



DPP

Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

PARLIAMENTARY JOINT COMMITTEE ON THE AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

INQUIRY INTO INTEGRITY OF OVERSEAS COMMONWEALTH LAW ENFORCEMENT OPERATIONS

Introduction

The CDPP is an independent prosecuting service established by the Parliament of Australia to prosecute alleged offences against Commonwealth law.

The CDPP's organisational vision is for a fair, safe and just society where the laws of the Commonwealth of Australia are respected and maintained and there is public confidence in the justice system. The CDPP's purpose is to provide an ethical, high quality and independent prosecution service for Australia in accordance with the *Prosecution Policy of the Commonwealth*.

The CDPP prosecutes a wide range of alleged criminal offences, such as offences relating to the importation of serious drugs, frauds on the Commonwealth including tax and social security fraud, offences relating to the administration of Government, commercial prosecutions, people smuggling, people trafficking, terrorism and a range of regulatory offences.

The CDPP is not an investigation agency. It can only prosecute when matters are referred to it by an investigative agency, such as the AFP, ACC or another government agency.

Investigation agencies

The decision to initiate investigative action and the subsequent conduct of the investigation in relation to alleged criminal conduct rests with investigation agencies, for example the AFP or the department or agency responsible for administering the relevant legislation.

The decision to refer a matter for prosecution is also a matter for the investigation agency concerned.

In order for agencies to use investigation resources efficiently and effectively it is essential for agencies to target cases. The enforcement strategies of agencies recognise that undertaking investigation and prosecution action to ensure compliance is inherently resource intensive and often protracted. Consideration is given by investigation agencies as to whether prosecution is the appropriate response or whether alternative avenues may appropriately address the alleged conduct. These strategies seek to ensure that the sanction of criminal prosecution is reserved for those cases where it is warranted.

The enforcement strategies of each agency sit within an Australian Government law enforcement framework which seeks to ensure that prosecution action is targeted. This framework includes:

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- *The Prosecution Policy of the Commonwealth*;
- *The Commonwealth Fraud Control Guidelines* which establish the policy framework and articulate the Government's expectations for effective fraud control for all agencies;
- Directives and guidelines issued by the Attorney-General's Department, including:
 - *Legal Services Directions* - a set of binding rules about the performance of legal work for the Commonwealth;
 - The Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA) *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions*; and
 - *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007).
- *Australian Government Investigations Standards* establishing minimum standards for Australian Government agencies conducting investigations and requiring agencies to have a written case prioritisation policy based on the above HOCOLEA overarching principles;
- Australian National Audit Office (ANAO) Better Practice Guide *Administering Regulation* (March 2007);
- Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling* (April 2009); and
- Relevant legislative obligations relating to security, privacy and freedom of information.

Conduct of Prosecutions

If, as a result of the investigation, an offence appears to have been committed the investigation agency usually refers a brief of evidence to the CDPP prior to the alleged offender being charged. In some cases, it is necessary and appropriate that a prosecution be instituted by way of arrest and charge by the investigation agency, prior to a brief of evidence being referred to the CDPP. In these cases, the matter is then referred to the CDPP for consideration of the prosecution.

Once a matter has been referred to the CDPP, the CDPP considers whether to commence or continue the prosecution in accordance with the *Prosecution Policy of the Commonwealth*. The *Prosecution Policy* is a public document which sets out guidelines for the CDPP when making decisions in the prosecution process. The *Prosecution Policy* has been tabled in Parliament and is publicly available. A copy is available on the CDPP website at <www.cdpp.gov.au>.

The main purpose of the *Prosecution Policy* is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. The *Prosecutions Policy* outlines the relevant factors and considerations which are taken into account when a prosecutor is exercising the discretions relevant to his or her role and functions.

The decision to institute (or continue) criminal proceedings is an important one, and careful consideration is given to each matter. The *Prosecution Policy* sets out the relevant guidelines for determining whether it is appropriate to institute a prosecution (or to continue a prosecution). Under the *Prosecution Policy* there is a two-stage test that must be satisfied:

- there must be sufficient evidence to prosecute the case; and
- it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

In determining whether there is sufficient evidence to prosecute a case, the CDPP must be satisfied that there is *prima facie* evidence of the elements of the offence, and a reasonable prospect of obtaining a conviction. The existence of a *prima facie* case alone is not sufficient.

In making this decision, the prosecutor must evaluate how strong the case is likely to be when presented in court. This is an important distinction as the decision can only be made based on admissible evidence, not necessarily all the information gathered during the course of the investigation.

