

## Public Accountability of Public Prosecutions

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The role of the Prosecutor and the exercise of prosecutorial discretion can have an enormous impact on the outcome of criminal proceedings. The exercise of prosecutorial discretion is, however, often secretive and misunderstood. There have been concerns that a lack of accountability and transparency can result in a fertile bed for corruption. This article considers the development of the prosecution system in Australia. It analyses the discretion that the Prosecutor wields and examines Australian attempts at safeguarding this discretion. It points out the problems with the Australian system of prosecution and suggests that there is room for greater public accountability of the Prosecutor's role. In the search for a solution to the prosecutorial conundrum, the article examines the Japanese model of 'democratic' public prosecution to see if such a system could be adopted in Australia.

### 1. Introduction

In discussions on criminal law, there is ample literature and debate on the role of the judiciary and the laws passed by the legislature. What is often forgotten however, is the role the Public Prosecutor<sup>1</sup> plays and the ambit of the Prosecutor's discretion in the commencement and conduct of criminal proceedings. While the legislature and judiciary are subject to public scrutiny and pegged to standards of transparency and independence, the role of the Prosecutor is often not known, and thus slips under the net of such scrutiny.

Indeed, as this article will argue, the Prosecutor often possesses immense discretion that could have a severe impact on criminal proceedings and the accused. Australia's current system of prosecution attempts to give some degree of independence to the Director of Public Prosecutions. To understand this, the article will look at the historical developments that resulted in the establishment of the office of Director of Public Prosecutions ('DPP') in Australia that aims to be independent, fair and accountable.

This paper will then highlight the concentration of power in the Prosecutor and the problems associated with this system. The article will examine whether public prosecution can truly be 'public'. It will analyse the Japanese system of 'democratizing' prosecution and examine whether this may be effective in tempering prosecutorial discretion and allowing a public voice in the prosecution arena and look at whether such a solution can be transposed into an Australian setting.

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<sup>1</sup> The precise term used to define the role may differ depending on the jurisdiction. In Australia, prosecutorial functions are carried out by 'State Prosecutors' or 'Police Prosecutors' and are directed by a 'Director of Public Prosecutions'. For the purposes of this article, the term 'Prosecutor' will be used to refer to government officials vested with the authority to initiate and conduct criminal proceedings.

## 2. The Prosecutor's Role in the Criminal Justice System

### 2.1 Checks and Balances

Western liberals have long accepted that a government with unchecked powers increases the likelihood of abuse of those powers. A system of checks and balances exists to ensure that the powers of the State are exercised appropriately and only when necessary. In the words of Montesquieu, 'there is no liberty, if the judicial power be not separated from the executive and legislative'.<sup>2</sup>

The separation of powers doctrine thus has state power organized in three separate branches: the executive, the legislature and the judiciary, each acting 'as the means of keeping each other in their proper places'. While this separation of powers is important in all facets of governance and law, it is arguably even more so in matters of criminal law as this affects the liberty and life of individuals.

It is in the criminal law where one is able to witness the 'fascinating inter-play between the different branches of government'.<sup>3</sup>

The Legislature makes the laws which define what a crime is, and which also prescribes what the processes should be; the Executive runs the enforcement machinery from detection and investigation to prosecution; and the Judiciary adjudicates guilt or innocence, and, if necessary, the punishment, on the material presented to it by the prosecution and the defendant; the Executive once again takes over and carries out the sentence of the court.<sup>4</sup>

From the completion of an offence to conviction and sentencing, the ball of control first starts with the legislature, made up of elected officials, to define the necessary elements of an offence. It then passes to the executive for investigation and prosecution and finally to the judiciary, made up of appointed judicial officers who are, in an ideal system, given independence and are thus free of influence from the other two branches. It is the executive control of this process and, within it, the exercise of the Prosecutor's power and discretion that is the concern of this article.

### 2.2 The Public Prosecutor's Role

In Australia, prosecutorial functions were traditionally carried out by the Attorney-General. Today, this role has fallen to the Directors of Public Prosecutions of the States and the Commonwealth, through the respective enabling legislation.<sup>5</sup> While the precise term may vary across jurisdictions, there is usually provision for a 'Public Prosecutor',<sup>6</sup> whose primary function is to prosecute offences against the law of the land. In carrying out this duty, the Prosecutor has to make certain decisions. This includes whether or not to prosecute, and if so,

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<sup>2</sup> Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, 1949) 51; James Madison, *The Federalist No 51* (1961) 347.

<sup>3</sup> Michael Hor, 'The Independence of the Criminal Justice System in Singapore' [2002] *Singapore Journal of Legal Studies* 497, 497.

<sup>4</sup> Ibid.

<sup>5</sup> Rod Harvey, 'The Independence of the Prosecutor: A Police Perspective' (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 18 April 1996) 5.

<sup>6</sup> Above n 1.

to choose from the plethora of available charges arising from the same set of facts. The Prosecutor also assists the court by making submissions fairly and in an even handed manner,<sup>7</sup> which may include applications on points of the criminal process from pre-trial hearings through to the trial itself, sentencing and appeals on both conviction and sentence, if necessary.<sup>8</sup>

In the exercise of these functions, the Prosecutor is meant to act fairly in seeking the truth and to represent the community rather than any individual or sectional interest.<sup>9</sup> While the Prosecutor is the adversary of the accused in our adversarial system,<sup>10</sup> the Prosecutor as ‘minister for justice’<sup>11</sup> is not entitled to act as if representing private interests in litigation. A Prosecutor ‘acts independently, yet in the public interest’.<sup>12</sup> The role of the Public Prosecutor is not to push for a conviction,<sup>13</sup> but to assist the court in arriving at the truth.<sup>14</sup> A Prosecutor does not represent a particular client,<sup>15</sup> but serves the community and, in doing so, must act in the spirit of fairness. To this extent, the accused and the community can expect that the Prosecutor ‘will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one’.<sup>16</sup>

### 2.3 Ball Passing

At a cursory glance, this ‘ball-passing’ of control from one branch of government to the other ensures that each is accountable to the other and reduces the risk of one branch being overly influenced by another. While the Westminster model of governance has accepted that some overlap between the legislature and executive cannot be avoided,<sup>17</sup> the judiciary remains separate and independent. This ensures that the risk of abuse is minimized and the liberty and rights of individuals are protected.<sup>18</sup>

However, upon closer examination, the executive’s role and specifically, the Prosecutor’s position is one of a special nature – it essentially forms the bridge that links the legislature’s definition of an offence to the judiciary’s adjudication of guilt or innocence. As the two institutions are independent of each other, it is up to the Prosecutor, upon receiving the ‘ball’, to decide when, how, and indeed whether or not to pass said ‘ball’ to the judiciary for adjudication.

<sup>7</sup> *R v Tait and Bartley* (1979) 46 ALR 473, 477; David Ross, *Crime* (Lawbook, 2<sup>nd</sup> ed, 2004) 749.

<sup>8</sup> *R v Allpass* (1993) 72 A Crim R 561.

<sup>9</sup> *Livernore v R* [2006] NSWCCA 334; Eric Colvin and John McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis, 5<sup>th</sup> ed, 2008) 739.

<sup>10</sup> *R v Karounos* (1995) 63 SASR 452, 465-6, 493.

<sup>11</sup> Harvey, above n 6.

<sup>12</sup> Critics have however mentioned that these concepts are ‘so diffuse and elastic that they do not constrain prosecutors much’, see Stephanos Bibas, ‘Prosecutorial Regulations versus Prosecutorial Accountability’ (2009) 157 *University of Pennsylvania Law Review* 959, 961.

<sup>13</sup> Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2<sup>nd</sup> ed, 2012) 28.

<sup>14</sup> Colvin and McKechnie, above n 10.

<sup>15</sup> Harvey, above n 5.

<sup>16</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 663. This includes avoiding the use of temperate or emotive language which may prejudice the jury – see *Livernore v R* [2006] NSWCCA 334 where the Court took objection to the prosecution repeatedly referring to a witness as ‘an idiot’, cited in Colvin and McKechnie, above n 9, 740.

<sup>17</sup> Stanley de Smith, *The New Commonwealth and its Constitutions* (Stevens, 1964) 131-149.

<sup>18</sup> Hor, above n 3.

The special position the Prosecutor is in is arguably compounded given that the judiciary in the adversarial common law system, while having final authority in deciding the matter, is only a passive adjudicator,<sup>19</sup> having a limited role in the commencement and conduct of criminal proceedings. For practical and constitutional reasons, it is neither expected, nor desired, that the courts play a more inquisitorial role in an adversarial system.<sup>20</sup> As such, the court can only consider matters that have been brought before it, based on materials presented by both parties.<sup>21</sup> The courts are also constrained in having to deal with the cases before them on a case-by-case basis, affording each the full attention and consideration of the court.<sup>22</sup>

While the Prosecutor has some limitations - for example, in Australia it is well accepted that a Prosecutor should play no role in the investigation of offences and is thus reliant on enforcement and investigative authorities to pursue matters - the Prosecutor does play an important role in the pre-trial decision making process and in court. He/she decides whether or not to proceed on charges and which charges to proceed on. If proceeding on a matter, he/she acts as an advocate before the court, selecting which materials to present and in doing so, is given great leeway in deciding the form of such presentation, or indeed whether the case at hand warrants such presentation.<sup>23</sup> More than a passive receiver of workload, the Prosecutor 'screens' cases and decides which are worthy of proceeding on and to what extent. The Prosecutor's importance within the criminal justice system cannot be overestimated.<sup>24</sup>

## 2.4 Prosecutorial Discretion

The Macquarie Dictionary defines discretion as the 'power or right of deciding, or of acting according to one's own judgment; freedom of judgment or choice.'<sup>25</sup> In the context of a Prosecutor's discretion, this refers to the wide scope given to commence, conduct, direct, take over and conduct criminal proceedings on behalf of the State, as its advocate.<sup>26</sup> According to Davis:

Discretion is indispensable for the individualization of justice (governments of laws and men). It is necessary as rules alone cannot cope with the complexities of modern government...Where law ends, discretion begins and the exercise of discretion may mean beneficence or tyranny, justice or injustice, reasonableness or arbitrariness.<sup>27</sup>

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<sup>19</sup> William A Hamilton and Charles R Work, 'The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness' (1973) 64 *Journal of Criminal Law and Criminology* 183.

<sup>20</sup> Michael A Simons, 'Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization' (2002) 75 *New York University Law Review* 893, 897.

<sup>21</sup> Hamilton and Work, above n 19.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Bibas, above n 12.

<sup>25</sup> Susan Butler (ed), *Macquarie Dictionary* (Macquarie, 5<sup>th</sup> ed, 2009) 479; Richard Refshauge, 'Prosecutorial Discretion - Australia' in Gabriël A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21<sup>st</sup> Century* (CopyRight Publishing, 2002) 353, 358. The Concise Australian Legal Dictionary defines discretion as 'the power or authority of a decision maker to choose between alternatives, or to choose no alternative', see Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis, 3<sup>rd</sup> ed, 2004) 130.

<sup>26</sup> George T Felkenes, 'The Prosecutor: A Look at Reality' (1975) 7 *Southwestern University Law Review* 98, 98.

<sup>27</sup> K Davis, *Police Discretion* (West Publishing, 1975) 12.

Whatever its origins, discretion now ‘pervades all facets of the administration of justice’.<sup>28</sup> While it has been accepted that a degree of discretion in decision making is required,<sup>29</sup> these decisions can have a significant impact on a defendant and reverberate through every component of the criminal justice system.<sup>30</sup> They can mean the difference between justice and injustice. Prosecutorial discretion is indeed ‘at the heart of the State’s criminal justice system’.<sup>31</sup>

In a straightforward shoplifting incident for example, where the only offence possible is stealing, the Prosecutor may simply have to make a choice whether or not to proceed with prosecution.<sup>32</sup> However, in more complicated matters where some force has been used in the commission of the offence, the Prosecutor has to decide whether to proceed with stealing, robbery (or possibly aggravated robbery).<sup>33</sup> Similarly, in an altercation between individuals where the level of injuries suffered may vary, a number of charges may be open: a common assault,<sup>34</sup> assault occasioning bodily harm,<sup>35</sup> grievous bodily harm<sup>36</sup> and/or wounding.<sup>37</sup> The Prosecutor may select from the menu of offences which one to proceed with. The Prosecutor’s discretion can be said to extend to the following: the decision whether or not to commence or continue a prosecution, and if so, which charges should be laid, and decisions as to the conduct of proceedings – which witnesses to call, what material to be presented and a range of other decisions regarding the conduct of the case.<sup>38</sup>

Some discretion must inevitably be vested in the Prosecutor. The state’s resources are finite and the Prosecutor performs a vital function by precluding random access to the courts and to their limited adjudicative resources and preserving these resources for the timely judgement of the matters to which the public attaches priority.<sup>39</sup> It is in this sense that the Prosecutor, acting in the interests of the public, serves as guardian, protector and custodian of the community’s scarce resources for adjudication.<sup>40</sup> This has been referred to as the ‘[p]rosecutor’s intelligent use of court [and state] resources.’<sup>41</sup> The Prosecutor is at the end of

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<sup>28</sup> Sidney I Lezak and Maureen Leonard, ‘The Prosecutor’s Discretion: Out of the Closet, Not Out of Control’ in Carl F Pinkele and William C Louthan (eds), *Discretion, Justice and Democracy: A Public Policy Perspective* (Iowa State Press, 1985) 44-5.

<sup>29</sup> In the United States, it has been recognized that prosecutorial discretion is a necessary aspect of the justice system, see *United States v Armstrong*, 116 S Ct 1489 (1996); Anne Bowen Poulin, ‘Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after *United States v Armstrong*’ (1997) 34 *American Criminal Law Review* 1071, 1079.

<sup>30</sup> Felkenes, above n 27.

<sup>31</sup> Kenneth Culp Davis, *Discretionary Justice* (1969) 170. Also cited in *McCleskey v Kemp*, 481 US 279, 297, 312 (1987).

<sup>32</sup> This scenario was laid out in Yeo, Morgan and Cheong above n 13, 29.

<sup>33</sup> For example, in Western Australia the offence of robbery encapsulates that of stealing, but includes a degree of violence at, during or immediately after the stealing. See *Criminal Code of Western Australia* ss370-1 Cf *Criminal Code of Western Australia* ss 391-2 which stipulates that a person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen commits a robbery. See *Criminal Code of Western Australia* s 391 for ‘circumstances of aggravation’.

<sup>34</sup> *Criminal Code of Western Australia* ss 222, 313.

<sup>35</sup> *Ibid* s 317.

<sup>36</sup> *Ibid* s 297.

<sup>37</sup> *Ibid* s 301.

<sup>38</sup> Refshauge, above n 25; Michael Rozenes, ‘Prosecutorial Discretion in Australia Today’ (Paper delivered at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 18-19 April 1996).

<sup>39</sup> Hamilton and Work, above n 19, 184.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

the day, a public servant, funded by the state and thus has a duty to ensure the efficient use of tax payer's dollars and state resources.<sup>42</sup> A degree of discretion is necessary to facilitate compromise and expediency in the criminal justice process.<sup>43</sup>

## 2.5 Gate Keeper of the Criminal Justice System

One would think that criminal trials, having the potential to deprive a defendant of liberty and indeed in some jurisdictions, life, would necessitate a stringent process before conviction, ideally before a jury of the defendant's peers. This notion is however, as some would put it, a 'romantic view' of the criminal law.<sup>44</sup> In reality, most decisions are made before the matter is put to trial.<sup>45</sup> This is the result of the considerable discretion afforded to the Prosecutor in the pre-trial decision making process. In practice, this has translated into the outcome of a criminal trial being heavily affected by the decisions of a Prosecutor who, in the words of then US Attorney General Robert Jackson, 'has more control over life, liberty and reputation than any other person'.<sup>46</sup> The term 'gate-keeper' of the criminal justice system is thus not an inaccurate label for the Prosecutor.<sup>47</sup>

Given the immense discretion a Prosecutor is given in the commencement and conduct of criminal proceedings and its corresponding effect on the accused, it is a strange state of affairs that the role of the Prosecutor is often 'forgotten in discussions of the criminal justice system'.<sup>48</sup> As highlighted in a report by the Australian Institute of Criminology:

[t]he exercise of prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. The considerable discretionary powers vested in prosecutors employed by the state and territory Offices of the Director of Public Prosecutions (DPP) are exercised in accordance with prosecution policies and guidelines, but the decision making process is rarely subject to external scrutiny<sup>49</sup>

<sup>42</sup> Vicki Wayne and Paul Marcus, 'Australia and the United States: Two Common Criminal Justice System Uncommonly at Odds, Part 2' (2010) 18 *Tulane Journal of International and Comparative Law* 335, 340.

<sup>43</sup> Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 41.

<sup>44</sup> F Andrew Hessick III and Reshma M Saujani, 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel and the Judge' (2002) *Brigham Young University Journal of Public Law* 189, 189.

<sup>45</sup> Findlay, above n 43.

<sup>46</sup> Robert H Jackson, 'The Federal Prosecutor' (1940) 24 *Journal of American Judicature Society* 18. See also comments such as 'no government official...has as much unreviewable power and discretion as the prosecutor' in Bibas, above n 12, and 'no government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime' in Kenneth J Melilli, 'Prosecutorial Discretion in an Adversarial System' (1992) 3 *Brigham Young University Law Review* 669, 671.

<sup>47</sup> A phrase referred to by The Justice Committee, United Kingdom House of Commons, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (2009) 3. A number of commentators have also used the term. See Felkenes, above n 27; Federick W Gay, 'Restorative Justice and the Prosecutor' (2000) 27 *Fordham Urban Law Review* 1651; Laurie L Levenson, 'Workingoutside the Rules: The Undefined Responsibilities of Federal Prosecutors' (1999) 26 *Fordham Urban Law Review* 553; Bennett L Gershman, 'A Moral Standard for the Prosecutor's Exercise of the Charging Decision' (1993) 20 *Fordham Urban Law Review* 513; Cassia Spohn and David Holleran, 'Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances and Intimate Partners' (2001) 18 *Justice Quarterly* 651; James C Backstrom, 'The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community' (1999) 50 *South Carolina Law Review* 699.

<sup>48</sup> Hamilton and Work, above n 19.

<sup>49</sup> Denise Lievore, 'Victim Credibility in Adult Sexual Assault Cases' [2004] (288) *Trends and Issues in Crime and Criminal Justice* 1.

Grosman notes that little is known about the powers exercised by Prosecutors and the factors which influence their exercise of discretion.<sup>50</sup> Legislative provisions which define the powers, duties and functions of the Prosecutor are significantly absent.<sup>51</sup> Judicial pronouncements, if any, are largely confined to the Prosecutor's behavior in the courtroom.<sup>52</sup> This trend, acknowledged by Sallmann and Willis, is a disturbing situation in any society which purports to embrace liberal, democratic principles and ideas.<sup>53</sup> However, in order to better understand the nature of the Prosecutor and the independence or lack thereof, of the exercise of that office's discretion, it is first useful to look at the development of the prosecution service and how it arrived in its current form.

### 3. The Prosecution System Illustrated

#### 3.1 The Development of Prosecutions in Australia

Different legal cultures have developed varying approaches in dealing with individuals who break the laws set down by the state and society.<sup>54</sup> In the trial of Socrates, as depicted in 'The Crito', the decision to prosecute Socrates was made by a trio of private citizens: a politician, a poet and a rhetorician.<sup>55</sup> In another well known trial four hundred years later, Pontius Pilate first found no basis for a charge against Jesus but later left his prosecution to a crowd. In various criminal justice systems today, the majority of prosecutions will be state sanctioned, initiated by the state 'in the public interest',<sup>56</sup> with official state Prosecutors at the helm.<sup>57</sup> In Japan, which does not recognize any offence unless prosecution is undertaken by the state, this has been described as a 'monopolization of prosecution'.<sup>58</sup> While some jurisdictions make limited provisions for private prosecutions,<sup>59</sup> these are few and far between – the reality of the criminal justice system is that prosecution is an arena dominated by the state and its Prosecutors.<sup>60</sup>

<sup>50</sup> B A Grosman, *The Prosecutor* (University of Toronto Press, 1969) 3.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Peter Sallmann and John Willis, *Criminal Justice in Australia* (Oxford University Press, 1984) 49.

<sup>54</sup> Mark West, 'Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion' (1992) 92 *Colombia Law Review* 684.

<sup>55</sup> Justin D Kaplan, *Introductory Note to Dialogues of Plato 2* (Jowett trans 1950), cited in West, above n 55.

<sup>56</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681, (Sir Hartley Shawcross, Attorney-General).

<sup>57</sup> Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 57.

<sup>58</sup> 'The Criminal Justice System in Japan: Prosecution' (Paper presented at the 107<sup>th</sup> International Training Course: The Role and Function of Prosecution in Criminal Justice, The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 1 September to 21 November 1997) 48.

