, we should ensure that the process by which that charge is determined is in accordance with the rule of law.

149. If we do that, then the exercise of the prosecutorial discretion *in the public interest* lives up to its role as a piece of public interest litigation.

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48 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy of the Commonwealth* (Policy 3rd Edition, 4 March 2009). See also *Prosecution Policy of the Australian Capital Territory 2021* (ACT); *Prosecution Guidelines 2021* (NSW); *Guidelines of the Director of Public Prosecutions 2016* (NT); *Director's Guidelines 2016* (QLD); *Statement of Prosecution Policy & Guidelines 2014* (SA); *Prosecution Policy & Guidelines 2025* (TAS); *Policy of the Director of Public Prosecutions 2023* (VIC), *Statement of Prosecution Policy and Guidelines 2022* (WA).

49 See, the Honourable Chief Justice Murrell, 'Prosecutors as Ministers of Justice' (Speech, Inaugural Annual ACT DPP Dinner, 2 August 2019), 8-9 in relation to the South African experience.

50 Andrew Ashworth, 'Prosecution, Police and Public – A Guide to Good Gatekeeping' (1984) 23(2) Howard Journal of Criminal Justice 65, 84.

150. Before I finish, I want to make one more observation about our collective duty to the Court.

151. We are all members of one of the great professions. Being an officer of the court comes with the duty to the Court. That duty extends beyond the duty that guides all of our work: the duty to the court above our client. In my view that duty includes a duty to protect the system in which we operate. In this heightened age of scrutiny, in an era where the rule of law is under increasing attack, it is incumbent on all of us to discharge our duty to the court by protecting the court. By ensuring that public and private discourse is informed. By standing up for the system.

152. We are all watching with alarm how institutions that we thought could never be shaken are being challenged in what once was a high functioning democracy. Our systems in Australia are robust. Court Orders are followed. The separation of powers is respected. But no system is beyond attack. It is in the interests of the administration of justice – for both defence practitioners and prosecutors, for all litigants, but for all members of the community, that the rule of law remains at the centre of what we do. Our duty to the court includes a duty to the maintenance of the rule of law, by maintenance of all parts of the system in which the rule of law functions.