THE DECISION TO PROSECUTE: GUIDELINES PRESENTED TO THE AUSTRALIAN FEDERAL PARLIAMENT ON BEHALF OF THE FEDERAL ATTORNEY-GENERAL

Memorandum by the COMMONWEALTH SECRETARIAT

In December 1982 the Australian Federal Attorney-General, Senator the Hon. Peter Durack, QC, arranged for guidelines to be presented to the Federal Parliament setting out the basis on which the decision to prosecute, and other discretions in the prosecutorial process, should be exercised.

2. The purpose was to give guidance to officers of the Attorney-General's Department and other officers engaged in the prosecution of Federal Offences, and also to make the public aware of the considerations upon which these decisions are made.

3. As the annexed document shows, the Attorney-General intends to follow these guidelines himself as First Law Officer and to require other Federal officers engaged in law enforcement to do so.

ANNEX

PROSECUTION POLICY OF THE COMMONWEALTH

Guidelines for the making of decisions in the prosecution process and the considerations upon which these decisions are made

Introduction

The Attorney-General's ministerial responsibility for the criminal justice system of the Commonwealth, as part of his general responsibility for law and justice, is clearly one of the most important features of his portfolio. In this connection I have been conscious for some time of the need for a clear statement of the prosecution policy of the Commonwealth.

2. It is important, I believe, not only that officers of my Department and other officers of the Commonwealth engaged in the prosecution of Commonwealth offences should have clear guidelines for the making of decisions as to prosecution action (whether it is the decision to prosecute or any other decision in the prosecution process) but also that the public generally should be aware of the considerations upon which these decisions are made. The Law Reform Commission in its recent Interim Report on Sentencing made observations to similar effect.

3. I have therefore decided that I should state the guidelines on prosecution action that I shall myself follow as First Law Officer and that I require to be followed by officers of my Department and other officers of the Commonwealth engaged in law enforcement. The principles set out in the statement do not, I believe, represent any substantial departure from those that have in the past guided persons responsible for Commonwealth prosecutions but this is the first time, so far as I am aware, that these principles have been gathered together in one statement.

4. I shall deal with the matter under the following headings:

(i) who may institute and conduct Commonwealth prosecutions;

(ii) the decision to prosecute;

(iii) line of authority within my Department;

(iv) the conduct of cases;

(v) the granting of indemnities or pardons to witnesses;

(vi) agreements to terminate prosecutions in return for guilty pleas to fewer than all charges or to lesser charges;

(vii) the use of the Crimes Act 1914 in place of the provisions of a particular Act;

(viii) the prosecution of minors;

(ix) no bill applications;

(x) Special Prosecutors and the National Crimes Commission

(xi) conclusion.

(i) Who may institute or conduct Commonwealth prosecutions

5. The right of the private citizen to initiate a prosecution for a breach of law has long been regarded as "a useful constitutional safeguard against capricious, corrupt or biased failures or refusal of authorities to prosecute offences against the criminal law": Lord Diplock in Gouriet v. H.M.'s Attorney-General [1977] 3 All. E.R. 70 at p.97. This right is recognized by section 13 of the Crimes Act 1914 which provides:

"13.Unless the contrary intention appears in the Act or regulation creating the offence, any person may -

(a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or

(b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

6. Nevertheless, while this is the position in law, in practice, all but a very small number of prosecutions are initiated by officers of the Government or its agencies. The division of responsibilities among the Ministers of the Government means that responsibility for initiating investigative action in relation to a suspected offence ordinarily rests with the Department administering the relevant Act or regulation and, of course, only a limited number of Commonwealth laws are administered by my Department. Except in cases where a Department maintains its own investigation branch, investigations are usually carried out by Australian Federal Police. Putting aside cases of a very routine nature, where the prosecutions are handled by the Department concerned, a report on the investigation if an offence appears to have been committed, should be submitted to my Department; there it will be examined to determine whether a prosecution should be initiated. I should mention that my Department is available to provide advice to police and other investigation officers at any stage of an investigation where there is need for legal advice or legal policy guidance. In complicated or especially difficult cases, it will be desirable that advice of this nature be sought and obtained at an early stage.