<sup>59</sup> In Australia for example, this is provided for by *The Crimes Act 1914* (Cth) s13. In Western Australia, private prosecution has since been discontinued – the Director of Public Prosecutions thus has full conduct of criminal matters in the State, see Western Australia, *Parliamentary Debates*, Legislative Council, 27 Oct 2004, 7328 (Second Reading Speech of the Criminal Procedure Bill 2004). In Singapore, private prosecution can be done by way of a Magistrate's Complaint, see Subordinate Courts Working Paper Committee, *Complaints to Magistrates* (1999) Subordinate Courts of Singapore

<<http://www.lawnet.com.sg/legal/ln2/comm/PDF/complaints.pdf>>. See also the comments of Yong CJ in *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626 [16]. For British examples, see Richard J Stafford, *Private Prosecutions* (Shaw & Sons, 1989) 181-187; Irving R Kaufman, 'Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions' (1980) 49 *Fordham Law Review* 26, 28, 30 and the *Prosecution of Offences Act 1985* (UK), s6(1) which preserves the power to instigate private prosecutions.

<sup>60</sup> Gans, above n 58.

In Australia, prior to 1982, prosecutions were conducted along the same vein as the English tradition where it was private citizens and the police, acting as citizens and not representatives of the state, who commenced and conducted prosecutions.<sup>61</sup> This however, was not ideal as private prosecutions imposed a significant burden on the private citizen acting as Prosecutor.<sup>62</sup> This also led to an element of arbitrariness as whether an offender was ultimately prosecuted depended on the victim's willingness to commence a prosecution. Thus, while the right to initiate private prosecutions remained under the *Crimes Act 1914* (Cth),<sup>63</sup> upon the statutory establishment of a police force, the police took over the vast majority of prosecution of offences.<sup>64</sup>

### 3.1.1 The Call for Separation

This was, however, still unsatisfactory given that the prosecution was often undertaken by the police investigator without reference to or consultation with the prosecuting authority.<sup>65</sup> The concept of a police prosecutor is problematic as the person who investigates the crime is seen as having an interest in seeing the case proceed. Also disconcerting was the fact that the prosecution service then was seen to be part of government, giving rise to the question of independence.<sup>66</sup> The prospect of a prosecution service entirely independent of the government and the police was rare, but one that has been described as being 'eminently sensible if one wanted to remove prosecutions and prosecutorial decisions from the political process.'<sup>67</sup> Some saw a need to remove the Attorney-General (who until that time was responsible for the commencement and conduct of prosecutions), an elected member of the legislature, from the prosecution process to ensure true independence from the day to day politics of government.<sup>68</sup> As noted by John Coldrey:

[A] major problem exists when the prosecutorial discretion must be exercised in controversial or politically sensitive circumstances. There is a real potential that such decisions will become subject to distortion or misconstruction if they are drawn into the ambit of party political debate or alternatively, will be perceived as having been motivated

<sup>61</sup> According to Williams, '[p]rosecution by private people was frequent and important before the advent of the modern police forces, in periods when it could be asserted that prosecuting for criminal offences was the patriotic duty of all citizens' see D G Williams, 'Prosecution, Discretion and the Accountability of the Police' in R Hood (ed) *Crime Criminology and Public Policy* 32 cited in Justin McCarthy, 'Towards a Public Prosecution System in Australia' (Paper presented at the International Society for the Reform of the Criminal Law Conference: Investigating Crime and Apprehending Suspects: Police Powers and Citizens Rights, Sydney, 19-24 March 1989) 1.

<sup>62</sup> Homer S Cummings and Carl McFarland, *Federal Justice* (1937) 13 cited in Robert L Misner, 'Recasting Prosecutorial Discretion' (1996) 86 *The Journal of Criminal Law and Criminology* 717, 729.

<sup>63</sup> *Crimes Act 1914* (Cth) s 13.

<sup>64</sup> Refshauge, above n 25.

<sup>65</sup> Damian Bugg, 'The Role of the DPP in the 20<sup>th</sup> Century' (Paper presented at the Judicial Conference of Australia, Melbourne, 13 November 1999).

<sup>66</sup> G E Fitzgerald, *Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 238; Bugg, above n 65.

<sup>67</sup> Jeremy W Rapke, 'ODPP Vic 25<sup>th</sup> Anniversary Dinner Speech' (Speech delivered at the Office of the Director of Public Prosecutions (Victoria) 25<sup>th</sup> Anniversary Dinner, Parliament House, Melbourne, 27 October 2008) <[http://www.opp.vic.gov.au/resources/2/d/2d61b900404a17b0b434fff5f2791d4a/25th\\_anniversary\\_speech\\_delivered\\_by\\_dpp-27oct08.pdf](http://www.opp.vic.gov.au/resources/2/d/2d61b900404a17b0b434fff5f2791d4a/25th_anniversary_speech_delivered_by_dpp-27oct08.pdf)>. Similar concerns were raised in the UK, see, eg, Great Britain, Royal Commission on Police, *Final Report* (1962).

<sup>68</sup> Jaala Hinchcliffe, 'A Brief History of the CDPP' (Speech delivered at the Commonwealth Director of Public Prosecutions 25<sup>th</sup> Anniversary Dinner, Old Parliament House, Canberra, 5 March 2001) <<http://www.cdpp.gov.au/Director/Speeches/20090305jh-a-brief-history-of-the-CDPP.aspx>>.



by political partisanship. It is not to the point that such assertions and perceptions may be factually groundless. The damage that is created is that the necessary public confidence in the administration of the criminal law will be eroded.<sup>69</sup>

In addition to the perceived lack of independence, the prosecution service suffered from a myriad of issues and was accordingly criticized:

In the late 1970s and early 1980s it became increasingly apparent that the Commonwealth prosecution process was fraught with delay and inefficiencies. Matters came to a head with the widespread debate concerning some of the revelations contained in the first Costigan Report. In particular, in that report the Royal Commissioner outlined what he described as the 'lamentable history of non-prosecution' which occurred in the Perth Office of the Deputy Crown Solicitor in relation to a 'bottom-of-the-harbour' tax prosecution which came to the attention of the Australian Taxation Office almost a decade earlier and still required prosecution attention. It is also clear that in the federal sphere in recent years crime has become much more complex, and for that reason traditional responses have been rendered inappropriate.<sup>70</sup>

Similarly, in a 1980 report by the Australian Law Reform Commission, it was noted that:

[t]he process of prosecutions in Australia at both State and Federal level is probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice.<sup>71</sup>

This remark, 'not wide off the mark',<sup>72</sup> alluded to the lack of consistent, publicly available guidelines and policies to guide the exercise of discretion and power of the Prosecutor. The report recommended the establishment of policies to be adopted by Prosecutors in the exercise of their discretion whether or not to initiate criminal proceedings and in reviewing and settling charges.<sup>73</sup> The report also recommended that such policies be made publicly

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<sup>69</sup> Geoffrey Flatman, 'The Office of the Director of Public Prosecutions: Independence Professionalism and Accountability' (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Independence of the Prosecutor, Melbourne, 18-19 April 1996) 2-3.

<sup>70</sup> Hinchcliffe, above n 68.

<sup>71</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980). Similarly, other reports that called for a transfer of prosecutions away from the Police include: Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report on Criminal Investigation* (1974) 174; Lusher, above n 101, 258; New South Wales, Royal Commission into Certain Committal proceedings against KE Humphries, *Report* (1983) 99; Independent Commission Against Corruption, *Investigation into the relationship between Police and Criminals - Second Report* (1994); G E Fitzgerald, *Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 238, which noted that '[t]he 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. This 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'; New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 2, 318 [3.318]; cited in Tony Krone, 'Police and Prosecution' (Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Mapping the Boundaries of Australia's Criminal Justice System, Australia Institute of Criminology, Canberra, 22-23 March 1999) 11-12. See also, New South Wales Office of Public Management, 'Transfer of certain prosecution functions from the police to the Director of Public Prosecutions (Report, New South Wales Office of Public Management, 1989); A Sanders, 'An Independent Crown Prosecution Service' (1986) 153 *The Criminal Law Review* 16.

<sup>72</sup> Bugg, above n 65.

<sup>73</sup> Australian Law Reform Commission, above n 72, [103].

available to be ‘reviewed and criticized where appropriate’,<sup>74</sup> for a restructuring of the charging process and for the charge bargaining system to be further examined and made more visible.<sup>75</sup> These comments demonstrate the lack of a ‘minimum level’ of transparency and accountability that is necessary if public confidence in the criminal justice system is to be guaranteed.

### 3.1.2 The Independent Prosecutor: Fair and Accountable

Attempts were thus made to establish an independent prosecution service. In Tasmania, this was done via the Crown Advocate under the *Crown Advocate Act*.<sup>76</sup> The Act however, failed to provide guidance on the relationship between the offices of the Crown Advocate, the Attorney-General and the Solicitor-General.<sup>77</sup> Additionally, it did not allow for the Crown Advocate to publish or issue prosecution guidelines which would have ensured some form of consistency and provided guidance in the exercise of prosecutorial discretion to other agencies with prosecution powers.<sup>78</sup> It was only later in Victoria that the Director of Public Prosecutions (‘the DPP’) was born,<sup>79</sup> with most of the Attorney-General’s functions in matters of criminal prosecution being transferred to that Office.<sup>80</sup> This was later followed by the establishment of the Commonwealth’s Office of Director of Public Prosecutions through the *Director of Public Prosecutions Act 1983* (Cth).<sup>81</sup>

This was followed by the remaining States each establishing their own DPP under local legislation.<sup>82</sup> The Offices were endowed with powers to commence prosecutions,<sup>83</sup> take over the conduct of prosecutions or terminate prosecutions,<sup>84</sup> enter a nolle prosequi,<sup>85</sup> but perhaps most importantly, addressing the issue that the Tasmania’s earlier experiment did not. The

<sup>74</sup> Ibid [107].

<sup>75</sup> Ibid 74 [102], 76 [123].

<sup>76</sup> *Crown Advocate Act 1973* (Tas); Bugg, above n 65, 1-2.

<sup>77</sup> Refshauge, above n 25, 354; Bugg, above n 65.

<sup>78</sup> Refshauge, above n 25, 354.

<sup>79</sup> Ibid. John Harber Phillips was appointed as the first Director of Public Prosecutions for Victoria, see Rapke, above n 67.

<sup>80</sup> *Director of Public Prosecutions Act 1982* (Vic).

<sup>81</sup> Refshauge, above n 25, 355. Ian Temby was the inaugural Commonwealth Director of Public Prosecutions.

<sup>82</sup> *Director of Public Prosecutions Act 1990* (NT); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA); *Director of Public Prosecutions Act 1984* (Qld); *Public Prosecutions Act 1994* (Vic) which replaced the *Director of Public Prosecutions Act 1982* (Vic); see also the *Director of Public Prosecutions Act 1973* (Tas), being the *Crown Advocate Act 1973* (Tas), renamed by amendment.

<sup>83</sup> *Director of Public Prosecutions Act 1983* (Cth) s 6(1)(a), (c), (d); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) s 8; *Director of Public Prosecutions Act 1991* (WA) ss 11(1)(a), 12(1)(a); *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(a); *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a)(i); *Public Prosecutions Act 1994* (Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

<sup>84</sup> *Director of Public Prosecutions Act 1983* (Cth) s9(5); *Director of Public Prosecutions Act 1990* (NT) ss 13(b), (c); *Director of Public Prosecutions Act 1986* (NSW) s 9; *Director of Public Prosecutions Act 1991* (WA) ss 11(1)(b), 12(1)(b); *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(c)(ii); *Director of Public Prosecutions Act 1982* (Vic) s 22(1)(b)(ii); *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a)(ii); Notably, the *Director of Public Prosecutions Act 1991* (SA) gives no express provision but relies on the incidental power of the act s 7(1)(i).

<sup>85</sup> ‘Declining to proceed’. *Director of Public Prosecutions Act 1983* (Cth) s 9(4); *Criminal Code Act* (NT) ss 297A, 302; *Criminal Code* (WA) s 581; *Criminal Code* (Qld) s 563; *Public Prosecutions Act 1994* (Vic) s 25; *Director of Public Prosecutions Act 1973* (Tas) s 16; *Director of Public Prosecutions Act 1991* (SA) s 7(1)(e); Notably, in NSW there is not statutory equivalent, but the inherent power may be found under general law per *R v Jell; Ex Parte Attorney-General (Qld)* [1991] 1 Qd R 48, 57-59.

Acts allowed the DPPs to publish guidelines and to give directions to other prosecuting officials.<sup>86</sup> This laid the foundation for an independent prosecution service exercising consistency and transparency in the course of its duties, not least of all in the exercise of their prosecutorial discretion. The objective of establishing the Office of the DPP can be seen in a comment made by Kirby P:

What is the object of having a Director of Public Prosecutions? Obviously it is to ensure that a high degree of independence in the vital task of making prosecution decisions in exercising prosecution discretion... Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.<sup>87</sup>

Kirby's comment referred to the political independence (or lack thereof) of the prosecution service and the desire for a less 'secretive, poorly understood'<sup>88</sup> process in prosecution, given the impact the exercise of prosecutorial decision has on stakeholders within the criminal justice system. These factors thus culminated in the Office of the DPP with the notion that the conduct of prosecutions in Australia would be independent, fair and accountable.<sup>89</sup>

### 3.1.3 The Hybrid System: A Compromise?

Despite the historical developments outlined above depicting a clear desire for an independent and impartial prosecution services, legally qualified practitioners employed by the Office of the DPP are only deployed in serious matters, before superior courts.<sup>90</sup> In minor matters such as thefts, drink driving and minor assaults before the lower courts, the majority of prosecutions are still being conducted by police prosecutors,<sup>91</sup> who may have some training in law and advocacy,<sup>92</sup> but need not necessarily be legally qualified.<sup>93</sup>

<sup>86</sup> *Director of Public Prosecutions Act 1983* (Cth) ss7, 11; *Director of Public Prosecutions Act 1990* (NT) ss 24(b), 25; *Director of Public Prosecutions Act 1986* (NSW) ss 13, 16; *Director of Public Prosecutions Act 1991* (WA) ss 23, 24; *Director of Public Prosecutions Act 1984* (Qld) ss 11(1)(b), (b); *Public Prosecutions Act 1994* (Vic) ss 26, 27; *Director of Public Prosecutions Act 1973* (Tas) s 16; Notably, the *Director of Public Prosecutions Act 1991* (SA) gives no express provision but relies on the incidental power of the Act s 7(1)(i).

<sup>87</sup> *Price v Ferris* (1994) 34 NSWLR 704, 708 (Kirby P). Kirby P also made reference to the Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980) in his remarks.

<sup>88</sup> Australian Law Reform Commission, above n 72, 61.

<sup>89</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008) <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>; Bugg, above n 65; John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996) 26 *University of Western Australia Law Review* 266. See the Director of Public Prosecutions (NSW) Bill Second Reading Speech, 'The high status of the Director's position, and the security of tenure provided, will ensure that the Director is freed from any suggestion or appearance that he or she is open to political pressure. There will be no reason to fear that the Director may make decisions to curry favour with the Government of the day, in order to secure reappointment or advancement', New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1986, 7343 (Terence Sheahan).

<sup>90</sup> Waye and Marcus, above n 43, 346. See *Director of Public Prosecutions Act 1983* (Cth); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (NT); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA); *Director of Public Prosecutions Act 1994* (Vic); *Director of Public Prosecutions Act 1973* (Tas). See also Colvin and McKechnie, above n 10, 694.

<sup>91</sup> Except for the Australian Capital Territory. Refshauge, above n 25, 356; Waye and Marcus, above n 43, 347; Harvey, above n 6.

<sup>92</sup> J Hunter, C Cameron and T Henning, *Litigation Volume II: Evidence and Criminal Process* (LexisNexis, 7<sup>th</sup> ed, 2005) 716.

Commentators have noted the oddity of this system,<sup>94</sup> citing several obvious inherent weaknesses. The paralegal police prosecutor, not legally qualified, is not subject to the ethical standards that govern those admitted to the bar.<sup>95</sup> Similarly, as non-legal practitioners, they are unable to claim professional privilege over their communications.<sup>96</sup> Furthermore, prosecutorial functions risk being tainted by corruption that has on occasion, surfaced within the police service.<sup>97</sup> Additionally, the issue of competence and training can be called into question. While some measures have been taken to ensure competency in prosecution at trial,<sup>98</sup> the training currently provided for the police prosecutor is inadequate and only allows a few weeks to learn the fundamentals of prosecuting and the legal system, with much of the work to be learned on-the-job.<sup>99</sup>

The question of independence has also not been resolved. As the Lusher report notes,<sup>100</sup> even if police prosecutors were legally qualified, it would still be inappropriate for them to conduct prosecutions as it breaches the principle of independence.<sup>101</sup> By combining the functions of policing, investigation and prosecution, it becomes harder to dispel the belief that everyone who is apprehended by the police for a criminal offence will be prosecuted.<sup>102</sup> The concern here is as much with impartiality as the *appearance of impartiality*,<sup>103</sup> which is greatly diminished if the police continue to have a role in the conduct of prosecutions.

While it was envisioned that the respective DPPs would have broad powers over prosecutions, these were not without limit. Initially in Western Australia, the wording of section 12 of the *Director of Public Prosecutions Act 1991 (WA)* made no provision that permitted the DPP to conduct summary prosecutions, leaving this area exclusively to the police. This has since been amended by inserting section 11 to allow the DPP to commence and conduct the prosecution of any offence, whether indictable or not.<sup>104</sup>

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<sup>93</sup> Refshauge, above n 25, 356.

<sup>94</sup> Duncan Chappell and Paul Wilson, *The Australian Criminal Justice System: The Mid 1980s* (Butterworths: 1986) 1-17; Way and Marcus, above n 43, 347.

<sup>95</sup> Way and Marcus, above n 43, 347; New South Wales, Royal Commission into the New South Wales Police, *Final Report* (1997) vol 2.

<sup>96</sup> Way and Marcus, above n 43, 347. This article of course, is not the place for a lengthy discussion on legal professional privilege.

<sup>97</sup> See especially Independent Commission Against Corruption, *Investigation into the relationship between Police and Criminals - Second Report* (1994), 112, which outlines one case where a police prosecutor accepted money to withhold a defendant's true criminal record.

<sup>98</sup> Ken Drew, 'The New South Wales Police Prosecutor', in Julia Vernon and Francis Regan (eds) *Improving Access to Justice: The Future of Paralegal Professionals* (Australian Institute of Criminology, 1992) 103, 105 for a list of measures, including in-house training methodologies and database of case law digests made available for the police prosecutor.

<sup>99</sup> John Murray, 'The Paralegal Police Prosecutor – For How Long?' in Julia Vernon and Francis Regan (eds) *Improving Access to Justice: The Future of Paralegal Professionals* 105 (Australian Institute of Criminology, 1992) 98.

<sup>100</sup> E A Lusher, *Commission to Inquire into New South Wales Police Administration* (1988) 255-256.

<sup>101</sup> Chris Corns, 'Police Summary Prosecutions: The Past, Present and Future' (Paper presented at the Australian Institute of Criminology History of Crime, Policing and Punishment Conference, Charles Stuart University, Canberra, 9-10 December 1999) 10.

<sup>102</sup> Peter Sweeny, 'The Role of the Police Prosecutor in the Magistrates Court System' in Ivan Potasa (ed) *Prosecutorial Discretion* (Australian Institute of Criminology, Seminar Proceedings No 6, 1984) 135, 143 cited in Krone, above n 72, 4.

<sup>103</sup> New South Wales, Royal Commission into the New South Wales Police, *Interim Report* (1996) 127; Corns, above n 102.

<sup>104</sup> Explanatory Memorandum, Director of Public Prosecutions Amendment Bill 2004 (WA).

Similarly, in Queensland, under the *Director of Public Prosecutions Act 1984* (Qld), ‘criminal proceedings are defined to mean proceedings on indictment and certain proceedings in the Supreme Court commenced by a person charged with an indictable offence’.<sup>105</sup> Thus, while the DPP is empowered to commence, institute and conduct criminal proceedings at the indictable level, and where necessary, take over and conduct proceedings at the summary level,<sup>106</sup> these powers, as Refshauge points out, do not extend to initiating prosecutions at the summary level.<sup>107</sup>

To the credit of the Directors of Public Prosecution, and the police, despite this ‘hybrid system’, the integrity and independence of the Australian prosecution service from governmental politics and police tampering is preserved. Unflinching prosecution of high profile political bribery matters helped reassure the community that prosecution was undertaken by officers who were not susceptible to political influence.<sup>108</sup> For example, in 1992, just two days after the *Director of Public Prosecutions Act 1991* (WA) was passed, John McKechnie, the then DPP for Western Australia, initiated contempt proceedings against a serving Minister in the Lawrence Government.<sup>109</sup> Additionally, McKechnie noted the Western Australian prosecution service has since prosecuted at least two former Premiers (Liberal and Labor), a former Deputy Premier and Member of Parliament, and a number of police officers.<sup>110</sup> These acts, particularly so early into the new experiment of the independent Office, were courageous acts but proper ones that arguably set the right tone for subsequent years, conceiving a prosecution service ‘free from the shackles of the past and from political and other influences, including that of the police’.<sup>111</sup> They demonstrated that the DPP would not shy away from initiating prosecutions unpopular with the government of the day.

