POLICE AND PROSECUTION

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PART 1  Introduction: Mapping the boundaries – Police and Prosecution

A review of the current boundaries between police and prosecutor in Australia shows that there is no distinction between the two functions of investigation and prosecution in the bulk of criminal cases that are dealt with in courts of summary jurisdiction. If police act as prosecutors, there is effectively no boundary between police and prosecution. For this reason, in this paper, the prosecution is understood to be a reference to the DPP or similar independent prosecution agency.

It is convenient to consider the boundary between police and the prosecutor in two stages. The first is during the investigation up to the point of charging. The second is following arrest or charge while the prosecution is being conducted.

It can be argued that the division between police and independent prosecutor achieved by the Australian Federal Police and the Commonwealth DPP best fits the philosophical ideal for the conduct of prosecutions. The failure to transfer the prosecution function in relation to summary matters in most jurisdictions should be seen as a reflection of the history of police and prosecutions in Australia. Despite the strong philosophical imperative to transfer the function, there is considerable resistance to change in the Australian States resulting from cultural inhibitors and concerns about the cost of implementing such a transfer.

There is no doubt that there are very real advantages for both police and prosecution in a clear delineation of responsibility underpinned by mutual obligation. I argue that there are sound philosophical reasons, as well as reasons based on cost efficiency, for the separation of the investigation and prosecution functions. As the criminal jurisdictions of more courts of summary jurisdiction increase, the transfer to the DPP of the prosecution of summary matters is essential and should be inevitable. To be successful, the very strong cultural and historical inhibitions against such a significant change in police/prosecutor relations will need to be carefully handled.

I shall review the progress made so far towards the transfer of the prosecution function from police to an independent prosecutor. Three of the more significant developments are the Memorandum of Understanding for the takeover of summary prosecutions entered into by the Northern Territory DPP and the Northern Territory Commissioner of Police in February 1998, the summary prosecution pilot in New South Wales and the findings of Project Pathfinder in Victoria.

Taking into account the core areas of independent responsibility for the police and the prosecutor I will discuss the degree of interdependence between each. For example, it is proper that the prosecutor give assistance to police prior to charging. Assistance and support are also required from police after charging to ensure the work of the prosecutor can be done efficiently and effectively. In particular, I seek to emphasise the non-operational support provided by the prosecutor to police and the information flows from the police on which the prosecutor depends, such as in relation to the prosecution’s obligation to provide full disclosure.
PART 2 The Independence of the Prosecutor and the separation of function

It is in the nature of the common law adversarial system inherited by Australia that a criminal prosecution is not an investigative or inquisitorial procedure. Stephen notes that “…English criminal trials gradually lost their original character of public inquiries, and came to be conducted in almost precisely the same manner as private litigations.”¹ The work of the prosecutor in this system is not to find the guilty party, but to present to the court, in an objective manner, the evidence gathered by the investigator. Within that context it is of the utmost importance that the roles of investigator and prosecutor be kept distinct. While allowing for the appropriate and necessary mutual co-operation and assistance.

In our legal system the role of the prosecution process has traditionally followed the charging of a person. There are other models: among them the District Attorney’s office in the United States of America, the Procurator Fiscal in Scotland and the investigative judge in Civil Code jurisdictions.² Unless we are prepared to adopt an inquisitorial system or transfer control over investigation by police to some other body, the role of the prosecutor in our system rightly requires that the prosecutor be detached from the police and the investigative process. This does not mean, however, that the prosecutor cannot give advice during the investigation (as discussed later).

There is no doubting the current pressure upon all participants in the criminal justice system. It would be difficult to imagine a time when the criminal justice system has been the subject of such intense public debate.³ In that debate it is of the utmost importance to reflect carefully on the underlying principles to which we as a society adhere. There is a tendency towards a type of dualism where we look outwardly to other countries and find fault with political uses of the criminal law, whilst internally we live with inaction or politically driven change. The danger is that the results are not always consistent with the principles that have developed under our law.


² In developing the institution of the independent prosecutor in Australia, considerable attention has been given to overseas models. Overseas models have had an influence on the development of principle, but it is well to remember that they are rooted in the history and legal culture of the jurisdiction where they are found. As in any discussion of prosecutions there are multiple ways to conceive of the allocation of responsibility between police and prosecutor. Overseas models are, therefore, influential but need not determine the setting of the boundary between police and prosecutor in Australia.

³ However, the controversy attaching to the conduct of criminal prosecutions is not a recent phenomenon. A review of the history of prosecutions in England quickly reveals that there has been an ongoing debate in favour of an independent prosecutor in respect of all criminal prosecutions for centuries. Two hundred years ago the Twenty-Eighth Report of the Committee on Finance suggested that the Attorney-General be empowered to appoint Counsel for the Crown, to conduct criminal prosecutions”. (L Radzinowicz, “A History of English Criminal Law,” Vol. 3 “The Reform of the Police” at pp. 259 and 301.) Patrick Colquhoun, who gave evidence before the Committee, promoted this idea. Radzinowicz notes that Jeremy Bentham and Edwin Chadwick put forward similar arguments at about that time. Robert Peel is quoted as expressing the view in 1826 that “I would have a public prosecutor acting in each case, on principle, and not on the heated and vindictive feelings of the individual sufferer on which we mainly rely at present for the due administration of justice”. ibid, footnote 2, p. 259.
PART 3 Arguments in favour of the separation of prosecution from investigation

The arguments in favour of the functional separation of investigation and prosecutions through the creation of an independent prosecutor are based on principle and practicality.

3.1 The desirability of having checks and balances in the exercise of prosecution power

An important aspect of the interposition of an independent prosecutor between the police and the court is the opportunity afforded for review of the initial decision by investigators to prosecute. Record keeping by each agency and the physical transfer of a brief ensures that both can be held accountable in any review of the prosecution process. Meanwhile, the separate interests of the police and the prosecutor ensures that each office will be held to account for any deficiency in the way it performs its duty.