7. I deal in a later part of this statement with the general considerations that should be taken into account in this examination; at this point, I explain that the views of the Department responsible for the administration of the law in question are carefully taken into account in the decision whether or not to prosecute and indeed it is very rare for a difference of view to arise at this stage. However, except in the limited cases where the consent of the responsible Minister or a specified officer to a prosecution is required by the terms of the relevant Act, the ultimate decision whether or not to prosecute is one for the Attorney-General or his Department. Even in those limited cases, it would not be appropriate for a prosecution to be commenced where the Attorney-General or his Department, because of the state of the evidence or other considerations, is of the view that it would not be in the interests of justice to proceed.

8. Prosecutions under the Crimes Act 1914, which is administered by the Attorney-General, require special mention. In the case of suspected offences against the general provisions of the Act, such as section 29B dealing with imposition on the Commonwealth, it is the practice for the Department directly affected by the suspected wrong doing to initiate investigative action. The decision whether or not to prosecute must lie with the Attorney-General or his Department.

9. The present general rule in relation to Commonwealth prosecutions is that all prosecutions, except those of the very routine nature mentioned above, are conducted by legally qualified officers of the Crown Solicitor's Division in my Department or by counsel briefed by the Crown Solicitor. The interests of justice are, I believe, best served by this practice although exceptional circumstances may arise from time to time requiring a departure from the rule in a particular case. Where officers of another Department conduct Commonwealth prosecutions I would expect them to observe the guidelines I am now indicating. It is also expected that Departments dealing with this limited class of cases will consult my Department where difficult questions of fact or law arise.

10. When a Commonwealth prosecution is instituted by way of summons or information, my Department, except in the routine cases mentioned above, prepares the summons or information. The great majority of Commonwealth prosecutions are so instituted. In some cases, however, the initial action will be arrest without warrant and this will usually be effected by an officer of the Australian Federal Police. However, a power of arrest is given by Commonwealth legislation to certain other Commonwealth officers, such as customs officers, and in appropriate circumstances this may be exercised. It should be noted that section 8A of the Crimes Act 1914 requires that, before effecting arrest without warrant for an offence against a law of the Commonwealth or Territory, a constable must have reasonable grounds to believe that proceedings against the person by summons would not be effective. A recent decision of the Federal Court establishes that this provision operates in the Australian Capital Territory to the exclusion of inconsistent Territory Ordinances. Of course, after the enactment of the Criminal Investigation Bill 1981, regard will need to be had to the changes that will be effected by that law.

11. Inevitably, cases will arise where it will be necessary and appropriate that a police officer should make an arrest without warrant and without an opportunity for consultation with my Department. However, in cases where difficult questions of law and fact are likely to arise, it is desirable in my view that there should, provided the exigencies of the situation permit, be consultation before the arrest between the responsible police officer and officers of the relevant Deputy Crown Solicitor's Office. To this end, there have been discussions between the Commissioner of the Australian Federal Police and officers of my Department and agreement has been reached on this need for consultation.

12. Where a prosecution is initiated by arrest, the Deputy Crown Solicitor bears the responsibility for deciding whether to proceed with this prosecution but he will consult with the police and the Department responsible for administering the law in question and I would expect that there will usually be no difference of view.

13. Special considerations apply in relation to prosecutions in the Australian Capital Territory. For example, these prosecutions include matters that, in a State, would be dealt with at municipal level. As a result, the Deputy Crown Solicitor, A.C.T., may be involved at a later stage than would be accpetable in the States.

14. There is a question whether the Attorney-General has the power to intervene in a private prosecution of a Commonwealth offence at the committal stage or during the hearing of a charge punishable on summary conviction. In the United Kingdom, by virtue of statutory provisions, the Director of Public Prosecution may, at any stage, intervene in a private prosecution and, by offering no evidence, terminate the prosecution. However, there are no equivalent Commonwealth statutory provisions and in my view it is highly doubtful that the Attorney-General has this power of intervention.

(ii) The decision to prosecute

15. The initial decision whether a prosectuion should be instituted is clearly the most important step in prosecution action and in every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made.

16. In this regard, the initial consideration is sufficiency of the evidence available; at

least, it must be sufficient to establish a prima facie case against the defendant, that is to say, establish commission of the offence, having regard to the standard of proof in criminal cases. Additionally, a prosecution should not normally proceed unless there is a reasonable prospect of conviction; it should be rather more likely than not that the prosecution will result in a conviction. This, of course, may be a difficult question and it is recognised that there can never be an assurance that any prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation and by a person experienced in weighing the available evidence is the best way of avoiding the risk of prosecution of an innocent man and the useless expenditure of public funds.