In Western Australia, the DPP operates a small team of five Prosecutors within the Police Prosecuting Division.<sup>112</sup> Headed by a consultant State Prosecutor,<sup>113</sup> the team handles a range of complex matters within the Magistrates Court jurisdiction.<sup>114</sup> This is a step towards remedying the situation but while there have been a number of attempts to transfer the functions of prosecution from the police to the DPP,<sup>115</sup> at the time of writing, a full-scale

<sup>105</sup> *Director of Public Prosecutions Act 1984* (Qld) s4.

<sup>106</sup> *Ibid.*

<sup>107</sup> Refshauge, above n 25, 356. Similarly, Refshauge also notes that the powers of the Director to direct police prosecutions in Victoria is somewhat limited, 357 (footnote 41).

<sup>108</sup> Bugg, above n 109.

<sup>109</sup> *R v Pearce* (1992) 7 WAR 395; McKechnie, above n 90, 270.

<sup>110</sup> McKechnie, above n 90.

<sup>111</sup> *Ibid.*

<sup>112</sup> Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 12.

<sup>113</sup> Consultant State Prosecutors are the most experienced prosecutors in the Office and are allocated the most complex legal matters. They report directly to the Deputy Director of Public Prosecutions. See Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 10.

<sup>114</sup> *Ibid.*

<sup>115</sup> In 2006 the Western Australia Police Commissioner announced a desire to move prosecution functions away from the police, ‘WA Commissioner wants to get rid of police prosecutors’, *AAP General News Wire* (Sydney), 20 Oct 2006, 1; In 2008, Robert Cock, the DPP of WA began discussions to take over the role of the police prosecutors, after a successful cost neutral pilot trial in the Children’s Court, Debbie Guest, ‘WA’s Police Prosecutors could lose role’, *The Australian*, 24 Oct 2008; In 2010, Joe McGrath, upon his appointment as DPP of WA, announced plans to take over police prosecutions in the Magistrate’s Court, Todd Cardy, ‘Lawyers to Replace Police Prosecutors’, *The Sunday Times*, 3 April 2010. So far, none of these announcements have amounted to a full transfer of prosecutorial functions from the police to the DPP.

transfer has yet to occur. This may simply be due to a lack of resources. Michael Rozenes, the then Commonwealth Director of Public Prosecution, noted the restrictions on the authority of the DPP on the initiation and conduct of prosecutions before summary courts, further stating that ‘even if a DPP was minded to become involved in prosecutions before the summary courts, often the Office simply did not have the funds to do so’.<sup>116</sup> As noted above, police prosecutors are not subject to the same professional obligations as a legal practitioner admitted to the bar. This, however, according to John Murray,<sup>117</sup> has its benefits. Police prosecutors often undertake their high volume of work in the conduct of a trial with minimal or no preparation.<sup>118</sup> Legally qualified practitioners, under their ethical obligations,<sup>119</sup> may not be so inclined to do so.<sup>120</sup> Police prosecutors are not subject to such obligations and are furthermore working in a quasi-military hierarchy, which allows for the direction of police prosecutors to undertake a high volume workload with little or no preparation.<sup>121</sup> Murray estimates that a full transfer of prosecutorial functions from the police to the DPP would necessitate an increase of staff in the order of 4:1.<sup>122</sup> As such, the retention of police prosecutors, though at the risk of prosecutions being criticized for not being impartial, is the result of practical necessity.

## 4. The Displacement of Discretion

### 4.1 Plea Bargaining

While the objective of an independent, fair and accountable prosecution service is admirable and commendable, the practicalities of the criminal justice system also need to be considered. It has been estimated that for every 1000 ‘crimes’ committed, only 400 are reported to the police and 320 are officially recorded.<sup>123</sup> Of these, only 64 will be cleared up, 43 persons convicted and only one will be imprisoned.<sup>124</sup> Such is the reality of the criminal law – of potentially unlimited offences being committed, but limited time and resources allocated to address the issues. This arguably necessitates a degree of compromise to achieve efficiency and by extension, justice.

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<sup>116</sup> Rozenes, above n 39, 2-3.

<sup>117</sup> John Murray was Chief Superintendent and Officer in Charge of the Prosecution Services of the South Australian Police Department.

<sup>118</sup> Murray, above n 100, 99.

<sup>119</sup> See *Legal Profession Conduct Rules 2010* (WA) r 7(f)-(g) which states that ‘[a] practitioner must...not accept an engagement which is beyond the practitioner’s competence; and not accept an engagement unless the practitioner is in a position to carry out and complete the engagement diligently’. See also *Legal Profession Conduct Rules 2010* (WA) r 6 (2) which states that ‘[a] practitioner must not engage in conduct that demonstrates that the practitioner is not a fit and proper person to practice law or may be prejudicial to, or diminish public confidence in, the administration of justice; or may bring the profession into disrepute’. Other States in Australia have similar provisions in their professional conduct rules.

<sup>120</sup> Murray, above n 100, 99 which noted that when DPP lawyers were on a guided tour of the Adelaide Police Prosecution Service, and upon examination of a number of briefs before police prosecutors, many opined that they would be reluctant to prosecute because of the limited information available.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> D Brown, D Farrier, S Egger, L McNamara, A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Processes in NSW* (Federation Press, 4<sup>th</sup> ed, 2006) 50.

<sup>124</sup> *Ibid.*

Thus, in the name of efficiency,<sup>125</sup> the nature of our system of prosecutions can result in accused persons pleading guilty to charges that they were not originally charged with.<sup>126</sup> Our criminal jurisprudence has accepted a system which allows an accused (in appropriate cases), charged with, say, murder, to agree to plead guilty to manslaughter in exchange for a reduced sentence.<sup>127</sup> This can be attributed to an amendment and/or withdrawal of charges, often due to the ‘plea bargaining’ process between the accused and the Prosecutor.<sup>128</sup> ‘Plea bargaining’ is a general description for the process by which an accused admits his guilt in exchange for some concessions,<sup>129</sup> and it is here that one is able to see the great reach of prosecutorial discretion.<sup>130</sup> Current literature is not always consistent in the use of the term ‘plea bargaining’, ‘plea discussions’, or ‘charge bargaining’.<sup>131</sup> This issue is further compounded by slightly different models adopted by various legal systems.<sup>132</sup> To reduce confusion, the term ‘plea bargaining’ is used in this article to refer to the process between the accused and the Prosecutor where a guilty plea is agreed upon in return for a charge for a lesser offence or a dismissal of one or more charges.<sup>133</sup> The result is thus a mutually satisfactory disposition of

<sup>125</sup> Though some say convenience or worse, sloth – is a factor that sustains plea bargaining, see John H Langbein, ‘Torture and Plea Bargaining’ (1978) 46 *University of Chicago Law Review* 3, 18-19.

<sup>126</sup> Sallmann and Willis, above n 53, 68.

<sup>127</sup> Paul Gerber, ‘When is Plea Bargaining Justified?’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 211.

<sup>128</sup> Sallmann and Willis, above n 53, 68.

<sup>129</sup> Matthias Boll, *Plea Bargaining and Agreement in the Criminal Process: A Comparison Between Australia, England and Germany* (Diplomica-Verl, 2009) 1-5. Commentators have noted that an early guilty plea may attract a discount of up to 30% on sentence, see Mirko Bagaric and Julie Brebner, ‘The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I’m Pleading Guilty Only Because of the Discount’ (2002) 30 *International Journal of the Sociology of Law* 51; David Field, ‘Plead Guilty Early and Convincingly to Avoid Disappointment’ (2002) 14 *Bond Law Review* 251; Ralph Henham, ‘Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process’ (1999) 62 *Modern Law Review* 515. Australian case authority seems to support this with sentencing discounts that range from 20% to 35%, see *Trescuri v The Queen* [1999] WASCA 172 [25]-[26] (Anderson J); *Atholwood v The Queen* [1999] WASCA 256 [11] (Ipp J); *Miles v The Queen* (1997) 17 WAR 518, 520-1 (Malcolm CJ); *Cameron v The Queen* (2002) 209 CLR 339, 351-2 (McHugh J). While it has been emphasized that the extent of the discount is a matter of judicial discretion with no hard and fast rule, the court can take into account public policy considerations. A fast-tracked guilty plea saves the court time and resources and if an offender pleads guilty at the earliest opportunity, a discount towards the higher end of this 20%-35% range would seem to be appropriate. In *Atholwood v The Queen* [1999] WASCA 256 [9], Ipp J also opined that a guilty plea motivated genuine remorse should be afforded a greater discount than a ‘bare plea’ (a plea not accompanied by genuine remorse).

<sup>130</sup> Wayne and Marcus, above n 43, 340.

<sup>131</sup> See, eg, Herbert S Miller, *Plea Bargaining in the United States* (1978) 17 cited in Douglas D Guidorizzi, ‘Should We Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics’ (1998) 47 *Emory Law Journal* 753, 755, where it is noted that definition of ‘plea bargaining’ will differ depending on jurisdiction and the context of its use. See also, Geraldine Mackenzie, ‘The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?’ (2007) 11 *Southern Cross University Law Review* 205, 218; Kathy Mack, ‘Balancing Principle and Pragmatism: Guilty Pleas’ (1995) 4 *Journal of Judicial Administration* 232.

<sup>132</sup> Guidorizzi, above n 131. ‘Plea bargaining’ can also refer to the process by which the judiciary is involved to give some indication of the sentence that would likely be imposed in exchange for a guilty plea, though this is perhaps more accurately described as ‘sentence indication bargaining’ – see Peter Clark, ‘The Public Prosecutor and Plea Bargaining’ (1986) 60 *Australian Law Journal* 199; Ole Kramp, *How to Deal with the Deals? The Role of Plea Bargaining in Australia and Germany – A Comparison* (GRIN Verlag GmbH, 2009) 5; N R Cowdery, ‘Doing the Job, Practical Prosecuting’ (Paper presented at the Australian Institute of Criminology Conference: Prosecuting Justice, Melbourne, 19 April 1996) 3.

<sup>133</sup> See Clark, above n 32, where the author notes a preference for the term ‘charge bargaining’. See also N R Cowdery, above n 132, 3; Kramp, above n 132, 4; *R v Marshall* [1981] VR 725, 732; Sallmann and Willis, above n 53, 74.

a case, subject to the court's approval.<sup>134</sup> In this context, the judge plays little or no role and is a mere 'satellite' to the discussions, 'orbiting in a detached manner from the main body'.<sup>135</sup>

Plea bargaining has been accepted as a necessary component of the criminal justice system in Australia and many other jurisdictions.<sup>136</sup> In the United States, plea bargaining remained an underground practice until endorsement by the courts in *Santobello v New York*,<sup>137</sup> where it was acknowledged that plea bargaining was an essential component of the administration of justice.<sup>138</sup> The absence of plea bargaining would result in an overwhelmed system incapable of handling the sheer volume of criminal matters before the courts.<sup>139</sup> In the United States, it is now not uncommon for more than 90% of matters to be settled by plea bargaining.<sup>140</sup> In Australia, while the first prosecution policies contained prohibitions against the Prosecutor inviting plea negotiation dialogue with the defence,<sup>141</sup> today, as Damian Bugg notes,<sup>142</sup> a degree of informality is encouraged and Prosecutors are invited to 'open the bidding' in plea discussions.<sup>143</sup> In Western Australia, over 90% of criminal matters are resolved summarily,<sup>144</sup> most without trial, usually by a guilty plea. It does not stretch the imagination to see that a full trial of all criminal matters would result in a drain on resources and overwhelm the system.<sup>145</sup>

#### 4.1.1 Advantages of Plea Bargaining

<sup>134</sup> Waye and Marcus, above n 43, 346.

<sup>135</sup> Boll, above n 129. Also, as the High Court held in *Maxwell v The Queen* (1996) 184 CLR 501, 513, such charge bargaining does not require the approval of the Court. Note that there have been some suggestions that plea-bargaining arrangements that are too favourable to the accused may amount to an abuse of court process, allowing the court to stay proceedings, see *R v Brown* (1989) 17 NSWLR 472 (though decided before *Maxwell*), where the Court suggested that gross undercharging could be an abuse of process, cited in Colvin and McKechnie, above n 9, 706.

<sup>136</sup> Though it should be noted that there is at least some research to suggest that certain jurisdictions such as Germany have resisted the plea bargaining concept, at least in principle – see John Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 *Michigan Law Review* 204.

<sup>137</sup> *Santobello v New York*, 404 US 257, 260 (1971). For a more comprehensive view of the history of plea bargaining in the United States, see Guidorizzi, above n 132, 763.

<sup>138</sup> *Santobello v New York*, 404 US 257, 260 (1971).

<sup>139</sup> John Langbein, 'Understanding the Short History of Plea Bargaining' (1979) 13 *Law and Society Review* 261.

<sup>140</sup> United States Department of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts 2004* (2007) 1; See also United States Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics 2001* (2003) 2 which notes that '[t]he proportion of convicted defendants who pleaded guilty increased from 87% during 1990 to 95% during 2001; United States Department of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons 2000* (2003) table 4.2 which noted that 95% of felony convictions in state courts were achieved through guilty pleas; United States Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2002* (2004) 445, table 5.57 cited in Waye and Marcus, above n 43, 341; Steve Colella, 'Guilty, Your Honor: The Direct and Collateral Consequences of Guilty Pleas and the Courts that Consistently Interpret Them' (2004) 26 *Whittier Law Review* 305; Mackenzie, above n 186, 218.

<sup>141</sup> Damian Bugg, 'The Role of the DPP in the 21<sup>st</sup> Century' (Paper presented at the Heads of Prosecuting Agencies Conference, Quebec, 6 July 2007).

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid* Cf Colvin and McKechnie, above n 9, 706 [27.38] where the authors note that it should be the accused or defence counsel who initiates the plea bargaining process.

<sup>144</sup> For example Western Australia's percentage of guilty pleas is 92.6% in 2010-2012 according to Western Australian Police, *Annual Report* (2011) 15.

<sup>145</sup> In the words of Justice Burger, plea bargaining 'is to be encouraged' because '[i]f every criminal charge were subject to a full scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities', *Santobello v New York*, 404 US 257, 260 (1971).



Proponents of the plea bargaining system argue that it offers benefits for all stakeholders in the criminal justice system. The Prosecutor must allocate finite state resources over an ever expanding criminal docket.<sup>146</sup> With plea bargaining, Prosecutors can summarily dispose of cases that are less serious, allowing them to concentrate resources on more serious offences (or offenders) that it would be in the public interest to prosecute to the fullest extent possible. The courts also benefits by preserving scarce judicial resources for more complicated and serious matters,<sup>147</sup> ensuring shorter waiting times for those serious cases. An early negotiated guilty plea also reduces the expense of trial for parties and the court (considerable where there is a jury trial). Similarly, an early negotiated plea also helps victims avoid the trauma of a trial and the potentially psychologically damaging effects that follow,<sup>148</sup> particularly for victims of sexual offences.<sup>149</sup> Finally (and perhaps most obviously), there is also a benefit to the accused. Rather than endure a protracted and lengthy trial, with unpredictable outcomes, the criminal defendant enters into an agreement with the prosecution and receives certain concessions by way of sentencing and a reduction in the severity and/or the overall number of charges.<sup>150</sup>

#### 4.1.2 Disadvantages of Plea Bargaining

The plea bargaining process raises many philosophical and ethical issues. While in principle the judge, despite not being a part of the negotiation between accused and the Prosecutor, is required to ensure that a plea of guilty by the accused to any proposed charges is entered into freely and voluntarily and to impose a sentence that properly reflects the criminal conduct of the accused, this is not always the case in practice.<sup>151</sup> A plethora of factors may impact on the accused's decision to plead guilty – the desire to avoid the social stigma that a public trial would bring, the desire to resolve the matter speedily, the desire for a more lenient sentence, or perhaps even the desire to protect co-offenders.<sup>152</sup> These factors are not always apparent to the judge,<sup>153</sup> or even if apparent, may still result in the court's reluctance to intrude on the exercise of prosecutorial discretion.<sup>154</sup> Additionally, while judges may theoretically reject the prosecution's recommendation on sentencing, this is seldom the case in practice and more often than not the recommendations of the Prosecutor are simply followed,<sup>155</sup> resulting in the Prosecutor essentially selecting the sentence for the court.<sup>156</sup> This issue is also compounded with the advent of mandatory penalties (as will be discussed later).<sup>157</sup>

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<sup>146</sup> Waye and Marcus, above n 43, 342.

<sup>147</sup> Ibid.

<sup>148</sup> Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practice* (Australian Institute of Judicial Administration, 1995) 85.

<sup>149</sup> William F McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' (1976) 13 *American Law Review* 649, 656.

<sup>150</sup> Waye and Marcus, above n 43, 342.

<sup>151</sup> John Bishop, *Prosecution without Trial* (Butterworths, 1989) 200.

<sup>152</sup> Mackenzie, above n 186, 216; Peter Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191; Bishop, above n 151; Kramp, above n 132, 7.

<sup>153</sup> Kramp, above n 132, 7.

<sup>154</sup> Bishop, above n 151.

<sup>155</sup> President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1978) 11 cited in Bishop, above n 151.

<sup>156</sup> Bishop, above n 151.

<sup>157</sup> See page 59 of this article.

#### 4.1.2.1 Fair Labeling and the Extreme Cases

It is an underlying thread of the criminal law that the degrees of wrongdoing should be subdivided and labeled so as to represent fairly the nature and magnitude of the law-breaking.<sup>158</sup> This is the principle of ‘fair labeling’,<sup>159</sup> and is the voice through which the ‘criminal law speaks to society as well as wrongdoers when it convicts them...by accurately naming the crime of which they are convicted’.<sup>160</sup> With plea bargaining, the offence which the offender pleads guilty to may not necessarily be the one which accurately reflects the nature of the criminal conduct.<sup>161</sup> Critics assert that it is criminals who benefit from the system by effectively ‘bargaining with the state’ and avoiding what would have been an appropriate sanction for their crime.<sup>162</sup> Is it fair that a murderer may only be convicted of wounding or that the actions of thieves are labeled as mere attempts or possession?<sup>163</sup> Aside from throwing crime statistics into chaos it risks undermining public confidence in the criminal justice system.<sup>164</sup>

This issue is evident in several extreme, but illustrative cases. In New York for example, an accused was charged with first degree manslaughter but later pleaded guilty to attempted manslaughter in the second degree.<sup>165</sup> The oddity was that in that particular jurisdiction, the crime of manslaughter does not involve intent and it would therefore be impossible to attempt to commit manslaughter. The New York Court of Appeals, while aware of the issue, was nonetheless not prepared to upset the conviction.<sup>166</sup> In another more comical case, an accused pleaded guilty to ‘driving the wrong way on a one-way street’.<sup>167</sup> There were however, no one-way streets in that particular community. These cases, while absurd, do highlight the dangers inherent in uncontrolled prosecutorial discretion.<sup>168</sup>

<sup>158</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 88. See also J Chalmers and F Leverick, ‘Fair Labelling in Criminal law’ (2008) 71 *Modern Law Review* 217, 246.

<sup>159</sup> The principle of fair labeling can be traced back to Ashworth’s work, ‘The Elasticity of Mens Rea’ in C F H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 53, where he coined the term ‘representative labeling’. This was later further developed by in G Williams, ‘Convictions and Fair Labelling’ (1983) 42 *Cambridge Law Journal* 85 stating that fair labelling was a better term chiefly because ‘representative’ can also refer to the few standing for the many.

<sup>160</sup> A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Hart, 3<sup>rd</sup> ed, 2007) 30.

<sup>161</sup> Chalmers and Leverick, above n 215, (note 131). It has also been noted elsewhere that ‘the criminal law is arguably the most direct expression of the relationship between a State and its citizens’, see Law Commission for England and Wales, *Criminal Law: A Criminal Code For England and Wales Vol 1* (Law Com No 177, 1989, 5).

<sup>162</sup> Guidorizzi, above n 132, 768. See also J Badgery-Parker, ‘The Criminal Process in Transition: Balancing Principle and Pragmatism II’ (1995) *Australian Journal of Judicial Administration* 193, 210-216.

<sup>163</sup> Boll, above n 129, 31.

<sup>164</sup> Langbein, above n 139, 16-17; James Edward Bond, *Plea bargaining and Guilty Pleas* (Boardman, 1975) 53; Matthias Boll, *Plea Bargaining and Agreement in the Criminal Process: A Comparison Between Australia, England and Germany* (Diplomica-Verl, 2009) 31.

<sup>165</sup> *People v Foster*, 278 NYS 2d 603 (1967), taken from A Davis, ‘Sentences for Sale: A Look at Plea Bargaining in England and America [1931]’ *Criminal Law Review* 150, 218, 220 and Bishop, above n 151, 201.

<sup>166</sup> *Ibid.*

<sup>167</sup> D J Newman, *Conviction* (1996) 101; Bishop, above n 151, 201; Boll, above n 129, 31.

<sup>168</sup> Bishop, above n 151, 201.