The checks and balances argument incorporates acceptance of the power of police to exercise prosecutorial discretion in relation to the power of arrest.

The exercise of discretion by the DPP in each jurisdiction in relation to indictable charges is highly visible. The decisions of the DPP affect cases in the public domain and we are aware of the effect of DPP action even if the reasoning applied in a particular case is not always published. The external flow of information between the police and the DPP exposes the actions of each to scrutiny by the other and allows for public accountability. The discretion exercised by a police prosecutor is not nearly so visible because it remains internal to the police service or has effect before any proceedings commence.

3.2 Accountability

While seeking to defend the role of police prosecutors, Superintendent Sweeny of the New South Wales Police Prosecuting Branch in 1984 gave a candid view of the degree of discretion afforded to the police. He said:

“There are undoubtedly those who believe that everyone who is apprehended by the police for a criminal offence will be prosecuted. But this is not the case. In deciding whether or not to prosecute, police have a wide discretion, the exercise of which is subject to little legal restriction. The law does not oblige police to declare publicly the principles upon which they act in exercising their discretion in prosecuting; neither does it oblige them to give reasons for their decisions in particular instances. Judicial control of this discretion is minimal and parliamentary control almost non-existent.”

Many police services now claim to operate in accordance with the prosecution policy established by the DPP in each State. The difficulty is that whilst the police may claim to give effect to DPP prosecution policy internally there is no way in which we can be confident that that is so.

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4 See K Waller D and Munro, “Prosecuting Summary Offences: Options and Implications” NSW Premier’s Department, May 1997 at pp. 30 and 37.

The guidelines for the conduct of prosecutions are published and each DPP is required to provide an annual report to parliament. The form of accountability required of the DPP in England has been described as the “explanatory and co-operative mode”. In this way the public prosecutor is able to be challenged and can be required to give reasoned explanations and to give advice and make recommendations. This view needs to be modified in the Australian context as the DPP may not necessarily be required to give reasoned explanation but if asked by the Attorney-General would be expected to do so. The DPP may also be subject to the exercise by the Attorney-General of an ultimate power to give directions.

Sweeny attempted to use the non-accountability of the police as an argument in favour of the status quo when he stated:

“Any evaluation of the present prosecution system, or the advantages or disadvantages of various alternatives, needs to rest on some view of the proper function of a prosecution system and the criteria by which the adequacy of such a system in performing its functions might be measured. This is a difficult area. There is much room for subjective judgment and objective data is sparse, and arguments about reform have tended to be based on propositions of principle rather than objective evidence that the present system is unsatisfactory in practice.”

It can be argued that it is precisely because of the unaccountability of the police prosecutor that there is a lack of objective data.

3.3 Fairness to the accused through impartial evaluation of each case

Numerous commentators have discussed the difficulty in police remaining impartial in the evaluation of their own cases. This is also a reason for ensuring that the public prosecutor does not become too involved in the investigative process.

3.4 Fairness to accused generally by the development and application of consistent policy

This was a reason promoted in England where each separate police force had its own procedures for the conduct of prosecutions. It is nevertheless applicable in each of the Australian jurisdictions insofar as the DPP provides general directions and guidelines for both police and prosecutors.

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7 Sweeny, op. cit. at p.143.

8 Independent Commission Against Corruption (ICAC), Investigation into the relationship between Police and Criminals, Second Report, ICAC, Sydney, April 1994 pp. 42-44 documenting the inability of the Police Service to provide copies of briefs of evidence in various inquiries.

9 For example, the Philips Commission.

10 Philips Commission, supra, pp. 136-138.
3.5 Efficiency through the integration of all police prosecutions

In those jurisdictions where the DPP has taken over the conduct of committal proceedings it has been found that cases are handled more efficiently in terms of the use of court time, the appropriateness of charges and overall cost.\textsuperscript{11}

The Project Pathfinder Report in Victoria recommended strongly that there be a single prosecution agency for all criminal matters in that State. The Report emphasised the potential economies of scale from a single prosecution agency. It was said that a key outcome would be “the consistent ownership of the prosecution brief as it passes through the various stages of hearings.”\textsuperscript{12}

3.6 Investigators are not trained as lawyers

Police prosecutors are generally not legally qualified and appear by leave rather than in reliance on a right of appearance in the courts they service.\textsuperscript{13} The importance of the lack of qualifications is the lack of professional obligations that attach to practice as a barrister or solicitor. A barrister or solicitor is subject to professional regulation and the supervision of the courts, to which a primary duty is owed. The police prosecutor shares in the camaraderie and discipline of common service with investigating police. Such an association is obviously not conducive to objectivity or impartiality.

PART 4 Separation of function in the prosecution of cases

The boundary between the police and the prosecutor is not consistently drawn in each Australian jurisdiction. This is not at all surprising given the history of the police and the DPP. One aspect of the boundary between police and prosecutor is the point at which the prosecutor is given responsibility for the conduct of a specific prosecution. It is convenient to discuss the point of transfer before considering the operational separation of police and the prosecutor in their general relationship.

With the exception of the Commonwealth and the ACT, there has long been a “two-tiered system” in Australia where matters prosecuted summarily have been dealt with differently from matters prosecuted on indictment.

In the first tier - the prosecution of offences before the summary courts - there has been no division between police and prosecutor in most Australian jurisdictions. In most States it is the police who prosecute the bulk of criminal cases brought in the courts of summary jurisdiction, including committals in relation to indictable charges.

\textsuperscript{11} See footnote 40, infra.

\textsuperscript{12} KPMG Management Consulting, “Project Pathfinder : Re-engineering the Criminal Justice System – Stage 1 – Redesign Opportunities”, Department of Justice, July 1996, p. 57 (Project Pathfinder).