The evaluation must take into account such matters as the availability, competence and credibility of witnesses and their likely effect on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence open to the alleged offender and any other factors that could affect the likelihood or otherwise of a conviction.

The possibility that any evidence might be excluded by a court should be taken into account and, if that evidence is crucial to the case, this may substantially affect the decision whether or not to institute or proceed with a prosecution. It is the prosecutor's role to look beneath the surface of the evidence in a matter, particularly in borderline cases.

Once satisfied that there is sufficient evidence to justify the initiation or continuation of a prosecution, the prosecutor must then consider whether the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted. In determining whether this is the case, the prosecutor will consider all of the provable facts and all of the surrounding circumstances. The factors to be considered will vary from case to case, but may include:

- whether the offence is serious or trivial;
- any mitigating or aggravating circumstances;
- the age, intelligence, health or any special infirmity of the alleged offender, any witness or victim;
- the alleged offender's antecedents;
- the staleness of the offence;
- the availability and efficacy of any alternatives to prosecution;
- the attitude of the victim;
- the likely outcome in the event of a finding of guilt; and
- the need for deterrence.

These are not the only factors, and other relevant factors are contained in the *Prosecution Policy*.

Generally the more serious the alleged offence is, the more likely it will be that the public interest will require that a prosecution be pursued.

The decision not to prosecute must be made impartially, and must not be influenced by any inappropriate references to race, religion, sex, national origin or political association. The decision to prosecute must not be influenced by any political advantage or disadvantage to the Government. The views of a referring agency can inform aspects of the public interest element in the prosecution decision but that decision always lies with the CDPP alone.

Liaison Relationship with Investigation Agencies

The CDPP works closely with Commonwealth agencies that refer matters for prosecution.

The CDPP has in place *General Guidelines for Dealing with Investigative Agencies* and also Memoranda of Understanding with a range of agencies. The CDPP holds regular meetings at the national and regional level with many Commonwealth agencies. It also maintains

relationships with other investigative agencies that from time to time refer briefs of evidence to the CDPP.

Commonwealth Offences Committed Overseas

The geographical jurisdiction for Commonwealth offences is set out in Part 2.7 of the *Criminal Code Act 1995* (Cth) ("the Code"). The intention behind Part 2.7 of the Code is to clarify the geographical application of Commonwealth offences. Provision is made for different levels of jurisdiction to give effect to specific governmental purposes. There is a standard geographical jurisdiction and four categories of extended geographical jurisdiction; Categories A-D.^[1]

If an offence only requires a narrow territorial based geographical jurisdiction, then subsection 14.1 automatically applies, and standard geographical jurisdiction operates.

However, if it is desired that the offence should reach outside Australia, the Code provides four categories of extended geographical jurisdiction:

1. Category A: where this category applies, the geographical jurisdiction for the offence covers Australian citizens for what they do anywhere in the world;
2. Category B: where this category applies, the geographical jurisdiction for the offence covers Australian citizens and residents for what they do anywhere in the world;
3. Category C: where this category applies, the geographical jurisdiction for the offence covers anyone for what they do anywhere in the world regardless of citizenship or residence, except where it is not unlawful in the other place; and
4. Category D: where this category applies, the geographical jurisdiction for the offence covers anyone for what they do anywhere in the world regardless of whether it is lawful elsewhere.

The Attorney-General's consent is required for some prosecutions where the alleged conduct occurs wholly in a foreign country.

Many offences in Chapter 7 of the Code, relating to the proper administration of Government, have extended geographical jurisdiction. These offences include property offences, fraudulent conduct, false or misleading statements, false or misleading information or documents, unwarranted demands of or made by a Commonwealth public official, forgery and related offences, impersonation of Commonwealth public officials, and obstruction of Commonwealth public officials.

Bribery and related offences are set out in Part 7.6 of the Code, including bribery of a Commonwealth public official, corrupting benefits given to, or received by, a Commonwealth public official, and abuse of public office. In respect of all these offences, subsection 142.3 provides that Category D extended geographical jurisdiction applies.

Division 70 of the Code provides a specific offence in relation to bribing a foreign public official. It contains a specific geographical jurisdiction provision in section 70.5 which provides:

(1) A person does not commit an offence against section 70.2 unless:

(a) the conduct constituting the alleged offence occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

^[1] Section 14.1 and sections 15.1 - 15.4.

- (b) the conduct constituting the alleged offence occurs wholly outside Australia and:
- (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

In considering whether a prosecution that involves conduct that has occurred outside of Australia can be commenced or continued, the CDPP must consider whether the geographical jurisdiction provisions that apply to the offence cover conduct occurring outside of Australia.