#### 4.1.2.2 The Dissatisfied Victim

The role of the victim sometimes takes a backseat in our criminal process.<sup>169</sup> McDonald notes that ‘while the victim is allowed to decide what shall be done with the case as a civil matter...the criminal case belongs solely to the State.’<sup>170</sup> This is derived from the notion that crime is perceived as an offence against not just the individual, but society,<sup>171</sup> and is accordingly a matter for the state. As argued above,<sup>172</sup> there are circumstances where it may be in the interests of the victim to avoid trial. Conversely, there are situations where the victim may prefer to go to court and testify if the alternative is the accused receiving a lesser charge (and consequently, a lesser sentence).<sup>173</sup>

Plea bargaining deprives the victim of this option. While a victim’s view may be considered, this varies with the individual Prosecutor.<sup>174</sup> Ultimately, if the decision is made to enter into a plea bargaining arrangement with the accused, there may be a feeling of dissatisfaction by the victim that the offender has ‘gotten away’ with a lenient sentence.<sup>175</sup> While the advantages of plea bargaining focus on the resource implications for the system as a whole, the individual victim is only focused on their particular case. Plea bargaining potentially leaves victims dissatisfied with the criminal justice system leading to diminished public confidence in the process.<sup>176</sup>

#### 4.1.3 Prosecutor-Adjudicator: The Prosecutor’s Power in the Pre-Trial Decision Making Process

The great reach of prosecutorial discretion is prominently seen in the plea bargaining process.<sup>177</sup> Prosecutors are given great leeway in plea bargaining<sup>178</sup> as they and they alone

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<sup>169</sup> See comments such as ‘Victims remain on the outside looking in, rather than being engaged as direct and active decision makers’ in Law Commission of Canada, *From Restorative Justice to Transformative Justice*, Paper for the Law Commission of Canada (1999) 18. Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3<sup>rd</sup> Ed, 2005) 49; McDonald describes the victim as the ‘forgotten man’ of the criminal justice system in McDonald, above n 149, 650. See also, H Fenwick, ‘Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process’ (1997) 60 *Modern Law Review* 317.

<sup>170</sup> See for example Michael O’Connell, ‘Evolving Mechanisms for Engaging Victims in the Sentencing Process: Should Victims Have a Stronger Voice in Court’ (Paper presented at the Sentencing Conference: Principles, Perspectives and Possibilities, National Judicial College of Australia, Canberra, 10-12 February 2006); McDonald, above n 149, 650.

<sup>171</sup> McDonald notes that the transformation of the victim from a central to peripheral actor can be attributed to (1) the advent of the great experiment in corrections and rehabilitations; (2) the growth of the office of public prosecutor and (3) the creation of a modern police force. While McDonald is referring to these factors in the American social and historical setting, the Australian story is not dissimilar – as explained earlier in this paper, Australia moved away from the initial system of private prosecutions with the introduction of a professional police force and prosecution service.

<sup>172</sup> See page 33 of this article.

<sup>173</sup> Mack and Anleu, above n 205; Henham, above n 129, 537.

<sup>174</sup> Though interestingly, there have been suggestions that victim participation in the plea bargaining process might help legitimize it in the public perception, see Sarah Welling, ‘Victim Participation in Plea Bargaining’ (1987) 65 *Washington University Law Quarterly* 301, 309 (note 31).

<sup>175</sup> Guidorizzi, above n 132, 770.

<sup>176</sup> This brings up a host of other issues - public dissatisfaction may in turn influence citizens’ willingness to comply with the law and result in vigilante justice, see Timothy J Flanagan, Edmund F McGarrell and Edward J Brown, ‘Public Perception of the Criminal Courts: The Role of Demographic and Related Attitudinal Variables’ (1985) 22(1) *Journal of Research in Crime and Delinquency* 66, 68; Catherine Kaukinen and Sandra Colavecchia, ‘Public Perception of the Courts: An examination of attitudes toward the treatment of victims and accused’ (1999) 41 *Canadian Journal of Criminology* 365, 367.

<sup>177</sup> Waye and Marcus, above n 43, 340.

determine which charges to lay against the accused,<sup>179</sup> whether they will make or accept a plea bargain offer or even if all charges should be dismissed.<sup>180</sup> An accused's acceptance of a lesser plea does not require the approval of the court.<sup>181</sup> This has resulted in the prosecution's role being one of the most important in the pre-trial decision-making process.<sup>182</sup> The court has little or no opportunity to intervene in the pre-trial decision making process.<sup>183</sup> Its task is limited to passing sentence after the charge bargaining arrangements have been concluded and the accused has pleaded guilty to the respective charges.<sup>184</sup>

Plea bargaining puts the Prosecutor centre stage in criminal administration and forms a vital component of the massive and powerful reservoir of prosecutorial discretion.<sup>185</sup> Arguably, the plea bargaining system places too much power into the hands of the prosecution.<sup>186</sup> Commentators have referred to this enormous discretion, done without judicial oversight, as 'prosecutorial adjudication'.<sup>187</sup> It has been contended that

with trials in open court and deserved sentences imposed by a neutral fact finder, we protect the due process right to an adversarial trial, minimize the risk of unjust conviction of the innocent, and at the same time further the public interest in effective law enforcement and adequate punishment of the guilty...plea negotiations simultaneously undercuts all of these interests.<sup>188</sup>

This has caused some to call for its abolition.<sup>189</sup> Indeed, the wide range of powers the Prosecutor has in the conduct of prosecutions provides a degree of leverage. Critics have noted that in some circumstances,<sup>190</sup> the daunting penalties that a defendant faces if convicted in court can result in the innocent defendant pleading guilty.<sup>191</sup> Risk adverse defendants (even if innocent),<sup>192</sup> when faced with the choice of pleading guilty weighed against the harsh penalties if convicted at trial, may well choose to plead guilty.<sup>193</sup> The forum for the

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<sup>178</sup> Stanley Yeo, Mark Findlay and Stephen Odgers, *Australian Criminal Justice* (Oxford University Press, 3<sup>rd</sup> edition, 2005) 123.

<sup>179</sup> *GAS and SJK v The Queen* (2004) 78 ALJR 768, 793.

<sup>180</sup> Rebecca Krauss, 'The Theory of Prosecutorial Discretion in Federal Law: Origins and Development' (2009) 6(1) *Seton Hall Circuit Review* 1, 8.

<sup>181</sup> *R v Andrew Foster Brown* (1989) 17 NSWLR 472, 480. Even if there may be evidence before the judge in supporting a more serious charge, see *Maxwell v The Queen* (1996) 184 CLR 501; Findlay, above n 178, 111.

<sup>182</sup> Kramp, above n 132, 6.

<sup>183</sup> *Wilson and Another v McCormack* [1968] Tas SR 55, 61.

<sup>184</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>185</sup> Sallmann and Willis, above n 54, 76.

<sup>186</sup> Langbein, above n 139.

<sup>187</sup> Krauss, above n 237; Maximo Langer, 'Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure' (2006) 33 *American Journal of Criminal Law* 223; Langbein, above n 139.

<sup>188</sup> Stephen J Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 *Yale Law Journal* 1979, 2009.

<sup>189</sup> *Ibid.*

<sup>190</sup> Guidorizzi, above n 132, 771.

<sup>191</sup> Thomas Church, 'In Defense of Bargain Justice' (1979) 13 *Law and Society Review* 509, 514-515; Herbert Packer, *The Limits of Criminal Sanction* (Stanford University Press, 1968) 116-117. See also Russell D Covey, 'Signaling and Plea Bargaining's Innocence Problem' (2009) 66 *Washington and Lee Law Review* 73.

<sup>192</sup> There may be a number of reasons why an innocent defendant may wish to plead guilty. This can include the desire to get the matter done and over with, or a desire to conceal other conduct which a trial may disclose, see Mackenzie, above n 187.

<sup>193</sup> Robert Scott and William Stunz, 'A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants' (1992) 101 *Yale Law Journal* 2011, 2012.

determination of an individual's liberty thus shifts from open court to the offices of the Prosecutor, giving him power of both judge and Prosecutor.<sup>194</sup>

As highlighted, one can begin to comprehend the immense scope and reach that the prosecutorial discretion affords. This is however, not the end of the story. It has it seems become somewhat fashionable for legislatures throughout the world to concentrate discretion that should, in an ideal system, be properly vested in other branches of government, into the executive office of the Prosecutor. Broadly defined offences, overlapping provisions in the criminal codes and a fondness for mandatory sentencing have worked to expand the authority of the Prosecutor.<sup>195</sup>

## 4.2 Overcriminalization and Broadly Defined Statutes

Legislators enact broad criminal statutes capable of nondiscriminatory application.<sup>196</sup> It then falls to the police and prosecution to identify and select a manageable number of cases to prosecute.<sup>197</sup> Given that criminal conduct is described in general terms, 'sweep[ing] together similar acts by markedly different actors amid infinitely variable circumstances, the exercise of discretion allows for the law to exempt those for whom criminal prosecution is neither appropriate nor necessary'.<sup>198</sup> This discretion is also seen as necessary as public attitudes change over time and it is not always immediately possible for the legislature to make the necessary amendments. To some extent, prosecutorial discretion also functions as an informal means of 'testing' public reaction which may lead to subsequent legislative amendments on the issue.<sup>199</sup>

The problem arises when legislators become overzealous in promulgating more criminal laws than the Executive has resources to enforce.<sup>200</sup> Indeed, if one takes into account the politics of the criminal law, legislators, as elected representatives of the people, are often tempted by the conventional wisdom that appearing tough on crime is one way of garnering popularity amongst the electorate.<sup>201</sup> This has subsequently resulted in a myriad of new offences and enhanced penalties as 'publicity stunts' designed to win support and elections.<sup>202</sup>

Commentators have noted that statutory criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the Prosecutor.<sup>203</sup> One of the dangers of these overly broad statutes is that they can be utilized by the prosecution for 'posturing' during the plea bargaining process.<sup>204</sup> Indeed, as Dervan argues, there is a 'symbiotic relationship' between overcriminalisation and plea bargaining –

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<sup>194</sup> Abraham Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (Louisiana State University Press, 1981) 3-5.

<sup>195</sup> Misner, above n 63.

<sup>196</sup> Poulin, above n 30.

<sup>197</sup> Ibid.

<sup>198</sup> Teslik W Randolph, *Prosecutorial Discretion: the decision to charge: An Annotated Bibliography* (National Institute of Law Enforcement and Criminal Justice, 1975) 7.

<sup>199</sup> Abrams Norman, 'Internal Policy: Guiding the Exercise of Prosecutorial Discretion' (1971) 19 *University of California Law Review* 1, 3.

<sup>200</sup> Poulin, above n 30, 1081.

<sup>201</sup> Erik Luna, 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703, 719.

<sup>202</sup> Ibid 720.

<sup>203</sup> Misner above n 63, 742.

<sup>204</sup> Lucian E Dervan, 'Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization' (2011) 7 *Journal of Law Economics and Policy* 645, 653.

both he contends, rely on each other for their very existence in the criminal justice system.<sup>205</sup> Expanding statutory offences only provides more 'items on a menu from which the Prosecutor may order as she [sic] wishes'.<sup>206</sup>

In Western Australia, the *Criminal Property Confiscation Act* gives the State a wide scope to seize property that is the proceeds of crime or property that has been unlawfully obtained.<sup>207</sup> The Act is also notable for its reversal of the onus of proof,<sup>208</sup> requiring suspects to prove that their wealth was lawfully obtained and its unlimited retrospectivity.<sup>209</sup> The Attorney-General, Jim McGinty acknowledged when introducing the Act that it 'is being cast far broader than ever could be intended to apply'.<sup>210</sup> Its breadth 'means the role of the Director of Public Prosecutions as its controller is crucially important. [It requires] a DPP who will not use the power capriciously and will take into account the public interest'.<sup>211</sup>

Prosecutors can also 'negate' possible defences raised by the accused in the framing of charges. For example, facts that give rise to an assault occasioning bodily harm under the *Criminal Code*<sup>212</sup> can also fall under the category of wounding or grievous bodily harm.<sup>213</sup> In the former, the defence of provocation is open to the accused, whereas the latter offences make no such provisions. Again, the Prosecutor is able to select from the menu of charges available which to proceed on. In the careful selection of charges, Prosecutors can thus effectively anticipate and bypass defences that may be raised.

As argued, through over criminalisation and broadly defined statutes, legislatures have effectively abdicated public policy-making to the Prosecutor.<sup>214</sup> This has attracted criticism that Prosecutors are 'the criminal justice system's real lawmakers'.<sup>215</sup>

### 4.3 The Imposition of Mandatory Minimum Sentences

Mandatory minimum sentences also shift discretion from the courts and places it into the Prosecutor's hands. Mandatory minimum sentencing<sup>216</sup> refers to the practice of parliament setting a fixed penalty for the commission of a criminal offence.<sup>217</sup> This effectively leaves the

<sup>205</sup> Ibid 645.

<sup>206</sup> William Stunz, 'Plea bargaining and Criminal Law's Disappearing Shadow' (2004) 117 *Harvard Law Review* 2548, 2549.

<sup>207</sup> *Criminal Property Confiscation Act 2004* (WA).

<sup>208</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2000, 523 (Jim McGinty, Attorney-General).

<sup>209</sup> Ibid.

<sup>210</sup> Ibid 524. See also, Amanda Banks, 'Fight Against Seizure Laws: WA Governor', *The Weekend West* (Western Australia), 20-21 August 2011, 21; 'Calls for Changes to Confiscation Laws', *ABC* (online), 27 June 2011 <<http://www.abc.net.au/news/2011-06-27/calls-for-changes-to-confiscation-laws/2772886>>; 'Law Society Labels Confiscation Laws as Draconian', *ABC* (online), 14 June 2011 <<http://www.abc.net.au/news/2011-06-14/law-society-labels-confiscation-laws-draconian/2757990>> for some background on the controversy of the confiscation laws in Western Australia.

<sup>211</sup> Ibid.

<sup>212</sup> *Criminal Code of Western Australia* s 317.

<sup>213</sup> If the injury sustained is serious enough to be classified as wounding of grievous bodily harm, see *Criminal Code of Western Australia* s ss 301 and 207 for the offences of wounding and grievous bodily harm, respectively.

<sup>214</sup> Misner, above n 63, 746.

<sup>215</sup> William Stunz, 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 505, 506.

<sup>216</sup> Sometimes referred to as 'mandatory minimum penalties' or 'mandatory penalties'.

<sup>217</sup> Declan Roche, 'Mandatory Sentencing' [1999] (138) *Trends and Issues in Crime and Criminal Justice* 1.

court with only one (or rather no) option upon sentencing.<sup>218</sup> With mandatory minimum sentencing, the choice of charge laid has a profound and direct impact on sentence. The same reasons that give rise to over criminalisation can also be found in mandatory minimum sentencing – politicians are eager to be seen as tough on crime.<sup>219</sup> Mandatory sentencing dates as far back as 1790 in the United States,<sup>220</sup> and in the eighteenth and early nineteenth century in England.<sup>221</sup> The 1990s witnessed a number of varying jurisdictions across the common law world increasing the number of mandatory sentencing laws.<sup>222</sup> Canada began passing a record number of mandatory sentencing laws from 1982<sup>223</sup> and by 1999, the *Criminal Code of Canada* contained 29 offences carrying mandatory sentences.<sup>224</sup> The United States has enacted a myriad of mandatory sentencing laws relating to aggravated rape, drug felonies, felonies involving firearms and felonies committed by previously convicted felons.<sup>225</sup> Singapore is also no stranger to mandatory minimum sentencing having inherited fixed sentencing from the *Indian Penal Code*.<sup>226</sup> Mandatory sentencing was later expanded for crimes under a number of statutes<sup>227</sup> and the *Penal Code (Amendment) Act 1984* provided for the imposition of mandatory minimum sentences for a range of offences including robbery, housebreaking, vehicle theft, extortion, aggravated outrage of modesty, and rape (if certain circumstances are made out).<sup>228</sup>

In 1996 Western Australia<sup>229</sup> adopted mandatory minimum sentencing for property offences in response to a ‘moral panic’ due to a number of home invasions and the perceived

<sup>218</sup> Neil Morgan, ‘Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories’ (1999) 22 *University of New South Wales Law Journal* 267, 267.

<sup>219</sup> Ibid. There are also a number of arguments in favour of mandatory minimum sentencing: selective incapacitation, deterrence, consistency, democratic principles but a comprehensive discussion on the advantages and disadvantages of mandatory minimum sentencing is best left for another article.

<sup>220</sup> Thomas Gabor and Nicole Crutcher, ‘Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures’ (Research Report, Department of Justice Canada, 2001) 1.

<sup>221</sup> Kate Warner, ‘Mandatory Sentencing and the Role of the Academic’ (2007) 18 *Criminal Law Forum* 323.

<sup>222</sup> Morgan, above n 218.

<sup>223</sup> Julian Roberts, ‘Public Opinion and Mandatory Sentencing, A Review of the International Findings’ (2003) 30 *Criminal Justice and Behavior* 483, 485.

<sup>224</sup> Gabor and Crutcher, above n 286, annex A; *Criminal Code of Canada* RSC 1985, c C-46.

<sup>225</sup> Michael Tonry, *Sentencing Matters* (Oxford University Press, 1996) 146.

<sup>226</sup> Palakrishnan, ‘Mandatory Sentences and Judicial Discretion in Criminal Law: Throwing Away the Key?’ (Paper presented at the LawAsia Conference, Christchurch, New Zealand, 6 October 2001) 5.

<sup>227</sup> Including the *Arms Offences Act* (Singapore, cap 14, rev ed 2008), *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008), *Immigration Act* (Singapore, cap 133 rev ed 2008), *Vandalism Act* (Singapore, cap 341, rev ed 1985), *Miscellaneous Offences (Public Order and Nuisance) Act* (Singapore, cap 184, rev ed 1997), *Undesirable Publications Act* (Singapore, cap 338, rev ed 1988), *Internal Security Act* (Singapore, cap 143, rev ed 1985), *Banishment Act* (Singapore, cap 18, rev ed 1985), *Maintenance of Religious Harmony Act* (Singapore, cap 167A, rev ed 2001), *Environmental Public Health Act* (Singapore, cap 95, rev ed 2002), see Ross Worthington, ‘Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore’ (2002) 28 *Journal of Law and Society* 490, 510.

<sup>228</sup> Chan Wing Cheong and Andrew Phang, *The Development of Criminal Law and Criminal Justice in Singapore* (2001) 41, to be read in conjunction with Jill Tan, ‘Book Review: The Development of Criminal Law and Criminal Justice in Singapore’ [2001] *Singapore Journal of Legal Studies* 229, 230 as the latter corrects a number of inaccuracies in the original article. See Palakrishnan, above n 290. The respective offences are contained in the *Penal Code* (Singapore, cap 224, rev ed 2008) include robbery: s392; housebreaking: ss456, 457; vehicle theft: s379A; extortion: s383; aggravated outrage of modesty: s354A; rape: s376(2). See also Singapore, *Parliamentary Debates*, 26 July 1984, vol 44, col 1861 for the Second Reading Speech of the *Penal Code (Amendment) Act 1984*.

<sup>229</sup> The earlier Western Australia attempt at mandatory sentencing through the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was a political maneuver to ‘cling to power’ and short lived. See Morgan, above n 218, 269.

inadequacy of sentences. This resulted in the ‘three-strike rule’ which provided that an offender convicted for the third time for a home burglary *must* receive a 12 month term of imprisonment.<sup>230</sup> More recently, likely due to the incident of police officer Matthew Butcher being assaulted and paralysed, Parliament has passed mandatory sentencing laws for persons convicted of assaulting police officers.<sup>231</sup> It would seem then that the legislatures in Western Australia and in various other jurisdictions have taken to including mandatory minimum penalties in their criminal statutes in what may be a popularist approach.<sup>232</sup>

The issue with mandatory minimum sentencing is that it ‘chips away’<sup>233</sup> at the judge’s role as adjudicator and curtails judicial discretion in sentencing, transferring it to the prosecution.<sup>234</sup> Critics argue that the legislature’s demonstrated eagerness to implement mandatory sentencing regimes is a knee-jerk reaction perceived to be popular with the electorate. Given this, the argument is that this is the beginning of a ‘slippery slope’ that will eventually see a plethora of offences on the statute books with mandatory minimum penalties that may, in the most extreme scenario, see judicial discretion reduced and prosecutorial discretion reaching unprecedented levels. This issue is further exacerbated in jurisdictions that impose the *mandatory* death penalty.<sup>235</sup> In such situations, the hands of the court are tied in matters of sentencing. It is arguable that to some extent, the power over life and death slides out of the judiciary, into the hands of the prosecution.

This curtailing of the judiciary’s discretion may be due to a number of reasons. It may be to allow for greater consistency in sentencing, or it may be part of a larger political trend toward distrust of the courts and greater empowerment of the Prosecutor.<sup>236</sup> For some, this shift in

<sup>230</sup> See s 401(4) *Criminal Code of Western Australia* (emphasis added); Morgan, above n 218, 269.