\textsuperscript{13} In New South Wales in 1996 only about 20% of police prosecutors were legally qualified (Royal Commission into the New South Wales Police Service : Interim Report, February 1996, (para 6.45)). Waller and Munro, op. cit. put the figure at 10% (p. 19). Even if legally qualified, the police prosecutor appears as a serving officer and appears by leave (ibid, p. 43).
In the second tier - those matters prosecuted on indictment - a line has been drawn between the work of the investigator and that of the prosecutor. Historically that line was drawn between matters in the summary courts and matters prosecuted on indictment in the superior courts. This division had the effect that the prosecution of a case was controlled independently of the police only from the point where an indictment was to be presented. This division exists in most Australian jurisdictions today where all prosecutions on indictment - but few, if any, summary prosecutions - are conducted by the DPP.

The transfer of the prosecution function from the Attorney-General at the second tier to an independent prosecutor has occurred over the last 17 years. In that time significant advances have been made in our thinking about the prosecution of criminal cases and the role of the police and the independent prosecutor. The most significant change to the administration of the criminal justice system has been the publication, acceptance and refinement of policy guidelines on the conduct of prosecutions. It is also widely accepted as a matter of principle that the conduct of prosecutions should be handled by an independent prosecution agency beyond the point of charging.

It remains to be seen whether the weight of history can be overcome so that summary prosecutions and committal proceedings across Australia are transferred to the DPP. A full separation of function would require all charges to be referred to the DPP for prosecution, regardless of the nature of the charge. However, this need not interfere with the police officer’s discretion relating to the power of arrest.

4.1.1 Separation of police and prosecutor - procedure on indictment

The fact that in Australia prosecutions on indictment are conducted independently of police is largely an accident of history rather than an acknowledgment that the prosecution of at least the more significant offences should not be left in the hands of those who conducted the investigation. Although at common law all citizens have the right to institute a prosecution, in the case of indictable offences the requirement at common law for a grand jury to find a “true bill” of indictment was considered to be unsuitable for a colony largely consisting of convicts. As a result, early in the 19th century, the grand jury was replaced by a requirement that indictable offences be prosecuted in the name of His Majesty’s Attorney General, or other officer duly appointed for such purpose by the Governor.

14 The first DPP established in Australia was in Victoria (Director of Public Prosecutions Act 1982 (Vic.))

15 The approach adopted by the Philips Commission was as follows:

“In Part II of the report we started from the position that the police function as investigators continues at least until they have assembled sufficient evidence to accuse a named person of a specified offence or to dismiss him from their inquiries. To ensure efficiency and effective law enforcement and to produce a workable system they should retain control of the procedures up to and including the point of accusation. Beyond it a new dimension is added. The variety of decisions that have to be made after that point and the nature of the task of preparing a case properly for trial require review by a legally qualified person if the prosecution system is to work fairly and efficiently.” pp. 193-194.

16 A similar procedure, with the inclusion of private prosecutors other than police, became settled law in New Zealand where s.345 (2) of the Crimes Act 1961 provided that only the Attorney-General, a Crown Solicitor or a private prosecutor may present an indictment. See Bernard Robertson, “A
4.1.2 Separation of police and prosecutor – summary procedure

The growth of statutory police forces in Australia led to an aggregation of police control over the commencement and conduct of summary proceedings. The bulk of these matters were summary in nature and were not required to be referred to the Crown for prosecution in the States and Territories.

Initially informant police officers prosecuted their own cases, appearing as of right in a personal capacity. Over time the police informant’s right of appearance was supplanted by the appearance of police officers who were not always the informant and who appeared by leave on behalf of the informant. This arrangement then became regularised by the creation of prosecuting branches within the police forces.\(^\text{17}\)

4.2 Second reading speeches introducing legislation for the creation of DPP’s

A review of the second reading speeches in relation to Commonwealth, State and Territory legislation creating the offices of DPP shows that the separation of the investigation and prosecution functions did not figure prominently as an issue. The principal aim was to establish the independence from Government of decision making in relation to prosecutions which to that point had been under the immediate control of the Attorney-General.\(^\text{18}\) In most jurisdictions it was intended that the police prosecutor would still retain the conduct of prosecutions before the summary courts. In some jurisdictions the establishment of a DPP was also seen as a move towards greater efficiency, such as in Queensland\(^\text{19}\) and Tasmania.\(^\text{20}\)

\(^\text{17}\) For example, in New South Wales in 1941. In Victoria the Victoria Police Prosecutions Division was established in 1981 - see Karl Head, “Police Prosecutors and Legal Practitioners”, Law Institute Journal, September 1990, pp. 842-843. Four hundred police successfully completed an intensive course of seven weeks duration of which Head comments: “Although the course does not presume to substitute for formal qualifications, it does provide a foundation upon which the individual may develop competence in prosecuting criminal matters.” (p. 842). At page 843 Head notes the police prosecutor “can rarely commit to a course of action prior to receiving instructions from informants”.

\(^\text{18}\) In Victoria, when the Attorney-General introduced the Public Prosecutions Bill to replace the Director of Public Prosecutions Act 1982, mention was made of “the independence from the government of the prosecutorial decision-making function in this state”. However, the Bill gave emphasis to accountability, containing costs and satisfying the “legitimate needs and concerns of victims of crime” (Hansard, Assembly, Victoria, 21 April 1994, at p. 1058). In the original Victorian DPP Act 1982, and in the remaining States and the Northern Territory, the second reading speeches highlighted the need for the prosecution process to be independent of government and the Attorney-General. In the second reading speeches for the Commonwealth, South Australian and the original Victorian DPP Acts, reference was also made to various reports which had called for the creation of a separate prosecution agency.