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

18. In making a decision to lay or proceed with conspiracy charges against a number of defendants jointly, regard must be had to the practical difficulties, particularly the length of a hearing, involved in a trial of numerous defendants. Therefore, in cases of this nature, attention should be directed at the earliest possible stage to determining the persons most seriously implicated and the appropriate charges to be laid against those persons. Ordinarily it should be sufficient to limit the conspiracy charges to those persons.

19. A decision whether or not to prosecute, must clearly not be influenced by:

(a) The offender's race, religion, sex, national origin or political associations, activities or beliefs;

(b) a possible political advantage or disadvantage to the Government or any political party;

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

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

20. As regards the Attorney-General's own involvement, I accept the principle as laid down by Sir Hartley Shawcross as Attorney-General in these words quoted in Edwards Law Officers of the Crown at p.223:

> "It is the duty of an Attorney-General in deciding whether or not to authorise the prosecution, to acquaint himself with all relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations."

The speech of the Prime Minister in the House of Representatives on 6 September 1977 clearly shows that his principle is accepted by the Government generally.

21. Where a decision is made not to prosecute, that decision should be appropriately recorded in the official papers.

22. As to the nature of the charge to be laid, the person responsible should take care to select the charge that:

(a) adequately reflect the nature of the criminal conduct involved;

(b) can be supported by admissible evidence sufficient to sustain a conviction; and

(c) provides a basis for an appropriate sentence in all the circumstances of the case.

(iii) Line of authority within my Department

23. Decisions to prosecute in the great majority of cases conducted by my Department are made by Deputy Crown Solicitor's officers in each State and Territory. A Deputy Crown Solicitor is expected in specially important, difficult or doubtful cases to consult with his Central Office and, in very exceptional cases, the Attorney-General himself may be consulted. He may also be involved by reason of a special statutory requirement for his consent.

(iv) Conduct of cases

24. The conduct of a prosecution once initiated is subject to the control of the relevant court and it is unnecessary for these guidelines to deal in detail with this aspect. It is sufficient to state that the role of the prosecution is fairly to place before the court all facts relevant to the charge so that the court may justly resolve the issue of guilt or innocence. If the defendant is being sentenced, facts and matters relevant to sentence should then be placed before the court.

(v) Granting of indemnities or pardons to witnesses

25. In principle it is desirable that the criminal justice system should operate without the need to grant indemnities or pardons to persons who participated in offences with a view to these persons giving evidence against the principal offenders. However, it has long been recognised that in some cases this course may be necessary in the interests of justice. Indeed, two recent Royal Commissions (the Australian Royal Commission on Drugs constituted by Mr Justice Williams and the N.S.W. Royal Commission on the same subject constituted by Mr Justice Woodward) have pointed to the need for the authorities to be prepared to grant pardons or immunity from prosecution to ensure that evidence is available in appropriate prosecutions for drug offences. Discussions that I have had with prosecutors in the United States have also emphasised this need.

26. Nevertheless, before a decision is made to grant an indemnity or to recommend to the Governor-General the grant of a pardon, all possible alternative courses must be considered. One possible alternative which must always be considered is to proceed to conviction of the prospective witness in respect of at least some of the offences committed by him before commencement of the trial of the principal offender. In broad principle, this course is preferable to giving an indemnity in respect of all offences committed by the prospective witness that would be disclosed by his evidence. However, the course may not be practicable in some cases; for instance, time may not permit charges against the prospective witness to proceed to conviction before the trial of the principal.

27. Having regard to these matters, I require information to be placed before me as to the following matters:

Do the interests of justice require the case to proceed against the principal offender?

Is the evidence of the person in respect of whom the indemnity or pardon is sought essential to achieve the conviction of the principal offender?

Whether it would be possible to proceed to conviction of this person on at least some of the charges that would be disclosed by his evidence before the trial of the principal offender?

What is the degree of involvement of the person in the offence compared with the involvement of the principal offender?

What is the general character of the person and his previous criminal record? Was any reward or inducement offered to the person as a condition of his giving evidence?