<sup>231</sup> In 2009, the Criminal Code Amendment Bill 2008 (WA) was passed in Parliament and introduced mandatory sentencing provisions for people convicted of assaulting or causing bodily harm to police officers, ambulance officers, transit guards, court security officers or prison officers; See Explanatory Memorandum, Criminal Code Amendment Bill 2008 (WA); Joseph Sapienza, ‘Mandatory Sentencing Law Concerns to Upper House’ *WA Today* (Western Australia, 22 June 2009).

<sup>232</sup> As mentioned in footnote 285, there are possible advantages to mandatory minimum sentencing. It should be noted though that in both Australia and Singapore, proponents of mandatory sentencing are more commonly found in Parliament than in academia. See the relevant Hansards in the respective jurisdictions – Western Australia: Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 964-966 (Christian Porter, Attorney-General); Singapore: Singapore, *Parliamentary Debates*, 9 May 2000, vol 72, col 151-163; Singapore, *Parliamentary Debates*, 16 February 1973, col 416; Singapore, *Parliamentary Debates*, 30 November 1973, vol 32, col 1348 (Chua Sian Chin); Singapore, *Parliamentary Debates*, 26 July 1984, vol 44, col 1867-1870 (Chua Sian Chin); Singapore, *Parliamentary Debates*, 9 March 2001, vol 73, col 506-532; Singapore, *Parliamentary Debates*, 26 July 1984, vol 44, col 1863, 1959-1962 (Chua Sian Chin). The WA Police Union has recently suggested that mandatory sentencing is responsible for ‘backroom deals’ between the prosecution and the accused, see Amanda Banks, ‘“Backroom Deals” Letting Thugs off Lightly’, *The West Australian* (Western Australia) 29 October 2012.

<sup>233</sup> Tan, above n 228.

<sup>234</sup> Becky Kohler da Cruz, *Prosecutorial Discretion Under Georgia’s Two Strikes Provision: A Quantitative Analysis* (PhD Thesis, Capella University, 2008) 8, 11; Barbara Vincent and Paul Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Federal Judicial Centre, 1994) 21.

<sup>235</sup> The mandatory death penalty is distinguishable from the death penalty. In the latter, upon conviction, the Court *may*, in its discretion, impose the death penalty. In the former, the Courts’ hands are tied and it *must*, upon pronouncement of guilt, impose the death penalty.

<sup>236</sup> Jill Farrell, ‘Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity’ (2003) 5 *Justice Research and Policy* 95; Kate Stith and Jose A Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998); Jeffrey T Ulmer, Megan C Kurlychek and John H Kramer, ‘Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences’ (2007) 44 *Journal of Research in Crime and Delinquency* 427; Jeffrey T Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* (State University of New York Press, 1997) 16.



power has caused concern, while others have accepted it as a necessary state of affairs. Nevertheless, this shift illustrates the ‘hydraulic displacement effect’.<sup>237</sup> The displacement theory proposes that discretion is inevitable,<sup>238</sup> and in this case the discretion taken away from the courts merely appears elsewhere – in the Prosecutor’s office.

As argued above, plea bargaining, over criminalisation, broadly defined statutes and mandatory minimum sentences have given Prosecutors greater leeway in the administration of justice. These measures have not however, come without their own costs. The expanded discretion afforded to Prosecutors has arguably resulted in lessened transparency and accountability.

## 5. Restraints on the Prosecutor

### 5.1 Duty to Give Reasons

The body responsible for the definition of a crime, the legislature, is subject to the democratic process and is accountable to the electorate. Parliamentary debates are publicized and freely available. Similarly, the judiciary, responsible for pronouncing guilt or innocence, also has certain standards to hold them accountable. Save for a few exceptions,<sup>239</sup> court hearings are open to the public. Most mature and competent judicial systems have adopted the principle heralded by Lord Denning more than half a century ago that in order for a trial to be fair, it is necessary not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen if the decision maker states his reasons.<sup>240</sup> This facilitates public accountability, public scrutiny, and public confidence in the system.<sup>241</sup> Additionally, in *Coleman v Dunlop Limited*,<sup>242</sup> Henry LJ, in quoting Lord Donaldson MR, stated that ‘[h]aving to give reasons concentrates the mind wonderfully’.<sup>243</sup>

The position in Australia on the duty to give reasons has been even clearer.<sup>244</sup> Australian courts have moved beyond the duty to state the reasons for decisions and onto the extent of that obligation as was the case in *Waterson v Batten*.<sup>245</sup> This principle has also been reiterated

<sup>237</sup> Terance D Miethe, ‘Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion’ (1989) 78 *The Journal of Criminal Law and Criminology* 155.

<sup>238</sup> Nancy Gertner, ‘Sentencing Reform: When Everyone Behaves Badly’ (2005) 57 *Maine Law Review* 570; Nancy Gertner, ‘Federal Sentencing Guidelines: A View From The Bench’ (2002) 29 *Human Rights Magazine* 6, 23.

<sup>239</sup> For example, trials that involve juveniles/minors are usually not open to the public.

<sup>240</sup> Alfred Denning, *The Road to Justice* (Stevens, 1955) 29. See also *Coleman v Dunlop Limited* [1998] PIQR 398, 403 (Henry LJ).

<sup>241</sup> H L Ho, ‘The Judicial Duty to Give Reasons’ [2006] 20 *Legal Studies: The Journal of the Society of Legal Scholars* 42.

<sup>242</sup> *Coleman v Dunlop Limited* [1998] PIQR 398, 403.

<sup>243</sup> *Tramontana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872.

<sup>244</sup> Though of course there are a number of exceptions, for example in interlocutory matters and where the case is clear and straightforward, with little contention by way of facts of legal issues, see *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, 566. Juries also do not have to provide reasons for their decisions.

<sup>245</sup> *Waterson v Batten* (13 May 1988, unreported) (NSW Court of Appeal), though Kirby P did also mention that in certain circumstances it may be impractical and unrealistic to expect delivery of written or oral grounds of decisions for every case due to the sheer number of cases, allowing for some latitude in the drafting of reasons. There is also WA authority suggesting that while Magistrates in the lower courts should provide reasons for decisions, this reasoning need not be extensive due to the sheer volume of matters handled by the lower courts, see *Garrett v Nicholson* (1999) 21 WAR 226; *Quinlan v Police* [2007] WASC 44 [126]-[127] (Johnson J).

in *Soulemezis v Dudley*<sup>246</sup> and *Public Service Board of New South Wales v Osmond*.<sup>247</sup> The idea is, as was put by Rawls, that reasons for decisions that are debated, attacked and defended, amount to an important restraint on the decision maker's exercise of power.<sup>248</sup> It is therefore accepted that public accountability of the branches of government that plays a role in the criminal law process is a crucial and integral part of any legal system that aspires to administer justice.<sup>249</sup>

It is somewhat of an oddity then that the Prosecutor has far fewer limitations and is subject to far less scrutiny.<sup>250</sup> In Australia, while publicly available policies guide the conduct of Prosecutors in the exercise of their discretion, Prosecutors, in general, are not required to explain their decisions and typically do not.<sup>251</sup> The rationale for a decision, to prosecute a particular case or not is rarely available and few mechanisms of review are available to the public.<sup>252</sup> This is somewhat questionable as Prosecutors, though performing a very different role from judges, do make decisions on prosecutorial matters, and are arguably playing a 'quasi-judicial' role.<sup>253</sup> In light of this, it is possible that there would be some benefit in requiring the Prosecutors to give reasons for decisions. It would, in the words of Lord Donaldson, 'concentrate the mind wonderfully',<sup>254</sup> and lead to increased care in analyzing the evidence and coming to a decision on whether to prosecute or not, which charges to lay and other prosecutorial functions.

## 5.2 Discovery Obligations

In the pursuit of truth in criminal proceedings, parties are obliged to comply with the 'rules of the game'.<sup>255</sup>

[S]ince it is impossible to equip both the prosecution and the defence with the same investigative facilities the only reasonable way to attain advance equality in access to the evidence is through the 'system', that is through a discovery procedure.<sup>256</sup>

<sup>246</sup> *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279.

<sup>247</sup> *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, 566.

<sup>248</sup> J Rawls, *Theory of Justice* (Oxford University Press, 1972) 133; D L Shapiro, 'In Defence of Judicial Candor' (1987) 100 *Harvard Law Review* 731, 737, cited in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 258 (Kirby P).

<sup>249</sup> It has been noted that other government actors enjoy less power yet are subject to far more regulations than prosecutors are in *Bibas*, above n 12, 962.

<sup>250</sup> Though it should be noted that while there are some internal mechanisms and review, these are not widely known and not as transparent as they could be – for example in Western Australia, the DPP prosecutors are divided into workgroups, each headed by a Workgroup Coordinator who is a Senior State Prosecutor. Presumably, prosecutorial decisions are monitored by each Coordinator, providing for some level of accountability and to ensure that 'junior prosecutors are appropriately mentored and guided'. Office of the Director of Public Prosecutions (Western Australia), *Annual Report 2010/2011* <[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)> 10.

<sup>251</sup> Gans, above n 58, 60.

<sup>252</sup> *Ibid.* In a *nolle prosequi*, the Prosecutor, as a matter of practice does state publicly before the court the reason why the prosecution is not proceeding on the matter, but this statement is notably brief and unelaborated.

<sup>253</sup> Krauss, above n 237; Langer, above n 244. See also page 28 of this article that describes the Prosecutor's quasi-adjudicator role in plea bargaining.

<sup>254</sup> *Tramontana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872.

<sup>255</sup> V S Winslow, 'Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia' (1989) 31 *Malaya Law Review* 1.

<sup>256</sup> Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (Working Paper, 1974).

In the criminal justice system, the vast resources of the state are pitted against the individual defendant. Imposing disclosure obligations on the prosecution allows the accused to have access to the evidence relevant to his/her case.<sup>257</sup> This ensures that the accused is aware of the case to be met and is able to adequately prepare their defence.<sup>258</sup> Also, and on a more practical note, discovery assists in resolving non-contentious and time-consuming issues ahead of trial and to encourage the entering of guilty pleas at an early stage.<sup>259</sup>

In the United Kingdom, there was a series of highly publicized, controversial cases in the late 1980s and early 1990s that highlighted the importance of disclosure obligations in the conduct of a fair trial. ‘Kiszko’,<sup>260</sup> the ‘Maguire Seven’,<sup>261</sup> the ‘Taylor sisters’,<sup>262</sup> the ‘Birmingham Six’,<sup>263</sup> the ‘Guildford Four’<sup>264</sup> and ‘Judith Ward’<sup>265</sup> all involved non-disclosure of significant material by the prosecution which resulted in a miscarriage of justice. In response,<sup>266</sup> the English courts saw an expansion of the prosecution’s disclosure obligations from *R v Saunders*,<sup>267</sup> *R v Maguire*<sup>268</sup> and culminating in *R v Ward* where it was held that any material gathered by the prosecution was capable of disclosure.<sup>269</sup>

In Australia, ‘miscarriages of justice due to non-disclosure have not occurred with same degree of frequency nor sensationalism [so] as to cause an appellate court to act so decisively’.<sup>270</sup> That has however, changed with *R v Mallard*.<sup>271</sup> In *Mallard*, it was conceded by the prosecution on appeal to the High Court that the nondisclosure of certain materials had breached the DPP’s Statement of Prosecution Policy and Guidelines that had been made and gazetted pursuant to the *Director of Public Prosecutions Act 1991* (WA).<sup>272</sup> Kirby J adopted the following statement as representing an accurate position of the common law in Australia:

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<sup>257</sup> New South Wales *Law Reform Commission, Procedure from Charge to Trial: Specific Problems and Proposals* (Discussion Paper on Criminal Procedure vol 1, 1987) [4.69].

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> See *R v Kiszko* (1991) *The Times*, 18 February 1992, 5 and *R v Kiszko* (1978) 68 Cr App R 62 for the first appeal. Kiszko is a vivid example of apparent deliberate police non-disclosure. Kiszko, who had an intellectual disability, was convicted in relation to the sexual assault and brutal murder of a girl on the basis of questionable and later retracted admissions that he made in interview. However, crucial forensic evidence was withheld that actually showed Kiszko’s innocence. He spent 16 years in prison before his eventual release but died soon after, see further J Niblett, *Disclosure in Criminal Proceedings* (Sweet & Maxwell, 1996) 21; G Tibballs, *Legal Blunders* (Robinson, 2000) 249-254; Jonathan Rose and Steve Panter, *Innocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (Fourth Estate, 1997) cited in David Plater, *The Changing Role of the Modern Prosecutor: has the notion of the ‘Minister of Justice’ Outlived its Usefulness?* (PhD Thesis, The University of Tasmania, 2011) 186-226.

<sup>261</sup> *R v Maguire* [1992] 1 QB 936.

<sup>262</sup> *R v Taylor & Taylor* (1994) 84 Cr App R 361.

<sup>263</sup> *R v McIlkenny* (1991) 93 Cr App R 287.

<sup>264</sup> *R v Richardson* (1989), *The Times*, 20 October 1989.

<sup>265</sup> *R v Ward* [1993] 1 WLR 619.

<sup>266</sup> As noted in Plater, above n 332, 186-226.

<sup>267</sup> (Unreported, Central Criminal Court, Henry J, 29 August 1989).

<sup>268</sup> [1992] 1 QB 936.

<sup>269</sup> *R v Ward* [1993] 1 WLR 619, 645.

<sup>270</sup> M Hinton, ‘Unused Material and the Prosecutor’s Duty of Disclosure’ (2001) 25 *Criminal Law Journal* 121, 132.

<sup>271</sup> (2005) 224 CLR 125.

<sup>272</sup> *Ibid* 219.

The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed<sup>273</sup>

The High Court confirmed the formal and wide duty of disclosure that the prosecution should comply with and that the Statement of Prosecution Policy and Guidelines served to complement the common law duty in this regard.<sup>274</sup> The prosecution's failure to meet its disclosure obligation may lead to an order that the conviction be quashed, as was the case in *Mallard*.<sup>275</sup> Additionally, in Western Australia, following a number of recommendations (albeit many years later),<sup>276</sup> Parliament has introduced statutory provisions that have strengthened the disclosure obligations.<sup>277</sup> These disclosure obligations are also reflected in the DPP's own Statement of Policy and Guidelines.<sup>278</sup>

<sup>273</sup> (2005) 224 CLR 125, 153 (Kirby J); Kirby P adopted this from Lord Hope's statement in *R v Winston Brown* [1998] AC 367, 377 (Lord Hope).

<sup>274</sup> *R v Mallard* (2005) 224 CLR 125, 150 (Kirby J).

<sup>275</sup> *Ibid.*

<sup>276</sup> The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Report No 92 (1999); Robert Mazza, 'Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia' (Paper presented at the Australian Institute of Judicial Administration, Criminal Justice Conference, Sydney, 7-9 September 2011).

<sup>277</sup> *Criminal Procedure Act 2004* (WA) ss 42, 61 and 95; See Criminal Procedure Bill 2004; Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 August 2004, 5722-5726 (Jim McGinty, Attorney General). The raising of disclosure obligations was done alongside the abolition of the Committal Hearings (Preliminary Hearing in WA) process. Higher disclosure obligations by the prosecution were thought to at least alleviate some of the concerns raised by critics that the abolition of Preliminary Hearings would bring about. A summary of the current system was articulated by the Court in *Re Grinter; Ex parte Hall* (2004) 28 WAR 427, 471 [191] which noted: 'Parliament has replaced the preliminary hearing...The transfer of power over prosecution decisions before trial is complete. The role of the grand jury and committing magistrate has been entirely replaced by the functions of the Director of Public Prosecutions and a statutory duty of disclosure'.

<sup>278</sup> See Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)> [101]-[118]. The ODPP in other states have similar provisions:

Office of the Director of Public Prosecutions (SA), *Prosecution Policy* (1999) <[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)> 39-43;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>; [8.1]-[8.18];

Office of the Director of Public Prosecutions (NSW), *Office of Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)> 30-32;

Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>.

### 5.3 Judicial Review

Australia has evinced a general reluctance to interfere with functions of prosecutorial discretion. Australian courts do not purport to exercise control over the commencement or continuation of criminal proceedings, save where it is necessary to prevent an abuse of process or to ensure a fair trial.<sup>279</sup> In a number of cases, the courts have confirmed the position that the decision whether or not to prosecute a case is not susceptible to judicial review.<sup>280</sup> This stems from *R v Maxwell* where the High Court held that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review.<sup>281</sup> They include decisions whether or not to prosecute,<sup>282</sup> to enter a *nolle prosequi*,<sup>283</sup> to proceed *ex officio*,<sup>284</sup> whether or not to present evidence<sup>285</sup> and decisions as to the particular charge to be laid or prosecuted.<sup>286</sup> As observed in *Maxwell*:

The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.<sup>287</sup>

Similarly, the selection of the appropriate charges to proceed with is a matter with which the court will not usually interfere with.<sup>288</sup> This position may even extend (as is notoriously common in drug offences) to decisions to particularize in the charge the amount of a prohibited drug as this is a matter for prosecutorial discretion. In *Matthews v Greene*, the Court held that ‘it may be that, as with the choice of a charge, the exercise of this prosecutorial discretion will be a matter with which courts are reluctant to intervene’.<sup>289</sup>

The court can, however, in limited circumstances where the bringing of criminal proceedings are oppressive and an abuse of process, embark upon a preliminary enquiry and stay proceedings.<sup>290</sup> It should however be emphasized that this power stems from the court’s

<sup>279</sup> *Barton v The Queen* (1980) 147 CLR 75, 90-1, 96.

<sup>280</sup> *Ibid* 94; *R v Jewitt* [1985] 2 SCR 128, 139-140.

*Hanna v Director of Public Prosecutions* [2005] NSWSC 134 [40]. It is also difficult to get a mandamus against anybody with prosecutorial or quasi-prosecutorial functions or powers to force it to take action, see Hannes Schoombee and Lee McIntosh, ‘Watching over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation’ (Paper presented at the Australian Institute of Administrative Laws Annual Conference, 4-5 July 2002).

<sup>281</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>282</sup> *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1277; *Director of Public Prosecutions v Humphrys* [1977] AC 1, 46; *Barton v The Queen* (1980) 147 CLR 75, 94-5, 110.

<sup>283</sup> *R v Allen* (1862) ER 929; *Barton v The Queen* (1980) 147 CLR 75, 90-1.

<sup>284</sup> *Barton v The Queen* (1980) 147 CLR 75, 92-3, 104, 107, 109.

<sup>285</sup> *R v Apostilides* (1984) 154 CLR 563, 575.

<sup>286</sup> *R v McCready* (1985) 20 A Crim R 32, 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593, 604-5 cited in *Maxwell v The Queen* (1996) 184 CLR 501 (emphasis added).

<sup>287</sup> *Maxwell v The Queen* (1996) 184 CLR 501, 534.

<sup>288</sup> *Chung v The Queen* (2007) 175 A Crim R 579, 589-591.

<sup>289</sup> *Ibid* [54]-[61] (Spigelman CJ); *Matthews v Greene* (2011) WASC 258 [68].

<sup>290</sup> *R v Bow Street Magistrates; Ex parte Mackeson* (1981) 75 Cr App R 54; *R v Riebold* [1967] 1 WLR 674; *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1296, 1347; *Herron v McGregor* (1986) 6 NSWLR 246; However, in *Jago v District Court of New South Wales* (1989) 168 CLR 23 the court held that the general principle is that a permanent stay of proceedings will only be granted in exceptional circumstances; *Williams v Spautz* (1992) 174 CLR 509 which lays out the ‘dominant purpose test’ which should be applied to determine the purpose of prosecution, though it has been noted that it is difficult for an accused to establish that the DPP instituted proceedings for an improper purpose, see Colvin and McKechnie, above n 10, 703.

inherent jurisdiction to protect its own processes from abuse and is not an opportunity for the judge to stray beyond a judicial role.<sup>291</sup> In the words of McKechnie J:

A Judge is not a Director of Public Prosecutions. It is not enough for a Judge to conclude that were he or she to exercise the prosecutorial discretion, in accordance with published prosecutorial guidelines, an indictment would not be presented or would be discontinued. A Judge can only exercise the power if satisfied that the processes of the Court, having been invoked, cannot continue in the interests of justice... In deciding the interests of justice require a stay of an indictment *a judge should be careful not to stray beyond a proper judicial role. The institution and continuation of judicial proceedings is a wholly executive function.*<sup>292</sup>

The respective Director of Public Prosecutions Acts authorize the function of prosecutions to be carried out by the Director.<sup>293</sup> The institution and continuation of criminal proceedings is thus a wholly executive function. As is made clear in *Maxwell* and the aforementioned cases, decisions made by the prosecution are seldom subject to judicial review.<sup>294</sup>

#### 5.4 Guiding the Discretion

Discretion can dangerously be synonymous with unchecked power.<sup>295</sup> The worry is that the Prosecutor, being only human, is subject to the imperfections of human nature that may be reflected in the choices made.<sup>296</sup> Research suggests that Prosecutors may bring to bear their personal biases in the exercise of their discretion.<sup>297</sup> It is the ‘personal synthesis of factors by the decision maker’<sup>298</sup> and as such can often be secretive and unaccountable. Unbridled prosecutorial discretion ‘makes easy the arbitrary, the discriminatory and the oppressive. It produces ‘inequality of treatment...and offers a fertile bed for corruption’.<sup>299</sup>

Even if it were to be assumed, optimistically, that the discretion would at all times be exercised in good faith and with honesty, the decision to prosecute often involves evidential or legal issues that are matters of professional judgment and inevitably involve a degree of subjectivity.<sup>300</sup> Accordingly, different Prosecutors may take different perspectives on a matter.<sup>301</sup> One senior Prosecutor acknowledges that the prosecution service is a ‘human

<sup>291</sup> *Salmat Document Management Solutions Pty Ltd v R* [2006] WASC 65.