\(^\text{19}\) The Attorney-General for Queensland stated that “in order to achieve a speedy and competent prosecution service, the Government has agreed to my recommendation that the prosecutions function
In New South Wales the Attorney-General said that the role of police prosecutors was not to be substantially affected:

“In the overwhelming number of criminal prosecutions before magistrates, the Director will not be involved. In relation to summary prosecutions, the Director will have powers not available to the Attorney-General or any other person in this State. However, by the exercise of these powers, either by direct intervention or the issuing of guidelines, the Director can bring about a more uniform prosecution policy throughout the various prosecuting agencies in this State.”

4.3 Separation of police and prosecutor– the Commonwealth, the ACT and the Northern Territory of Australia

The initiative in 1974 for the transfer of responsibility for summary prosecutions in the ACT from police officers to the then office of the Deputy Crown Solicitor (ACT) came from the Attorney-General, Lionel Murphy QC. The reason for transferring responsibility was later summed up by Enderby QC, who had been a member of the Government at the time, when he said:

“The police function is too important to be allowed to overlap into prosecution work. Police work is basic to the proper functioning of any modern community and the police have enormous power. It is essential that the exercise of that power be seen to be fair and above suspicion and that the police be not weakened by criticism that attaches to them when they become involved in prosecuting.”

Prior to the creation of each Office of Director of Public Prosecutions, Crown Law officers under the general administration of the respective Attorneys-General conducted prosecutions on indictment in each State and on behalf of the Commonwealth. However, in none of the States was it intended that the DPP assume control of summary prosecutions to the exclusion of police prosecutors. The ACT, the Commonwealth and progressively the Northern Territory of the Crown law office should be separated from other legal functions undertaken on behalf of the Government”. (Queensland, Parliamentary Debates, (Hansard), Legislative Assembly 27 November 1984, at p. 3010.) A lack of appreciation of the importance of independence in the office of the DPP in Queensland was shown in 1996 when the Public Service Bill was drafted with a provision to allow the removal of a term appointee from office at any time, with the DPP and Deputy Director defined as term appointees. The DPP raised the matter with the Premier who acted to have the offending provisions deleted. See DPP Queensland Annual Report, 1996-1997, at p. 5

20 In Tasmania the Attorney-General introduced the Bill saying “Supervision of the delivery of legal services from three separate offices will enable their provision in a more efficient and specialised way”. Tasmania, Parliamentary Debates, (Hansard), House of Assembly, Fortyeth Parliament – First Session 1986, at p. 1320.

21 Hansard, Assembly, New South Wales, 1 December 1986, at p. 7342.

Territory\textsuperscript{23} are the only jurisdictions where control over summary prosecutions is in the hands of the DPP rather than the police.\textsuperscript{24}

The establishment of the Commonwealth DPP does not account for the separation of function. The Australian Federal Police and its predecessor, the Commonwealth Police, did not establish their own police prosecuting branch.\textsuperscript{25} Instead, the practice developed for the relevant Deputy Crown Solicitor’s Office to represent the police in the conduct of summary and committal proceedings instituted by a federal police officer. In summons matters, it was the practice for the federal police officer to refer the matter to the relevant Deputy Crown Solicitor’s Office for advice whether a prosecution should be instituted and, if so, on what charges. While the relationship between the police and the Deputy Crown Solicitor’s Office strictly speaking was one of solicitor and client, in practice the Deputy Crown Solicitor was able to assert a considerable amount of de facto control over the institution and conduct of prosecutions. The establishment of the Commonwealth DPP placed this de facto control on a proper legal footing.

In the Australian Capital Territory, on the other hand, the ACT Police (which was a separate police force until 1979 when it became part of the Australian Federal Police) had established its own prosecution section. Police prosecutors conducted prosecutions in the summary courts of the ACT which had been instituted by ACT Police officers. When that arrangement was overturned by the Attorney-General in 1974, the reform was controversial and excited great dissatisfaction amongst ACT Police officers.\textsuperscript{26} However, despite the transfer of responsibility for prosecuting cases in court, the responsibility for advising on the charges to be laid in summons matters remained with the police.\textsuperscript{27}

\textsuperscript{23} Director of Public Prosecutions (NT) Annual Report 1997-1998, pp. 71-82.

\textsuperscript{24} The prosecution of a Commonwealth offence may, of course, be instituted by a State police officer. While there is no legal requirement for such prosecutions to be referred to the Commonwealth DPP for prosecution, nevertheless that often occurs. Further, the Commonwealth DPP has sufficient powers to assume control of such a prosecution if it is considered that it would not be appropriate to allow it to remain in the hands of the State police.


\textsuperscript{26} The depth of police resentment and disaffection with the transfer can be gauged from the summary of the paper prepared by Mr A J Oldroyd for the Symposium at which Enderby’s paper was delivered. The paper was not delivered and was not published other than by way of summary presented by the Symposium Convenor, J K Bowen, op. cit. at pp. AA2 – AA3. Mr Oldroyd was a representative of the Police Association and is attributed as claiming “that police have no confidence in prosecuting lawyers whom they regard as being in the enemy camp”. Of the police prosecutor, he is said to have claimed that “…membership of a disciplined force enables him to make a fair decision…(he) understands the need of the police informant…(he has) gained the trust of the police whom he represents…(he) has a responsibility to protect the police informant from an adverse verdict…(and he) is not there to assist the magistrate to obtain the facts, but to establish that the police informant acted wisely and correctly”. These sentiments are not dissimilar to those expressed by Superintendent Sweeny op. cit. pp. 135-153, see footnote 5.

\textsuperscript{27} According to Enderby, when the prosecution of offences was transferred from the ACT Police to the Deputy Crown Solicitor’s Office the following functions were to be included: “furnishing of particulars of charges to defendants, answering representations from defendant’s lawyers in relation to
The transfer of responsibility for prosecutions from police to the DPP in the Northern Territory of Australia is remarkable in that it is the result of direct negotiation between the DPP and police. The DPP has effectively absorbed the police prosecutors in Darwin and Alice Springs under his jurisdiction.