28. The ultimate decision to grant an indemnity or recommend grant of a pardon is only made after the most careful consideration of this material. Assuming a decision is made to grant an indemnity, the scope of the indemnity should be no wider than the circumstances require.

(vi) Agreements to terminate prosecutions in return for guilty pleas to fewer than all charges or to lesser charges

29. In discussing this topic, I must first emphasize that I am not referring to agreements involving consultations with the trial judge as to the sentence he would be likely to impose in the event of the defendant pleading guilty to a criminal charge. In the past, it has not been unknown in Australia for this to occur but the High Court in the unreported case of R. v. Bruce (21 May 1976) indicated its disapproval of this practice. I am therefore of the view that a person prosecuting on behalf of the Commonwealth should not participate in any practice of this nature. Different considerations, however, apply in relation to proceedings of the kind brought under Part IV of the Trade Practices Act 1974 which are not criminal in nature.

30. My present remarks are directed primarily to agreements between the posecution and the defence, not involving consultation with the trial judge, that, on the defendant pleading guilty to fewer than all of the charges or to a lesser charge, the remaining charges will not be proceeded with. Having regard to the care that should be taken in the settling of charges, it should not ordinarily be appropriate for the prosecution to enter into such arrangements and I would not wish anything I am now saying to be interpreted as suggesting that such arrangements are other than an exceptional course. Nevertheless, circumstances can alter and new facts can come to light after charges have been laid and, provided that proper constraints are observed, arrangements of this nature can be consistent with the requirements of justice. However, until now, there has been no attempt, so far as I am aware, to articulate the principles applying in these cases and the constraints that should operate, although I should mention that in the United States the Department of Justice has laid down guidelines to operate in these circumstances which I have found helpful.

31. In my view, the proper constraints on the making of arrangements of this nature are -

(a) the prosecution should not initiate any negotiations leading to such an agreement
(b) no proposal for acceptance of a plea of guilty to a lesser number of charges or a lesser charge should be entertained unless -
- the proposed charge bears a reasonable relationship to the nature of the criminal conduct of the accused
- the proposed charge provides the basis for an appropriate sentence under all the circumstances of the case and
- there is evidence to support the charge

32. In deciding whether or not to agree to the proposal advanced by the defence, the person responsible for the decision on behalf of the Commonwealth must take into account all the circumstances of the case and other relevant considerations including -

(a) whether the defendant is willing to co-operate with regard to the investigation or prosecution of others;
(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved);
(c) the desirability of prompt and certain despatch of the case;
(d) the defendant's history with respect to criminal activity;
(e) the strength of the prosecution case;
(f) whether it is in the public interest that the case should be publicly tried so as to ensure fuller publicity rather than be terminated by a guilty plea;
(g) the likelihood of adverse consequences to witnesses;
(h) whether the defendant, in cases where there has been a financial loss to the Commonwealth or any person, has made restitution or made arrangements for restitution;

(i) the need to avoid delay in the despatch of other pending cases; and
(j) the expense of trial and appeal.

33. I must emphasize that a decision to drop or reduce charges is an exceptional course; any such decision would need to take into account all circumstances, including those listed above by way of example. The existence of any one of these considerations is not by itself a sufficient basis.

34. If the defendant maintains his innocence with respect to the charges to which he offers to plead guilty, the prosecution should in no circumstances agree to the termination of a prosecution in return for a defendant's plea of guilty to fewer than all of the charges lodged against him or to a lesser charge.

35. Where the relevant legislation permits an indictable offence to be dealt with summarily, a suggestion by the defence that a plea be accepted to a lesser number of charges or a lesser charge may include a request that the proposed charges should be dealt with summarily and that the prosecution should either consent to or not oppose (as the legislation requires) the summary trial of the offence. Alternatively the defence may suggest that the defendant will plead guilty to an existing charge if the matter is dealt with summarily.

36. The decision of the prosecution on such a request should be determined by similar considerations to those that I have said should apply to defence proposals of the kind earlier discussed. There will be a significant difference between the upper limit of the penalty that can be imposed by the court dealing with matter on indictment and a court dealing with the matter summarily. Before deciding to accept such a suggestion from the defence, the prosecution must be satisfied that the penalty that can, and is likely to, be imposed by the court dealing with the matter summarily will be adequate in all the circumstances of the offence.