<sup>292</sup> *Ibid* [36]–[37], [41]–[42] (emphasis added).

<sup>293</sup> *Director of Public Prosecutions Act 1983* (Cth) ss 6(1)(a), (c), (d), 9 (5); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) ss 8, 9; *Director of Public Prosecutions Act 1991* (WA) ss 11, 12; *Director of Public Prosecutions Act 1984* (Qld) s 10(1)(a); *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a); *Public Prosecutions Act 1994*(Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

<sup>294</sup> *Maxwell v The Queen* (1996) 184 CLR 501.

<sup>295</sup> Simons, above n 21, 899.

<sup>296</sup> Davis, above n 32; Poulin, above n 30, 1072.

<sup>297</sup> Kenneth J Melilli, *Prosecutorial Discretion in an Adversary System* [1992] *Brigham Young University Law Review* 669, 685–91; Poulin, above n 30, 1080.

<sup>298</sup> Refshauge, above n 25, 359.

<sup>299</sup> Charles D Breital, ‘Controls in Criminal Law Enforcement’ (1960) 27 *University of Chicago Law Review* 427, 429.

<sup>300</sup> HM Crown Prosecution Service Inspectorate, *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (2002) 45 [8.5]; See also House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System: Ninth Report of Session 2008–2009* (2009) 44–47 which comments on the lack of consistency in the Crown Prosecution Service.

<sup>301</sup> *Ibid*.

institution',<sup>302</sup> and 'no-one makes correct decisions all of the time',<sup>303</sup> further noting that cases with circumstantial evidence can often lead to different inferences and different perspectives can lead to different decisions.<sup>304</sup>

Finally, there is the issue of perception and public confidence in the criminal justice system. Prosecutorial discretion must not only be exercised in good faith, free of personal, emotional and political influences, but must be seen to be so. Its exercise must be seen to be consistent with some fair and transparent standards. There must be a 'minimum level' of transparency and accountability in accordance with society's demands. This would in turn lend confidence to the notion that prosecutorial discretion is more than the mere arbitrary will of the Prosecutor.

The situation begets the question: given the Prosecutor's status as 'gate keeper' of the criminal justice system and the potential of the discretion to effect justice or injustice, what safeguards are in place to ensure that the exercise of this discretion is carried out and seen to be carried out with consistency and not used capriciously or even maliciously? How does one ensure that it is 'not arbitrary, vague and fanciful, but legal and regular... and exercised within the limit to which an honest man, competent in the discharge of his/her office ought to confine himself?'<sup>305</sup>

#### 5.4.1 Prosecutorial Guidelines

Sir Hartley Shawcross, the then Attorney-General of the UK, in a statement to the House of Commons, said:

It has never been the rule in this country – I hope it will never be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulation under which the Director of Public Prosecution worked provided that he should intervene to prosecute, amongst other cases:

'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'.

That is the dominant consideration...<sup>306</sup>

While the statement was made for an English audience, the statement has been referred to by commentators in Australia and has been influential in shaping the prosecutorial landscape in Australia.<sup>307</sup> This has translated into the initial conceptualization of two elements: first, is there sufficient evidence to justify a prosecution and second, is such a prosecution necessary in the public interest?<sup>308</sup>

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<sup>302</sup> Lievore, above n 50, 6.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> *Sharp v Bishop of Wakefield* [1981] 1 AC 173, 179 (Lord Halsbury).

<sup>306</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681; Also, about the same time when Australia undertook the establishment of its Director of Public Prosecutions, the United Kingdom underwent similar reforms, creating its own Crown Prosecution Service, see Ashworth and Redmayne, above n 225, 174-178.

<sup>307</sup> Ross, above n 8, 347; Bugg, above n 109; Refshauge, above n 25, 361.

<sup>308</sup> Rozenes, above n 39; Refshauge, above n 25, 361.

### 5.4.1.1 The Evidentiary Sufficiency

The first element of ‘sufficient evidence’ has been the source of some contention. Upon initial interpretation, it was ‘fashionable’ for this to mean a prima facie case.<sup>309</sup> This approach was however, unsatisfactory as it was evident that a mere prima facie case was often insufficient for a jury to find a guilty verdict.<sup>310</sup> Given the growing number, and length of criminal trials, it was felt that to commit limited resources to cases that would not likely see a conviction was, at best, unwise.<sup>311</sup> Thus, by the mid-1980s the switch to a ‘reasonable prospect of conviction’ standard was thought to be more appropriate as it conserved limited resources and lowered the risk that an innocent person would be prosecuted.<sup>312</sup>

A ‘reasonable prospect of conviction’<sup>313</sup> was thus deemed to be a more appropriate test. This was interpreted as ‘rather more likely than not that the prosecution will result in a conviction’,<sup>314</sup> or the ‘51% rule’.<sup>315</sup> In the application of this test, the Prosecutor must not only consider whether or not the court would convict based on the evidence adduced by the prosecution, but must also take into account the impact of any likely defence, the impact of any witnesses on the jury and a number of factors that could affect the outcome of a trial in order to determine whether or not the prosecution, if initiated, would ‘more likely than not’ result in conviction.<sup>316</sup> This test was criticized as in some cases, a Prosecutor, no matter how experienced, will simply be unable to say whether a conviction or acquittal is the more likely result.<sup>317</sup> This ‘51%’ rule can also pose a problem in sexual assault cases, where it is often a matter of ‘he said versus she said’, falling short of the necessary 51% threshold.<sup>318</sup> In the 1986 guidelines, an attempt was thus made to rectify the issues by subsuming the sufficiency of evidence test with ‘public interest considerations’ so that whether a conviction was the more likely result became the dominant factor in determining whether the public interest required a prosecution.<sup>319</sup> This approach however, was also unsatisfactory as the incorporation of the sufficiency of evidence test with public interest considerations was deemed artificial and difficult to apply in practice.<sup>320</sup>

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<sup>309</sup> Rozenes, above n 39.

<sup>310</sup> Bugg, above n 156.

<sup>311</sup> Ibid.

<sup>312</sup> Ian Temby, ‘Prosecution Discretion and the Director of Public Prosecutions Act 1983’ (1985) 59 *Australian Law Journal* 197; Refshauge, above n 25, 361.

<sup>313</sup> Attorney-General’s Department, *Prosecution Policy of the Commonwealth* (1982) [16]; Commonwealth Director of Public Prosecutions, *Steps in the Commonwealth Prosecution Process* <<http://www.cdpp.gov.au/Practice/Prosecution-Process.pdf>> [2]; Rozenes, above n 39; Temby above n 426, 198.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Rozenes, above n 39.

<sup>317</sup> Ibid.

<sup>318</sup> As mentioned earlier, private prosecution has since been discontinued in WA. Given this, where the prosecution has decided not to proceed with a matter, the only option left to the victim of a sexual assault case is civil action against the perpetrator. Studies have shown that Prosecutors’ charging decisions in sexual assault cases were often guided by the likelihood of conviction, see Spohn and Holleran, above n 45.

<sup>319</sup> Rozenes, above n 39, 7-8.

<sup>320</sup> Ibid 8.



So it was in the 1990 version of the guidelines that the Commonwealth adopted the view taken by the Victorian Shorter Trials Committee.<sup>321</sup> The Committee found that the ‘reasonable prospects of conviction’ should not be equated with a 51% chance of conviction being sustained. It may be something less than that and is not appropriately expressed in mathematical terms’.<sup>322</sup> Additionally, the ‘reasonable prospect of conviction’ test was the test adopted by the Victorian and New South Wales Directors of Public Prosecution, and at a general meeting of State and Territory Directors of Public Prosecutions, it was thought desirable for all jurisdictions to operate under this same test.<sup>323</sup>

#### 5.4.1.2 The Public Interest

A second set of considerations is often also taken into account in the exercise of a Prosecutor’s discretion. This asks that the Prosecutor look at possible mitigating factors not adequately presented in the substantive law.<sup>324</sup> These extra-evidential factors are known as ‘public interest’ considerations,<sup>325</sup> and also found their way into the uniform guidelines in Australia.<sup>326</sup> The cases envisaged are often ones where the harmfulness of the conduct was relatively low, or where the offender’s culpability was low, including cases of ‘genuine mistake or misunderstanding’ or where the offender is elderly or suffers from a mental illness. Given the theory of proportionality,<sup>327</sup> it is considered not in the public interest to institute full prosecution against these individuals,<sup>328</sup>

<sup>321</sup> Ibid 9.

<sup>322</sup> Victorian Shorter Trials Committee, *Report on Criminal Trials* (Australia Institute of Judicial Administration, 1985) [3.53].

<sup>323</sup> Commonwealth Director of Public Prosecutions, above n 90;

Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)>;

Office of the Director of Public Prosecutions (SA), *Prosecution Policy* (1999) <[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994) <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993) <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (NSW), *Office of the Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>;

Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999) <[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)>.

These guidelines are available from each of the respective Director of Public Prosecution’s websites; Rozenes, above n 39, (note 20).

<sup>324</sup> Hor above n 4, 509.

<sup>325</sup> Jones Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 120-129, 413-434; Ashworth and Redmayne, above n 225, 159-194.

<sup>326</sup> Refshauge, above n 25, 361.

<sup>327</sup> A von Hirsch and A Ashworth, *Principled Sentencing* (Hart, 2<sup>nd</sup> ed, 1998) Ch 4.

<sup>328</sup> Ashworth and Redmayne, above n 226, 185.

However, it is important to note that these ‘public interest’ considerations are the next step of a two-stage process. The Prosecutor must first be satisfied that there is a ‘reasonable prospect of securing a conviction’. If this test is not met, public interest considerations, no matter how compelling, are irrelevant.<sup>329</sup> The 12 factors featured in the guidelines include matters such as the seriousness or triviality of the offence, aggravating or mitigating circumstances, age, medical condition, prevalence or obsolescence of the offence, consequences of conviction, cost and expenses of a trial and public confidence in the criminal justice system.<sup>330</sup> These guidelines also provide for the institution and conduct of prosecutions,<sup>331</sup> the control of prosecutions,<sup>332</sup> including their discontinuance,<sup>333</sup> declining to proceed after committal,<sup>334</sup> indemnities,<sup>335</sup> charge bargaining<sup>336</sup> and the choice of charges to be laid.<sup>337</sup>

#### 5.4.2 The Effect of Prosecutorial Guidelines

In Australia, the primary mechanism for the control of discretion by Prosecutors to ensure its fair and accountable exercise is in the form of publicly promulgated guidelines.<sup>338</sup> This is largely in line with the *United Nations Guidelines on the Role of Prosecutors* requiring Prosecutors vested with discretionary functions to provide guidelines for the exercise of such powers so as to ensure consistency and fairness in the exercise of the discretion.<sup>339</sup> As noted by McKechnie, a written prosecution policy is an ‘important keystone of independence’.<sup>340</sup> A set of guidelines enables a degree of objectivity to be brought to the decision-making process and independence is confirmed if the decision maker is able to justify a decision in accordance with previously published material.<sup>341</sup>

##### 5.4.2.1 The Legal Effect

While courts seem to encourage the development and promulgation of guidelines to assist in decision making,<sup>342</sup> the legal effect and enforceability of prosecutorial guidelines in Australia is not entirely clear as there has not yet been any significant judicial decision by Australian courts on the matter.<sup>343</sup> They are not delegated legislation, merely ‘rules of law’,<sup>344</sup> and thus sit in an area of legal ambiguity.<sup>345</sup> There are however, certain general principles that can be

<sup>329</sup> Rozenes, above n 39.

<sup>330</sup> See for example, Commonwealth Director of Public Prosecutions, above n 90 [2.10] which is also reflected in the respective Directors of Public Prosecution Guidelines for each state. While some states have made minor amendments, there is not a substantive change in the Guidelines with regards to these public interest factors.

<sup>331</sup> Commonwealth Director of Public Prosecutions, above n 90 [3.1]-[3.11].

<sup>332</sup> Ibid [4.1].

<sup>333</sup> Ibid [4.2]-[4.6].

<sup>334</sup> Ibid [6.22]-[6.27].

<sup>335</sup> Ibid [6.1]-[6.10].

<sup>336</sup> Ibid [6.14]-[6.21].

<sup>337</sup> Ibid [2.19]-[2.23].

<sup>338</sup> Refshauge, above n 25, 359.

<sup>339</sup> Office of the United Nations High Commissioner for Human Rights, *Guidelines on the Role of Prosecutors* (1990) <<http://www2.ohchr.org/english/law/prosecutors.htm>>.

<sup>340</sup> McKechnie, above n 90.

<sup>341</sup> Ibid.

<sup>342</sup> *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 624 cited in Refshauge, above n 25, 364.

<sup>343</sup> Refshauge, above n 25, 364.

<sup>344</sup> *R v Immigration Appeal Tribunal; Ex parte Alexander* [1982] 1 WLR 1076, 1089; *De Falco v Crawley Borough Council* [1980] QB 460, 478-482.

<sup>345</sup> Refshauge, above n 25; See also Bibas, above n 12 on the difficulty of constraining prosecutorial discretion.

drawn. Firstly, the guidelines must be lawful in the sense that they do not include considerations incompatible with their enabling statute,<sup>346</sup> or other legislation (such as, for example, racial discrimination legislation), or preclude the consideration of clearly relevant considerations.<sup>347</sup> Guidelines that fetter the decision maker's discretion by leaving no room for the exercise of the discretion are legislative in nature and infringe upon the legal principle that administrative authorities should not legislate unless express authorization to do so is provided for.<sup>348</sup> The courts have held that the discretion must not be exercised in blind adherence to policy,<sup>349</sup> especially where the case in question requires individualized judgment,<sup>350</sup> as is the case with prosecutorial discretion.<sup>351</sup>

The non-compliance with prosecutorial guidelines may result in the decision being rendered null and void for failure to take into account relevant considerations.<sup>352</sup> This may however, be subject to privative clauses. For example, section 25(3) of the *Director of Public Prosecutions Acts 1990* (NT) states that the Director shall not be called into question on the ground of a failure to comply with published guidelines.<sup>353</sup> Additionally, the courts have shown a general reluctance to subject prosecutorial decisions to judicial review as was held in the case of *Maxwell v The Queen*.<sup>354</sup>

In the UK, however, in *R v Chief Constable of the Kent County Constabulary; Ex parte L (a minor)*,<sup>355</sup> it was held that the exercise of prosecutorial discretion not to prosecute was subject to judicial review, but only if the decision was made with no consideration of or contrary to the established guidelines.<sup>356</sup> Similarly, in *R v Inland Revenue Commissioner; Ex parte Mead*,<sup>357</sup> it was held that a member of the public had a legitimate expectation that the prosecution would follow its own published guidelines.<sup>358</sup> Additionally, in *R v Commissioner of Police of the Metropolis; Ex parte Blackburn*,<sup>359</sup> it was held that a policy decision not to prosecute certain gambling establishments were, in principle, reviewable if Wednesbury unreasonableness could be made out.<sup>360</sup>

While it may be argued that these guidelines provide the aggrieved citizen at least some basis for a challenge, in reality of course, this may be difficult to prove given the broad nature of the guidelines. Similarly, Australian courts have yet to indicate any definitive position on the legal effect of prosecutorial guidelines and while it can be argued that they may be inclined to lean towards the English approach based on common law and principles of administrative law,<sup>361</sup> the reluctance of the courts to interfere in the executive's exercise of prosecutorial

<sup>346</sup> *Green v Daniels* (1977) 51 ALJR 463, 467.

<sup>347</sup> *NCA Brisbane Pty Ltd v Simpson* (1986) 70 ALR 10, 47.

<sup>348</sup> *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492, 506.

<sup>349</sup> *R v Moore; Ex parte Australian Telephone and Phonogram Officers' Association* (1982) 148 CLR 600, 403.

<sup>350</sup> *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480, 493.

<sup>351</sup> Refshauge, above n 25, 364.

<sup>352</sup> *R v Immigration Appeal Tribunal; Ex parte Alexander* [1982] 1 WLR 1076, 1089, 148 CLR 600, 403.

<sup>353</sup> *Director of Public Prosecutions Act 1990* (NT) s 25(3).

<sup>354</sup> *Maxwell v The Queen* (1995) 184 CLR 501, 512, 535.

<sup>355</sup> [1993] 1 All ER 756

<sup>356</sup> *R v Chief Constable of the Kent County Constabulary; Ex parte L (a minor)* [1993] 1 All ER 756 cited in Refshauge, above n 25, 364.

<sup>357</sup> [1993] 1 All ER 772.

<sup>358</sup> *R v Inland Revenue Commissioner; Ex parte Mead* [1993] 1 All ER 772.

<sup>359</sup> [1968] 2 QB 118.

<sup>360</sup> *Ibid*; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>361</sup> Refshauge, above n 25, 365.

discretion is a barrier to any successful challenge by an aggrieved accused or a member of the public.

#### 5.4.2.2 The Practical Effect

In Australia, prosecutorial guidelines are publicly accessible through the websites of the various Directors of Public Prosecutions,<sup>362</sup> and in their annual reports.<sup>363</sup> Their accessibility facilitates plea negotiations between the prosecution and defence counsel (or the accused, if

<sup>362</sup> Commonwealth Director of Public Prosecutions, above n 90;

Office of the Director of Public Prosecutions (ACT), *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991)

<[http://www.dpp.act.gov.au/about\\_the\\_dpp/the\\_prosecution\\_policy](http://www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy)>;

Office of the Director of Public Prosecutions (NT), *Guidelines and Exercise of General Prosecutorial Discretion* (1991) <<http://www.nt.gov.au/justice/dpp/html/guidelines.html>>;

Office of the Director of Public Prosecutions (Qld), *Statement of Prosecution Policy and Guidelines* (1995)

<[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/16701/Directors-guidelines.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/Directors-guidelines.pdf)>; Director of Public Prosecutions (SA), *Prosecution Policy* (1999)

<[http://www.dpp.sa.gov.au/03/prosecution\\_policy\\_guidelines.pdf](http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf)>;

Office of the Director of Public Prosecutions (Tas), *Director of Public Prosecution Guidelines* (1994)

<[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)>;

Office of the Director of Public Prosecutions (Vic), *Prosecutorial Guidelines* (1993)

<<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>;

Office of the Director of Public Prosecutions (NSW), *Office of the Director of Public Prosecutions Guidelines* (2007)

<[http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines\\_whole\\_document\\_current%20to%2031\\_dec\\_2010.pdf](http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf)>;

Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999)

<[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)>.

Notably, some jurisdictions (such as the UK) have gone one step further and made these policies available in a number of languages (Welsh, Arabic, Bengali, French, Gujarati, Polish, Punjabi, Somali, Tamil, Traditional Chinese, Urdu and of course, English) likely to facilitate further accessibility, particularly for racial minorities and individuals from a CALD (cultural and linguistically diverse) background: see The Crown Prosecution Service, *The Code for Crown Prosecutors* (February 2010).

<[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/index.html](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html)>.