Meanwhile the thrust of the comments by Enderby has been reinforced repeatedly in Australia and overseas. There is also recognition of the reverse proposition, that the work of the prosecutor should not be unduly enmeshed with that of the investigator. The boundary between police and the prosecution remains contentious and significant.

4.4 **Previous calls in Australia for a complete separation of function**

The call for the total separation of police from prosecution in Australia has been made repeatedly without success. The following list highlights some of the Reports that have argued for reform in this area:

1974  Mitchell Committee Report on Criminal Law Reform;  
1981  Lusher Inquiry into the Administration of the New South Wales Police Service;  

the conduct of particular prosecutions, assessment of the strength of the evidence in relation to each charge and any necessary advising thereon to police informants, selection of the evidence to be placed before the courts, preparation of witness summonses, and the actual presentation of police informant cases before courts of summary jurisdiction in the Territory.” Enderby goes on to describe the uncertainty and confusion that arose following the transfer of functions as the police sought to retain control over those functions. See Enderby, op. cit.

28  See footnote 23. In South Australia the transfer of function is currently being considered by a Steering Committee, see footnote 38.


30  There is ample evidence that police-prosecution co-operation is essential to the orderly transfer of function and that such co-operation is not always immediate. The relationship between the police and the Crown Prosecution Service in England has been described as “fraught with antagonism and hostility, perhaps inevitably, given that the CPS effectively ‘usurped’ a major function of the police.” - Julia Fionda, “The Crown Prosecution Service and the Police: A Loveless Marriage?” The Law Quarterly Review, Vol.110, July 1994, pp. 376-379 at p. 376.


32  In its Report the Lusher inquiry recommended “that the Prosecutor’s Branch be phased out as soon as possible and within five years its personnel cease to act as prosecutors in Courts of Petty Sessions and of summary jurisdiction and in Coroners Courts’ and other Courts where they presently appear in that role, other than in remote areas and in respect of minor matters. That immediate steps be taken to replace them with an appropriate Prosecuting Department through the Attorney General or other appropriate officer and comprised of person[s] admitted as barristers and solicitors. That this should commence with the conduct of committal proceedings of serious charges considered likely to proceed to trial, and be extended as soon as possible to all prosecutions. That in the meantime, steps be taken immediately to enable the Clerk of the Peace to take over and conduct the committal proceedings of such complex and lengthy prosecutions as he thinks fit with a view to preventing unnecessary delays
Only the Commonwealth, the Australian Capital Territory and the Northern Territory DPPs routinely exercise the responsibility to conduct summary prosecutions. In the States, either the relevant DPP has only a limited power to conduct summary prosecutions or, while the

and duplication and expense in the preparation and presentation of such matters as may be likely to go to trial.” Report by Mr Justice Lusher of the Commission to Inquire into New South Wales Police Administration, 29 April 1988, p. 258.

“This restructuring of the Magistrates’ Courts will bring under examination again the question of the role of the police as prosecutors in Magistrates’ Courts. This question was considered by Mr Justice Lusher in his recent Inquiry into the New South Wales Police Administration… Without addressing myself to the details of those recommendations, I commend to the Government the recognition and adoption of the conclusion that underlies them, namely that prosecutions should be handled by a Prosecuting Department under the Ministerial authority of the Attorney General in place of the present system of their being handled by a branch of the police force.” Report by Chief Justice Street of the Commission into Certain Committal proceedings against KE Humphries, July 1983, p. 99.

“The employment of experienced police officers as Police Prosecutors absorbs resources which might be better employed on other essential policing duties. It is undesirable that the courts be seen as having to rely upon the Police Force to exercise important discretions in bringing and pursuing charges. That is made worse by any public perception that the Police have special standing or influence in the prosecution process. Independent, legally qualified people could be employed by the Director of Public Prosecutions to conduct prosecutions. This course of action may involve increased initial costs, but they must be balanced against the ability to recruit staff with specialised skills, the cost of training and employing approximately 100 police exclusively on prosecution duties and the other costs of present practices. Independent, legally qualified prosecution staff will in all likelihood bring about efficiencies and reductions in the caseload of prosecutions. Defective cases can be identified and either remitted for further investigation or, if the defect is incurable be dropped. Better prepared cases from which avoidable legal flaws have been eliminated will result in fewer contests with savings in time and resources”. Report by Mr Fitzgerald QC of the Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct, 3 July 1989, p. 238.

Independent Commission Against Corruption (ICAC), Investigation into the relationship between Police and Criminals, Second Report, ICAC, Sydney, April 1994. This report recommended a trial be conducted for the conduct of summary prosecutions by the DPP.

Justice Wood, Royal Commission into New South Wales Police Service, Final Report, Volume II, para 3.318, p. 318. The Commissioner recommended that the function of the prosecution of summary cases be progressively transferred to the DPP.

The functions of the WA DPP with respect to summary prosecutions are limited to the prosecution of those indictable offences which are capable of summary disposition (Director of Public Prosecutions Act 1991 (WA), section 12). While the NSW DPP may also institute and conduct a prosecution of any indictable offence capable of summary disposition (Director of Public Prosecutions Act 1986 (NSW) section 8(1)(c)), the NSW Director may not institute and conduct a prosecution in respect of a summary offence unless either the summary offence is one that is prescribed or the person otherwise responsible for the prosecution has consented in writing (DPP Act (NSW), section 8(3)).
power to conduct summary prosecutions is unfettered by the relevant enabling legislation, it is rarely exercised.

In the Northern Territory the general power given to the DPP to take over summary prosecutions has been used to institute the process of taking over all summary prosecutions from the police.