37. A full record should be made in departmental papers of an agreement to proceed with a lesser number of charges or a different charge or an agreement to allow an indictable offence to be dealt with summarily and the reasons why the agreement was made.

(vii) Use of the Crimes Act 1914 in place of the provisions of a particular Act

38. The general provisions of the Crimes Act, such as section 29B dealing with imposition on the Commonwealth, may cover the same as section 138 of the Social Services Act 1946 dealing with making of false statements in support of a claim.

39. Ordinarily, the provisions of the particular Act should be applied but circumstances of aggravation may justify the application of the Crimes Act 1914. Again, ordinarily the provisions of the Crimes Act should not be invoked to avoid a time limit provided under the particular Act but this course may be justified in special circumstances, for instance, where the proposed defendant has substantially contributed to the lapse of time. However, I have instructed that Deputy Crown Solicitors should not adopt the course of invoking the provisions of the Crimes Act for this purpose without prior reference to the Central Office of my Department and indeed a Deputy Crown Solicitor should consult his Central Office when in doubt as to any use of the Crimes Act 1914 in lieu of a special Act.

(viii) Prosecution of minors

40. Special considerations apply to the prosecution of persons under the age of 16 years. In many such cases a caution or reprimand will suffice. However, there are cases where, by reason of the previous criminal record of the child or the serious nature of the offence, the interests of justice and the community require use of the prosecution process.

41. I have made it clear to Deputy Crown Solicitors that a decision to prosecute a person under the age of 16 years should only be made after careful consideration of these matters and the alternative courses open to the authorities. Where a Deputy Crown Solicitor remains in any doubt as to the appropriate course, he is expected to consult his Central Office.

(ix) No bill Applications

42. After a person has been committed by a Magistrate for trial, applications are occasionally made to the Attorney-General by the defendant or his legal advisors that, regardless of the committal, the Attorney-General should decide that an indictment should not be filed against the defendant.

43. In my view, a decision not to proceed on a charge on which a defendant has been committed for trial should be an exceptional course. To justify the adoption of such a course, the defendant must point out some special feature of the case making it truly exceptional. It is not sufficient simply to assert that the Magistrate should not have committed the defendant for trial or that a jury would be unlikely to convict or that, if convicted, the defendant would recieve no more than a nominal penalty.

44. Undoubtedly, circumstances are conceivable where it may be appropriate to apply to the Attorney-General not to proceed with a charge after committal, for example, where unusual events have occurred after the committal that make it no longer appropriate for the prosecution to proceed. However, these circumstances are very limited and an Attorney-General, in my view, should be very cautious in dealing with applications of this nature.

(x) Recent developments

45. The recent enactment of the Special Prosecutors Act 1982 and the introduction of the National Crimes Commission Bill should finally be mentioned.

46. It was made clear in the Minister's speech on the introduction of the Special Prosecutors Bill that appointments of Prosecutors under that Act would be confined to exceptional cases where the community should not be left in the slightest doubt that the prosecutions would be handled with the highest professional competence and with complete independence. A Special Prosecutor, when appointed, is therfore empowered by the Act to prosecute by indictment in his own name and, although he is required to report each year to the Attorney-General, is otherwise not subject to control by him.

47. The establishment of the National Crimes Commission, while representing a very significant innovation so far as the investigation of criminal offences and preparation of cases for prosecution are concerned, does not represent any departure from the general rule as to control by the Attorney-General of the conduct of prosecutions.

48. The Commission will have important functions in relation to the assembly of evidence for prosecutions in the cases handled by it but the conduct of ensuing prosecutions will remain clearly within the control of the Attorney-General. In a particular case, counsel may be selected to assist the commission with a view to his being the prosecutor if criminal proceedings eventuate, but the relationship between the Attorney-General and such counsel will be no different from that applying under present procedures.

(xi) Conclusion

49. These guidelines do not of course cover all questions that can arise in the prosecution process. However, they do, I believe, cover the more significant questions. There are few more difficult, and at the same time more significant, responsibilities than those vested in the officers of the Government concerned with the prosecution process. The purpose of this statement is to assist and guide these officers in the discharge of their onerous functions, to ensure consistency of approach, and to inform members of the public of the criminal justice processes and the considerations on which prosecution decisions, so far as the Commonwealth is concerned, are based.

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