<sup>363</sup> Commonwealth Director of Public Prosecutions, *CDPP Annual Report 2010/2011*

<<http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2010-2011.pdf>>; Office of the Director of Public Prosecutions (ACT), *Annual Report 2010/2011*

<[http://www.dpp.act.gov.au/files/annual\\_reports/AR2010-2011.pdf](http://www.dpp.act.gov.au/files/annual_reports/AR2010-2011.pdf)>;

Office of the Director of Public Prosecutions (NT), *Annual Report 2010/2011*

<<http://www.nt.gov.au/justice/dpp/docs/Final%20Annual%20Report%2004.10.11.pdf>>;

Office of the Director of Public Prosecutions (Qld), *Annual Report 2010/2011*

<[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0017/130661/odpp-annual-report-2010-11.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0017/130661/odpp-annual-report-2010-11.pdf)>;

Office of the Director of Public Prosecutions (SA), *Annual Report 2010/2011*

<<http://www.dpp.sa.gov.au/03/2010-11.pdf>>;

Office of the Director of Public Prosecutions (Tas), *Annual Report 2010/2011*

<[http://www.crownlaw.tas.gov.au/\\_\\_data/assets/pdf\\_file/0005/180977/ar2010-11.pdf](http://www.crownlaw.tas.gov.au/__data/assets/pdf_file/0005/180977/ar2010-11.pdf)>;

Office of the Director of Public Prosecutions (Vic), *Annual Report 2010/2011*

<[http://www.opp.vic.gov.au/Home/Resources/oppannualreport\\_2010-11-fullreport](http://www.opp.vic.gov.au/Home/Resources/oppannualreport_2010-11-fullreport)>;

Office of the Director of Public Prosecutions (NSW), *Annual Report 2010/2011*

<[http://www.odpp.nsw.gov.au/annual%20reports/2011%20AR%20\\_Final\\_lowres.pdf](http://www.odpp.nsw.gov.au/annual%20reports/2011%20AR%20_Final_lowres.pdf)>;

Office of the Director of Public Prosecutions (WA), *Annual Report 2010/2011*

<[http://www.dpp.wa.gov.au/content/DPP\\_Annual\\_Report\\_2011.pdf](http://www.dpp.wa.gov.au/content/DPP_Annual_Report_2011.pdf)>.

unrepresented).<sup>364</sup> Similarly, while it is arguable that the public availability of these documents allows for public scrutiny of the guidelines, it offers some form of accountability of the Prosecutors operating throughout the states and territories,<sup>365</sup> and ensures that Prosecutors act in accordance with these guidelines. This was not always the accepted position. In a Law Reform Commission Paper by Cashman and Rizzo, it was noted by a prosecuting officer that while prosecutorial guidelines were necessary for the guidance of persons who have to make decisions on prosecutions, no useful purpose could be served by publicly stating what those guidelines are.<sup>366</sup> It was further argued that positive harm might result from the public availability of the guidelines by allowing greater scope for delay and other tactics by the accused.<sup>367</sup> Sallmann also acknowledges that Prosecutors may be reluctant to declare such guidelines in a public way as it would make their jobs more difficult.<sup>368</sup> The suggestion is that while prosecutorial guidelines may be useful, their internal circulation is sufficient and it is neither necessary nor appropriate to have them publicly promulgated. This warning was, however, not heeded and in 1982 the Commonwealth Attorney-General tabled a statement of the Commonwealth's Prosecution Policy in the Senate.<sup>369</sup> Today the guidelines of the respective Directors of Public Prosecution are easily accessible to anyone with internet access.<sup>370</sup> Its practical effect is to allow for a degree of public scrutiny and accountability of prosecutorial decisions. It remains to be seen though, whether the 'positive harm' Cashman and Rizzo warned of will outweigh the benefits of such accountability.

As articulated above, there has yet to be a challenge in Australia on the grounds of these promulgated prosecutorial guidelines. Indeed, while in theory, the publicly available guidelines can offer some semblance of consistency, accountability and public scrutiny, it should be noted that the guidelines often allude to general principles.<sup>371</sup> They are, at the end of the day, overarching guiding principles that do not conclusively assist in the determination of a prosecution decision in individual cases. That ultimate decision still lies with the Prosecutor.

## 5.5 The Independence Connundrum

It is this fine balancing act - the need to ensure that the Public Prosecutor is free from political influence and the need to ensure a degree of accountability – that has attracted the most attention to the prosecution service. Some commentators have noted that Australia's eagerness to de-politicize the prosecution service has its disadvantages, including limited

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<sup>364</sup> Defence counsel may for example, cite certain portions of the Guidelines that would favour a reduced charge in the particular circumstances.

<sup>365</sup> Bugg, above n 65, 9; McKechnie, above n 90.

<sup>366</sup> Peter Cashman and Concetta Rizzo, *Social Security Prosecutions* (Australian Law Reform Commission Research Paper 9, 1982) 77.

<sup>367</sup> *Ibid.*

<sup>368</sup> Sallmann Willis, above n 54, 65, 83 (note 32).

<sup>369</sup> Cashman and Rizzo, above n 366.

<sup>370</sup> In the United States for example, it was noted that the internet has assisted in curing the defect of the inaccessibility of prosecutorial guidelines which may facilitate better control of prosecutorial discretion, see Simons, above n 21 (note 181).

<sup>371</sup> The Australian Guidelines allude to general principles. Interestingly though, the United Kingdom's Crown Prosecution Service's Guidelines are notably more detailed. See The Crown Prosecution Service, *Prosecution Policy and Guidance* <<https://www.cps.gov.uk/>>.

grounds for judicial review<sup>372</sup> and near nonexistent parliamentary oversight.<sup>373</sup> Australia thus walks a fine line between allowing the DPP sufficient independence but ensuring that there is at least some oversight of the Director's duties, given that the Office is an unelected one, unanswerable to any constituents. This brings up the question of independence versus accountability, as evinced by one report:

It would defy the principles of responsible, democratic government if the Attorney-General were to abdicate totally his responsibility for such an important area of government, in favour of a person who is not elected, and thus not answerable to Parliament or the community. However, it is proper, in order to facilitate a more efficient and consistent prosecution policy, and to provide for what is perceived as a more independent decision-making process, that the Government should give authority to a person to exercise these powers on a day-to-day basis.<sup>374</sup>

The Australian solution it would seem, transfers the prosecutorial functions of the Attorney-General to the DPP,<sup>375</sup> but still allows for the retention of the residual power of the Attorney-General as the 'First Law Officer'.<sup>376</sup> This additionally encompasses several obligations including the furnishing of an annual report to the Attorney-General with respect to the operations of the Office.<sup>377</sup> The Attorney-General is further required to provide a copy of that report to each House of Parliament within fifteen sitting days of receiving the report.<sup>378</sup> The system is however, still anxious to keep the Director independent from the Attorney-General. This insistence on a separation of prosecutorial function and day to day politics, it would seem, is not just an Australian concern. In the UK House of Commons, it was expressed by Sir Hartley Shawcross:

That was the view that Lord Birkenhead once expressed on a famous occasion, and Lord Simon stated that the Attorney-General: '...should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute...' I would also add to that that he should also decline to receive orders that he should not prosecute: That is the traditional and undoubted position of the Attorney-General in such matters...<sup>379</sup>

<sup>372</sup> Judicial review of prosecutorial discretion is limited to rare cases where an abuse of process can be established. See *Maxwell v The Queen* (1996) 184 CLR 501, 513-14. Otherwise, '[d]ecisions to commence, not to commence[,] or to terminate a prosecution are made independently of the courts', *Price v Ferris* (1994) 34 NSWLR 704, 708 (Kirby P). The High Court has stated in *The King v Weaver* (1931) 45 CLR 321, 334 that '[i]t is entirely a matter for the law officers of the Crown to determine the form of prosecution, and for the Court to determine whether the charge made had been supported'.

<sup>373</sup> E Campbell and H Whitmore, *Freedom in Australia* (Sydney University Press, 1973) 104 where it is suggested that judicial supervision of prosecutions is minimal and Parliamentary control almost nonexistent; Refshauge, above n 25; Wayne and Marcus, above n 43, 348.

<sup>374</sup> Johns Rowena, *Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey* (Briefing Paper 9/2001, Parliamentary Library, New South Wales, 2001) 14.

<sup>375</sup> *Director of Public Prosecutions Act 1983* (Cth) s 6(1)(a), (c), (d), 9(5); *Director of Public Prosecutions Act 1990* (NT) ss 12, 13; *Director of Public Prosecutions Act 1986* (NSW) ss 8, 9; *Director of Public Prosecutions Act 1991* (WA) ss 11, 12; *Director of Public Prosecutions Act 1984* (Qld) s 10; *Director of Public Prosecutions Act 1973* (Tas) s 12(1)(a); *Public Prosecutions Act 1994* (Vic) s 22(1); *Director of Public Prosecutions Act 1991* (SA) s 7(1)(i).

<sup>376</sup> Commonwealth Director of Public Prosecutions, above n 90, 4 [1.2]; Damian Bugg, 'Accountability, Independence and Ethics in the Prosecution Practice' (Paper delivered at the International Society for the Reform of Criminal Law 18<sup>th</sup> Annual Conference: Keeping Justice Systems Just and Accountable – A Principled Approach in Challenging Times, Montreal, 8 August 2004).

<sup>377</sup> Damian Bugg, 'The Independence of the Prosecutor and the Rule of Law' (Paper presented at the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007).

<sup>378</sup> *Director of Public Prosecutions Act 1983* (Cth) s 33.

<sup>379</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 681-687.

John McKechnie notes that express provisions in the Western Australian Act preclude the Attorney-General from giving directions in any particular case, confining his power to issuing directions as to general policy.<sup>380</sup> In Western Australia, section 27(2) of the Act makes it clear that the Attorney-General may not issue directions in respect of a particular case,<sup>381</sup> with similar provisions in several other jurisdictions within Australia.<sup>382</sup>

While the Commonwealth *Director of Public Prosecutions Act* allows for the Attorney-General to give directions to the DPP in general matters as well as individual cases,<sup>383</sup> the direction must first be discussed, given in writing and subsequently tabled in Parliament and gazetted.<sup>384</sup> The then Director, Damian Bugg noted that in the twenty-three years since 1984, only four directions have been given.<sup>385</sup> None of the directions related to individual matters,<sup>386</sup> and none interfered with the independence of the Commonwealth DPP.<sup>387</sup> This demonstrates an adherence to the notion that the Attorney-General, despite having final authority, should be slow to interfere with the Director's prosecutorial functions.

However, the office of the DPP also has its own problems. The role of the DPP is an appointed one, and while the office bearer in theory has independence, at least for the duration of the appointment, the term of the appointment is not consistent throughout Australia. The term of the office can range from 5 years (Western Australia), to a duration to be determined by the Governor/Governor-in-Council or the instrument of appointment.<sup>388</sup> In New South Wales, the term of office was initially a lifetime appointment, until Parliament amended this.<sup>389</sup> While these measures do not apply retrospectively, a failure to amend the pension provisions that required the office holder to retire when they turned 65,<sup>390</sup> attracted

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<sup>380</sup> McKechnie, above n 90, 275.

<sup>381</sup> *Director of Public Prosecutions Act 1991* (WA) s 27(2).

<sup>382</sup> *Director of Public Prosecutions Act 1984* (Qld) s10A(2); *Director of Public Prosecutions Act 1990* (NT) s28(2); *Director of Public Prosecutions Act 1986* (NSW) s26 (3).

<sup>383</sup> *Director of Public Prosecutions Act 1983* (Cth) s 8.

<sup>384</sup> Ibid; Damian Bugg, 'The Independence of the Prosecutor and the Rule of Law (Paper presented at the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007).

<sup>385</sup> Bugg, above n 156.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

<sup>388</sup> In Victoria, the Director holds office for 10 to 20 years: *Constitution Act 1975* (Vic) s 87AB; In Queensland the term of the appointment is determined by the Governor in Council: *Director of Public Prosecutions Act 1984* (Qld) s 5; In South Australia the Director is appointed for a term of 7 years: (SA) s 4; In Western Australia the term of office is 5 years: *Director of Public Prosecutions Act 1991* (WA) sch 1; In Tasmania the Director holds office 'during good behavior on such terms and conditions as the Governor determines: *Director of Public Prosecutions Act 1973* (Tas) s 5; In the Northern Territory the period of office is 'for such period as as is specified in the instrument of appointment or without limitation on the period of office': *Director of Public Prosecutions Act 1990* (NT); The Commonwealth DPP's term of appointment is determined in the instrument of appointment, but may not exceed 7 years: *Director of Public Prosecutions Act 1983* (Cth) s 18.

<sup>389</sup> Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Bill 2007 (NSW); New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2007, 3030-3038 (John Ajaka); 'NSW govt reviewing life tenure for DPP', *The Sydney Morning Herald* (Sydney), 14 June 2007.

<sup>390</sup> Lisa Davis, 'DPP Nick Cowdery Retires, but it Won't be Quietly', *The Daily Telegraph* (Sydney), 15 April 2010; Richard Ackland, 'Last Act for Hatzistergos Before Axe Falls', *The Sydney Morning Herald* (Sydney), 18 March 2011; Jamelle Wells, 'NSW DPP Takes Parting Shot at State Govt', *ABC* (Sydney), 18 March 2011; Simon Benson, 'Legislation Cuts DPP Position to 10-year Term', *The Daily Telegraph* (Sydney), 25 September 2007.

criticisms of the government exerting pressure on then Director Nicholas Cowdery (who was appointed for life) in an attempt to encourage him to retire from office.<sup>391</sup>

### 5.5.1 The Case of Paul Nemer

The case of Paul Nemer in 2003 highlights the tensions that can arise between an independent DPP and the government. In South Australia, Paul Habib Nemer shot newsagent Geoffrey Williams resulting in the loss of William's eye. A plea bargain was struck between the prosecution and the defence, where Nemer would plead guilty to the lesser charge of endangering life and the court imposed a three-year good behavior bond.<sup>392</sup> There was public dissatisfaction with the sentence,<sup>393</sup> thought to be inadequate and too lenient given the severity of the offence, with allegations that Nemer was treated more favorably because of his affluent background.<sup>394</sup> Subsequent public pressure resulted in the Attorney-General forcing the DPP to appeal the sentence,<sup>395</sup> citing section 9 of the *Director of Public Prosecutions Act*, which provided for the Attorney-General to 'give directions and furnish guidelines to the Director in relation to the carrying out of his or her functions'.<sup>396</sup> The appeal was successful and the initial sentence quashed, with a more severe sentence of four years and nine months imprisonment imposed, including a non-parole period of one year and nine months.<sup>397</sup>

The *Nemer* case brought sharply into focus the difficulty of balancing the need to be properly accountable to the community for prosecution decisions made by the office, with the need to ensure that those decisions are free from any political influence or even the perception of political influence.<sup>398</sup> While one may argue that the action taken by the Attorney-General was appropriate given his role as 'First Law Officer', and the government was exercising its power to 'maintain the accountability of the criminal justice system to Parliament',<sup>399</sup> it is also arguable that the actions run contrary to the principle of independence that is the *raison d'être* for the DPP's establishment.

<sup>391</sup> ABC Radio, 'NSW Govt Trying to "Undermine Independence" of the DPP', *The World Today*, 26 March 2008 (Simon Santow); Angela Kamper, 'DPP Boss Nicholas Cowdery "Felt Pressure to Retire"', *The Daily Telegraph* (Sydney), 4 December 2010.

<sup>392</sup> *R v Nemer* (2003) 87 SASR 168.

<sup>393</sup> ABC Radio, 'Controversial SA Sentence Overturned', *PM*, 18 November 2003 (Mark Colvin); ABC Radio, 'Nemer Decision Sparks Political Debate', *PM*, 19 November 2003 (Mark Colvin). Government of South Australia, 'Plea Bargain Reforms Recommended by Kourakis Report' (News Release, 19 April 2004).

<sup>394</sup> C Hockley, 'Power of the People', *The Advertiser* (South Australia), 31 July 2003, 1.

<sup>395</sup> The Attorney-General's direction:

I Paul Holloway, Attorney-General, having consulted with the Director of Public Prosecutions, pursuant to the *Director of Public Prosecutions Act 1991* (SA) s 9(2), direct the Director of Public Prosecutions to appeal, pursuant to section 352(1)(a)(iii) of the *Criminal Law Consolidation Act 1935*(SA), to the Full Court against the sentence imposed upon Paul Habib Nemer by Justice Sulan on 25 July 2003, upon the following grounds which have been settled by the Solicitor General, and I further direct that the Director of Public Prosecutions brief the Solicitor General as counsel on the hearing of any proceedings relating to the appeal

See Office of the Director of Public Prosecutions (SA), *Annual Report 2003/2004*

<<http://www.dpp.sa.gov.au/03/2003-2004.pdf>> 17; Robert Moles, *A State of Injustice* (Lothian, 2004) Ch 14.

<sup>396</sup> *Director of Public Prosecutions Act 1991* (SA) s 9(2).

<sup>397</sup> *R v Nemer* (2003) 87 SASR 168.

<sup>398</sup> Office of the Director of Public Prosecutions (SA), *Annual Report 2003/2004*

<<http://www.dpp.sa.gov.au/03/2003-2004.pdf>> 1, 25.

<sup>399</sup> G Kelton, 'Government "Vindicated" on Nemer Case', *The Advertiser* (South Australia) 17 February 2004, 12.



## 6. Democratizing Prosecutions: The Japanese Answer

The fact that South Australia's Attorney-General felt that he had to act and exercise his overriding prosecutorial discretion in order to meet public demand raises the question - how does the prosecution system fit into a democratic system of governance? How does the voice of a dissatisfied victim or the demands of the public feature in the criminal justice system?

Japan answers this question with a unique solution. Similar to Australia, Japan's prosecution landscape is dominated by state actors.<sup>400</sup> Prosecutors in Japan serve across various hierarchically divided offices - the Local Prosecutors, District Public Prosecutors' Office, High Public Prosecutors' Office and Supreme Public Prosecutors' Office, each handling matters in the Summary, District, High and Supreme Courts respectively.<sup>401</sup> While formally part of the Ministry of Justice and overseen by the Minister of Justice, the day to day functions of prosecutions are carried out by the Prosecutor-General, a Cabinet appointee.<sup>402</sup> Public Prosecutors also enjoy a status equivalent to that of judges in terms of qualifications and salary and cannot be dismissed, suspended or suffer a reduction in salary save in limited situations.<sup>403</sup> Like Australia, there is no scope for private prosecution and generally, it is within the discretion of public prosecutors that the power to initiate criminal proceedings lies. There are however, two exceptions to this: quasi-prosecution and the Prosecution Review Commission.

### 6.1 Quasi Prosecution

The first exception is known as 'quasi-prosecution'<sup>404</sup> and is essentially a form of judicial-sanctioned prosecution. Briefly, this process is triggered when a complaint is filed in the courts against the Public Prosecutor's decision not to prosecute a matter related to an abuse of authority by government officials.<sup>405</sup> In such circumstances, the court may then, upon consideration of the matter, commit the case to trial on its own accord. The court may also appoint a member of the Bar to act as the prosecutor in that case.<sup>406</sup> While it is an interesting example of judicial participation in the prosecution process, it does not appear to be often used.<sup>407</sup>

<sup>400</sup> UNAFEI, above n 58.

<sup>401</sup> A Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) *16 University California Los Angeles Pacific Basin Law Journal* 38, 42.

<sup>402</sup> Manoa Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press, 2002) 121. This is similar to the Australian situation of having the Attorney-General as First Law Officer but with a Director appointed to carry out daily prosecutorial functions.

<sup>403</sup> See Public Prosecutors Office Law, Article 25, cited in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), *Criminal Justice in Japan* (2011) 4.

<sup>404</sup> Saibanjo no junkiso tetsuzuki or 'quasi-prosecution through judicial action' - see A Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) *16 University California Los Angeles Pacific Basin Law Journal* 38, 61; UNAFEI, above n 58.

. See art 262-269 of the *Japanese Code of Criminal Procedure*. An English version is available from the Organization for Economic Co-operation and Development's website <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf>>.

<sup>405</sup> United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), *Criminal Justice in Japan*, 23.

<sup>406</sup> Art 268 *Japanese Code of Criminal Procedure*.

<sup>407</sup> According to United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), *Criminal Justice in Japan*, 23 as of 2011 only 3 out of 4724 applications for quasi-prosecutions were granted.

## 6.2 Prosecution Review Commission

The second exception is known as the Prosecution Review Commission (PRC).<sup>408</sup> Some have likened the Prosecution Review Commission to a United States' grand jury system that embeds into the prosecution system, democratic participation.<sup>409</sup> Historically, the power to prosecute lies exclusively with the state. It was post-World War II intervention by the Allied Powers that saw the PRC set up, in an attempt to democratize the prosecution landscape.<sup>410</sup> The PRC comprises eleven citizens drawn randomly from the register of voters,<sup>411</sup> each serving a six-month term and convenes when an aggrieved victim challenges the Prosecutor's Office's decision not to prosecute a matter.<sup>412</sup> The PRC may also initiate reviews of its own volition.<sup>413</sup> During the hearing, it has the powers to call on witnesses, question Prosecutors and seek expert advice.<sup>414</sup> After hearing the evidence, the PRC may deliver one of the following recommendations to the Prosecutor's Office:<sup>415</sup>

- (i) non-prosecution is proper;
- (ii) non-prosecution is improper; or
- (iii) prosecution is proper.<sup>416</sup>

A simple majority is required for the first two recommendations while the last requires a special majority vote of eight out of eleven Committee members.<sup>417</sup> The recommendation

<sup>408</sup> Or 'kensatsu shinsakai' where 'kensatsu' literally means prosecution, 'shinsa' means investigation and the suffix 'kai' means meeting, see West, above n 54, 685 footnote 9.

<sup>409</sup> Hiroshu Fukurai, 'Japan's Prosecution Review Commissions: Lay Oversight of the Government's Discretion of Prosecution' (2011) 6 *University of Pennsylvania East Asia Law Review* 1, 6. The similarities between the US style Grand Jury and the PRC are understandable, given their historical ties, however, there are also distinct differences between the two models – I do not propose to canvas these here but see Carl Goodman, 'Prosecution Review Commissions, The Public Interest and the Right of the Accused: The Need for a "Grown up" in the room' (2013) 22 *Pacific Rim Law and Policy Journal* 1 for a detailed analysis.