At the same time, the importance of the role of the courts of summary jurisdiction has been growing rapidly with an increasing number of cases able to be dealt with by or brought exclusively within the jurisdiction of the courts of summary jurisdiction. This role is likely to continue to expand.\textsuperscript{38}

While a number of the State DPPs have stated that it would be appropriate for their office to assume responsibility for the conduct of all prosecutions before the summary courts,\textsuperscript{39} the only real progress has been in taking over the conduct of committal proceedings from the police.\textsuperscript{40} Only in NSW has there been a trial for the DPP to take over summary prosecutions.

\textsuperscript{38} See Chief Justice Gleeson, “The Future State of the Judicature,” a paper presented to The Judicial Conference of Australia – Colloquium on the Courts and the Future, Surfers Paradise 8 November 1998, at p. 6. The Chief Justice stated that “Governments will continue to respond to the tension between ever increasing demands for access to justice and the unsustainable cost of justice by increasing the role of summary justice, administered by magistrates or equivalent judicial officers. A greater proportion of criminal offences will be dealt with summarily.”

\textsuperscript{39} The Victorian DPP stated this in his 1996-97 Annual Report at p. 24:

“It seems to be … beyond argument that it is desirable in principle that [summary prosecution] should be carried out by an independent authority … It is the core business of the prosecutor rather than the investigator. It does seem right that we are ultimately the appropriate body.”

See also Project Pathfinder op. cit., which stated it was envisaged that there would be a single prosecutorial body which would conduct all criminal prosecutions and that the police would cease to be involved in the actual conduct of prosecutions (p. 56).

Similarly, the South Australian DPP has stated that the taking over of summary prosecution from the police is being considered and that a Steering Committee has been established to examine the matter. DPP Annual Report (SA) (1997-98), p. 1.

\textsuperscript{40} The NSW DPP assumed control of all committal proceedings some years ago. In 1997 the WA DPP was involved in a trial project in which officers from the DPP had the conduct of all committal proceedings in the Perth Court of Petty Sessions other than committals for sentence. The Report on the trial project (A Review of the Role of the Director of Public Prosecutions in the Perth Court of Petty Sessions 1997 : Office of the Director of Public Prosecutions Western Australia) stated:

“Statistics indicate that the involvement of the DPP in the Perth Court of Petty Sessions has contributed to a significant saving in court time, with 47% of listed preliminary hearings being resolved on the hearing date. The average time taken for preliminary hearings involving the calling of evidence was only 54% of the listed time allocated by the court. Figures also show that 28% of indictable matters dealt with by the Crown Prosecutors in the Perth Court of Petty Sessions reached finality without adding to the expense and demands for a trial in the District or Supreme Courts.

The Queensland DPP commenced a similar trial project at the Ipswich Magistrates Court in 1994. The success of the trial led to an extension to the Brisbane Central Magistrates Court in 1995. In 1998 the Director reported a finding that an overall net benefit of $826,000 to the criminal justice system had resulted from the committals project. As a result, the committals project is to be funded for 1998-99
Following a suggestion by the Wood Royal Commission into the NSW Police Service in 1996, the NSW DPP participated in a pilot project involving DPP prosecutors conducting summary prosecutions in two NSW courts (Campbelltown and Dubbo). While the report evaluating the pilot project recommended that the NSW DPP should have the conduct of all summary prosecutions, so far no substantive action has been taken to implement that recommendation.

There appears to be a lack of political will to proceed with the transfer of all matters to be prosecuted on behalf of police to the jurisdiction of the DPP. This may be attributed to the fact that such a move would remove an important aspect of police power and expose to public controversy the exercise of a previously hidden discretion.

PART 5 Operational separation within the general relationship of police and prosecutor

Apart from the point of transfer of responsibility in the conduct of a court prosecution, the boundary between police and prosecutor in terms of their general relationship cannot be drawn with a single line. There are interdependencies and spheres of mutual influence, as well as core areas of independence. These intricacies of the relationship are a result of history and circumstance. There is no prescriptive model to refer to and the relationship is an evolving one.

It is in the interaction between the investigator and prosecutor that the role-boundaries for each can become obscured. The way in which that interplay is negotiated ultimately determines which cases are prosecuted in our courts.

The relationship between police and the prosecutor can be illustrated diagrammatically as follows:

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but extension of the project depends on a resolution of inter-agency issues and amending the legal aid scale for committals. (see Director of Public Prosecutions, Annual Report, 1997-98, p. 20-21). The South Australian DPP has also established a committal unit which conducts all committal proceedings in certain Magistrates Courts, including Adelaide Magistrates’ Court. (see Director of Public Prosecutions, Annual Report, 1997-98, pp. 8-9)

41 Waller and Munro, Ibid., p. 41.
It is important to maintain the proper balance and distinction between the work of prosecuting and that of investigating. There exists a constant risk of losing perspective or, at the least, the development of a perception that perspective and objectivity are in jeopardy. As long ago as 1855 it was put by the Attorney-General to a Select Committee on Public Prosecutors in England:

“I think it is of the first importance that policemen should be kept strictly to their functions as policemen, as persons to apprehend and have the custody of the prisoners, and not as persons who are to mix themselves up in the conduct of a prosecution, whereby they acquire a bias infinitely stronger than that which must, under any circumstances, naturally attach itself to their evidence.”

In England it has been considered feasible to combine the functions of investigator and prosecutor simultaneously rather than consecutively and it has been argued that there is scope for the public prosecutor to lead a team of investigators, as is the case in the Serious Fraud Office. The obvious retort is that if the investigator can lose objectivity when prosecuting, the same problem can arise for the prosecutor who investigates and the roles ought not be combined in the one office. Professor J L L J Edwards addressed this issue before a meeting of Commonwealth Law Ministers in 1977, noting it had become popular among Attorneys-General and DPPs in the Commonwealth. In relation to the police and prosecution function he said:

“It can be said with confidence, however, that the manner in which the criminal law is administered in any given jurisdiction and the confidence it engenders among the general population will relate directly to the greatest degree of separation possible between the functions of these important criminal justice agencies.”

5.1 Areas of independent responsibility for the prosecutor

The DPPs in Australia share two common features regarding the degree of independence exercised by them. In practice all are independent of the political process and are, as a matter of law, independent of the police. Each is also accountable to the Legislature. There are a number of ways in which that independence is exercised:

1. The exercise of prosecutorial discretion and the application of a public interest test for the prosecution of cases.
2. Objective consideration of cases presented for prosecution.
3. Control over all aspects of the prosecution of a criminal charge from the point of transfer to the DPP.
4. Power to issue guidelines or directions.
5. Providing particulars and liaising with the accused’s representatives.


43 Hetherington, ibid. pp. 188-189.

The primary importance of discretion in criminal proceedings is summed up in the words of Sir Hartley Shawcross QC as Attorney General in addressing the House of Commons on 29 January 1951:

“\textquote{It has never been the rule in this country \textemdash I hope it never will be \textemdash that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should…prosecute ‘whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.’ That is still the dominant consideration.}^{45}

These words are quoted by all but two of the Australian Directors in their guidelines for the conduct of prosecutions. Our system allows for discretion in the selection of matters for prosecution and the manner in which they are prosecuted.

A review of the legislation establishing the offices of DPP in the various Australian jurisdictions demonstrates that all but the Tasmania DPP have defined powers and authority. These include the power to issue general guidelines and, in most instances, there is a specific power to give directions or guidelines to police.\textsuperscript{46}

### 5.2 Areas of independent responsibility for the police

On the other hand, the two core areas of independent authority for the police are:

1. Independence of the investigator in relation to the manner of investigation.
2. The exercise of the common law power (available to any person) to lay charges without reference to any other agency.

Despite the fact that criminal proceedings may be brought by any person, they are usually commenced by the action of an investigative official. Police exercise considerable discretionary power each day in deciding whether to proceed with a prosecution, against whom, and on what charge. In so doing, the investigative officer makes an assessment of the sufficiency of evidence and the charges available.

In England the Philips Commission considered whether it would be appropriate to achieve a complete separation of the investigative and prosecutorial function by removing from the police their authority to institute a prosecution. In the end the Royal Commission recommended that this responsibility should be left with the police.

“We have examined a number of other common law jurisdictions having prosecution arrangements in which the prosecutor and the investigator are separate officials. Our conclusion is that, as a matter of practice, it is difficult to achieve a total separation. The two roles overlap and intertwine. This is partly because the decision to prosecute is not a single intellectual act of a single person at an identifiable moment in the pre-}


\textsuperscript{46} South Australia, Queensland, NSW, the ACT and the Commonwealth.
trial process but it is made up of a series of decisions of a widely different kind made by many people and at various stages in the process.

We know of no other common law jurisdiction in which the first decision maker, the officer in the street, has his discretion to start the process of prosecution circumscribed other than by his training and the constraints of the law. It would be impossible and, indeed, in our view, undesirable for this discretion to be further limited. Thus the pure theory of separation could not work in practice.”

Later the Commission commented:

“To bring the independent legal prosecutor into the process before inquiries have been made to determine whether the reported incident is an offence and whether there is sufficient evidence to constitute a prima facie case would simply be to create a different kind of police investigator.”

The comment on the initiation of the prosecution process, at least in relation to arrest, is applicable in all jurisdictions in Australia. In Canada the Law Reform Commission in its review of criminal prosecutions also accepted that the police should retain an absolute discretion in relation to the “laying of charges.” Nevertheless, there are some who have argued that even this does not go far enough, pointing out that with the responsibility for instituting a prosecution the police retain the discretion to take no action and to caution. In particular, it has been argued that the independent prosecutor would be more accountable in the exercise of the discretion to caution.

In Australia, we have seen that the Commonwealth DPP is consulted in relation to Commonwealth summons matters sought to be initiated by the AFP. In all other jurisdictions it is usually a matter for the police to consider whether to obtain advice prior to commencing proceedings.

It is significant in relation to the commencement of proceedings that during the Summary Prosecution Pilot conducted in New South Wales, all the functions of the Police Legal Services Branch were handed to the DPP except after hours emergency advice. As a result during the pilot, the DPP was given the responsibility of approving the institution of proceedings by way of summons.

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47 Philips Commission, paras 6.30-6.31

48 Ibid., at p. 147. It should be noted, however, that a minority of the Royal Commission considered that not only should the police retain the right to make the decision to institute a prosecution but that the prosecuting authority should not have the sole discretion to discontinue a prosecution on public interest grounds (see Philips Commission at paras 7.12 and 9.2).


Once proceedings have been started they tend to have a life of their own. The dropping of charges, charge bargaining and the manner of presentation of the case for the prosecution is fertile ground for controversy between the investigator and the prosecutor. Yet both are exercising an aspect of discretion that exists on a continuum. The various factors affecting the discretion whether to commence proceedings and those that affect the conduct of the prosecutions, frequently overlap.

As I have indicated, the police and DPP together act as a check and balance on the exercise of power by each other. Despite the core areas in which each agency exercises its powers independently, there is an area of mutual influence where the views expressed by one can influence decision-making by the other without the surrendering of independence.

5.3 Areas of mutual influence

Where an independent prosecutor is given the responsibility for the conduct of criminal prosecutions, there remains the question of the operational separation of police and the independent prosecutor. All DPPs face the issue of maintaining a proper separation of prosecution and investigative functions. For the DPP to act fairly and objectively, and to be seen to do so, it is essential that the DPP prosecutor not be unduly drawn into the investigative process.\(^{51}\) This does not mean, however, that there should be a complete barrier between the investigator and prosecutor that is breached only by the delivery of a brief of evidence.