<sup>410</sup> See West, above n 54; Fukurai, above n 409, 3 which suggest that General MacArthur was one of the key influencers for the system of PRC. See also Howard Meyers, 'Comment: The Japanese Inquest of Prosecution (1950) 64 *Harvard Law Review* 279, 280-281 and Hiroshu Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-colonial Strategies and Deliberative Participatory Democracy (2011) 86 *Chicago-Kent Law Review* 789 for a detailed historical account.

<sup>411</sup> Kensatsu Shinsakai Hō (*Prosecutorial Review Commission Act*), Law No 147 of 1948, art 4 <<http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>> ('PRC Act'). See Fukurai, above n 409, 12-15 for a comprehensive outline of the PRC selection system. Each Commissioner serves a six-month term and approximately half of the Commission is selected every three months. Members cannot serve consecutive terms. See Carl Goodman, 'Prosecution Review Commissions, The Public Interest and the Right of the Accused: The Need for a "Grown up" in the room' (2013) 22 *Pacific Rim Law and Policy Journal* 1, 11.

<sup>412</sup> A suitable proxy of the victim can also challenge the decision, see West, above n 54. However, the issue of who has 'standing' to bring a matter to the PRC has also caused some debate – see Goodman, above n 409, 15.

<sup>413</sup> West, above n 54, 697.

<sup>414</sup> Art 35-37 *PRC Law*; Fukurai, above n 409, 8.

<sup>415</sup> UNAFEI, above n 403; Fukurai, above n 409, 3.

<sup>416</sup> It should be noted that the difference between the recommendation 'non-prosecution is improper' and 'prosecution is proper' has been criticized. The Japanese Federation of Bar Associations has long maintained that the two share the same legal status and both recommendations should require a two-thirds majority. In 2001, the Justice System Reform Council proposed that both recommendations be made legally binding, while the Ministry of Justice proposed that only the third 'prosecution is proper' recommendation is made legally binding.

<sup>417</sup> UNAFEI, above n 403; Fukurai, above n 409, 8.

however, up until recently, was only regarded as *advisory*.<sup>418</sup> The Prosecutor's Office may, despite the recommendation, decline prosecution.<sup>419</sup>

This has changed, however, since May 2009 with the amendment of the PRC law.<sup>420</sup> Under the new law, when faced with a recommendation from the PRC to prosecute, the Prosecutor's Office may, in the first instance, still decline upon presenting to the PRC, reasons for the decision.<sup>421</sup> The PRC, if unconvinced, may issue a second, legally binding resolution compelling the Prosecutor's Office to commence prosecution.<sup>422</sup>

### 6.1.1 The Akashi Stampede

On 21 July 2001, 130,000 people gathered to observe a fireworks display on a shoreline in Akashi.<sup>423</sup> A stampede later occurred on a bridge connecting the train station and the shoreline. A report later found that the local police, among others, were responsible for the incident as they failed to take the necessary precautions despite being warned of the stampede risk.<sup>424</sup>

However, the Prosecutor's Office took no action against the police responsible.<sup>425</sup> Families of the victims filed an appeal with the PRC and a 'prosecution is proper' recommendation was issued.<sup>426</sup> Prosecutors ignored the recommendation, leading to a second PRC review and a further, albeit still non-binding recommendation in 2005 reiterating that 'prosecution is proper'. Again, prosecutors took no action.

On 29 May 2009, the day that amendments to the PRC law made recommendations binding, the families lodged a further appeal, resulting in the first recommendation of the PRC under the new regime that 'prosecution is proper'. The Prosecutor's Office again maintained its position of non-prosecution, but because of the new PRC law, was obliged to furnish reasons for doing so. The PRC, unsatisfied with those reasons, issued a final and legally binding resolution on 27 January 2010 directing that Deputy Chief of Police Kazuki Sakaki be prosecuted.<sup>427</sup> Three private lawyers were appointed by the Court to act as prosecutors in the

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<sup>418</sup> (emphasis added).

<sup>419</sup> A Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) 16 *University California Los Angeles Pacific Basin Law Journal* 38, 61; UNAFEI, above n 611.

<sup>420</sup> See art 41(6)(1) of PRC Act; Kensatsu Shinsakai Kisosoto 2kaide Kisoe [PRC: Forced Prosecution by Second Indictment Resolution], *Asahi Shimbun*, 19 May 2009 <<http://www.asahi.com/special/080201/TKY200905180395.html>>, cited in Fukurai, above n 409, 41.

Notably, the Japanese Federation of Bar Association has long advocated for recommendations of the PRC to be legally binding - See Japanese Federation of Bar Association, *The Proposed Amendment to the Prosecutorial Review Commission: To Enrich and Strengthen* (1975) cited in Fukurai, above n 409.

<sup>421</sup> Art 41(2)(2), 41(6)(2) PRC Act; UNAFEI, above n 404, Fukurai, above n 409.

<sup>422</sup> 41(6)(1) PRC Act; Fukurai, above n 409.

<sup>423</sup> See Fukurai, above n 409, 15 for a detailed outline of the incident.

<sup>424</sup> 'Panel Finds City, Police at Fault in Fireworks Stampede', *Japan Economic Newswire*, 30 Jan 2002.

<sup>425</sup> Fukurai, above n 409, 15. The Chief and Deputy Chief of the police station responsible were not indicted, see Goodman, above n 409, 22.

<sup>426</sup> Ibid.

<sup>427</sup> See Fukurai, above n 409, 17 for a detailed outline of the incident. 'Citizens Force Charge on Ex-police Deputy', *The Asahi Shimbun*, 28 Jan 2010 <<http://www.asahi.com/english/TKY201001270404.html>>.

matter.<sup>428</sup> The Deputy Chief became the first person to be formally indicted by a citizen's panel.<sup>429</sup>

### 6.1.2 The Fukuchisen Derailment

Another notable incident occurred on 25 April 2005, where a train on the West Japan Railway Fukuchiyama Line derailed in the Hyogo prefecture, resulting in the deaths of 107 people and 555 more injured. On 8 July 2009, prosecutors initiated prosecution against West Japan Railway's president, Masao Yamazaki, after concluding that his negligence contributed to the accident.<sup>430</sup>

However, prosecutors took no action against the West Japan Railway's former executives, all of whom had some responsibility over safety. Aggrieved, the victims' families appealed to the PRC and on 22 October 2009, the Kobe PRC recommended prosecution against the past three presidents of the West Japan Railway.<sup>431</sup> Despite this, prosecutors indicated that no charges would be preferred against the three previous presidents as investigations revealed that they were not responsible for the system that resulted in the derailment. Ultimately, upon hearing from families of the victims and hearing the prosecutor's explanation the Kobe PRC issued a resolution that the three former presidents of West Japan Railway be charged with professional negligence resulting in injury and death.<sup>432</sup> Three private lawyers were appointed by the court to act as prosecutors in the matter and filed formal charges against all three past presidents.<sup>433</sup>

Both incidents in Japan's history point to the PRC acting as a safeguard against any arbitrary exercise of prosecutorial discretion in Japan. As suggested above, in cases where the government may be reluctant to commence prosecution against political heavyweights and the economic elites, the PRC gives the aggrieved victim (or their families) an avenue of recourse. It plays a powerful role in checking the powers of government and allows the public voice to be heard in the criminal justice system.

## 6.3 Criticisms of the System

### 6.3.1 Obscurity and Ignorance

<sup>428</sup> Fukurai, above n 409; Goodman, above n 409, 22.

<sup>429</sup> See Fukurai, above n 409, 1. Despite the mandatory prosecution, it appears that the Kobe District Court has dismissed the charges against Kazuki Sakaki – see Yomiuri, 'Ex-deputy chief cleared over Akashi crush', *News On Japan*, Feb 21, 2013 <<http://www.newsonjapan.com/html/newsdesk/article/101084.php>>. There have also been comments that there is an alarming number of 'not guilty' verdicts in PRC compelled prosecutions. While intriguing, an analysis of this is unfortunately beyond the scope of this paper. See Cherrie Lou Billones, 'Alarming Number of 'Not Guilty' Verdicts Found in Mandatory Indictments', *Japan Daily Press*, 22 Feb 2013 <<http://japandailynews.com/alarming-number-of-not-guilty-verdicts-found-in-mandatory-indictments-2223948>>.

<sup>430</sup> Fukurai, above n 409.

<sup>431</sup> 'Crash Inquest Panel: Indict Ex-JR West Heads', *Japan Times*, 23 Oct 2009 <<http://search.japantimes.co.jp/cgi-bin/nn20091023a1.html>>.

<sup>432</sup> Fukurai, above n 409.

<sup>433</sup> Ibid. The trial against the executives concluded in January 2012 and the accuseds were acquitted of the charges – see Goodman, above n 409, 22, footnote 96; 'Former President's Acquittal doesn't lessen JR's responsibility for disaster', *Asahi Shimbun*, 12 Jan 2012 <<http://ajw.asahi.com/article/views/editorial/AJ201201120048>>.

Ironically, this democratic system that reflects the popular will is hardly popular. Critics have noted that it is seldom used.<sup>434</sup> In a poll conducted by the Japanese Cabinet, the majority of respondents had no knowledge of the PRC system.<sup>435</sup> This ignorance extends to jurists as well as lay-persons.<sup>436</sup> One law Professor at Tokyo University acknowledged this ignorance.<sup>437</sup> There is also a general reluctance to question the prosecution service.<sup>438</sup> This could, of course in and of itself indicate that the system is after all, a final safeguard which may not be entirely necessary where prosecutorial discretion is being exercised responsibly.<sup>439</sup> Arguably, despite being rarely used, the PRC system at least provides an option for the aggrieved victim, if necessary.<sup>440</sup>

### 6.1.2 Structural Limitations

Another, more structural, limitation of the system is that it only addresses a claim that a prosecution was improperly dropped.<sup>441</sup> In this regard, it provides the aggrieved victim with legal recourse through the PRC, who may then compel the prosecution to commence criminal proceedings. It does not provide recourse to an accused person who feels prosecution has been wrongly commenced against him/her.<sup>442</sup> An aggrieved person's only avenue of address is through the courts.

The PRC system in its current form is also unable to address the criticisms of plea bargaining. The decision to enter or accept a plea bargain is still within the Public Prosecutor's discretion. Similarly, the precise offence on which a charge is predicated lies outside the scope of the PRC. The PRC system does not interfere with prosecutorial discretion in these areas and this is arguably a good thing. While some degree of democratic participation is beneficial to the system, there must be a careful balancing act. As discussed above, prosecutorial discretion on some matters, arguably allows for the Prosecutor to take into account the realities of the criminal justice system and allocate the finite resources of the state accordingly.

## 6.4 Benefits of the System

### 6.4.1 Popular Oversight

However, despite these criticisms, the PRC has a number of useful functions. As highlighted above, it allows for the victim's voice to feature in the prosecution landscape – a landscape that has far too often been dominated by state actors. Additionally, and perhaps more importantly, the PRC serves as popular oversight and as a civic watchdog over government

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<sup>434</sup> Setsuko Kamiya, 'Inquest fuels ardour for democracy', *Japan Times*, 27 Feb 2005 <<http://www.japantimes.co.jp/life/2005/02/27/to-be-sorted/inquest-service-fuels-ardor-for-democracy>>.

<sup>435</sup> Japanese Cabinet Office, Public Relations, *Public Opinion Poll on the PRC System* (1990), available at <<http://www8.cao.go.jp/survey/h02/H02-10-02-15.html>> cited in Fukurai, above n 403, 8; West, above n 403, 699-702.

<sup>436</sup> West, above n 409, 700.

<sup>437</sup> See Nobuyoshi Toshitani, *Are You Familiar With Prosecution Review Commissions?* cited in West, above n 403, 700.

<sup>438</sup> William Clifford, *Crime Control in Japan* (1976) 103.

<sup>439</sup> Shigemitsu Dando, *The System of Discretionary Prosecution in Japan* (1970) 18 *American Journal of Comparative Law* 528.

<sup>440</sup> *Ibid.*

<sup>441</sup> Marcia E Goodman, 'The Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 *University of California Pacific Basin Law Journal* 16, 55.

<sup>442</sup> *Ibid.*

action in Japan.<sup>443</sup> The requirement to furnish reasons for non-prosecution upon a PRC's initial recommendation is also a markedly different approach from the Australian position which has maintained that Prosecutors need not and typically do not provide reasons for their decisions. The Japanese system puts in place an additional layer of safeguard to ensure that the exercise of prosecutorial discretion, especially against those with political and economic influence, is properly exercised.<sup>444</sup> It democratizes prosecutions in Japan by providing an element of accountability, transparency and independence in the prosecution system.

#### 6.4.2 Inspiring Confidence

The PRC system also benefits the community by inspiring confidence in the criminal justice system. Those who have served on the PRC feel that lay participation in the system functions as a deterrent against crimes in the community.<sup>445</sup> Despite the aforementioned reluctance to question authoritative figures, Fukurai's work suggests that those who have been through the PRC process come away with a greater sense of confidence in the criminal justice system.<sup>446</sup>

An aggrieved victim is also comforted by the fact that there is an avenue of redress. Notably, and as discussed above, upon receipt of the PRC's first recommendation that 'prosecution is proper', the prosecution, if still maintaining its position of non-prosecution, must furnish reasons. By having to provide reasons, the Prosecutor is forced to take additional care in the analysis of the decision. Here, the aggrieved victim may take some comfort in knowing that the decision is not the mere arbitrary will of a Prosecutor.

#### 6.4.3 Educative Functions

Finally, there may also be some educative value in lay participation in the criminal justice system. Aside from coming to terms with their civic duties, Fukurai documents evidence of previous members of the PRC coming away with a better understanding of the structural mechanisms and legal relations between the prosecution, courts and the police.<sup>447</sup> The PRC system raises awareness of the criminal justice system and the crucial role the Prosecutor plays and allows members of the public to understand the myriad of factors that are taken into account in the exercise of prosecutorial discretion.

### 6.4 Transplantation – Can the PRC System Work in Australia?

Criticisms of the failings of the PRC system revolve around a number of factors.<sup>448</sup> The first problem is the prior non-binding nature of the decisions of the PRC. Although there is some

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<sup>443</sup> Kirtland C Marsh, 'To Charge or Not to Charge' (2006) 16 *Pacific Rim Law and Policy Journal* 561.

<sup>444</sup> Ibid.

<sup>445</sup> Fukurai, above n 409, 20. See also the positive experience cited by previous members of the PRC in Setsuko Kamiya, 'Inquest fuels ardour for democracy', 27 Feb 2005, *Japan Times* <<http://www.japantimes.co.jp/life/2005/02/27/to-be-sorted/inquest-service-fuels-ardor-for-democracy>>.

<sup>446</sup> Ibid. See generally John Gastil, Hiroshu Fukurai, Kent Anderson and Mark Nolan, 'Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform' (2012) 48 *Court Review* 124. See also Setsuko Kamiya, 'Inquest fuels ardour for democracy', 27 Feb 2005, *Japan Times* <<http://www.japantimes.co.jp/life/2005/02/27/to-be-sorted/inquest-service-fuels-ardor-for-democracy>> and Fukurai, above n 409, 25.

<sup>447</sup> Fukurai, above n 409, 26.

<sup>448</sup> West, above n 54, 702.

social check on the Prosecutor's power,<sup>449</sup> the lack of binding force in the PRC's verdicts essentially defeats the purpose of a system to provide democratic oversight of Prosecutors.<sup>450</sup> This defect however, has arguably been remedied with the amendment to the PRC law in May 2009, as discussed above.<sup>451</sup>

The second issue and one more difficult to resolve in Japan is the Japanese legal culture. West discusses this at some length and the discourse indicates that the Japanese trust in authority figures and the non-litigious nature of Japanese culture makes it difficult for the PRC system to gain prominence as a cornerstone in the criminal justice system.<sup>452</sup> It has been suggested that Japanese citizens place a great deal of trust in their public Prosecutors.<sup>453</sup> This has translated to a reluctance by the general public to question the judgment of Prosecutors and similarly, an unwillingness by members of the PRC to adjudicate over public Prosecutors who as seen as authority figures.<sup>454</sup>

However, this issue of culture is arguably limited to a Japanese context. There is little evidence to suggest that similar issues would be encountered in Australia. Indeed, if anything, the South Australian example of Nemer demonstrates a growing public demand for popular oversight of the prosecution service in Australia. In the political arena, there is also on-going debate about the community voice featuring in the criminal justice system.<sup>455</sup> In Western Australia, the Australian Labor Party has proposed a Western Australian Sentencing Council to ensure sentences passed are in line with community expectations.<sup>456</sup> The proposed Council would comprise the Chief Justice and include as members, the Chief Judge of the District Court, Chief Magistrate, the Director of Public Prosecutions, the Commissioner of Police and - most significantly - two members of the public.<sup>457</sup> While it is structurally different from the PRC, the trend is discernible – the demand to include popular will of the collective in the criminal justice system. It is submitted then that the Japanese PRC system, while a brave new move, is certainly one that Australia can consider to ensure it has a prosecution service that is transparent, independent and accountable.<sup>458</sup>

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<sup>449</sup> Ibid. 703. See generally John Haley, 'Introduction: Legal vs Social Controls' (1984) *Law in Japan: An Annual* 1.

<sup>450</sup> West, above n 54, footnote 105.

<sup>451</sup> See above page 60.

<sup>452</sup> West, above n 54, 707.

<sup>453</sup> Clifford, above n 432. See also Setsuko Kamiya, 'Inquest fuels ardour for democracy', *Japan Times*, 27 Feb 2005 <<http://www.japantimes.co.jp/life/2005/02/27/to-be-sorted/inquest-service-fuels-ardor-for-democracy>>.

<sup>454</sup> West, above n 54, 707, footnote 127.

<sup>455</sup> See for example, the Australian Labor Party's proposal of an Australian Sentencing Council to ensure sentences handed down reflect community standards. The proposed Comprise Chief Justice and include as members the Chief Judge, Chief Magistrate, the Director of Public Prosecutions, the Commissioner of Police and, most importantly, two members of the public - - Western Australia Labor Party, *WA Labor's policy to judge the judges* (17 February 2013) <<http://walabor.org.au/news/2013/02/17/wa-labors-policy-to-judge-the-judges>>.

<sup>456</sup> Ibid.

<sup>457</sup> Ibid.

<sup>458</sup> Hiroshi Fukurai has himself suggested that the Prosecution Review Commission should be considered in Australia, see H Fukurai, *Japan's lay judges and why Australia should listen up* (28 June 2012) *East Asia Forum* < <http://www.eastasiaforum.org/2012/06/28/citizen-adjudication-systems-in-japan-and-why-australia-should-follow-suit/>>.

Having said that, one must of course be cautious about the wholesale transplantation of an entirely different legal system.<sup>459</sup> The Japanese concept, while normatively attractive, is based on a civil law tradition – inherently different from the common law tradition which is founded on incremental developments of the law and where legal safeguards on prosecutorial discretion are still slowly being developed.<sup>460</sup> While the PRC system is one useful safeguard to ensure the proper discharge of prosecutorial discretion, it certainly is not the only means of doing so and may not be entirely necessary in jurisdictions with existing measures to ensure the proper and responsible exercise of prosecutorial discretion. In any consideration of adopting the PRC system in any jurisdiction, one must take into account the jurisdiction's existing safeguards, legal tradition and the cultural-social-political milieu.

## 7. Conclusion

The debate on prosecutorial discretion will continue to be a controversial one. The power over life, liberty and sometimes death that prosecutorial discretion confers on the state must be heavily scrutinized. The Australian landscape has seen significant historical developments that have resulted in its current prosecution system. It has aimed to be a system that is transparent, accountable and independent and to some extent it has succeeded in this regard. Nonetheless, there is still a growing centralization of power in the Office of the Public Prosecutor. Broadly defined statutes, overcriminalisation and mandatory punishment all add to the increasing discretion that the Prosecutor wields.

As revealed by the case of Paul Nemer, the system is not without its defects and there is a growing public demand to address the issues. As discussed above, there are a number of measures that jurisdictions can employ to prevent the arbitrary exercise of prosecutorial discretion. The Japanese PRC system is one possible solution that the Japanese have used to allow for a check on the ever expanding discretion of the public Prosecutor. In light of the centralization of power in the office of the Prosecutor, Australia will need to assess whether public demand for greater oversight of prosecutorial functions should be acceded to. If so, it can look to the experience of others, including Japan with its PRC system and assess the extent to which some of its features can be incorporated. In the search for continual improvement, Australia can look beyond its borders to consider 'taking a leaf from another jurisdiction's book' as an additional layer of safeguards to ensure transparency, accountability and independence in its prosecution service.

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<sup>459</sup> See for example D Berkotiwz, K Pistor and J Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163.

<sup>460</sup> In the UK for example, the recent cases *R v DPP, Ex Parte E & Ors* [2011] EWHC 1465 (Admin); *Wilson's (Jason) Application* [2012] NIQB 102; *Rv Crown Prosecution Service, Ex Parte Gujra* [2012] UKSC show that the law on prosecutorial discretion is still being developed.