For example, the Prosecution Policy of the Commonwealth provides in relation to consideration by the DPP of discontinuing proceedings that “the independence of the DPP in the prosecution process does not mean that those who investigated the matter should be excluded from the decision making process.”\(^{52}\) However, police-prosecutor interaction is not confined to consultation regarding prosecutions that have already commenced.

The theory requiring a strict separation of investigation and prosecution functions fails to recognise the reality that the roles are intertwined. In practice a high level of interaction between the police and the prosecutor exists. Reports into the relationship between police and independent prosecutors have stressed repeatedly the need for communication and consultation between the two. In this way there is a moderation of the independence of each. The DPP does not take the position that the power over prosecution should be asserted without consultation. Ultimately however, prosecutors will make their decisions independently and on a consideration of the particular case.

Consultation with police informants is required where a charge-bargain is contemplated or where the DPP is considering discontinuing a prosecution. Each DPP is conscious of the need to consider the views of the informant and any material that the informant may put that is relevant to an evaluation of the public policy considerations. This may include material that is not admissible in evidence.

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\(^{51}\) For example, there is considerable pressure to include the prosecutor in the investigation of child sexual assault cases.

\(^{52}\) Prosecution Policy of the Commonwealth, AGPS, Canberra, 1996 at paragraph 4.6.
5.4 The interdependent flow of information and services

On a mechanical level there is a straightforward exchange of information and services that marks the interdependence of the prosecutor and the police.

The DPP may provide other assistance to police. The lack of an internal prosecution branch within the Australian Federal Police means that, of the police agencies in Australia, it is perhaps the most dependent upon the services provided by a DPP.

In addition to questions about the commencement of proceedings, very often the Commonwealth DPP and other DPP offices are called upon to provide advice to investigators, either before or after charging and at times where no charge is contemplated.

It is often necessary to give advice to investigators in the abstract before a prosecution is commenced or in the absence of any suspect. This is becoming an increasingly important function of the DPP.

The ready availability of the independent prosecutor to provide advice to police was a key recommendation of the Narey Report into the CPS.\(^{53}\) It was also a prominent issue in the evidence given before the New South Wales Police Royal Commission by the DPP.\(^{54}\) All but non-urgent out-of-hours advice to police was included among the responsibilities in the Summary Prosecutions Pilot in New South Wales.\(^{55}\)

In complex cases, the police and other investigative agencies often require almost continuous advice throughout the investigation. The principle of separation of responsibility in such circumstances must not prevent the investigators from obtaining the assistance necessary to effectively and lawfully carry out their investigations.\(^{56}\) The crucial divide between responsibilities will have been breached however, if the prosecutor begins to advise or direct the course or conduct of the investigation. Control over the investigative process must be kept by the police who are in a position to answer for the manner of their investigation in any subsequent proceedings.

The professional relationship between police and prosecutor requires that the manner in which advice is given ensures that the question raised and the material submitted for consideration can be readily ascertained by the prosecutor at the time the advice is requested and on review at any later stage, if required. This is a basic anti-corruption measure. The prosecutor from whom the advice is sought must view summaries of evidence with considerable caution. Wherever possible, requests for advice, and the advice itself, should be in writing.

As an investigation progresses, it is important to have regard to the context in which advice is given during that investigation. This is a further reason for the keeping of records in relation to advice. Where complaints are made that the prosecutor does not provide off-the-cuff oral advice, other factors must be taken into account.


\(^{54}\) Wood Royal Commission, Transcript of Evidence, 1 July 1996 pp. 27917-27961.

\(^{55}\) Waller and Munro, op. cit. p. 40.

advice, two related questions must be raised. The first is: what urgency is there to provide off-the-cuff advice that has no record of the information given, the reasoning applied or the conclusion. Secondly, what value is advice given without a proper record of that advice? We have ample evidence of the danger inherent in providing power without accountability. It cannot be doubted that the raising of professional standards among police will reduce the demand for oral advice. Nevertheless, where the urgency of a situation genuinely means that oral advice is required, it should be given.

During the investigation phase the police may require assistance from the DPP which extends beyond the provision of advice. For example, it is a common practice for the Commonwealth DPP to assist the AFP in applications before judicial officers for search warrants or listening device or telephone intercept warrants. The assistance provided includes settling the documents required to be put before the judicial officer and appearing on any application.

The Commonwealth DPP is also involved in providing training assistance to police by attendance at workshops or assisting in settling the content of course material. It is proper that the DPP does what it can to ensure that the police are kept informed of developments affecting prosecution law and policy. It is also an important aspect of securing a good professional relationship.

5.5 The involvement of the DPP in the investigative stage

The main advantage of DPP involvement in providing advice and assistance to police is to ensure that police effectively and lawfully exercise their powers of investigation. The prosecutor will also have some knowledge of the case prior to receiving a brief. The most appropriate charges can also be settled prior to the charging stage. This can provide significant resource savings in focusing the scope of an investigation and the later conduct of a prosecution. Nevertheless, the DPP must guard against becoming too closely involved in the investigation.

Conclusion

I have emphasised the way in which the work of the police and independent prosecutor are intertwined. I have also discussed the importance of their independence in relation to the powers to be exercised by police up to the point of charging and by the prosecution following charge. There is a strong basis in principle to require a clear delineation of authority and to extend to each DPP the responsibility for prosecuting all criminal charges brought by police. The relationship between the two agencies creates its own system of checks and balances on the exercise of power by each.

In many jurisdictions the appropriate boundary between police and prosecutor has not yet been set. In all probability there will be difficulties in finding the resources to establish new services and implement new boundaries. We have a long way to go before Australia develops the defined boundary between police and prosecutor that modern society requires. We should be encouraged by the progress made in the Northern Territory where the police and the DPP have demonstrated the virtue of coming together to resolve this issue.

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